




10-1982

Solem v. Helm

Lewis F. Powell Jr.

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Resp. was sentenced to "life"
"without parole" under State
habitual offender law.

Resp's offense was passing a
bad \$100 check. But he had
6 prior felony convictions -
including burglary, grand
larceny, & obtaining money
under false pretenses.

Resp was an alcoholic.

CA 8 found cruel & unusual
punishment. Remmel does not

PRELIMINARY MEMORANDUM

control, as parole was possible
under Tex. law.

November 5, 1982 Conference
List 1, Sheet 4

No. 82-492-CFH

SOLEM (warden)

v.

HELM

Cert to CA 8

(Lay [CJ], Bright, Ross)

Federal/Habeas

Timely

1. SUMMARY: Whether a statutorily authorized sentence of
life-without-parole, imposed on a nonviolent offender for his seventh
felony--all committed under the influence of alcohol--constitutes
cruel and unusual punishment.

2. FACTS AND PROCEEDINGS BELOW: Resp entered a guilty plea
in state court to a felony charge of uttering a "no account" check for
discuss. The apparent conflict makes this a probable grant, though
these cases inevitably are fact-specific. I think the CA 8

\$100. Against the advice of counsel, he also admitted to ✓ six prior felony convictions. These included three convictions for third degree ✓ burglary, and one conviction each for a third offense for driving while intoxicated, ✓ grand larceny, and ✓ obtaining money under false pretenses. The record indicates that resp is an alcoholic, and that alcohol contributed to his actions leading to each of his prior convictions. Asked by the TC to describe the events of his last crime, resp said:

"I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places." Pet. App., at A-3.

Resp waived his right to a presentence report and requested immediate ✓ sentencing. The TC agreed, and sentenced him under the state habitual offender statute to life imprisonment. That statute provided that resp would never be "eligible for parole" by the board of pardons and paroles." S.D. Codified Laws Ann. §24-15-4 (1979). As petr, the State of South Dakota, explains it, "by imposing a life sentence, the sentencing judge committed [resp] to the state penitentiary for the remainder of his natural life, barring a pardon or commutation of his sentence" by the governor.

Resp appealed his sentence to the South Dakota Supreme Court. With two justices dissenting (Morgan, Henderson), that court affirmed the sentence. Resp then filed a petition for habeas corpus in the D.S.D. (Bogue [CJ]). The DC denied the petn. See Supplemental Appendix. Resp's argument that the sentence violated due process

because it was done without a presentence report was unavailing because resp had waived a report. Resp's argument that the sentence violated the Eighth Amendment was unavailing because governed by this Court's decision in Rummel v. Estelle, 445 U.S. 263 (1980).

3. DECISION BELOW: Resp appealed to the CA8, urging only that the sentence constituted cruel and unusual punishment under the Eighth Amendment. The CA8 reversed and remanded to the DC with instructions that the writ issue unless within 60 days the State resentenced resp. The court first held that Rummel was not dispositive. There, this Court rejected an Eighth Amendment disproportionality challenge to a life sentence with the possibility of parole under the Texas habitual offender statute. But the Rummel Court did not reject entirely the idea that a term of imprisonment might be so disproportionate to the offense as to be unconstitutional. In extreme cases, the Court indicated, where a legislature made relatively innocuous behavior felonious, a proportionality principle might come into play. 445 U.S., at 274 n. 11. But more importantly, this Court distinguished the life sentence at issue there from a life sentence without parole. This Court noted that Texas had:

"a relatively liberal policy of granting good time credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years. ... [A] proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life. If nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person sentenced under a recidivist statute like Mississippi's, which provides for a sentence of life without parole upon conviction of three felonies including at least one violent felony." 445 U.S., at 280-281.

Contrary to the State's assertion, Hutto v. Davis, U.S. , 102 S. Ct. 703 (per curiam), does not stand for the proposition that disproportionality analysis is inapposite except in capital cases. Hutto said only that Rummel stands for the proposition that federal courts should be "reluctant to review legislatively mandated terms of imprisonment," and that successful challenges in such contexts should be "exceedingly rare." 102 S. Ct. at 705. And Davis was sentenced to a definite term of years and so, like Rummel, had the prospect of parole or otherwise of release.

The CA8 held that a life sentence without parole differs in quality from a term of years or a life sentence with the prospect of parole. "As with the death penalty, the State totally rejects rehabilitation as a basic goal of our criminal justice system." Pet. App., at A-14. Compare Rummel, at 272 (death penalty differs from other forms of criminal punishment, inter alia, in rejecting possibility of rehabilitation).¹

Identifying "objective factors" in making its proportionality inquiry, as mandated in Coker v. Georgia, 433 U.S. 584, 592 (1977), the CA8 noted that in only one other State, Nevada, could a nonviolent

¹The CA8 rejected the State's contention that the possibility that the sentence could be commuted by the governor brings the case within Rummel. Pet. App., at A-12 n. 6. Although commutations were fairly common in South Dakota before 1975, since that time the governor had denied all 25 requests for commutation, including resp's. The CA8 noted this Court's recent decision in Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 464 (1981), which held that decisions to commute life sentences did not and need not depend--as parole decisions must--upon objective fact-finding but may rest instead on purely subjective evaluations entrusted unreviewably to the denominated decisionmaker.

habitual offender receive a life sentence without the possibility of parole. Moreover, the circumstances surrounding resp's crimes demonstrated that life without parole was "grossly disproportionate." In each, alcohol was a factor. Although not excusing the offenses, alcoholism "is nonetheless a condition amenable to treatment." Pet. App., at A-19. To forsake rehabilitation for such an offender violates "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958).

4. CONTENTIONS: Petr contends that this case is controlled by Rummel and Hutto and should be summarily reversed. The CA8's distinction between life sentences with and without parole does not square with Rummel's statement that "a sentence of death differs in kind from any sentence of imprisonment, no matter how long," 445 U.S., at 390, and Hutto's statement that Rummel distinguished between "punishments--such as death--which by their very nature differ from all other forms of conventionally accepted punishment, and punishments which differ from others only in duration." The State accepts the Hutto dissenters' conclusion that the majority there held proportionality analysis inapplicable to non-capital punishment cases.

The "objective factors" relied on by the CA8 were rejected in Rummel. For example, the fact that South Dakota is more severe in this respect than any other State save one was considered irrelevant since "some states will always bear the distinction of treating particular offenders more severely than in any other state." 445 U.S., at 282. Resp's seven felonies and incarceration for most of his adult life distinguish this case from the hypothetical posed in Rummel where the plurality indicated it might apply a proportionality

approach--"life imprisonment for overtime parking."

The possibility of parole, although noted in Rummel, was only one example posed by the Court of the complexities involved in Rummel's attempt to portray Texas as the most severe State in the nation. Moreover, Rummel emphasizes the strong state interest in imposing what "might otherwise constitute a disproportionate prison sentence on an individual determined under state law to be a habitual offender." Hutto v. Davis, supra. The State also emphasizes the possibility that the governor might commute resp's sentence.

If summary reversal is not appropriate, the State urges that the Court grant this case. It submits that the CA8's distinction between life with and life without parole conflicts with Britton v. Rogers, 631 F.2d 572, 578 (CA8 1980), Terrebonne v. Blackburn, 646 F.2d 997 (CA5 1981), United States v. Valenzuela, 646 F.2d 352 (CA9 1980), Gov't of Virgin Islands v. Gereau, 592 F.2d 192 (CA3 1979), and Moore v. Corvan, 560 F.2d 1298, 1303 (CA6 1977), cert. denied, 435 U.S. 929 (1978).

Resp repeats the CA8's argument that life without parole is qualitatively different from life with parole. It notes that South Dakota is free under the CA8's approach to sentence resp to 99 years imprisonment, which would make him ineligible for parole for 38 years, 24 more than Rummel was.

Resp also argues that because only Nevada and South Dakota have laws like this one, a decision by this Court would have very little impact.

He concludes by distinguishing the cases the State claims conflict with this one. In Britton, the governor regularly commuted

life sentences (and the underlying crime was rape). In Terrebonne the majority equated dealing in heroin, the crime at issue, with violent crime. In Valenzuela, a major drug ring was at issue. Gereau dealt with a conviction on eight counts of First Degree Murder, and in Moore the defendant had been convicted on three counts of rape.

5. DISCUSSION: Although the CA8's decision is inconsistent with the implications of certain passages in Rummel, which suggest that terms of imprisonment, no matter how severe, may be immune from proportionality analysis in most cases, on its face neither Rummel nor Hutto forecloses the result reached below. As the CA8 noted, life without parole shares with the death penalty a rejection of the possibility of rehabilitation. Although the Court may ultimately decide that this is a difference in degree, and not a difference in kind, from life with parole, that question is not answered by Rummel or Hutto and seems more appropriately addressed after plenary review. Moreover, if certain passages in Rummel suggest that the distinction made is without constitutional significance, it is true as well that the Court in Rummel took care to distinguish Mississippi's life-without-parole statute (which, incidentally, required that at least one prior offense be a violent crime). This Court has held in other contexts that the difference between the possibility of parole and the possibility of a pardon is of constitutional magnitude. Connecticut Board of Pardons v. Dumschat, 451 U.S., at 464-465.

Moreover, the fact, apparently known to the sentencing judge at the time of sentencing, that each of resp's offenses were committed under the influence of alcohol, also may distinguish this case from Rummel. The Rummel Court emphasized that recidivist statutes

punishing comparatively minor crimes with severe sentences were supported by a strong state 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. ... [T]he State of Texas ... has a valid interest in so dealing with that class of persons." 445 U.S., at 276. The CAB held that a State could not validly treat an individual who committed each of his minor crimes under the influence of alcohol as one of that class, given the fact that alcoholism is treatable. Again, although the Court may ultimately reject that position, it is worthy of plenary review.

6. RECOMMENDATION: I recommend that the petn be granted.

There is a response.

October 25, 1982

Ogden

opn in petn

wait for a more direct conflict, i.e., a case where a non-violent acid-wiper is given life without parole, & the CA upholds it. As of now, the conflicting cases all deal with more serious crimes where it is hard to say that life without parole is disproportionate. Thus, denial is not out of the question.

I agree completely that summary reversal is not warranted. Kunmel & Hutto v. Davis do not directly control.

mm

Reviewed 3/26
Thorough & helpful -
thought it reflects Mike's
strong interest in affirmance

BENCH MEMORANDUM

No. 82-492

Solem v. Helm

Michael F. Sturley

March 25, 1983

Question Presented

Does a life sentence without possibility of parole for a
seventh non-violent, ~~alcohol-related~~ *alcohol-related* felony violate the Eighth
Amendment proscription of cruel and unusual punishments?

Outline of Memorandum

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I. Background

A. The State Statutes

South Dakota, in common with many other States, has a recidivist statute that can be applied to a defendant's fourth¹ felony conviction:

When a defendant has been convicted of at least three prior convictions [sic] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony.

S.D. Codified Laws Ann. §22-7-8 (1979).² The maximum penalty for a "Class 1 felony" is "life imprisonment in the state penitentiary" and a \$25,000 fine.³ §22-6-1(3) (Supp. 1982) (previously codified at §22-6-1(2) (1979)). There is added bite to a life sentence in South Dakota, for state law explicitly provides that

¹South Dakota has a separate recidivist statute that can be applied to a defendant's second or third felony conviction. Under S.D. Codified Laws Ann. §22-7-7 (1979), the subsequent felony sentence is enhanced by increasing the felony classification to the next highest class. See note 3, infra.

²This is the version in force when Helm was convicted. The statute now requires "at least three prior felony convictions," S.D. Codified Laws Ann. §22-7-8 (Supp. 1982), rather than simply "three prior convictions." As Helm's previous convictions were for felonies, the change would not have affected him.

³There are two more serious felony classes. A "Class A" felony carries the death penalty or mandatory life imprisonment. S.D. Codified Laws Ann. §22-6-1(1) (Supp. 1982). A "Class B" felony carries mandatory life imprisonment. §22-6-1(2). South Dakota has a total of eight felony classes. The lower classes and the maximum punishments provided are:

Class 2	25 years and \$25,000	§22-6-1(4)
Class 3	15 years and \$15,000	§22-6-1(5)
Class 4	10 years and \$10,000	§22-6-1(6)
Class 5	5 years and \$5,000	§22-6-1(7)
Class 6	2 years and \$2,000	§22-6-1(4)

parole is unavailable:

A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles.

§24-15-4 (1979). The Governor, however, may pardon a defendant or commute his sentence. The board of pardons and paroles is authorized to make recommendations to the Governor on this subject, §24-14-5; S.D. Executive Order 82-04 (Apr. 12, 1982), but the Governor is not bound by the recommendation, §24-14-5.

B. Facts

By 1979, resp Helm had been convicted of six felonies. He had three convictions for third degree burglary, one conviction for third offense driving while intoxicated, one conviction for grand larceny, and one conviction for obtaining money under false pretenses. The record is essentially devoid of any details about these prior convictions, except that they were all non-violent and alcohol was a contributing factor to Helm's actions in each case.

It is unclear when Helm committed his previous felonies, but under the present law third degree burglary, a "Class 4 felony," is defined as "enter[ing] or remain[ing] in an unoccupied structure, with intent to commit any crime therein." §22-32-8 (1979).⁴ Third offense driving while intoxicated is a "Class 6

⁴The Rummel majority asserts "that for crimes concededly classified and classifiable as felonies ..., the length of the sentence actually imposed is purely a matter of legislative

Footnote continued on next page.

felony." §32-23-4 (Supp. 1982). There is no "grand larceny" in

grace." 445 U.S., at 274 (footnote omitted). I see no legal basis for this assertion. But to the extent one might accept it, it is worth noting that the South Dakota burglary statute--particularly third degree burglary--might not satisfy the constraint of "concededly ... classifiable as [a] felon[y]."

Common law burglary is clearly classifiable as a felony, but that crime was defined as breaking and entering the dwelling house of another in the nighttime with intent to commit a felony. The South Dakota statute applies to any presence (even lawful presence) in any structure (even one open to the public) at any time (even the middle of the day) with the intent to commit any crime (even a petty misdemeanor).

In State v. Blair, 273 N.W.2d 187 (S.D. 1979), for example, the court upheld a third degree burglary indictment charging the defendants with attempting to steal money from the coin boxes in a laundromat's washing machines. The amount of money involved in the theft ordinarily would have made the crime "petty theft," a class 2 misdemeanor punishable by 30 days in the county jail and/or a \$100 fine. The laundromat was open to the public, so there was no unlawful entry. But the laundromat was a "structure," so the statutory elements of third degree burglary were satisfied.

✓ Blair's implications are broad indeed. It means that shoplifting, which is ordinarily a class 2 misdemeanor, is automatically third degree burglary, a class 4 felony punishable by 10 years in the state penitentiary and/or a \$10,000 fine. In fact, if a South Dakota college student in his own dormitory room intends to take a dime from his roommate's desk some night, he already has committed first degree burglary, a class 2 felony punishable by 25 years in the state penitentiary and/or a \$25,000 fine. §22-32-1(3).

The South Dakota burglary statute has been criticized along these lines by others. See, e.g., State v. Blair, 273 N.W.2d, at 188 (Zastrow, J., dissenting); Note, "Steal the Chick at the Henhouse Door:" The South Dakota Burglary Statute, 15 D. L. Rev. 158 (1980).

It is possible, of course, that Helm's offenses might have been classified as felonies, but for the particular reason to believe that this is the case. What happened in this case, it seems at least as likely that Helm pleaded guilty to third degree burglary in return for a light sentence without much concern for the fact that it was a conviction. The laundromat thief in Blair, for example, ultimately pleaded guilty to third degree burglary and received a light sentence. See Note, supra, at 162. Perhaps it would be helpful if, at oral argument, you asked for some of the details of Helm's prior offenses.

grand larceny

the current South Dakota law,⁵ but it was previously defined, in relevant part, as "the taking ... by fraud or stealth" of livestock⁶ or property worth more than \$50. §§22-37-1 and 22-37-2(1) & (3) (1967). It was punishable "by imprisonment in the state penitentiary not exceeding ten years or by imprisonment in the county jail not exceeding one year." §22-37-3 (1967). There is also no "obtaining money under false pretenses" in the current law,⁷ but Helm may have been convicted under §22-41-4 (1967):

"Every person who designedly, by color or aid of any false token or writing, or other false pretense, ... obtains from any person any money or property ... is punishable by imprisonment in the state penitentiary not exceeding three years or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both such fine and imprisonment."

This is comparable to a present "Class 6" felony. In any event, it appears that Helm's conviction for obtaining money under false

⁵Under the current §22-30A-15, "theft" includes "the separate offens[e] committed or charged before the effective date of [the current law] and known as larceny." "Grand theft," a "Class 4 felony," is defined, in relevant part, as the theft of property worth more than \$200, any livestock, or a firearm. §22-30A-17.

⁶I find it interesting that a ✓critic of the South Dakota burglary statute would advise potential chicken thieves to "Steal the Chicken at the Henhouse Door" to avoid committing burglary. See Note, supra n. 4. Under South Dakota law, however, a chicken thief commits a serious felony (previously grand larceny; now grand theft) inside or outside the henhouse. Once again, we do not know the details of Helm's grand larceny. He may have been no more than a chicken thief. Clarification at oral argument might be useful.

⁷Current law includes "false pretense" within the theft definition. §22-30A-15.

pretenses began with a charge of uttering a "no account" check. See Helm's Brief in Supreme Court of South Dakota, No. 12789, at 5. (This is the most information we have about any of his prior convictions.)

In sum, it is impossible to be certain about Helm's previous offenses on the record now before the Court. It appears that prior to 1979 he had been convicted of four "Class 4" felonies and two "Class 6" felonies, but the statutory definitions leave room for some very minor behavior. We do know that none of the offenses was a crime against a person, and all six involved alcohol. As a result of the convictions, the 36-year-old Helm had spent much of his adult life in the South Dakota State Penitentiary.

In 1979, Helm pleaded guilty to uttering a "no account" check for \$100, a "Class 5 felony." §22-41-1.2. It appears that the offense was committed after Helm had been drinking to such an extent that he was unable to remember what had happened.

C. Decisions Below

The state TC (Parker) accepted Helm's guilty plea and sentenced him to life imprisonment under §22-7-8. It reasoned that because his prior imprisonments had been insufficient to motivate Helm to correct his drinking problem, there was no purpose in giving him another chance. Since he was "beyond rehabilitation," the TC "lock[ed] [him] up for the rest of [his] natural life, so [there would not be] further victims of [his] crimes."

✓ The South Dakota Supreme Court affirmed the sentence by a 3-2 vote. 287 N.W.2d 497 (1980). The majority, per Justice Dunn, found the sentence "severe," but "it [did] not shock the conscience of the court." Id., at 498. Chief Justice Wollman, concurring specially, noted the availability of executive clemency. Id., at 499. Justices Morgan and Henderson filed dissenting opinions in which they argued that Helm's sentence was disproportionate. Justice Morgan would reserve life sentences for crimes against persons. Justice Henderson, applying the analysis adopted by CA4 in Hart v. Coiner, 483 F.2d 136 (1973), cert. denied, 415 U.S. 983 (1974), concluded that Helm's sentence violated the Eighth Amendment. At the very least, he would give Helm "an opportunity to obtain parole during his lifetime." 287 N.W.2d, at 502.

Helm then sought federal habeas. The DC (S.D.; Boque) denied the writ, relying on Rummel v. Estelle to dispose of Helm's Eighth Amendment claim.

On appeal, ✓ CA8 (Lay, Bright, Ross) reversed. The court distinguished Rummel v. Estelle on the ground that Helm had been sentenced to life imprisonment without possibility of parole. In ✓ Hutto v. Davis, 454 U.S. 370 (1982) (per curiam), there was also a possibility of parole. There is a qualitative difference, because the State has rejected the possibility of rehabilitation. Examining the crimes Helm had committed and the sentence he had received, the court ^{CA8} concluded that the sentence was grossly disproportionate. Accordingly it granted habeas relief.

II. Discussion

In view of your familiarity with this area, I discuss the principles very briefly. The main purpose of this bench memo, as I see it, is to fill in some of the gaps that the briefs have left.

A. The Relevant Precedents

Two recent decisions of this Court are of particular significance here: Hutto v. Davis, 454 U.S. 370 (1982) (per curiam), and Rummel v. Estelle, 445 U.S. 263 (1980). You dissented from JUSTICE REHNQUIST's opinion in Rummel, writing an opinion in which JUSTICES BRENNAN, MARSHALL, and STEVENS joined. In Davis, a summary reversal of CA4, you declined to join JUSTICE REHNQUIST's per curiam opinion, but concurred in the judgment on the authority of Rummel. Yes

Since you wrote in both of these cases, I will only summarize their facts briefly to refresh your memory. Rummel was convicted in 1964 of presenting a credit card with intent to defraud, obtaining \$80. In 1969 he was convicted of passing a forged check for \$28.36. In 1973 he was convicted of a third felony: obtaining \$120.75 under false pretenses.⁸ After the 1973 conviction, the state TC sentenced Rummel to life imprisonment under Texas's habitual criminal statute. Relying in part on the

⁸These were the only convictions specifically at issue, but it appears that Rummel had a total of 13 convictions. See Amicus Brief of the Criminal District Attorney of Bexar County, Texas, in Rummel, No. 78-6386, at 3, n. 2.

possibility of parole, see 445 U.S., at 280-281; cf. id., at 268, this Court upheld the sentence in a 5-4 decision. Texas freed Rummel less than eight months after the decision was announced.

Davis was convicted of selling marijuana and with possession of marijuana with intent to distribute. A total of nine ounces of marijuana, with a value of approximately \$200, was at issue. Davis had at least one prior conviction involving LSD. In addition, there was evidence that he had been distributing other drugs (including LSD) at the time he was arrested on the marijuana charges. There were two other possible aggravating circumstances: sale of marijuana for use by a prisoner, and for the use of an inmate's wife left alone with an infant child. Davis was sentenced to 20 years and fined \$10,000 on each of the two marijuana charges, the sentences to run consecutively. Despite a letter from the State's prosecutor admitting that the sentence was grossly disproportionate, this Court summarily reversed an en banc CA4 decision granting habeas relief on Eighth Amendment grounds.

B. The Applicable Principles

In Rummel, the Court recognized that some sentences short of death still may be so disproportionate that they violate the Eighth Amendment, regardless of whether they are "different in kind" from other penalties. Although the Court deemphasized cases such as Weems v. United States, 217 U.S. 349 (1910), Ingraham v. Wright, 430 U.S. 651, 667 (1977) (your opinion), and Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion), it

admits their statement of this principle. See 445 U.S., at 271-272. And it concedes "that a proportionality principle would ... come into play in [an] extreme [case]." Id., at 274. But the Court does not identify this proportionality principle. Rummel holds, therefore, is that the appropriate proportionality principle--whatever it might be--was not violated in that case.

Under these circumstances, I think you should continue to apply the principles that you announced in your Rummel dissent. You identified three factors in particular: "(i) the nature of the offense ...; (ii) the sentence imposed for commission of the same crime in other jurisdictions ...; and (iii) the sentence imposed upon other criminals in the same jurisdiction" Id., at 295 (POWELL, J., dissenting). In applying these principles, Rummel serves as a benchmark. If a sentence is more grossly disproportionate than that in Rummel, it violates the Eighth Amendment. But if the sentence is less grossly disproportionate (or equally disproportionate), then Rummel controls. You already have recognized Rummel's controlling authority in appropriate circumstances. Hutto v. Davis, 454 U.S., at 375 (POWELL, J., concurring in the judgment).

C. The Application of the Principles

Here the sentence is more grossly disproportionate than that in Rummel. It therefore violates the Eighth Amendment, and the decision below should be affirmed.

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Rummel

On its face, the nature of the principal felony here (uttering a \$100 no account check) is very like the principal felony in Rummel (obtaining \$120.75 under false pretenses). The prior criminal records are also similar. Both consist of relatively minor, non-violent property crimes.⁹ The principal difference is that all of Helm's crimes were committed as a result of his alcoholism. As CA8 properly recognized, this does not by any means serve to excuse the crimes. Petn. app. A-19. But it is a condition that can be treated. In Rummel the Court reasoned that "the interest of the State of Texas ..., expressed in all recidivist statutes, [is] 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." 445 U.S., at 276. Here Helm's "repeated criminal acts" do not show that he is "incapable of conforming to the norms of society." He may well be able to conform if his alcoholism is treated. *rarely successful* Thus Helm's record does not present so serious a case as Rummel's, while his sentence is more severe, see infra.

How important is this? Any case law?

?

Turning to the second factor you identified ("the sen-

⁹Helm had six prior felony convictions, while only two of Rummel's prior felony convictions were in the record. The Court had been informed, however, of Rummel's full criminal record, which consisted of 13 convictions. See Amicus Brief of the Criminal District Attorney of Bexar County, Texas, in Rummel, No. 78-6386, at 3, n. 2. Included on this list were "unlawfully carrying a deadly weapon" and "aggravated assault on a female." According to your Conference notes, the existence of these 13 convictions was one of the three principal factors on which THE CHIEF JUSTICE based his decision.

tence imposed for commission of the same crime in other jurisdictions"), there is not a large difference between this case and Rummel. But to the extent there is a difference, it is in Helm's favor. In Rummel, you noted that only two other States necessarily would have punished Rummel's conduct so severely. 445 U.S., at 296. Here, only one other State could match South Dakota's sentence. The distinction, however, is greater than this statement suggests. In Rummel, the comparison was made between Texas and other States that had mandatory life sentences for habitual criminals like Rummel. At least three additional States would have permitted a life sentence for someone in Rummel's circumstances. See 445 U.S., at 280, and n. 21. Here, however, only one other State is even authorized to sentence a person like Helm to life imprisonment without possibility of parole. Thus there is a real distinction in Helm's favor.

Only
one
other
state

Only
one
other
state

you
In my view, the most telling distinction between Rummel and this case is the nature of the sentence imposed. While Rummel involved life imprisonment, here it is life imprisonment without possibility of parole.¹⁰ The State implicitly (and the

¹⁰This Court often has recognized that there is a difference in kind between capital punishment and all other forms of punishment. That difference is relevant when applying a proportionality analysis, but I do not think it is relevant in deciding whether to apply proportionality analysis. Even the Rummel Court would apply proportionality analysis to a life sentence for a traffic offense.

In any event, I think there is a difference in kind between life imprisonment without possibility of parole and other forms of imprisonment. It is not nearly so great as the difference between capital punishment and all other forms of punishment. I would not even put it in the same order of magnitude. But given

Footnote continued on next page.

TC explicitly) rejected rehabilitation as a goal of the penal system. The prisoner has no prospect of ever resuming a normal life. It is also significant that the Rummel Court relied on the possibility of parole in reaching its result. 445 U.S., at 280-281; cf. id., at 268.¹¹

Here the State suggests that the possibility of executive clemency is comparable to parole.¹² I see no basis for that in fact, and there is certainly no basis for it in law. In Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981), the legal distinction between pardon and parole was made explicit. Even Rummel implicitly recognized the distinction. The Court stressed that Rummel was better off than a person sentenced to life without parole under Mississippi's recidivist statute. 445 U.S., at 281. But the Mississippi Constitution empowers the Governor to grant powers "[i]n all criminal and penal cases, except-

the State's rejection of rehabilitation as a goal, there is a qualitative difference.

However great the qualitative difference may be in the capital punishment context, the Court clearly has recognized that other qualitative differences exist. In Argersinger v. Hamlin, 407 U.S. 25 (1972), for example, the Court distinguished between punishments involving imprisonment and other punishments. Only the former involved a loss of liberty, and thus only the former required the appointment of counsel.

¹¹According to your Conference notes, the possibility of parole was one of the three principal factors on which THE CHIEF JUSTICE based his decision. It is the only point that JUSTICE WHITE mentions.

¹²Executive clemency, of course, is also available in capital cases. That fact has never prevented the Court from finding a death penalty to be a disproportionate punishment.

ing those of treason and impeachment." Section 124. The Mississippi Supreme Court has long recognized that the power to pardon includes the power to commute a convict's sentence. See Whittington v. Stevens, 221 Miss. 598, 603-604, 73 So.2d 137, 139-140 (1954). The Rummel Court must have recognized that the possibility of executive clemency does not compensate for the unavailability of parole. This is sensible, for executive clemency is not the same "'established variation on imprisonment of convicted criminals,'" Rummel, 445 U.S., at 280 (quoting Morrissey v. Brewer, 408 U.S. 471, 477 (1972)), that parole is.

III. Conclusion

The sentence imposed on Helm is more grossly disproportionate to his crimes than was the sentence imposed on Rummel. Accordingly, Rummel is not controlling. Applying your Rummel analysis, the decision below should be affirmed.

*Of course, I was on
the short end in Rummel.*

Supreme Court of the United States

Memorandum

....., 19.....
"third degree
burglary" - a "Class
4 felon" defined
as entering an
"unoccupied structure"

x x x x
"grand larceny"
- taking by fraud
of livestock ~~or~~ or
property worth \$50

Argued 3/29/83

S. D. sentence of life w/o parole
where only offender had been low level
criminal involving property.

Only one other State imposes
such severe type recidivist punishment

Rummel & Hutto v Davis (Va.
Maryland case in which I concurred
on the authority of Rummel.

Meierhenry (AG of S.D)

~~JP~~ noted that no one has
PS noted parole in ~~a~~ system -
considered regularly - often is automatic.
Burnett (Pub. Defender for Resp.)

Coker & Weams recognized
doctrine of proportionality.

No life sentence has been
commuted since 1975.

Absence of parole means no
chance of rehabilitation.

Relies on the objective factors
identified in my Summary op.

To: JUSTICE POWELL
From: Michael
Re: Solem v. Helm, No. 82-492

I have examined the records of commutations of life sentences contained at J.A. 22-29. There are two charts. The first (pp. 22-26) shows the inmates presently serving life sentences, the dates on which they began serving those sentences, and the dates on which commutation was denied. The second (p. 29) lists the inmates whose life sentences have been commuted since 1964, the dates on which commutation was granted, the date on which parole was granted (if any), and the date of discharge (if any).

Statistically the charts are not very helpful for a number of reasons. (1) Neither chart gives us the full population of life prisoners. We do not know, for example, how many life prisoners there have been since 1964 who are no longer serving in the state penitentiary but who were denied commutation. This category would include life prisoners who died in prison, prisoners who have been transferred to a different prison (see, e.g., Olim v. Wakinekona, No. 81-1581), and escapees. In other words, the State has told us about all of the cases that support its position, but left open the possibility that there are other cases contrary to its position. (2) Neither chart gives any details about either the crimes or the reasons for granting or denying commutation. This omission could cut either way. To the extent that life prisoners have committed serious, violent

crimes, it is understandable why commutation has been denied. On the other hand, death-bed commutations for terminally ill prisoners do little to support the State's position. Since (i) the State prepared these charts, (ii) the State has the full records available, and (iii) Helm lacks access to the full records, I would construe the omission against the State. (3) Since commutation is left to the Governor's discretion, past practice may be a poor indicator of future performance. While parole is usually subject to fairly detailed guidelines, that does not seem to be the case with commutations. Even if commutations were frequently granted, there is no reason to assume that they will continue to be granted.

Even if we ignore these problems with the State's statistics, there is not much support for their position in them. There has not been a commutation in South Dakota since March 7, 1975. Since that date, over one hundred requests for commutation have been denied. Furthermore, the commutation that was granted in 1975 is not very meaningful. Although the prisoner's sentence was commuted (after 38 years) he still has not been paroled. This demonstrates that commutation is only the first hurdle a prisoner must clear to be released. The last time that a life prisoner was paroled was in 1974.

It should also be noted that Helm was one of the those whose commutation request was denied. That seems to be the best indication of his chances. The governor has already refused to commute his sentence to a fixed term of years.

App'm ~~5-4~~

No. 82-492, Solem v. Helm

Conf. 4/1/83

The Chief Justice Rev

Over half of life sentences are commuted
Rummel controls

Justice Brennan App'm

Rummel is distinguishable

Agrees with C 8

Justice White Rev

Agrees with C 8

Justice Marshall

Aff'm

Commutation exists in capital cases
& makes no diff.

Justice Blackmun

Aff'm

Different from Rummel.

Justice Powell

Aff'm

A sentence for life, w/o parole, for the
offender at issue is grossly disproportionate.

I accepted & followed Rummel in
Hutto v Davis - but Va as did Texas -
provided for parole. Also drug offenders
are serious.

Commutation is no equivalent of
parole. Over 100 requests made in S.D.
since 1975. ~~None~~ All denied.
Only one other state.

Justice Rehnquist *Rev.*

Justice Stevens *Agree*

Agree with L.F.P.

Justice O'Connor *Rev.*

mfs 03/29/83

To: JUSTICE POWELL
From: Michael
Re: Solem v. Helm, No. 82-492

At oral argument, the South Dakota Attorney General informed the Court of the dates of Helm's prior convictions. Although we still do not know the details of his crimes, it is at least possible to find the statutory definitions.

From 1964 to 1969, third degree burglary was defined in at least two sections. Under §22-32-8 (1967), "breaking into any dwelling house in the nighttime with intent to commit a crime" was third degree burglary. In addition, "breaking or entering at any time ... any building or part of any building, booth, tent, railroad car, vessel, vehicle ..., or any structure or erection in which any property is kept, with intent to commit larceny or any felony," §22-32-9 (1967), was also third degree burglary. Under §22-37-1 (1967), "[l]arceny is the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof." "Larceny" includes petit larceny, which is otherwise punishable by 30 days in county jail and/or a \$10-\$100 fine. Shoplifting would apparently satisfy the definition of third degree burglary.

The definitions for the other crimes are as noted in my bench memo. In particular, the minimum amount for grand larceny was \$50. §22-37-2 (1967).

To: JUSTICE POWELL
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Re: Solem v. Helm, No. 82-492

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It should also be noted that Helm was one of the those whose commutation request was denied. That seems to be the best indication of his chances. The governor has already refused to commute his sentence to a fixed term of years.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 1, 1983

Re: No. 82-492 -- Solem v. Helm

Dear Chief,

Lewis has agreed to write the
opinion for the Court in the above.

Sincerely,

Bul

The Chief Justice

Copies to the Conference

mfs 04/05/83

To: JUSTICE POWELL
From: Michael
Re: Solem v. Helm, No. 82-492

I have begun working on a draft opinion in this case. In the near future I will have to set it aside for a time to resume work on the April bench memos, but I wanted to at least get a start on it so that I could put the research librarians to work. Before I invest inordinate amounts of their time or my time, however, I would like to explain my strategy to you. If this is not what you have in mind, I will take a different tack before I go too far.

It seems to me that JUSTICE BLACKMUN will have to be our focus. There is a real risk that he will concur only in the judgment, and if that happens we will have accomplished little. I therefore propose to attempt a draft that he can join happily. I see this as imposing several constraints on us. 2

(1) We cannot rely on the Rummel dissent at all. We obviously cannot rely on it for binding authority. I do not think it would be wise to cite it even for persuasive authority. The arguments made in Rummel will have to be repeated--even elaborated--rather than being incorporated by reference. The points you made in dissent should be made in a majority opinion in any event. yes

(2) We will have to cover all of the bases. I view this as an important constitutional case in which we should cover all ?

of the bases anyway. It's not like Lockheed, where the Government made some frivolous arguments that didn't warrant response. But the importance of JUSTICE BLACKMON's vote makes it particularly important to do a thorough job. You may recall that he even objected in Lockheed to our failure to respond to frivolous arguments.

(3) We cannot cast doubt on the correctness of the judgment in Rummel. This should not be a problem for you, since you recognized Rummel as binding in Davis. Fortunately there is no real analysis in Rummel to reject. We should thus be able to provide an analytical framework, apply it to Helm's facts, and note that it is consistent with Rummel. I should add, though, that we cannot endorse the judgment in Rummel, either. We would then risk losing JUSTICES BRENNAN, MARSHALL, and STEVENS, who would not follow Rummel in Davis.

I am afraid that this looks like a large project. It probably will increase the average length of your opinions. But I am excited about this opportunity to establish some precedent in an area where the Court has offered no guidance in 70 years. There is a lot out there, including some good historical material. (I hope to get at least one Magna Carta citation in here. That's real history!) And Rummel has sparked a fair bit of academic comment that should be useful. Shall I proceed along these lines?

mfs 04/05/83

To: JUSTICE POWELL
From: Michael
Re: Solem v. Helm, No. 82-492

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Even if we ignore these problems with the State's statistics, there is not much support for their position in them. There has not been a commutation in South Dakota since March 7, 1975. Since that date, over one hundred requests for commutation have been denied. Furthermore, the commutation that was granted in 1975 is not very meaningful. Although the prisoner's sentence was commuted (after 38 years) he still has not been paroled. This demonstrates that commutation is only the first hurdle a prisoner must clear to be released. The last time that a life prisoner was paroled was in 1974.

It should also be noted that Helm was one of the those whose commutation request was denied. That seems to be the best indication of his chances. The governor has already refused to commute his sentence to a fixed term of years.

put this in the text can be viewed as ostentatious, and the sort of opinion writing by other Justices that I have sometimes criticized. Moreover, Mike, in view of the torture, what went on in the Tower of London and other barbarisms, few really will believe that any serious attention was paid in those very early centuries to proportionality or due process. As for what goes into the text, I would start with the English Bill of Rights at the bottom of p. 8. This is the basic source for us. Some of what you have in the first three paragraphs can be summarized for a footnote. Also, Mike, I made a speech in the Great Hall of the Law Courts in 1965 when the English were celebrating the 750th anniversary of Magna Carta. Take a look at this (published in the ABA Journal), and if I said anything really relevant we might cite it. Also Professor Dick Howard at Virginia has written on Magna Carta. Ask the library to find this for you. I would like to cite Dick if it is relevant.

Before we go to a printed Chambers draft, I would like to see your revision of this subpart II-A, as it is a fairly personal type of statement.

2. In Rummel and other cases, we have emphasized that legislatures have broad authority to

determine the types and limits of punishments for crimes, and normally this authority is not challenged by courts. Moreover, appellate review of sentences also is rarely undertaken in view of the necessary deference that must be accorded sentencing decisions by trial courts. It is necessary, Mike, for us to recognize and repeat these principles loudly and clearly.

✓ 3. Helms has paid his penalty for each of the other six offenses. You do focus only on the \$100 check offense. It might be well at some point to say explicitly that this is the only offense that triggered the life sentence and is before us, as all other sentences have been served.

4. The discussion of the difference between parole and commutation is good. It occurs to me, however, that it may be strengthened by emphasizing that parole is expressly authorized by statute, that hearings with due process characteristics normally are required, that good time usually is allowed by statute, etc. A governor's authority to commute is different from the authority to pardon, and I suppose commutation also is authorized by statute. But am I not right that in the end the governor's discretion is as absolute as his authority to

pardon? I think we have said, in a case decided within the past two or three years, that there is a significant difference ^{between} the parole system and a governor's authority to pardon. The case came, as I recall, either from Connecticut or the Second Circuit. There are due process cases involving parole. Are there any with respect to commutation?

5. The paragraph that commences on page 25 is of doubtful force - at least on a first reading. It leaves me with the impression that we are "reaching" to make an argument that we really do not need. Take a close second look at the paragraph.

6. Footnote 13 also leaves me rather cool. Apart from being longer than I like, I am not persuaded that it - or least all of it - adds strength of our opinion.

* * *

If you accept the substance of my changes, and meet the comments suggested above, I will not need to see a draft until your editor has worked it over. Then, unless he make substantive suggestions, go directly to a printed Chambers draft so we have it in print before the

mad rush at the end of May. Theⁿ remind me that I will
want to take a close final look at the Chambers draft.

L.F.P., Jr.
LFO

SS

TO: Mike
FROM: LFP, JR.
SUBJECT: Solem

Further thoughts about our opinion:

1. We should make clear that the Court is not condemning all sentences without parole. Add a note along the following lines:

1. We raise no question as to the validity generally of sentences without parole. The only issue before us is whether, in the circumstances of this case and in light of the principle of proportionality, the sentence authorized and imposed violates the Eighth Amendment.

2. The dissent will emphasize the "habitual criminal" argument. We might anticipate this by a note saying in substance:

"Petitioner, age _____, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record of relative minor crimes involved no instance of violence of any kind. Incarcerating petitioner for life is not likely to serve in any substantial way the goals of our criminal justice system. Neither petitioner nor the state will have any incentive to pursue clearly needed treatment for his alcohol problem.

3. We must bear in mind our opinion in Jones (Mark's case) where the dissent will emphasize that Jones is no danger to society because his only crime was against property. See our footnote to the effect that sometimes property crimes result in threats to the safety of persons. Try to work out a note with Mark.

4. I do not recall whether our draft refers to how infrequently commutation has been granted by the Governor of South Dakota. Mention of this may be appropriate.

LFP, JR.

File

Solem v. Helm
Outline of Opinion

(Helpful)

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

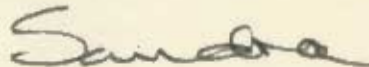
May 31, 1983

No. 82-492 Solem v. Helm

Dear Lewis,

I am sorry to part company on this,
but I will await the dissent.

Sincerely,



Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 31, 1983

Re: 82-492 - Solem v. Helm

Dear Lewis:

Please join me.

In the second sentence of footnote 14 on pages 10-11, I think you mean to refer only to a sentence of imprisonment; surely some forms of torture would be unconstitutional.

Respectfully,

JP

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 1, 1983



No. 82-492

Solem v. Helm

Dear Lewis,

I agree.

Sincerely,

Bill


Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 1, 1983



Re: 82-492 - Solem v. Helm

Dear Lewis,

I await the dissent.

Sincerely,



Justice Powell

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

✓
June 1, 1983

Re: No. 82-492-Solem v. Helm

Dear Lewis:

Please join me.

Sincerely,

JM.

T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 6, 1983

Re: No. 82-492 - Solem v. Helm

Dear Lewis:

I am certainly with you in the judgment in this case and may well be able to join your opinion.

→ I write to inquire whether you could see your way clear to omit the material concerning Ballew v. Georgia appearing on page 15. In fact, if you could omit the paragraph that begins on page 15 and concludes after the first five lines on page 16, and then mend the first sentence of the following paragraph on page 16, I think I could join your opinion in full. I may write a few words in separate concurrence, but this may depend on what the forthcoming dissent has to say.

Sincerely,

Harry

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

✓
June 8, 1983

Re: No. 82-492 - Solem v. Helm

Dear Lewis:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", followed by a horizontal line.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 21, 1983

Re: 82-492 - Solem v. Helm

MEMORANDUM TO THE CONFERENCE:

Enclosed is a typescript early draft of my dissent in this case. Given the date, I send what is essentially a "work draft" so you can see the "direction."

Regards,

WRB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 21, 1983



No. 82-492 Solem v. Helm

Dear Chief,

Please join me in your dissenting opinion.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 22, 1983

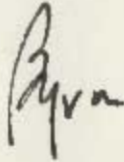


Re: 82-492 - Solem v. Helm

Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice

cc: The Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

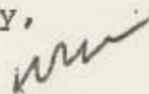
June 22, 1983

Re: No. 82-492 Solem v. Helm

Dear Chief:

Please join me in your dissent.

Sincerely,

A handwritten signature in dark ink, appearing to be 'W. H. Rehnquist', written in a cursive style.

The Chief Justice

cc: The Conference

lfp/ss 06/22/83

Rider A, p. 18 (Solem)

SOLM18 SALLY-POW

Note: Justice Blackmun is concerned by the Chief's charge that we are overruling Rummel and ignoring stare decisis. We could add a footnote along the following lines:

The dissent of the Chief Justice, arguing that Rummel controls this case, charges the Court with "blithely discard[ing] any concept of stare decisis." Post, at 1, ____ and _____. Lawyers and judges often disagree as to which cases are "controlling". But contrary to repeated inferences in the dissent, we neither ignore nor overrule Rummel sub silentio --- as is evident from our repeated references to it. The critical distinction is that whereas Rummel could be and apparently was paroled promptly, Helm, at age 36, was sentenced to life with no possibility of parole.

The dissenting opinion itself is hardly consistent with precedent. It does not accept that "the Eighth Amendment prohibits imprisonment 'disproportionate to the crime committed'". Post, at ____, ____ and 14. The Court repeatedly has expressed a contrary view. In addition to the early decision in Weems, more recent

expressions by the Court have recognized that the proportionality principle may apply to imprisonment. See, e.g., Hutto v. Finney, 437 U.S. 678, 685 (1978); Ingraham v. Wright, 430 U.S. 651, 667 (1977); Rummel v. Estelle, 445 U.S., at 274, n. 11 (1979); and Hutto v. Davis, 454 U.S. 370, 374, n. 3 (1982).

To: JUSTICE POWELL
From: Michael
Re: Solem v. Helm, No. 82-492

I have reviewed your comments on my proposed changes. I attach the master copy with changes marked; the copies of the riders that I gave you yesterday, and that you have already marked; and fresh copies of the riders that incorporate your suggestions. On notes 13 and 30, I propose new language along the lines of your suggestions. This new language is marked on the current copies of the riders. (I have not marked technical changes, or changes that you made.)

I also attach a copy of the revision of n. 15 that you drafted. The substance of the last sentence is incorporated in my proposed n. 15. I fear that we will get into trouble, however, if we use the first sentence without some explanation. We do say that all sentences are subject to appellate scrutiny to ensure that they are proportionate--just as all trials are subject to appellate scrutiny to ensure that they are sufficiently "speedy." In most cases, of course, an appellate court can dismiss an Eighth Amendment claim summarily, for few sentences are constitutionally disproportionate (even if they are very severe). In the same way, an appellate court generally can dismiss a Sixth Amendment speedy trial claim summarily, for few trials are delayed by constitutional dimensions (even if they move slowly). The point we have to make, therefore, is that--although all sentences are subject to appellate scrutiny--few sentences will re-

quire extended appellate scrutiny. This is because the standard is not, as the dissent seems to suggest, whether the sentence is "correct." Rather, the standard is whether the sentence is within constitutional limits. If this is not clear enough from my proposed draft, perhaps we could add the following sentence:

Indeed, the limited scope of review suggests that few prisoners will find it worthwhile to bring Eighth Amendment challenges to the length of their sentences.

If you think it worthwhile, we could also add a cross-cite to the "speedy trial" discussion I plan to draft.

I have reviewed the changes you marked on pages 10 and 11. I agree wholeheartedly. They should make the point of n. 15 even clearer.

I will draft language covering two additional points. On page 7, n.10, I will propose an addition in support of our view that the Framers incorporated the English principle of proportionality when they adopted the English language. On page 15, I will draft a paragraph discussing the Speedy Trial Clause cases. As both of these points are fairly self-contained, you should be able to review them in isolation when I have finished my research and drafting.

I have made a comment on page 8.

I would hope that we could have all of this in the Print Shop by Monday morning, so we could easily circulate a printed draft by Tuesday.

To: JUSTICE POWELL
From: Michael
Re: Solem v. Helm, No. 82-492

I have reviewed your latest comments on my proposed changes. I attach the master copy with changes marked and fresh copies of the riders that incorporate your suggestions. I also attach proposed language for page 15 discussing the speedy trial example. I anticipate that I will finish the historical addition by tomorrow afternoon.

*Mike - new n 30, p 23
goes a long way towards answering
the CJS release on Rummel.*

In addition to the rider for page 15, which is new, I think that footnote 13 warrants your particular attention. At the moment, it seems that there is either too much or not enough there. I think we should either explain the argument in more detail or cut back the footnote to a summary rejection of the Rummel/CJ-dissent argument. *OK*

We say that the Rummel dicta is meaningless as an Eighth Amendment standard. But our only justification for this assertion is the observation that there is a wide range of sub-classifications within "felonies." For this point to make sense to the uninitiated reader, I think we have to continue the analysis. The idea lurking behind the observation about sub-classifications is that a felony punishment at the lower end of the scale may be justified for a given crime (i.e., the crime could be classified as a class 6 felony), but a felony punishment

at the higher end of the scale would be out of all proportion (i.e., the crime is clearly not a class A felony). The fact that a crime may fall within some sub-classification does not mean that it may be placed in any sub-classification.

II

I think the argument can be made even stronger than that, however, for the analysis does not depend on the existence of explicit sub-classifications. Even if South Dakota did not have a fragmented definition, the fallacy in the Rummel dicta would still apply. The fact that a crime may fall within the lower range of a broad definition does not mean that it therefore may be placed in the higher range. yes

One of the reasons that the felony classification is particularly meaningless is the fact that it is totally arbitrary. There is nothing that sets felonies apart from other crimes except their punishments. The definitions vary slightly, but generally a "felony" is a crime that is punishable by more than one or two years in prison. See, e.g., 18 U.S.C. §1(1); 18 U.S.C. App. §1202(c)(2). Historically the definition was different, but even in the middle ages it was based solely on the authorized punishment. See 2 Pollock & Maitland, The History of English Law 467 (2nd ed. 1909) ("We thus define felony by its legal effects; any definition that would turn on the quality of the crime is unattainable").

In other words, the Rummel dicta is entirely circular. It uses the fact that a crime warrants punishment to justify the

imposition of a punishment. What is worse, it is boot-strapping. It relies on the fact that a crime may warrant some lower level of punishment to justify the imposition of a much higher level of punishment. If you break down the reasoning, this boot-strapping becomes clear. It is a simple three-step argument:

- (i) Crime X may be punished by one year in prison.
- (ii) Crime X is, by definition, classifiable as a felony (at least under the most common definition).
- (iii) Crime X may be punished by life imprisonment without possibility of parole.

Rummel tries to insert step (ii) to disguise the real argument that is being made: If (i) a crime may be punished by one year in prison, then (iii) it may be punished by life imprisonment without possibility of parole.

III

There are, of course, other responses that we could make to the Rummel/CJ-dissent argument. The "without fear of contradiction" language is, in my view, simply silly. The Third Amendment is still an enforceable part of the Constitution, despite the fact that this Court has not been called upon to enforce it yet. The "purely a matter of legislative prerogative" is simply an abdication of responsibility. We recognize the deference properly due to legislatures, but in the final analysis it is this Court that must determine what is constitutional.

If you would like me to develop any of these arguments, I will be happy to do so.

IV

Given the Chief's heavy reliance on this Rummel dicta, I think it would be appropriate for us to expose it with some explanation, rather than to dismiss it summarily. I do not think we need to worry about frightening off JUSTICE BLACKMUN. If he thought the felony standard were correct, he obviously would not have voted with us. If he had thought it was correct when he joined Rummel, JUSTICE REHNQUIST would have made it the rule of the case, rather than putting it in the "one could argue" form. Furthermore, I think JUSTICE BLACKMUN would prefer us to justify our failure to follow the spirit of Rummel (so that he will not have to justify his failure to do so). Pointing out that this passage (the one on which the Chief relies most heavily) is meaningless dicta would be a big step in that direction.

67L

I propose the following changes on page 15:

When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights,¹⁰ they also adopted the English principle of proportionality. ~~-The-people-were-guaranteed the-rights-they-had-possessed-as-English-subjects~~ Indeed, one of the consistent themes of the era was that Americans had all the rights of English subjects. R. Rutland, The Birth of the Bill of Rights, 1776-1791, at (1955). Thus our Bill of Rights was designed in part to ensure that these rights were preserved. Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection--including the right to be free from excessive punishments.

This case is here on writ of certiorari to the Court of Appeals for the Eighth Circuit.

Under South Dakota's habitual offender law, respondent Helm was sentenced to life imprisonment without possibility of parole. This sentence was occasioned by his issuing a \$100 check without an account.

as felonies
This is a felony in South Dakota, and was Helm's seventh offense - over a period of 15 years - *all* ~~so~~ classified under state law. The other six offenses also were nonviolent. They included third degree burglaries, obtaining money under false pretenses, larceny as defined by the state, and drunk driving.

Respondent was 36 years old when convicted of the check offense. He is not a professional criminal. He is addicted to alcohol, with consequent difficulty in holding a job.

After exhausting state remedies, Helm sought habeas relief in federal court, contending that his sentence constituted cruel and unusual punishment under the Eighth Amendment.

CA 8 agreed, and granted the writ.

CA8 agreed, and granted the writ.

Our prior cases establish that the Eighth Amendment/prohibits disproportionate sentences/as well as punishments that are inherently barbaric. In determining disproportionality,/we examined a number of objective factors that are set forth fully in our opinion.

On the basis of these factors, we find that respondent's sentence to life imprisonment without possibility of parole is grossly disproportionate to his crimes. Accordingly, we affirm the Court of Appeals.

Our opinion makes clear, however, that invalidating an imprisonment sentence,/imposed under state law,/is action reserved only for the most exceptional cases.

The Chief Justice has filed a dissenting opinion in which Justices White, Rehnquist and O'Connor join.

82-492# Solem v. Helm (Mike)

LFP for the Court

1st draft 5/27/83

2nd draft 6/2/82

3rd draft 6/7/83

4th draft 6/27/83

Joined by WJB, TM, HAB, JPS

Copy to Mr. Lind 6/2/83

CJ dissent

typed draft 6/21/83

Printed copy 6/22/83

2nd draft 6/23/83

Joined by BRW, WHR, SOC

UNIVERSITY OF VIRGINIA
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SCHOOL OF LAW

OCT 19 1983

October 17, 1983

The Honorable Lewis F. Powell, Jr.
Supreme Court of the United States
Washington, D.C. 20543

Dear Justice Powell:

I thought you might like to know that I spoke at the Third Circuit Judicial Conference recently and took as my text "In Praise of Solem v. Helm." As you may remember, the proportionality analysis which the Court undertook in that case is precisely the kind of inquiry which I suggested at the time of the Mullaney-Patterson controversy as the preferable focus of attention. Thus, it will hardly surprise you that I endorsed your views, and indeed stole shamelessly from arguments advanced in the Solem opinion and in your dissent in Rummel v. Estelle (which I still regard as one of the best and most thoughtful opinions ever to issue from the Supreme Court).

In any event, the topic seemed to excite a lot of interest. Some judges, as you would imagine, expressed concern over how such an inquiry might be conducted, but in general I'd say the reaction was favorable. They seemed particularly receptive to the argument, which I lifted from the Rummel dissent, that the supposed impossibility of conducting a proportionality inquiry is belied by the experience of the lower federal courts, most notably the Fourth Circuit, in actually administering such an approach.

On a different note, you will be pleased to hear that Paul Stephan's spirits, which had seemed to drag a bit of late, have entirely revived with the faculty's favorable decision on tenure. He is his old cheerful self and very welcome.

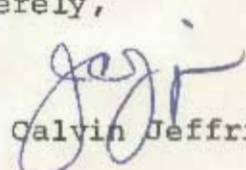
And by this time you will perhaps have heard that the faculty have acted favorably on David Martin. David's case was perceived here as uncomfortably close, but ultimately we were persuaded to go forward. My own view is that we have made no mistake, and I am very pleased for David and Cyndy.

The Honorable Lewis F. Powell, Jr.
Page 2
October 17, 1983

Finally, I understand from Dick Merrill that I and others will join Justice and Mrs. Rehnquist for dinner at Dick's house in early November. As you know, I am an admirer of his and look forward to the chance to meet him socially.

Well, that's the news from this front. I shall keep in mind your kind invitation to call you for lunch. In the meantime, I am, with warm regards,

Sincerely,


John Calvin Jeffries, Jr.

JCJjr/ss

Solem

October 19, 1983

Dear John:

Thank you for writing, and to coin a phrase your letter "makes my day". My opinion in Solem followed almost inevitably from my dissent in Rummel. Yet, the cases were sufficiently different to win HAB's defection from the Rummel Court's views.

It is only fair to say that Jon Sallet was the principal architect of my opinion in Rummel though I never had any doubt as to my position and as usual worked closely with my law clerk. Jon was and is one of my favorite clerks.

Your report on Paul Stephan's spirits and Dave Martin's tenure also pleased me. I was concerned about Dave, having heard nothing about the faculty action.

I am sending a copy of your letter to Jon Sallet, with the request that he treat it confidentially.

As ever,

Professor John C. Jeffries, Jr.
School of Law
University of Virginia
Charlottesville, Virginia 22901

lfp/ss

cc: Jonathan B. Sallet, Esquire

Texas forced Returned
Lew H. & Mrs. after
his case here was decided.

Wicks

To: Justice Brennan

Justice White

Justice Marshall

Justice Blackmun

Justice Powell

Justice Rehnquist

Justice Stevens

Justice O'Connor

From: The Chief Justice

JUN 21 1983

Circulated:

Recirculated:

1. "all sentences" subj. to review - 2, 7, 13 L.F.O.

2. quoted language incomplete - 5

3. Powell on stare decisis - 9

4. mention no "parole" in footnote 4, p10 (in this only time 3) - NO. 5 see 14, 15

5. will "flood" appellate courts - 13

6. "usurpation" - 16

7. CJ does not accept principle - 14
(attempts to distinguish
Weaver, but ~~does~~ overlooks
1st Draft Hutto)

No. 82-492, Solem v. Helm

CHIEF JUSTICE BURGER, dissenting.

The controlling law governing this case is crystal clear, but today the Court ~~blithely~~ blithely discards any concept of stare decisis, trespasses gravely on the authority of the States, and distorts the concept of proportionality of punishment by tearing it from its moorings in capital cases. Only two Terms ago, we held in Rummel v. Estelle, 445 U.S. 263 (1980), that a life sentence imposed after a third nonviolent felony conviction did not constitute cruel and unusual punishment under the Eighth Amendment. Today, the Court ignores its recent precedent and holds that a life sentence imposed after a seventh felony conviction does constitute cruel and unusual punishment under the Eighth Amendment. Moreover, I reject the fiction that all Helm's crimes were innocuous or non-violent. Among his felonies were three burglaries and a third conviction for drunk driving. By comparison Rummel was a relatively

"model citizen." Although today's holding cannot rationally be reconciled with Rummel, the Court does not purport to overrule Rummel. I dissent.

I

A

The Court's starting premise is that the Eighth Amendment's Cruel and Unusual Punishments Clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." Ante, at 6. What the Court means is that a sentence is unconstitutional if it is more severe than five justices think appropriate. In short, all sentences of imprisonment are subject to appellate scrutiny to ensure that they are "proportional" to the crime committed.

We did not

The Court then sets forth three assertedly "objective" factors to guide the determination of whether a given sentence of imprisonment is constitutionally excessive: (1) the "gravity of the offense and the harshness of the penalty," id., at 11; (2) a comparison of the sentence imposed with "sentences imposed on other criminals in the same jurisdiction," id., at 12 (emphasis added); (3) and a comparison of "the sentences imposed for commission of the same crime in other jurisdictions." Ibid (emphasis added). In applying this analysis, the Court determines that respondent

"has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, ..." Id., at 23. (Emphasis added).

Therefore, the Court concludes, respondent's sentence is "signifi-

cantly disproportionate to his crime, and is ... prohibited by the Eighth Amendment." This analysis is completely at odds with the reasoning of our recent holding in Rummel, in which, of course, JUSTICE POWELL dissented.

B

The facts facing us in Rummel bear repeating. William James Rummel was convicted in 1964 of fraudulent use of a credit card; in 1969, he was convicted of passing a forged check. Both of these offenses were felonies. In 1973, Rummel was charged with obtaining money by false pretenses, which is a felony under Texas law. These were indeed nonviolent crimes. Under Texas' recidivist statute, which provides for a mandatory life sentence upon conviction for a third felony, the trial judge imposed a life sentence as he was obliged to do after the jury returned a verdict of guilty of felony theft.

Rummel, in this Court, advanced precisely the same arguments that respondent advances here; we rejected those arguments notwithstanding that his case was stronger than respondent's. The test in Rummel which we rejected would have required us to determine on an abstract moral scale whether Rummel had received his "just deserts" for his crimes. We declined that invitation; today the Court accepts it. Will the Court now recall Rummel's case so five justices will not be parties to "disproportionate" criminal justice?

It is true, as we acknowledged in Rummel, that the "Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of a crime." 445 U.S., at 271. But even a cursory review of our cases

shows that this type of proportionality review has been carried out only in a very limited category of cases, and never before in a case involving solely a sentence of imprisonment. In Rummel, we said that the capital punishment cases were inapposite because of the "unique nature of the death penalty...." Id., at 272. "Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel." Ibid.

The Rummel Court also rejected the claim that Weems v. United States, 217 U.S. 349 (1910), required it to determine whether Rummel's punishment was "disproportionate" to his crime. In Weems, the Court had struck down as cruel and unusual punishment a sentence of cadena temporal imposed by a Phillipine Court. This bizarre penalty, which was unknown to Anglo-Saxon law, entailed a minimum of 12 years' imprisonment chained day and night at the wrists and ankles, hard and painful labor, and a number of "accessories" including lifetime civil disabilities. In Rummel the Court carefully noted that "[Weems'] finding of disproportionality cannot be wrenched from the facts of that case." 445 U.S., at 273.¹

The lesson the Rummel Court drew from Weems and from the capital punishment cases was that the Eighth Amendment did not author-

¹Other authorities have shared this interpretation of Weems v. United States, 217 U.S. 349 (1910). E.g., Packer, Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071, 1075 (1964).

ize courts to review sentences of imprisonment to determine whether they were "proportional" to the crime. In language quoted incompletely by the majority, ante, at 9 n. 13, the Rummel Court stated:

"Given the unique nature of the punishments considered in Weems and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative." 445 U.S., at 274. (Emphasis added).

In context it is clear that this Court was not merely summarizing an argument, as the majority suggests, ante, at 9 n. 13, but was stating affirmatively the rule of law laid down. This passage from Rummel is followed by an explanation of why it is permissible for courts to review sentences of death or bizarre punishments as in Weems, but not sentences of imprisonment. Id., at 274-275. The Rummel Court emphasized, as has every opinion in capital cases in the past decade, that it was possible to draw a "bright line" between "the punishment of death and the various other permutations and commutations of punishment short of that ultimate sanction"; similarly, a line could be drawn between the punishment in Weems and "more traditional forms of imprisonment imposed under the Anglo-Saxon system." Id., at 275. However, the Rummel Court emphasized that drawing lines between different sentences of imprisonment would thrust the Court inevitably "into the basic line-drawing process that is pre-eminently the province of the legislature" and produce judgments that were no more than the visceral reactions of individual Justices. Ibid.

The Rummel Court categorically rejected the very analysis

adopted by the Court today. Rummel had argued that various objective criteria existed by which the Court could determine whether his life sentence was proportional to his crimes. In rejecting Rummel's contentions, the Court explained why each was insufficient to allow it to determine in an objective manner whether a given sentence of imprisonment is proportionate to the crime for which it is imposed.

First, it rejected the distinctions Rummel tried to draw between violent and nonviolent offenses, noting that "the absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular individual." Ibid. Similarly, distinctions based on the amount of money stolen are purely "subjective" matters of line drawing. Id., at 275-276.

Second, the Court squarely rejected Rummel's attempt to compare his sentence with the sentence he would have received in other States--an argument that the Court today accepts. The Rummel Court explained that such comparisons are flawed for several reasons. For one, the recidivist laws of the various states vary widely. "It is one thing for a court to compare those States that impose capital punishment for a specific offense with those States that do not. ... It is quite another thing for a court to attempt to evaluate the position of any particular recidivist scheme within Rummel's complex matrix." 445 U.S., at 280 (citation and footnote omitted). Another reason why comparison between the recidivist statutes of different States is inherently complex is that some states provide for parole and others do not. Id., at 280-281. Fi-

nally, and most importantly, such comparisons trample on fundamental concepts of federalism. Different states surely may view particular crimes as more or less severe than other states. Thus, even if the punishment accorded Rummel in Texas were to exceed that which he would have received in any other State,

"that severity would hardly render Rummel's punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other States. ... Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." 445 U.S., at 281-282. (Emphasis added).

Finally, we flatly rejected Rummel's suggestion that we measure his sentence against the sentences imposed by Texas for other crimes:

"Other crimes, of course, implicate other societal interests, making any such comparison inherently speculative. ... Once the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence imposed under a recidivist statute for several separate felony convictions not involving 'violence' violates the cruel-and-unusual-punishment of the Eighth Amendment." 445 U.S., at 282-283 n. 27.

Rather, we held that the severity of punishment to be accorded different crimes was peculiarly a matter of legislative policy. Ibid.

In short, Rummel held that the length of a sentence of imprisonment is a matter of legislative discretion; this is so particularly for recidivist statutes. I simply cannot understand how the majority can square Rummel with its holding that "a criminal sentence must be proportionate to the crime for which the defendant

*Ask Mike: does C 9 refer to my
qualifying note*

has been convicted." Ante, at 11.²

If there were any doubts as to the meaning of Rummel, they were laid to rest last Term in Hutto v. Davis, 454 U.S. 370 (1982) (per curiam). There a United States District Court held that a 40-year sentence for the possession of nine ounces of marijuana violated the Eighth Amendment. The District Court applied almost exactly the same analysis adopted today by the Court. Specifically, the District Court stated:

"After examining the nature of the offense, the legislative purpose behind the punishment, the punishment in the [sentencing jurisdiction] for other offenses, and the punishment actually imposed for the same or similar offenses in Virginia, this court must necessarily conclude that a sentence of forty years and twenty thousand dollars in fines is so grossly out of proportion to the severity of the crimes as to constitute cruel and unusual punishment in violation of the United States Constitution." Davis v. Zahradnick, 432 F. Supp. 444, 453 (WD Va. 1977).

The Court of Appeals sitting en banc affirmed. 646 F. 2d 123 (CA4 1981) (per curiam). We reversed in a brief per curiam opinion, holding that Rummel had disapproved each of the "objective" factors on which the District Court and en banc Court of Appeals purported to rely. 454 U.S., at 373. It was therefore clear error for the District Court to have been guided by these factors, which, paradoxically, the Court adopts today.

²Although Rummel v. Estelle, 445 U.S. 263, 274 n. 11 (1980), conceded that "a proportionality principle [might] come into play ... if a legislature made overtime parking a felony punishable by life imprisonment," the majority has not suggested that respondent's crimes are comparable to overtime parking. Indeed, respondent's seven felonies compare unfavorably with Rummel's three.

Contrary to the Court's interpretation of Hutto, see ante, at 11 and n. 16, the Hutto Court did not hold that the District Court miscalculated in finding Davis' sentence disproportionate to his crime. It did not hold that the District Court improperly weighed the relevant factors. Rather, it held that the District Court clearly erred in even attempting to determine whether the sentence was "disproportionate" to the crime. Hutto makes crystal clear that under Rummel it is error for appellate courts to second-guess legislatures as to whether a given sentence of imprisonment is excessive in relation to the crime,³ as the Court does today. Ante, at 16-23.

JUSTICE POWELL, only days ago, stated that "the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." City of Akron v. Akron Center for Reproductive Health, Inc., ___ U.S. ___, ___ (1983). I agree. While the doctrine of stare decisis does not absolutely bind a court to its prior opinions, a decent regard for the orderly development of the law and the administration of justice requires that

³Both Rummel and Hutto v. Davis, 454 U.S. 370 (1982) (per curiam), leave open the possibility that in extraordinary cases--such as a life sentence for overtime parking--it might be permissible for a court to decide whether the sentence is grossly disproportionate to the crime. I agree that the Cruel and Unusual Punishments Clause might apply to those rare cases where reasonable men cannot differ as to the inappropriateness of a punishment. In all other cases, we must defer to the legislature's line-drawing. However, the majority does not contend that this is such an extraordinary case that reasonable men could not differ about the appropriateness of this punishment.

??

directly controlling cases be either followed or candidly overruled.⁴ Especially is this so with respect to two key holdings less than three years old. What the Court does today is purely and simply visceral jurisprudence.

II

Although historians and scholars have disagreed about the Framers' original intentions, the more common view seems to be that the Framers viewed the Cruel and Unusual Punishments Clause as prohibiting the kind of torture meted out during the reign of the Stuarts.⁵ Moreover, it is clear that until 1892, over 100 years after

? *first mention of this* →
⁴I do not read the Court's opinion as arguing that respondent's sentence of life imprisonment without possibility of parole is so different from Rummel's sentence of life imprisonment with the possibility of parole as to permit it to apply the proportionality review used in the death penalty cases, e.g., Coker v. Georgia, 433 U.S. 584 (1977), to the former although not the latter. Nor would such an argument be tenable. As was noted in Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Justice Stewart, JUSTICE POWELL, and JUSTICE STEVENS),

"[T]he penalty of death is qualitatively different from a sentence of imprisonment. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

The greater need for reliability in death penalty cases cannot support a distinction between a sentence of life imprisonment with possibility of parole and a sentence of life imprisonment without possibility of parole, especially when an executive commutation is permitted as in South Dakota.

⁵Compare, e.g., Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Calif. L. Rev. 839 (1969); Schwartz, Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel, 71 J. Crim. L. & Criminology 378, 379-382 (1980); Katkin, Habitual Offender Laws: A Reconsideration, 21 Buffalo L. Rev. 99, 115 (1971), with, e.g., Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 Stan. L. Rev. 838, 853-855 (1972);

Footnote continued on next page.

the ratification of the Bill of Rights, not a single Justice of this Court even asserted the doctrine adopted for the first time by the Court today. The prevailing view up to now has been that the Eighth Amendment reaches only the mode of punishment and not the length of of a sentence of imprisonment.⁶ In light of this history, it is disingenuous for the Court blandly to assert that "The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." Ante, at 8. That statement seriously distorts history and our cases.

This Court has applied a proportionality test only in extraordinary cases, Weems being one example and the line of capital cases another. See, e.g., Coker v. Georgia, 433 U.S. 584 (1977); Enmund v. Florida, 458 U.S. ____ (1982). The Court's reluctance to give legislatures unlimited freedom in choosing which crimes to punish by death rests on the uniqueness and finality of the death sen-

Comment, The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States - Excessive Punishment Doctrine, 24 Buffalo L. Rev. 783 (1975).

⁶In 1892, the dissent in O'Neil v. Vermont, 144 U.S. 323, 339-340 (1892) (Field, J., dissenting), argued that the Eighth Amendment "is directed ... against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." Before and after O'Neil, most authorities thought that the Eighth Amendment reached only the mode of punishment and not the length of sentences. See, e.g., Note, 24 Harv. L. Rev. 54, 55 (1910). Even after Weems was decided in 1910, it was thought unlikely that the Court would extend proportionality analysis to cases involving solely sentences of imprisonment. See Packer, Making the Punishment Fit the Crime, 77 Harv. L. Rev. 1071, 1075 (1964). Until today, not a single case of this Court applied the "excessive punishment" doctrine of Weems to a punishment consisting solely of a sentence of imprisonment, despite numerous opportunities to do so. E.g., Hutto v. Davis, 454 U.S. 370 (1982); Rummel v. Estelle, 445 U.S. 263 (1980); Badders v. United States, 240 U.S. 391 (1916); Graham v. West Virginia, 224 U.S. 616 (1912).

tence, which calls for exacting procedural limitations to ensure that only those most deserving of the death penalty receive it. Such scrutiny is not required where only a sentence of imprisonment is at stake.

The Court's traditional abstention from reviewing sentences of imprisonment to ensure that punishment is "proportionate" to the crime has been well founded. Today's claim by five Justices that they are able to say that one offense has less "gravity" than another is nothing other than a bald substitution of individual subjective moral values for those of the legislature. Nor, as this case well illustrates, are we endowed with Solomonic wisdom that permits us to draw principled distinctions between a sentence of X years and a sentence of X + Y years for "repeaters" who have demonstrated that they will not abide by the law. The simple truth is that "[n]o neutral principle of adjudication permits a federal court to hold that in a given situation individual crimes are too trivial in relation to the punishment imposed." Rummel v. Estelle, 568 F. 2d 1193, 1201-1202 (CA5) (Thornberry, J., dissenting), vacated, 587 F. 2d 651 (CA5 1978) (en banc), affirmed, 445 U.S. 263 (1980). The apportionment of punishment entails, in Justice Frankfurter's words, "peculiarly questions of legislative policy." Gore v. United States, 357 U.S. 386, 393 (1958). Legislatures are far better equipped than we are to balance the competing penal and public interests and to draw the essentially arbitrary lines between appropriate sentences for different crimes.

By asserting the power to review sentences of imprisonment for excessiveness the Court launches itself into uncharted and

unchartable waters. Today it holds that a sentence of life imprisonment, without the possibility of parole, is excessive punishment for a seventh allegedly "nonviolent" felony. How about the eighth "nonviolent" felony? The ninth? The twelfth? Suppose one offense was a simple assault? Or selling liquor to a minor? Or statutory rape? Or price-fixing? The permutations are endless and the Court's opinion is bankrupt of realistic guiding principles. Instead, it casually lists several allegedly "objective factors" and arbitrarily asserts that they show respondent's sentence to be "significantly disproportionate" to his crimes. Ante, at 23. Must all these factors be present in order to hold a sentence excessive under the Eighth Amendment? How are they to be weighed against each other? Suppose several States punish severely a crime that the Court views as trivial or petty? Unfortunately, I can see no limiting principle in the Court's opinion.

Moreover, the Court's decision will flood the appellate courts with cases in which equally arbitrary lines must be drawn. It is no answer to say that appellate courts must review criminal convictions in any event; up to now, that review has been on the validity of the judgment, not the sentence. Moreover, the vast majority of criminal cases are disposed of by pleas of guilty,⁷ and ordinarily there is no appellate review in such cases. To require appellate review of all sentences of imprisonment--as the Court's opinion does--will "administer the coup de grace to the courts of appeal as

⁷In 1972, nearly 90% of the convictions in federal courts followed pleas of guilty or nolo contendere. H. Friendly, Federal Jurisdiction: A General View 36 (1973).

we know them." H. Friendly, Federal Jurisdiction: A General View 36 (1973). This is judicial usurpation with a vengeance.

III

Even if I agreed that the Eighth Amendment prohibits imprisonment "disproportionate to the crime committed," ante, at 6, I reject the notion that respondent's sentence is disproportionate to his crimes for, if we are to have a system of laws, Rummel is controlling.

The differences between this case and Rummel are insubstantial. First, Rummel committed three truly nonviolent felonies, while respondent, as noted at the outset, committed seven felonies, four of which cannot fairly be characterized as "nonviolent." At the very least, respondent's burglaries and his third-offense drunk driving posed real risk of serious harm to others. It is sheer fortuity that the places respondent burglarized were unoccupied and that he killed no pedestrians while behind the wheel; what would have happened if a guard had been on duty during the burglaries is a matter of speculation, but the possibilities shatter the notion that respondent's crimes were minor or "nonviolent." Respondent, far more than Rummel, has conclusively demonstrated his inability to bring his conduct into conformity with the minimum standards of civilized society. Clearly, this difference demolishes any semblance of logic in the Court's conclusion that respondent's sentence constitutes cruel and unusual punishment although Rummel's did not.

The Court's opinion necessarily reduces to the proposition that a sentence of life imprisonment with the possibility of commu-

tation, but without possibility of parole, is so much more severe than a life sentence with the possibility of parole that one is excessive while the other is not. This distinction does not withstand scrutiny; a well-behaved "lifer" in respondent's position is most unlikely to serve for life.

It is inaccurate to say, as the Court does, ante, at 22, that the Rummel holding relied on the fact that Texas had a relatively liberal parole policy. In context, it is clear that the Court's discussion of parole merely illustrated the difficulty of comparing sentences between different jurisdictions. 445 U.S., at 280-281. However, accepting the Court's characterization of Rummel as accurate, the Court today misses the point. Parole was relevant to an evaluation of Rummel's life sentence because in the "real world," he was unlikely to spend his entire life behind bars. Only a fraction of "lifers" are not released within a relatively few years. In Texas, the historical evidence showed that a prisoner serving a life sentence could become eligible for parole in as little as 12 years. In South Dakota, the historical evidence--which the Court's opinion ignores--shows that since 1964, 22 life sentences have been commuted to terms of years, while 25 requests for commutation were denied. In short, there is a significant probability that respondent will experience what so many "lifers" experience. Even assuming that at the time of sentencing, respondent was likely to spend more time in prison than Rummel,⁸ that marginal difference is sure-

⁸No one will ever know if or when Rummel would have been released on parole since he was released in connection with a Footnote continued on next page.

20 yrs
1 per yr.

ly supported by respondent's greater demonstrated propensity for crime--and more serious crime at that. I find it nothing less than bizarre for the Court to say that while Rummel's sentence was constitutional, respondent's is "significantly disproportionate to his crime," and hence unconstitutional.

IV

It is indeed a curious business for this Court to so far intrude into the administration of criminal justice to say that a state legislature is barred by the Constitution from identifying its habitual criminals and removing them from the streets. Surely seven felony convictions warrant the conclusion that respondent is incorrigible. It is even more curious that the Court should brush aside controlling precedents that are barely in the bound volumes of United States Reports. The Court would do well to heed the words of Justice Black in condemning judges who usurp the policy-making powers of legislatures under the guise of constitutional interpretation:

"Such unbounded authority in any group of politically appointed or elected judges would unquestionably be sufficient to classify our Nation as a government of men, not the government of laws of which we boast. With a 'shock the conscience' test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test wilfully throws away the certainty and security that lies in a writ-

separate federal habeas proceeding in 1980. On October 3, 1980, a federal District Court granted Rummel's petition for a writ of habeas corpus on the grounds of ineffective assistance of counsel. Rummel v. Estelle, 498 F. Supp. 793 (WD Tex 1980). Rummel then plead guilty to theft by false pretenses and was sentenced to time served under the terms of a plea bargaining agreement. Two-Bit Lifer Finally Freed--After Pleading Guilty, Chicago Tribune, Nov. 15, 1980, at 2, col. 3.

ten constitution, one that does not alter with a judge's health, belief, or his politics." Boddie v. Connecticut, 401 U.S. 371, 393 (1971) (Black, J., dissenting).

I dissent.

1. All subject to review. 2

2. consider Rummel recognized

proportionality - 3 But says

p. 1-4, 6-14, has in first case apply w/ it to
length of sentence - 3

3. Argues Rummel ~~that~~

stated a "rule of law" - 4, 7

20

1st DRAFT

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

LPH

From: The Chief Justice

Circulated: _____

Recirculated: 6/23/83

(What about
Hutto cases?)

SUPREME COURT OF THE UNITED STATES

No. 82-492

HERMAN SOLEM, WARDEN, PETITIONER v.
JERRY BUCKLEY HELM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[June —, 1983]

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The controlling law governing this case is crystal clear, but today the Court blithely discards any concept of *stare decisis*, trespasses gravely on the authority of the States, and distorts the concept of proportionality of punishment by tearing it from its moorings in capital cases. Only two Terms ago, we held in Rummel v. Estelle, 445 U. S. 263 (1980), that a life sentence imposed after only a *third* nonviolent felony conviction did not constitute cruel and unusual punishment under the Eighth Amendment. Today, the Court ignores its recent precedent and holds that a life sentence imposed after a *seventh* felony conviction constitutes cruel and unusual punishment under the Eighth Amendment. Moreover, I reject the fiction that all Helm's crimes were innocuous or nonviolent. Among his felonies were three burglaries and a third conviction for drunk driving. By comparison Rummel was a relatively "model citizen." Although today's holding cannot rationally be reconciled with Rummel, the Court does not purport to overrule Rummel. I therefore dissent.

Rummel
"ignored"

I

A

The Court's starting premise is that the Eighth Amend-

ment's Cruel and Unusual Punishments Clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Ante*, at 6. What the Court means is that a sentence is unconstitutional if it is more severe than five justices think appropriate. In short, all sentences of imprisonment are subject to appellate scrutiny the ensure that they are "proportional" to the crime committed.

*all
subject
to
appellate
review.*

The Court then sets forth three assertedly "objective" factors to guide the determination of whether a given sentence of imprisonment is constitutionally excessive: (1) the "gravity of the offense and the harshness of the penalty," *id.*, at 11; (2) a comparison of the sentence imposed with "sentences imposed on other criminals in the same jurisdiction," *id.*, at 12 (emphasis added); (3) and a comparison of "the sentences imposed for commission of the same crime in other jurisdictions." *Ibid* (emphasis added). In applying this analysis, the Court determines that respondent

"has received the penultimate sentence for *relatively minor* criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, . . ." *Id.*, at 23. (Emphasis added).

Therefore, the Court concludes, respondent's sentence is "significantly disproportionate to his crime, and is . . . prohibited by the Eighth Amendment." This analysis is completely at odds with the reasoning of our recent holding in *Rummel*, in which, of course, JUSTICE POWELL dissented.

B

The facts in *Rummel* bear repeating. Rummel was convicted in 1964 of fraudulent use of a credit card; in 1969, he was convicted of passing a forged check; finally, in 1973 Rummel was charged with obtaining money by false pre-

tenses, which is also a felony under Texas law. These three offenses were indeed nonviolent. Under Texas' recidivist statute, which provides for a mandatory life sentence upon conviction for a third felony, the trial judge imposed a life sentence as he was obliged to do after the jury returned a verdict of guilty of felony theft.

Rummel, in this Court, advanced precisely the same arguments that respondent advances here; we rejected those arguments notwithstanding that his case was stronger than respondent's. The test in *Rummel* which we rejected would have required us to determine on an abstract moral scale whether Rummel had received his "just deserts" for his crimes. We declined that invitation; today the Court accepts it. Will the Court now recall Rummel's case so five justices will not be parties to "disproportionate" criminal justice?

It is true, as we acknowledged in *Rummel*, that the "Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of a crime." 445 U. S., at 271. But even a cursory review of our cases shows that this type of proportionality review has been carried out only in a very limited category of cases, and never before in a case involving solely a sentence of imprisonment. In *Rummel*, we said that the proportionality concept of the capital punishment cases was inapposite because of the "unique nature of the death penalty. . . ." *Id.*, at 272. "Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel." *Ibid.*

The *Rummel* Court also rejected the claim that *Weems v. United States*, 217 U. S. 349 (1910), required it to determine whether Rummel's punishment was "disproportionate" to his crime. In *Weems*, the Court had struck down as cruel and unusual punishment a sentence of *cadena temporal* imposed

concession

length of sentence

by a Phillipine Court. This bizarre penalty, which was unknown to Anglo-Saxon law, entailed a minimum of 12 years' imprisonment chained day and night at the wrists and ankles, hard and painful labor while so chained, and a number of "accessories" including lifetime civil disabilities. In *Rummel* the Court carefully noted that "[Weems'] finding of disproportionality cannot be wrenched from the facts of that case." 445 U. S., at 273.¹

The lesson the *Rummel* Court drew from *Weems* and from the capital punishment cases was that the Eighth Amendment did not authorize courts to review sentences of imprisonment to determine whether they were "proportional" to the crime. In language quoted incompletely by the Court, *ante*, at 9, n. 13, the *Rummel* Court stated:

"Given the *unique nature* of the punishments considered in *Weems* and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the *length of the sentence actually imposed is purely a matter of legislative prerogative.*" 445 U. S., at 274. (Emphasis added).

Five Justices joined this clear and precise limiting language.

In context it is clear that this Court was not merely summarizing an argument, as the Court suggests, *ante*, at 9, n. 13, but was stating affirmatively the rule of law laid down. This passage from *Rummel* is followed by an explanation of why it is permissible for courts to review sentences of death or bizarre physically cruel punishments as in *Weems*, but not sentences of imprisonment. *Id.*, at 274-275. The *Rummel*

¹Other authorities have shared this interpretation of *Weems v. United States*, 217 U. S. 349 (1910). *E. g.*, Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1075 (1964).

Court emphasized, as has every opinion in capital cases in the past decade, that it was possible to draw a "bright line" between "the punishment of death and the various other permutations and commutations of punishment short of that ultimate sanction"; similarly, a line could be drawn between the punishment in *Weems* and "more traditional forms of imprisonment imposed under the Anglo-Saxon system." *Id.*, at 275. However, the *Rummel* Court emphasized that drawing lines between different sentences of imprisonment would thrust the Court inevitably "into the basic line-drawing process that is pre-eminently the province of the legislature" and produce judgments that were no more than the visceral reactions of individual Justices. *Ibid.*

The *Rummel* Court categorically rejected the very analysis adopted by the Court today. *Rummel* had argued that various objective criteria existed by which the Court could determine whether his life sentence was proportional to his crimes. In rejecting *Rummel's* contentions, the Court explained why each was insufficient to allow it to determine in an *objective* manner whether a given sentence of imprisonment is proportionate to the crime for which it is imposed.

First, it rejected the distinctions *Rummel* tried to draw between violent and nonviolent offenses, noting that "the absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular individual." *Ibid.* Similarly, distinctions based on the amount of money stolen are purely "subjective" matters of line drawing. *Id.*, at 275-276.

Second, the Court squarely rejected *Rummel's* attempt to compare his sentence with the sentence he would have received in other States—an argument that the Court today accepts. The *Rummel* Court explained that such comparisons are flawed for several reasons. For one, the recidivist laws of the various states vary widely. "It is one thing for a court to compare those States that impose capital punishment for a specific offense with those States that do not. . . . It is quite

another thing for a court to attempt to evaluate the position of any particular recidivist scheme within Rummel's complex matrix." 445 U. S., at 280 (citation and footnote omitted). Another reason why comparison between the recidivist statutes of different States is inherently complex is that some states have comprehensive provisions for parole and others do not. *Id.*, at 280-281. Perhaps most important, such comparisons trample on fundamental concepts of federalism. Different states surely may view particular crimes as more or less severe than other states. Stealing a horse in Texas may have different consequences and warrant different punishment than stealing a horse in Rhode Island or Washington, D. C. Thus, even if the punishment accorded Rummel in Texas were to exceed that which he would have received in any other State,

"that severity would hardly render Rummel's punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other States. . . . *Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.*" 445 U. S., at 281-282. (Emphasis added).

Finally, we flatly rejected Rummel's suggestion that we measure his sentence against the sentences imposed by Texas for other crimes:

"Other crimes, of course, implicate other societal interests, making any such comparison inherently speculative. . . . Once the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence imposed under a recidivist statute for several separate felony convictions not involving 'violence' violates

the cruel-and-unusual-punishment of the Eighth Amendment." 445 U. S., at 282-283, n. 27.

Rather, we held that the severity of punishment to be accorded different crimes was peculiarly a matter of legislative policy. *Ibid.*

In short, *Rummel* held that the length of a sentence of imprisonment is a matter of legislative discretion; this is so particularly for recidivist statutes. I simply cannot understand how the Court can square *Rummel* with its holding that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted." *Ante*, at 11.³

If there were any doubts as to the meaning of *Rummel*, they were laid to rest last Term in *Hutto v. Davis*, 454 U. S. 370 (1982) (*per curiam*). There a United States District Court held that a 40-year sentence for the possession of nine ounces of marijuana violated the Eighth Amendment. The District Court applied almost exactly the same analysis adopted today by the Court. Specifically, the District Court stated:

"After examining the nature of the offense, the legislative purpose behind the punishment, the punishment in the [sentencing jurisdiction] for other offenses, and the punishment actually imposed for the same or similar offenses in Virginia, this court must necessarily conclude that a sentence of forty years and twenty thousand dollars in fines is so grossly out of proportion to the severity of the crimes as to constitute cruel and unusual punishment in violation of the United States Constitution." *Davis v. Zahradnick*, 432 F. Supp. 444, 453 (WD Va.

³ Although *Rummel v. Estelle*, 445 U. S. 263, 274, n. 11 (1980), conceded that "a proportionality principle [might] come into play . . . if a legislature made overtime parking a felony punishable by life imprisonment," the majority has not suggested that respondent's crimes are comparable to overtime parking. Respondent's seven felonies are far more severe than *Rummel's* three.

1977).

The Court of Appeals sitting *en banc* affirmed. 646 F. 2d 123 (CA4 1981) (*per curiam*). We reversed in a brief *per curiam* opinion, holding that *Rummel* had disapproved each of the "objective" factors on which the District Court and *en banc* Court of Appeals purported to rely. 454 U. S., at 373. It was therefore clear error for the District Court to have been guided by these factors, which, paradoxically, the Court adopts today.

Contrary to the Court's interpretation of *Hutto*, see *ante*, at 11 and, n. 16, the *Hutto* Court did *not* hold that the District Court miscalculated in finding Davis' sentence disproportionate to his crime. It did *not* hold that the District Court improperly weighed the relevant factors. Rather, it held that the District Court clearly erred in even embarking ~~on a~~ determination whether the sentence was "disproportionate" to the crime. *Hutto* makes crystal clear that under *Rummel* it is error for appellate courts to second-guess legislatures as to whether a given sentence of imprisonment is excessive in relation to the crime,³ as the Court does today, *ante*, at 16-23.

I agree with what the Court stated only days ago, that "the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law." *City of Akron v. Akron Center for Reproductive Health*,

³Both *Rummel* and *Hutto v. Davis*, 454 U. S. 370 (1982) (*per curiam*), leave open the possibility that in extraordinary cases—such as a life sentence for overtime parking—it might be permissible for a court to decide whether the sentence is grossly disproportionate to the crime. I agree that the Cruel and Unusual Punishments Clause might apply to those rare cases where reasonable men cannot differ as to the inappropriateness of a punishment. In all other cases, we should defer to the legislature's line-drawing. However, the Court does not contend that this is such an extraordinary case that reasonable men could not differ about the appropriateness of this punishment.

Inc., — U. S. —, — (1983). While the doctrine of *stare decisis* does not absolutely bind the Court to its prior opinions, a decent regard for the orderly development of the law and the administration of justice requires that directly controlling cases be either followed or candidly overruled.⁴ Especially is this so with respect to two key holdings only three years old.

omission

II

Although historians and scholars have disagreed about the Framers' original intentions, the more common view seems to be that the Framers viewed the Cruel and Unusual Punishments Clause as prohibiting the kind of torture meted out during the reign of the Stuarts.⁵ Moreover, it is clear that

⁴I do not read the Court's opinion as arguing that respondent's sentence of life imprisonment without possibility of parole is so different from Rummel's sentence of life imprisonment with the possibility of parole as to permit it to apply the proportionality review used in the death penalty cases, e. g., *Coker v. Georgia*, 433 U. S. 584 (1977), to the former although not the latter. Nor would such an argument be tenable. As was noted in *Woodson v. North Carolina*, 428 U. S. 280, 305 (1976) (opinion of Justice Stewart, JUSTICE POWELL, and JUSTICE STEVENS),

"[T]he penalty of death is qualitatively different from a sentence of imprisonment. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."

The greater need for reliability in death penalty cases cannot support a distinction between a sentence of life imprisonment with possibility of parole and a sentence of life imprisonment without possibility of parole, especially when an executive commutation is permitted as in South Dakota.

⁵Compare, e. g., Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Calif. L. Rev. 839 (1969); Schwartz, Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel, 71 J. Crim. L. & Criminology 378, 379-382 (1980); Katkin, Habitual Offender Laws: A Reconsideration, 21 Buffalo L. Rev. 99, 115 (1971), with, e. g., Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 Stan. L. Rev. 838,

until 1892, over 100 years after the ratification of the Bill of Rights, not a single Justice of this Court even asserted the doctrine adopted for the first time by the Court today. The prevailing view up to now has been that the Eighth Amendment reaches only the *mode* of punishment and not the length of a sentence of imprisonment.³ In light of this history, it is disingenuous for the Court blandly to assert that "[t]he constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." *Ante*, at 8. That statement seriously distorts history and our cases.

This Court has applied a proportionality test only in extraordinary cases, *Weems* being one example and the line of capital cases another. See, e. g., *Coker v. Georgia*, 433 U. S. 584 (1977); *Enmund v. Florida*, 458 U. S. — (1982). To read the Eighth Amendment as restricting legislatures' authority to choose which crimes to punish by death rests on the finality of the death sentence. Such scrutiny is not required where a sentence of imprisonment is imposed after the

853-855 (1972); Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 Buffalo L. Rev. 783 (1975).

³In 1892, the dissent in *O'Neil v. Vermont*, 144 U. S. 328, 339-340 (1892) (Field, J., dissenting), argued that the Eighth Amendment "is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." Before and after *O'Neil*, most authorities thought that the Eighth Amendment reached only the mode of punishment and not the length of sentences. See, e. g., Note, 24 Harv. L. Rev. 54, 55 (1910). Even after *Weems* was decided in 1910, it was thought unlikely that the Court would extend proportionality analysis to cases involving solely sentences of imprisonment. See Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1075 (1964). Until today, not a single case of this Court applied the "excessive punishment" doctrine of *Weems* to a punishment consisting solely of a sentence of imprisonment, despite numerous opportunities to do so. E. g., *Hutto v. Davis*, 454 U. S. 370 (1982); *Rummel v. Estelle*, 445 U. S. 268 (1980); *Badders v. United States*, 240 U. S. 391 (1916); *Graham v. West Virginia*, 224 U. S. 616 (1912).

State has identified a criminal offender whose record shows he will not conform to societal standards.

The Court's traditional abstention from reviewing sentences of imprisonment to ensure that punishment is "proportionate" to the crime is well founded in history, in prudential considerations, and in traditions of comity. Today's conclusion by five Justices that they are able to say that one offense has less "gravity" than another is nothing other than a bald substitution of individual subjective moral values for those of the legislature. Nor, as this case well illustrates, are we endowed with Solomonic wisdom that permits us to draw principled distinctions between sentences of different length for a chronic "repeater" who has demonstrated that ~~he~~^A will not abide by the law. g
he

The simple truth is that "[n]o neutral principle of adjudication permits a federal court to hold that in a given situation individual crimes are too trivial in relation to the punishment imposed." *Rummel v. Estelle*, 568 F. 2d 1193, 1201-1202 (CA5) (Thornberry, J., dissenting), vacated, 587 F. 2d 651 (CA5 1978) (en banc), *aff'd*, 445 U. S. 263 (1980). The apportionment of punishment entails, in Justice Frankfurter's words, "peculiarly questions of legislative policy." *Gore v. United States*, 357 U. S. 386, 393 (1958). Legislatures are far better equipped than we are to balance the competing penal and public interests and to draw the essentially arbitrary lines between appropriate sentences for different crimes.

By asserting the power to review sentences of imprisonment for excessiveness the Court launches into uncharted and unchartable waters. Today it holds that a sentence of life imprisonment, without the possibility of parole, is excessive punishment for a seventh allegedly "nonviolent" felony. How about the eighth "nonviolent" felony? The ninth? The twelfth? Suppose one offense was a simple assault? Or selling liquor to a minor? Or statutory rape? Or price-fixing? The permutations are endless and the Court's opinion is

bankrupt of realistic guiding principles. Instead, it casually lists several allegedly "objective" factors and arbitrarily asserts that they show respondent's sentence to be "significantly disproportionate" to his crimes. *Ante*, at 23. Must all these factors be present in order to hold a sentence excessive under the Eighth Amendment? How are they to be weighed against each other? Suppose several States punish severely a crime that the Court views as trivial or petty? I can see no limiting principle in the Court's holding.

There is a real risk that this holding will flood the appellate courts with cases in which equally arbitrary lines must be drawn. It is no answer to say that appellate courts must review criminal convictions in any event; up to now, that review has been on the validity of the judgment, not the sentence. The vast majority of criminal cases are disposed of by pleas of guilty,⁷ and ordinarily there is no appellate review in such cases. To require appellate review of all sentences of imprisonment—as the Court's opinion does—will "administer the *coup de grace* to the courts of appeal as we know them." H. Friendly, *Federal Jurisdiction: A General View* 36 (1973). This is judicial usurpation with a vengeance; Congress has pondered for decades the concept of appellate review of sentences and has hesitated to act.

III

Even if I agreed that the Eighth Amendment prohibits imprisonment "disproportionate to the crime committed," *ante*, at 6, I reject the notion that respondent's sentence is disproportionate to his crimes for, if we are to have a system of laws, not men, *Rummel* is controlling.

The differences between this case and *Rummel* are insubstantial. First, *Rummel* committed three truly nonviolent

⁷In 1972, nearly 90% of the convictions in federal courts followed pleas of guilty or *nolo contendere*. H. Friendly, *Federal Jurisdiction: A General View* 36 (1973).

felonies, while respondent, as noted at the outset, committed seven felonies, four of which cannot fairly be characterized as "nonviolent." At the very least, respondent's burglaries and his third-offense drunk driving posed real risk of serious harm to others. It is sheer fortuity that the places respondent burglarized were unoccupied and that he killed no pedestrians while behind the wheel. ^{What} what would have happened if a guard had been on duty during the burglaries is a matter of speculation, but the possibilities shatter the notion that respondent's crimes were innocuous, inconsequential, minor, or "nonviolent." Four, I repeat, had harsh potentialities for violence. Respondent, far more than Rummel, has demonstrated his inability to bring his conduct into conformity with the minimum standards of civilized society. Clearly, this difference demolishes any semblance of logic in the Court's conclusion that respondent's sentence constitutes cruel and unusual punishment although Rummel's did not.

of respondent's crimes

The Court's opinion necessarily reduces to the proposition that a sentence of life imprisonment with the possibility of commutation, but without possibility of parole, is so much more severe than a life sentence with the possibility of parole that one is excessive while the other is not. This distinction does not withstand scrutiny; a well-behaved "lifer" in respondent's position is most unlikely to serve for life.

It is inaccurate to say, as the Court does, *ante*, at 22, that the *Rummel* holding relied on the fact that Texas had a relatively liberal parole policy. In context, it is clear that the *Rummel* Court's discussion of parole merely illustrated the difficulty of comparing sentences between different jurisdictions. 445 U. S., at 280-281. However, accepting the Court's characterization of *Rummel* as accurate, the Court today misses the point. Parole was relevant to an evaluation of Rummel's life sentence because in the "real world," he was unlikely to spend his entire life behind bars. Only a fraction of "lifers" are not released within a relatively few

years. In Texas, the historical evidence showed that a prisoner serving a life sentence could become eligible for parole in as little as 12 years. In South Dakota, the historical evidence—which the Court's opinion ignores—shows that since 1964, 22 life sentences have been commuted to terms of years, while 25 requests for commutation were denied although they may be reopened.

In short, there is a significant probability that respondent will experience what so many "lifers" experience. Even assuming that at the time of sentencing, respondent was likely to spend more time in prison than Rummel,^{*} that marginal difference is surely supported by respondent's greater demonstrated propensity for crime—and for more serious crime at that.

omission

IV

It is indeed a curious business for this Court to so far intrude into the administration of criminal justice to say that a state legislature is barred by the Constitution from identifying its habitual criminals and removing them from the streets. Surely seven felony convictions warrant reasonable minds to conclude that respondent is incorrigible. It is even more curious that the Court should brush aside controlling precedents that are barely in the bound volumes of United States Reports. The Court would do well to heed Justice Black's comments on judges who usurp the policy-making powers of legislatures under the guise of constitutional interpretation:

^{*} No one will ever know if or when Rummel would have been released on parole since he was released in connection with a separate federal habeas proceeding in 1980. On October 3, 1980, a federal District Court granted Rummel's petition for a writ of habeas corpus on the grounds of ineffective assistance of counsel. *Rummel v. Estelle*, 498 F. Supp. 793 (WD Tex 1980). Rummel then plead guilty to theft by false pretenses and was sentenced to time served under the terms of a plea bargaining agreement. *Two-Bit Lifer Finally Freed—After Pleading Guilty*, Chicago Tribune, Nov. 15, 1980, at 2, col. 3.

"Such unbounded authority in any group of politically appointed or elected judges would unquestionably be sufficient to classify our Nation as a government of men, not the government of laws of which we boast. With a 'shock the conscience' test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test wilfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief, or his politics." *Boddie v. Connecticut*, 401 U. S. 371, 393 (1971) (Black, J., dissenting).

I dissent.

lfp/ss 05/21/83

Rider A, p. 16 (Solem)

SOLEM16 SALLY-POW

Application of the relevant factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments - just as legislatures make them in the first instance. Most comparisons of the gravity of crimes are close "judgment calls" left to legislative bodies responsible for enacting the criminal laws. Comparisons can be made in light of harm caused or threatened to the victim or society, and the culpability of the offender. Thus is Enmund the Court determined that murder is more serious than aiding and abetting murder, and a line customarily is drawn between intent to commit a

crime and the actual consummation of the intent. Indeed, there are widely shared views as to the relative seriousness of crimes. See Rossi, Waite, Bose & Berk, The Seriousness of Crimes: Normative Structure and Individual Differences, 39 Am. Soc. Rev., 224, 237 (1974). For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence. Indeed, the State concedes that crimes against people generally are more serious than crimes against property. Tr. of Oral Arg., at 16.

Note to Mike: Your subpart B (p. 16-18) is excellent. I have merely reframed the first two paragraphs. Tell me

about the Rossi article that you cite. I generally avoid
citing even law review articles in the text.

1fp/ss 05/21/83

Rider A, p. 14 (Solem)

SOLEM14 SALLY-POW

In reviewing sentences under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized. See Hutto v. Davis, 454 U.S., at 373-374, n. 2; Rummel v. Estelle, 445 U.S., at 275-276.

File

lfp/ss 05/21/83

Rider A, p. 14 (Solem)

SOLEM14 SALLY-POW

In reviewing sentences under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized. See Hutto v. Davis, 454 U.S., at 373-374, n. 2; Rummel v. Estelle, 445 U.S., at 275-276.

lfp/ss 05/21/83

Rider A, p. 16 (Solem)

SOLEM16 SALLY-POW

Application of the relevant factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments - just as legislatures make them in the first instance. Most comparisons of the gravity of crimes are close "judgment calls" left to legislative bodies responsible for enacting the criminal laws. Comparisons can be made in light of harm caused or threatened to the victim or society, and the culpability of the offender. Thus is Enmund the Court determined that murder is more serious than aiding and abetting murder, and a line customarily is drawn between intent to commit a

crime and the actual consummation of the intent. Indeed, there are widely shared views as to the relative seriousness of crimes. See Rossi, Waite, Bose & Berk, The Seriousness of Crimes: Normative Structure and Individual Differences, 39 Am. Soc. Rev., 224, 237 (1974). For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence. Indeed, the State concedes that crimes against people generally are more serious than crimes against property. Tr. of Oral Arg., at 16.

Note to Mike: Your subpart B (p. 16-18) is excellent. I have merely reframed the first two paragraphs. Tell me

about the Rossi article that you cite. I generally avoid citing even law review articles in the text.

lfp/ss 06/22/83

Rider A, p. 11 (Solem)

SOLEM11 SALLY-POW

Suggested Revision of Footnote 15:

15. Contrary to the repeated assertion in the dissenting opinion, we neither say nor imply that "all sentences of imprisonment are subject to appellate scrutiny to ensure that they are 'proportional' to the crime committed." (Post, at 2, 7, 13). We do say, in accord with decisions of this Court, that the principle of proportionality is inherent in the Eighth Amendment. [cites] In view, however, of the substantial deference that must be accorded legislatures and sentencing courts we anticipate that there will be relatively few occasions for appellate review -- as has been true in the past.

This is the revision
of note 15 that
you drafted

I propose revising footnote 15, on page 11, as follows:

¹⁵In view of the substantial deference properly due to legislatures and sentencing courts, most reviewing courts normally will not be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate. The dissent thus exaggerates the difficulties that appellate courts will face in applying the Eighth Amendment. See post, at 2, 12. An appellate court need not decide if a sentence is "correct"; it need only decide if the sentence is within constitutional limits.

*Mike - See my revision
of n 15, I will, of course,
consider any further thoughts
you may have.*

I propose adding a new footnote at the end of Part II.B,
on page 9, as follows:

And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, e.g., [citations].¹²⁵

¹²⁵The dissent charges that "the Court blithely discards any concept of stare decisis." Post, at 1; cf. id., at 2, 8-9, 14. On the contrary, our decision ~~today~~ is ~~entirely~~ consistent with this Court's prior cases--including Rummel v. Estelle, 445 U.S. 263 (1980). See n. 30, infra. It is rather the dissent that ~~would~~ ~~seeks to~~ discard prior precedent. Its assertion that the Eighth Amendment establishes only a narrow principle of proportionality is contrary to the entire line of cases cited in the text.

These are the copies of the riders that you have already seen and marked.

I propose revising footnote 13, on page 9, as follows:

¹³According to Rummel v. Estelle, 445-U.S.-263-(1980), "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary,--- the length of sentence actually imposed is purely a matter of legislative prerogative." Id. 445 U.S., at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible.

To the extent that the State--or the dissent, see post, at 4-- makes this argument here, we find it meritless. The class of "crimes concededly classified and classifiable as felonies" is meaningless as an Eighth Amendment standard. The definition of a felony is invariably based on its legal consequences. See, e.g., 18 U.S.C. §1(1). The effect of this standard would be absurd: when a State concededly may punish a crime by imprisonment for a year, it could punish the crime by life imprisonment without possibility of parole.

Legislatures determine the definition of crimes & classify them generally as felonies & misdemeanors, with a wide variety of sub-classification of felonies - as is well illustrated by South Dakota's fragmentation of felonies into many sub-classes that, ^{in the} ~~absent~~ ^{of an} examination of the crimes defined are meaningless. For example, (Cite a SD example)

Miche - something like this seems more to the point.

I propose revising footnote 15, on page 11, as follows:

¹⁵In view of the substantial deference properly due to legislatures and sentencing courts, most reviewing courts normally will not be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate. The dissent thus exaggerates the difficulties that appellate courts will face in applying the Eighth Amendment. See post, at 2, 12. An appellate court need not decide if a sentence is "correct"; it need only decide if the sentence is within constitutional limits.

Mike - I'd like to
compare this with
the revision of n 15
I drafted.

Also, what about
changes I made
in text on pp 10, 11 &

I propose revising footnote 16, on page 11, as follows:

¹⁶The dissent concedes--as it must--that some sentences of imprisonment are so disproportionate that they are unconstitutional under the Cruel and Unusual Punishments Clause. Post, at 8, n. 3; cf. id., at 7, n. 2. The dissent, however, offers no meaningful guidance to enable courts to recognize these admittedly rare cases. We prefer to reiterate the objective factors that our cases have recognized. See, e.g., Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion). As the Court has indicated, no one factor will be dispositive in a given case. See Hutto v. Davis, 454 U.S. 370, 373-374 n. 2 (1982) (per curiam); Rummel v. Estelle, 445 U.S., at 275-276. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. Thus no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment. See Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1376-1377 (1979). But a combination of objective factors can make such analysis possible.

does it typed
draft concede this?

Make - why does
"federalism"
system so result?

I don't see "meaningful"
a journalistic favorite

I propose adding a new footnote near the bottom of page 22 as follows:

Why repeat?
In fact, no life sentence has been commuted in over eight years, App. 29, while parole--where authorized--has been granted regularly during that period, Tr. of Oral Arg. 8-9.^{27.5}

During these years
27.5 ~~In the last~~ eight years, over 100 requests for commutation have been denied. See app. 22-26. Although 22 life sentences were commuted to terms of years between 1964 and 1975, see app. 29; but see n. 28, *infra*, we do not have complete figures on the number of requests that were denied during the same period. We know only that at least 35 requests were denied. See app. 22-26. In any event, we believe that past practice--particularly the practice of a decade ago--is not a reasonable indicator of future performance when the relevant decision is left to the Governor's unfettered discretion. *of each Governor* Even if a particular Governor were to commute every sentence, there is no reason to believe that his successor would continue the practice. Indeed, the best indication we have of Helm's chance for commutation is the fact that his request has already been denied. App. 26.

I propose adding a new footnote after the penultimate sentence, on page 23, as follows:

We conclude that his [Helm's] sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.³⁰

³⁰Contrary to the suggestion in the dissent, post, at 2-9, our conclusion today is not inconsistent with Rummel v. Estelle. The Rummel Court recognized--as does the dissent, see post, at 8, n. 3--that some sentences of imprisonment are so disproportionate that they violate the Eighth Amendment. 445 U.S., at 274, n. 11. Since Rummel--like the dissent today--offered no meaningful ~~standards for~~ ^{guidelines} to determine when an Eighth Amendment violation had occurred, it is controlling only in a similar factual situation.

In this case, Helm's crimes were about as serious as Rummel's. See supra, at 1-3, and 16-17. His sentence, however, is far more severe than Rummel's. See supra, at 17-18, and 20-23. Thus Rummel is not controlling.

What about note I drafted

I propose adding a new footnote at the end of Part II.B,
on page 9, as follows:

And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, e.g., [citations].¹²⁵

OK

¹²⁵The dissent charges that "the Court blithely discards any concept of stare decisis." Post, at 1; cf. id., at 2, 8-9, 14. On the contrary, our decision is entirely consistent with this Court's prior cases--including Rummel v. Estelle, 445 U.S. 263 (1980). See n. 30, infra. It is rather the dissent that would discard prior precedent. Its assertion that the Eighth Amendment establishes only a narrow principle of proportionality is contrary to the entire line of cases cited in the text.

These are the current
copies of the riders.
Changes of a substantial
nature from yesterday's
riders are marked.

OK as
edited

I propose revising footnote 13, on page 9, as follows:

¹³According to Rummel v. Estelle, "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of sentence actually imposed is purely a matter of legislative prerogative." 445 U.S., at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible.

To the extent that the State--or the dissent, see post, at 4--makes this argument here, we find it meritless. The class of "crimes concededly classified and classifiable as felonies" is meaningless as an Eighth Amendment standard. Legislatures do not simply define crimes and classify them as felonies or misdemeanors. Within the broad class of felonies, there ^{usually} is a wide range of sub-classifications. This is well illustrated by the practice in South Dakota. See n. 6, supra. It is absurd to suggest that because a crime is concededly punishable by two years imprisonment, it is punishable by life imprisonment without possibility of parole.

of fragmenting felonies. ~~See~~ See n. 1-6 supra

Mike -
I suggested
an example.
I now have
second
thoughts. The
reference to
the notes 1-6
to tell the
story.

I propose adding the following paragraph on page 15. To place the new paragraph in context, I reprint the last two sentences of the paragraph before and the first sentence of the paragraph that follows. Except as marked, I have made no changes in these paragraphs. Since the new paragraph is entirely new, I have left it unmarked so that it will be easier to read. It may be a bit longer than you had anticipated, but I think it is justified for two reasons. First, it is our strongest line-drawing example. Although there is good language in Baldwin specifically about sentencing, the Barker analysis is closer to our present inquiry. Second, this section was a little light. You will recall that in the first two drafts we discussed Williams v. Florida, Apodaca v. Oregon, Ballew v. Georgia, and Burch v. Louisiana at this point. Since JUSTICE BLACKMUN was mentioned by name, he asked us to delete that paragraph. The new paragraph is shorter than the one we deleted.

Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

OK
good

The Sixth Amendment offers two good examples. A State is constitutionally required to provide an accused with a speedy trial, Klopfer v. North Carolina, 386 U.S. 213 (1967), but the ~~amount of delay that is permissible under the Speedy Trial Clause~~ a case by case must be determined on ~~an individual~~ basis. "[A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case" Barker v.

Wingo, 407 U.S. 514, 522 (1972) (unanimous opinion). In Barker, we identified some of the objective factors that courts should consider in determining whether a particular delay was excessive. Id., at 530. None of these factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." Id., at 533. Thus the type of inquiry that a court should conduct to determine if a given sentence is ^{constitutionally} disproportionate is ~~very~~ similar to the type of inquiry required by the Speedy Trial Clause.*

The Sixth-Amendment-right to a jury trial is another example. Baldwin v. New York, 399 U.S. 66 (1970), in particular, illustrates the line-drawing function of the judiciary, and offers guidance on the method by which some lines may be drawn.

* [If you think it would be helpful, I could add a footnote here explaining a further parallel between the Speedy Trial Clause and the Cruel and Unusual Punishments Clause: all trials are subject to appellate scrutiny to ensure that they are sufficiently "speedy," just as all sentences are subject to appellate scrutiny to ensure that they are proportionate, but in both cases reviewing courts often can dismiss such claims summarily. This, of course, would tie in with footnote 15. We might even say that we are confident courts can handle proportionality claims because they have been able to handle speedy trial claims, where the line-drawing is at least as difficult.]

no
the
textual
addition
is
enough

New footnote near the bottom of page 22:

During these eight years, over 100 requests for commutation have been denied. See app. 22-26. Although 22 life sentences were commuted to terms of years between 1964 and 1975, see app. 29; but see n. ____, infra, we do not have complete figures on the number of requests that were denied during the same period. We are told only that at least 35 requests were denied. See app. 22-26. In any event, past practice in this respect--particularly the practice of a decade ago--is not a reliable indicator of future performance when the relevant decision is left to the unfettered discretion of each Governor. Indeed, the best indication we have of Helm's chance for commutation is the fact that his request already has been denied. App. 26.

New footnote after the penultimate sentence on page 23:

Contrary to the suggestion in the dissent, post, at 2-9, our conclusion today is not inconsistent with Rummel v. Estelle. The Rummel Court recognized--as does the dissent, see post, at 8, n. 3--that some sentences of imprisonment are so disproportionate that they violate the Eighth Amendment. 445 U.S., at 274, n. 11. Indeed, Hutto v. Davis, 454 U.S., at 374, and n. 3, makes clear that Rummel should not be read to foreclose proportionality review of sentences of imprisonment. Rummel did reject a proportionality challenge to a particular sentence. But since the Rummel Court--like the dissent today--offered no standards for determining when an Eighth Amendment violation has occurred, it is controlling only in a similar factual situation. Here the facts are clearly distinguishable. Whereas Rummel was eligible for a reasonably early parole, Helm, at age 36, was sentenced to life with no possibility of parole. See supra, at ____-____, and ____-____.

File

lfp/ss 06/24/83

Rider A, p. 11 (Solem)

SOL11 SALLY-POW

Revise footnote 15 to read as follows:

15. Contrary to the repeated assertions in the dissenting opinion, post, at 2, 7, 13, we do not adopt or imply approval of a general rule of appellate review of sentences. Absent statutory authority, it is not the role of an appellate court to substitute its judgment for that of the trial court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts a reviewing court rarely will be

required to engage in extended analysis to determine that
a sentence is not constitutionally disproportionate.

lfp/ss 06/24/83

Rider A, p. 11 (Solem)

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required to engage in extended analysis to determine that
a sentence is not constitutionally disproportionate.

I propose revising footnote 16, on page 11, as follows:

OK as
edited

⁹⁺
16 The dissent concedes--as it must--that some sentences of imprisonment are so disproportionate that they are unconstitutional under the Cruel and Unusual Punishments Clause. Post, at 8, n. 3; cf. id., at 7, n. 2. ^{however,} ~~The dissent, however,~~ offers no guidance ^{as to how courts are to judge} ~~to enable courts to recognize~~ these admittedly rare cases. We ¹ ~~prefer to~~ reiterate the objective factors that our cases have recognized. See, e.g., Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion). As the Court has indicated, no one factor will be dispositive in a given case. See Hutto v. Davis, 454 U.S. 370, 373-374 n. 2 (1982) (per curiam); Rummel v. Estelle, 445 U.S., at 275-276. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. Thus no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment. See Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1376-1377 (1979). But a combination of objective factors can make such analysis possible.

good note!

*OK as
edited*

I propose adding a new footnote near the bottom of page 22 as follows:

In fact, no life sentence has been commuted in over eight years, App. 29, while parole--where authorized--has been granted regularly during that period, Tr. of Oral Arg. 8-9.²⁷ 5

²⁷⁵ During these eight years, over 100 requests for commutation have been denied. See app. 22-26. Although 22 life sentences were commuted to terms of years between 1964 and 1975, see app. 29; but see n. 28, infra, we do not have complete figures on the number of requests that were denied during the same period. We *are told* ~~know~~ only that at least 35 requests were denied. See app. 22-26. In any event, we ~~believe that~~ *in this respect* past practice--particularly the practice of a decade ago--is not a *reliable* ~~reasonable~~ indicator of future performance when the relevant decision is left to the unfettered discretion of each Governor. Indeed, the best indication we have of Helm's chance for commutation is the fact that his request already has been denied. App. 26.

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Mike: Why not say that Hutto v Davis, 454 U.S. at 374, makes clear that Rummel cannot be used as foreclosing review of sentence of imprisonment on the 8th Amend. issue.?

New footnote at the end of Part II.B, on page 9:

The dissent charges that "the Court blithely discards any concept of stare decisis." Post, at 1; cf. id., at 2, 8-9, 14. On the contrary, our decision is entirely consistent with this Court's prior cases--including Rummel v. Estelle, 445 U.S. 263 (1980). See n. ___, infra. It is rather the dissent that would discard prior precedent. Its assertion that the Eighth Amendment establishes only a narrow principle of proportionality is contrary to the entire line of cases cited in the text.

Revised footnote 13, on pages 9-10:

¹³According to Rummel v. Estelle, "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of sentence actually imposed is purely a matter of legislative prerogative." 445 U.S., at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible. To the extent that the State--or the dissent, see post, at 4--makes this argument here, we find it meritless.

Revised footnote 15, on page 11:

¹⁵Contrary to the dissent's suggestions, post, at 2, 12, we do not adopt or imply approval of a general rule of appellate review of sentences. Absent statutory authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

Revised footnote 16, on page 11:

¹⁶The dissent concedes--as it must--that some sentences of imprisonment are so disproportionate that they are unconstitutional under the Cruel and Unusual Punishments Clause. Post, at 8, n. 3; cf. id., at 7, n. 2. It offers no guidance, however, as to how courts are to judge these admittedly rare cases. We reiterate the objective factors that our cases have recognized. See, e.g., Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion). As the Court has indicated, no one factor will be dispositive in a given case. See Hutto v. Davis, 454 U.S. 370, 373-374 n. 2 (1982) (per curiam); Rummel v. Estelle, 445 U.S., at 275-276. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. Thus no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment. See Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1376-1377 (1979). But a combination of objective factors can make such analysis possible.

Additional language on page 7:

Indeed, one of the consistent themes of the era was that Americans had all the rights of English subjects. See, e.g., 1 J. Continental Congress 83 (Ford ed. 1904) (Address to the People of Great Britain, Oct. 21, 1774) ("we claim all the benefits secured to the subject by the English constitution"); 1 American Archives 700 (4th series 1837) (Georgia Resolutions, Aug. 10, 1774) ("his Majesty's subjects in America ... are entitled to the same rights, privileges, and immunities with their fellow-subjects in Great Britain"). Thus our Bill of Rights was designed in part to ensure that these rights were preserved. Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection

Additional language on page 15:

offers two good examples. A State is constitutionally required to provide an accused with a speedy trial, Klopfer v. North Carolina, 386 U.S. 213 (1967), but the delay that is permissible must be determined on a case-by-case basis. "[A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case" Barker v. Wingo, 407 U.S. 514, 522 (1972) (unanimous opinion). In Barker, we identified some of the objective factors that courts should consider in determining whether a particular delay was excessive. Id., at 530. None of these factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." Id., at 533. Thus the type of inquiry that a court should conduct to determine if a given sentence is constitutionally disproportionate is similar to the type of inquiry required by the Speedy Trial Clause.

The

Revised footnote 10, on page 7:

The Eighth Amendment was based directly on Art. I, §9 of the Virginia Declaration of Rights (1776), authored by George Mason. He, in turn, had adopted verbatim the language of the English Bill of Rights. There can be no doubt that the Declaration of Rights guaranteed at least the liberties and privileges of Englishmen. See A. Nevins, *The American States During and After the Revolution* 146 (1924) (Declaration of Rights "was a restatement of English principles--the principles of Magna Charta ... and the Revolution of 1688"); A. Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 205-207 (1968). As Mason himself had explained: "We claim Nothing but the Liberties & Privileges of Englishmen, in the same Degree, as if we had still continued among our Bretheren in Great Britain.... We have received [these rights] from our Ancestors, and, with God's Leave, we will transmit them, unimpaired to our Posterity." Letter to "the Committee of Merchants in London" (June 6, 1766), reprinted in 1 *The Papers of George Mason* 71 (Rutland ed. 1970); cf. the Fairfax County Resolves (1774) (colonists entitled to all "Privileges, Immunities and Advantages" of the English Constitution), reprinted in 1 *The Papers of George Mason* 201.

New footnote 13, on page 9:

The dissent charges that "the Court blithely discards any concept of stare decisis." Post, at 1; cf. id., at 2, 8-9, 14. On the contrary, our decision is entirely consistent with this Court's prior cases--including Rummel v. Estelle, 445 U.S. 263 (1980). See n. 32, infra. It is rather the dissent that would discard prior precedent. Its assertion that the Eighth Amendment establishes only a narrow principle of proportionality is contrary to the entire line of cases cited in the text.

new footnote 14, on pages 9-10:

According to Rummel v. Estelle, "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of sentence actually imposed is purely a matter of legislative prerogative." 445 U.S., at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible. To the extent that the State--or the dissent, see post, at 4--makes this argument here, we find it meritless.

new footnote 16, on page 11:

Contrary to the dissent's suggestions, post, at 2, 12, we do not adopt or imply approval of a general rule of appellate review of sentences. Absent statutory authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

new footnote 17, on page 11:

The dissent concedes--as it must--that some sentences of imprisonment are so disproportionate that they are unconstitutional under the Cruel and Unusual Punishments Clause. Post, at 8, n. 3; cf. id., at 7, n. 2. It offers no guidance, however, as to how courts are to judge these admittedly rare cases. We reiterate the objective factors that our cases have recognized. See, e.g., Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion). As the Court has indicated, no one factor will be dispositive in a given case. See Hutto v. Davis, 454 U.S. 370, 373-374 n. 2 (1982) (per curiam); Rummel v. Estelle, 445 U.S., at 275-276. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. Thus no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment. See Jeffries & Stephan, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1376-1377 (1979). But a combination of objective factors can make such analysis possible.

New footnote 29, on page 22:

The most recent commutation of a life sentence in South Dakota occurred in 1975. App. 29. During the eight years since then, over 100 requests for commutation have been denied. See id., at 22-26. Although 22 life sentences were commuted to terms of years between 1964 and 1975, see id., at 29; but see n. 30, infra, we do not have complete figures on the number of requests that were denied during the same period. We are told only that at least 35 requests were denied. See app. 22-26. In any event, past practice in this respect--particularly the practice of a decade ago--is not a reliable indicator of future performance when the relevant decision is left to the unfettered discretion of each Governor. Indeed, the best indication we have of Helm's chance for commutation is the fact that his request already has been denied. Id., at 26.

New footnote 30, on page 22:

The record indicates that the prisoner whose life sentence was commuted in 1975, see n. 29, supra, still has not been paroled. App. 29.

New footnote 32, on page 23:

Contrary to the suggestion in the dissent, post, at 2-9, our conclusion today is not inconsistent with Rummel v. Estelle. The Rummel Court recognized--as does the dissent, see post, at 8, n. 3--that some sentences of imprisonment are so disproportionate that they violate the Eighth Amendment. 445 U.S., at 274, n. 11. Indeed, Hutto v. Davis, 454 U.S., at 374, and n. 3, makes clear that Rummel should not be read to foreclose proportionality review of sentences of imprisonment. Rummel did reject a proportionality challenge to a particular sentence. But since the Rummel Court--like the dissent today--offered no standards for determining when an Eighth Amendment violation has occurred, it is controlling only in a similar factual situation. Here the facts are clearly distinguishable. Whereas Rummel was eligible for a reasonably early parole, Helm, at age 36, was sentenced to life with no possibility of parole. See supra, at ____-____, and ____-____.

*An excellent opinion draft.*second draft: Solem v. Helm, No. 82-492

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

I

By 1975 the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.¹ In 1972 he was convicted of obtaining money under false pretenses.² In 1973

¹In 1969 third-degree burglary was defined in at least two sections of the South Dakota criminal code:

"A person breaking into any dwelling house in the nighttime with intent to commit a crime but under such circumstances as do not constitute burglary in the first degree, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. §22-32-8 (1967) (repealed 1976).

"A person breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof, or any building or part of any building, booth, tent, railroad car, vessel, vehicle as defined in §32-14-1, or any structure or erection in which any property is kept, with intent to commit larceny or any felony, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. §22-32-9 (1967) (repealed 1976).

imprisonment In 1964 and 1966 the third-degree burglary definition was essentially the same. See S.D. Code §13.3703 (1939 ed., supp. 1960); 1965 S.D. Laws, ch. 32. Third-degree burglary was punishable by "imprisonment in the state penitentiary for any term not exceeding fifteen years." S.D. Comp. Laws Ann. §22-32-10 (1967) (previously codified at S.D. Code §13.3705(3) (1939)) (repealed 1976).

Footnote(s) 2 will appear on following pages.

Do you mean his particular felonies or the class of felonies in general? If the latter, I tend to think of burglary as generally violent. It's an assault against property. hrs particular Felonies; violence against property doesn't count, but DWI can be violent in my opinion.

he was convicted of grand larceny.³ And in 1975 he was convicted of third-offense driving while intoxicated.⁴ The record contains no details about the circumstances of any of these offenses, ex-

²In 1972 the relevant statute provided:

"Every person who designedly, by color or aid of any false token or writing, or other false pretense, ... obtains from any person any money or property ... is punishable by imprisonment in the state penitentiary not exceeding three years or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both such fine and imprisonment." S.D. Comp. Laws Ann. §22-41-4 (1967) (repealed 1976).

³In 1973 South Dakota defined "larceny" as "the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof." S.D. Comp. Laws Ann. §22-37-1 (1967) (repealed 1976). Grand larceny and petit larceny were distinguished as follows:

"Grand larceny is larceny committed in any of the following cases:

(1) When the property taken is of a value exceeding fifty dollars;

(2) When such property, although not of a value exceeding fifty dollars, is taken from the person of another;

(3) When such property is livestock.

Larceny in other cases is petit larceny." S.D. Comp. Laws Ann. §22-37-2 (1967) (repealed 1976).

Grand larceny was then punishable by "imprisonment in the state penitentiary not exceeding ten years or by imprisonment in the county jail not exceeding one year." S.D. Comp. Laws Ann. §22-37-3 (1967) (repealed 1976).

⁴A third offense of driving while under the influence of alcohol is a felony in South Dakota. S.D. Codified Laws §32-23-4 (1976). See 1973 S.D. Laws, ch. 195, §7 (enacting version of §32-23-4 in force in 1975).

Something that must be clear to the hearts of South Dakotans

cept that they were all nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case.

In 1979 Helm was charged with uttering a "no account" check for \$100.⁵ The only details we have of the crime are those given by Helm to the state trial court:

"I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places." State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980) (Henderson, J., dissenting) (quoting Helm).

After offering this explanation, Helm pleaded guilty.

Ordinarily the maximum punishment for uttering a "no account" check would have been five years imprisonment in the state penitentiary and a five thousand dollar fine. See S.D. Codified Laws §22-6-1(6) (1979) (now codified at §22-6-1(7) (Supp. 1982)). As a result of his criminal record, however, Helm was subject to South Dakota's recidivist statute:

"When a defendant has been convicted of at least three prior convictions [sic] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." S.D. Codified Laws §22-7-8 (1979) (amended 1981).

⁵The governing statute provides, in relevant part:

"Any person who, for himself or as an agent or 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 §22-41-1.2 (1979).

The maximum penalty for a "Class 1 felony" was life imprisonment in the state penitentiary and a twenty-five thousand dollar fine.⁶ S.D. Comp. Laws Ann. §22-6-1(2) (1967 ed., supp. 1978) (now codified at S.D. Codified Laws §22-6-1(3) (Supp. 1982)). Moreover, South Dakota law explicitly provides that parole is unavailable: "A person sentenced to life imprisonment is not

⁶When Helm was sentenced in April 1979, South Dakota law classified felonies as follows:

"Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished from each other by the respective maximum penalties hereinafter set forth which are authorized upon conviction:

- (1) Class A felony: life imprisonment in the state penitentiary. A lesser sentence may not be given for a Class A felony;
- (2) Class 1 felony: life imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;
- (3) Class 2 felony: twenty-five years imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;
- (4) Class 3 felony: fifteen years imprisonment in the state penitentiary. In addition, a fine of fifteen thousand dollars may be imposed;
- (5) Class 4 felony: ten years imprisonment in the state penitentiary. In addition, a fine of ten thousand dollars may be imposed;
- (6) Class 5 felony: five years imprisonment in the state penitentiary. In addition, a fine of five thousand dollars may be imposed; and
- (7) Class 6 felony: two years imprisonment in the state penitentiary or a fine of two thousand dollars, or both.

"Nothing in this section shall limit increased sentences for habitual criminals

"Except in cases where punishment is prescribed by law, every offense declared to be a felony and not otherwise classified is a Class 6 felony." S.D. Comp. Laws Ann. §22-6-1 (1967 ed., supp. 1978) (amended 1979 and 1980).

*it still is -
but that's not
really relevant.*

is it longer

*Is there any 67 pardon?
life sentence NO*

eligible for parole by the board of pardons and paroles." S.D. Codified Laws §24-15-4 (1979). The Governor⁷ is authorized to pardon prisoners, or to commute their sentences, S.D. Const., Art. IV, §3, but no other relief from sentence is available even to a rehabilitated prisoner. ~~That is no such thing~~

Immediately after accepting Helm's guilty plea, the South Dakota Circuit Court sentenced Helm to life imprisonment under §22-7-8. The court explained:

"I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over." State v. Helm, 287 N.W.2d, at 500 (Henderson, J., dissenting) (quoting S.D. Circuit Court, Seventh Judicial Circuit, Pennington County (Parker, J.)).

The South Dakota Supreme Court, in a 3-2 decision, affirmed the sentence despite Helm's argument that it violated the Eighth Amendment. State v. Helm, supra.

After Helm had served two years in the state penitentiary, he requested the Governor to commute his sentence to a fixed term of years. Such a commutation would have had the effect of making Helm eligible to be considered for parole when he had served three-fourths of his new sentence. See S.D. Codified Laws

⁷The board of pardons and paroles is authorized to make recommendations to the Governor, S.D. Codified Laws §24-14-1 (1979); §24-14-5; S.D. Executive Order 82-04 (Apr. 12, 1982), but the Governor is not bound by the recommendation, §24-14-5.

§24-15-5(3) (1979). The Governor denied Helm's request in May 1981. App. 26.

In November 1981, Helm sought habeas relief in the ~~United~~ ^{stat.} States District Court for the District of South Dakota. Helm argued, among other things, that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. Although the District Court recognized that the sentence was harsh, it concluded that this Court's recent decision in Rummel v. Estelle, 445 U.S. 263 (1980), was dispositive. It therefore denied the writ.

The ~~United States~~ Court of Appeals for the Eighth Circuit reversed. 684 F.2d 582 (1982). The Court of Appeals noted that Rummel v. Estelle was distinguishable. Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabilitation as a goal of the criminal justice system. The Court of Appeals examined the nature of Helm's offenses, the nature of his sentence, and the sentence he could have received in other States for the same offense. It concluded, on the basis of this examination, that Helm's sentence was "grossly disproportionate to the nature of the offense." 684 F.2d, at 587. It therefore directed the District Court to issue the writ unless the State resentenced Helm. Ibid. Is that wrong

Recognizing the important Eighth Amendment question presented ^{by} in this case, we granted certiorari. 459 U.S. ____ (1982). We now affirm.

This sounds as if we spotted the issue on an exam. Would it be OK to say "In view of . . ."

II

The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

A

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence.⁸ In 1215, ~~for example~~, three chapters of Magna Carta were devoted to the rule that "amercements"⁹ may not be excessive.¹⁰ And the principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275). These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments. See, e.g., Le Gras v.

⁸The principle is by no means original to the common law. It was a recognized limitation on punishments in biblical times. See Exodus 21:23-25; Leviticus 24:19-20; Deuteronomy 19:19, 21.

⁹An amercement ^{is} was similar to a modern-day fine. It was the most common criminal sanction in thirteenth century England. See 2 F. Pollock & F. Maitland, The History of English Law 513-515 (2d ed. 1909).

¹⁰Chapter 20 declared that "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." See 1 S.D. Codified Laws, p. 4 (1978) (translation of Magna Carta). According to Maitland, "there was no clause in Magna Carta more grateful to the mass of the people" F. Maitland, Pleas of the Crown for the County of Gloucester xxxiv (1884). Chapter 21 granted the same rights to the nobility, and chapter 22 granted the same rights to the clergy.

These are the exact same passages that Judge Cox cited in upholding the Mississippi death penalty statute. You realize that you'll just spare his efforts to outdo even our Bible quotes.

Other wise people will ask why you did not pick 1214 or 1216. We could have used the 1216 version of Magna Carta, or even the 1217, or even the 1225. We picked 1215 as an example.

Bailiff of Bishop of Winchester, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), reprinted in 52 Selden Society 3 (1934). When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional. See, e.g., Hodges v. Humkin, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K.B. 1615) (Croke, J.) ("imprisonment ought always to be according to the quality of the offence").

The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 W. & M., sess. 2, ch. 2 (1689). Although the precise scope of this provision is uncertain, it at least incorporated "the longstanding principle of English law that the punishment ... should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959); see 4 W. Blackstone, *Commentaries* *16-19 (1769); see also id., at *16-17 (in condemning "punishments of unreasonable severity," uses "cruel" to mean severe or excessive). Indeed, barely three months after the Bill of Rights was adopted, the House of Lords declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon, was excessive and exorbitant, against magna charta, the common right of the subject, and against the law of the land." Earl of Devon's Case, 11 State Trials 133, 136 (1689).

When the Framers of the Eighth Amendment adopted the

What did
The Earl
of Devon
do?
That doesn't
seem bad
for treason.
Assault.

language of the English Bill of Rights,¹¹ they also adopted the English principle of proportionality. The people were guaranteed the rights they had possessed as English subjects--including the right to be free from excessive punishments.

Are there other rights that should not be incorporated -
No.

It's this principle going to get you in trouble
No.

B

The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.¹² In the leading case of Weems v. United States, 217 U.S. 349 (1910), the defendant had been convicted of falsifying a public document and sentenced to 15 years of "cadena temporal," a form of imprisonment that included hard labor in chains and permanent civil disabilities. ^{But see Ala. Code §1837a (1982 ed.)} The Court noted "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense," id., at 367, and held that the sentence violated the Eighth Amendment. The Court endorsed the principle of proportionality as a constitutional standard, see, e.g., id., at 372-

¹¹This language had earlier been incorporated in the Virginia Declaration of Rights, Art. I, §9.

¹²In O'Neil v. Vermont, 144 U.S. 323 (1892), the defendant had been convicted of 307 counts of "selling intoxicating liquor without authority," and sentenced to a term of over 54 years. The majority did not reach O'Neil's contention that this sentence was unconstitutional, for he did not include the point in his assignment of errors or in his brief. Id., at 331. Furthermore, the majority noted that the Eighth Amendment "does not apply to the States." Id., at 332. Accordingly the Court dismissed the writ of error for want of a federal question. Id., at 336-337. The dissent, however, reached the Eighth Amendment question, observing that it "is directed ... against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." Id., at 339-340 (Field, J., dissenting).

34 years for 307 counts doesn't seem all that bad. It was really a continuing offense.

373, and determined that the sentence before it was "cruel in its excess of imprisonment," id., at 377.

The Court next applied the principle to invalidate a criminal sentence in Robinson v. California, 370 U.S. 660 (1962).¹³ A 90-day sentence was found to be excessive for the crime of being "addicted to the use of narcotics." The Court explained that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." Id., at 667. Thus there was no question of an inherently barbaric punishment. "But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." Ibid.

Most recently, the Court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. Enmund v. Florida, 458 U.S. ____ (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend ^{That is} ~~to take~~ ^{be taken} life or that lethal force be used); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) ("sentence of death is grossly disproportionate and excessive punishment for the crime of rape"); id., at 601 (POWELL, J., concurring in the judgment in part and dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman"). And the Court has continued to

¹³Members of the Court continued to recognize the principle of proportionality in the meantime. See, e.g., Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion); id., at 111 (BRENNAN, J., concurring); id., at 125-126 (Frankfurter, J., dissenting).

recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, e.g., Hutto v. Finney, 437 U.S. 678, 685 (1978); Ingraham v. Wright, 430 U.S. 651, 667 (1977); Gregg v. Georgia, 428 U.S. 153, 171-172 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); cf. Hutto v. Davis, 454 U.S. 370, 374, and n. 3 (1982) (per curiam) (recognizing that some prison sentences may be constitutionally disproportionate); Rummel v. Estelle, 445 U.S., at 274, n. 11 (same).

C

There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences.¹⁴ The constitutional language itself suggests no exception for imprisonment. We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines,

¹⁴According to Rummel v. Estelle, 445 U.S. 263 (1980), "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies ... the length of sentence actually imposed is purely a matter of legislative prerogative." Id., at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible.

To the extent that the State seeks to make this argument here, we reject it. Although courts should be reluctant to invalidate legislative judgments, we have a constitutional duty to ensure that legislative judgments are consistent with the Eighth Amendment. See Enmund v. Florida, 458 U.S. ___, ___ (1982).

The class of "crimes concededly classified and classifiable as felonies" is of little assistance as an Eighth Amendment standard. The definition of a felony is invariably based on its legal consequences. See, e.g., 18 U.S.C. §1(1). The effect of this standard would be absurd: when a State concededly may punish a crime by imprisonment for a year, it could punish the crime by life imprisonment without possibility of parole.

and other punishments, Ingraham v. Wright, 430 U.S., at 664, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. See Hodges v. Humkin, supra. And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis. See, e.g., Weems, 217 U.S., at 377; cf. Hutto v. Finney, 437 U.S., at 685 ("Confinement in a prison ... is a form of punishment subject to scrutiny under Eighth Amendment standards").

When we have applied the proportionality principle in capital cases, we have drawn no distinction ^{for} with imprisonment. See Gregg v. Georgia, 428 U.S., at 176 (opinion of Stewart, POWELL, and STEVENS, JJ.). It is true that the "penalty of death differs from all other forms of criminal punishment, not in degree but in kind." Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). As a result, "our decisions [in] capital cases are of limited assistance in deciding the constitutionality of the punishment" in a noncapital case. Rummel v. Estelle, 445 U.S., at 272. All this means, however, is that, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare,"¹⁵ ibid. (emphasis added); see Hutto v. Davis,

Footnote(s) 15 will appear on following pages.

454 U.S., at 374. It does not mean that proportionality analysis is entirely inapplicable in noncapital cases.

nice
I think
This makes
the point
less subject
to attack

In sum, we hold that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. As a matter of theory, therefore, every sentence is subject to challenge on constitutional grounds. Reviewing courts should grant considerable deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. Thus in most cases it will not require extended analysis to determine that a sentence is not constitutionally disproportionate. See, e.g., Badders v. United States, 240 U.S. 391, 394 (1916) (seven concurrent five-year terms and \$7,000 fine for seven counts of mail fraud). But no penalty is per se constitutional. As the Court noted in Robinson v. California, 370 U.S., at 667, a single day in prison may be unconstitutional in some circumstances.

III

A

In reviewing sentences under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized. First, we look to the gravity of the offense and the

¹⁵In Enmund, for example, the Court found the death penalty to be excessive for felony murder in the circumstances of that case. But clearly no sentence short of death would be unconstitutional for Enmund's crime.

harshness of the penalty. In Enmund, for example, the Court examined the circumstances of the defendant's crime in great detail. 458 U.S., at ____ - _____. In Coker the Court considered the seriousness of the crime of rape, and compared it to other crimes, such as murder. 433 U.S., at 597-598 (plurality opinion); id., at 603 (POWELL, J., concurring in the judgment in part and dissenting in part). In Robinson the emphasis was placed on the nature of the "crime." 370 U.S., at 666-667. And in Weems, the Court's opinion commented in two separate places on the pettiness of the offense. 217 U.S., at 363 and 365. Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate. See, e.g., Coker, 433 U.S., at 598 (plurality opinion); Weems, 217 U.S., at 366-367.

Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. Thus in Enmund the Court noted that all of the other felony murderers on death row in Florida were more culpable than the petitioner there. 458 U.S., at _____. The Weems Court identified an impressive list of more serious crimes that were subject to less serious penalties. 217 U.S., at 380-381.

Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. In Enmund the Court conducted an extensive review of capital punishment statutes and determined that "only about a third of American jurisdictions would ever permit a defendant

obscure
sure!
cite that
others
please
said that
services that
you said
read Weems
to agree
with you.
If you
read the
whole
opinion and
think that
this state-
ment is
unjustified
I'll delete it.

X
please
see
back

[such as Enmund] to be sentenced to die." 458 U.S., at ____.
Even in those jurisdictions, however, the death penalty was almost never imposed under similar circumstances. Id., at ____.

*Did I look to
Saul's
Arabic
case. RF.
Death of
a Finches*
The Court's review of foreign law also supported its conclusion. Id., at ____, n. 22. The analysis in Coker was essentially the same. 433 U.S., at 593-597. And in Weems the Court relied on the fact that, under federal law, a similar crime was punishable by only two year's imprisonment and a fine. 217 U.S., at 380. Cf. Trop v. Dulles, 356 U.S. 86, 102-103 (1958) (plurality opinion).

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (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.

B

Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments--just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. Thus in Enmund the Court determined that the petitioner's conduct was not so serious as his accomplices' conduct. Indeed, there are widely shared

views as to the relative seriousness of crimes. See Rossi, Waite, Bose & Berk, The Seriousness of Crimes: Normative Structure and Individual Differences, 39 Am. Soc. Rev. 224, 237 (1974). For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence. Cf. Tr. of Oral Arg. 16 (State recognizes that law protects people before property).

There are other widely held principles that courts may apply in measuring the harm caused or threatened to the victim or society. The absolute magnitude of the crime may be relevant. Stealing a million dollars is viewed as more serious than stealing a hundred dollars--a point recognized in statutes distinguishing petty theft from grand theft. See, e.g., S.D. Codified Laws §22-30A-17 (Supp. 1982). Other things being equal, murdering two people is more serious than murdering one. See, e.g., Mass. Gen. Laws Ann., ch. 279, §69(a)(8) (West Supp. 1982). Few would dispute that a lesser included offense should not be punished more severely than the greater offense. Thus a court is justified in viewing assault with intent to murder as more serious than simple assault. See Roberts v. Collins, 544 F.2d 168, 169-170 (CA4 1976) (per curiam), cert. denied, 430 U.S. 973 (1977). Cf. Dembowski v. State, 251 Ind. 250, 252, 240 N.E.2d 815, 817 (1968) (armed robbery more serious than robbery); Cannon v. Gladden, 203 Or. 629, 632, 281 P.2d 233, 235 (1955) (rape more serious than assault with intent to commit rape). It is also widely recognized that attempts are less serious than completed crimes. See, e.g., S.D. Codified Laws §22-4-1 (1979); 4 Black-

we
ask to
review
people for
being
wrong?
we do?

stone *15. Similarly, an accessory after the fact should not be subject to a higher penalty than the principal. See, e.g., 18 U.S.C. §3.

Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In Enmund the Court looked at the petitioner's lack of intent to kill ⁱⁿ ~~to~~ ^{ing} determining that he was less culpable than his accomplices. 458 U.S., at _____. Most would agree that negligent conduct is less serious than intentional conduct. South Dakota, for example, ranks criminal acts in ascending order of seriousness as follows: negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts. S.D. Codified Laws §22-1-2(1)(f) (Supp. 1982). A court is also entitled to look at a defendant's motive in committing a crime. As Blackstone observed, "theft, in case of hunger, is far more worthy of compassion, than when committed through avarice, or to supply one in luxurious excesses." 4 Blackstone *15; cf. In re Foss, 10 Cal.3d 910, 519 P.2d 1073 (1974) (furnishing heroin to fellow addict going through withdrawal not so serious as sale for profit). Similarly, a murder is more serious when it is committed pursuant to a contract. See, e.g., Mass. Gen. Laws Ann., ch. 279, §69(a)(5) (West Supp. 1982).

This list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.

C

Application of the factors that we identify also assumes that courts are able to compare different sentences. This assumption, too, is justified. The easiest comparison, of course, is between capital punishment and noncapital punishments, for the death penalty is different from other punishments in kind rather than degree.¹⁶ For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence,¹⁷ but in most cases it would be more difficult to decide whether the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

The Sixth Amendment right to a jury trial is an example. In Williams v. Florida, 399 U.S. 78 (1970), the Court upheld a criminal conviction returned by a unanimous 6-member jury, and in Apodaca v. Oregon, 406 U.S. 404 (1972), we upheld a conviction returned by ten members of a 12-member jury. In Ballew v. Georgia, 435 U.S. 223 (1978), however, we reversed a conviction returned by a unanimous 5-member jury. JUSTICE BLACKMUN "readily admit[ted] that we d[id] not pretend to discern a clear line be-

¹⁶There is also a clear line between sentences of imprisonment and sentences involving no deprivation of liberty. See Argersinger v. Hamlin, 407 U.S. 25 (1972).

¹⁷The possibility of parole may complicate the comparison, depending upon the time and conditions of its availability.

tween six members and five." Id., at 239 (opinion of BLACKMUN, J.). He nevertheless found a difference between them of "constitutional significance." Ibid.; cf. id., at 245-246 (POWELL, J., concurring in the judgment). And the following Term, in Burch v. Louisiana, 441 U.S. 130 (1979), we reversed a conviction returned by five members of a 6-member jury:

"[W]e do not pretend the ability to discern a priori a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases. But ... it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved." Id., at 137 (citations omitted).

Another Sixth Amendment case illustrates the line-drawing function of the judiciary, and offers guidance on the method by which some lines may be drawn. In Baldwin v. New York, 399 U.S. 66 (1970), the Court determined that a defendant has a right to a jury trial "where imprisonment for more than six months is authorized." Id., at 69 (plurality opinion). In choosing the 6-month standard, the plurality relied almost exclusively on the fact that only New York City denied the right to a jury trial for an offense punishable by more than six months. As JUSTICE WHITE explained:

"This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn--on the basis of the possible penalty alone--between offenses that are and that are not regarded as 'serious' for purposes of trial by jury." Id., at 72-73.

In short, Baldwin clearly demonstrates that a court properly may distinguish one sentence of imprisonment from another. It also supports our holding that courts should look to the practices in other jurisdictions in deciding where lines between sentences should be drawn.

IV

It remains to apply the analytical framework established by our prior decisions to the case before us. We first consider the relevant criteria, viewing Helm's sentence as life imprisonment without possibility of parole. We then consider the State's argument that the possibility of commutation is sufficient to save an otherwise unconstitutional sentence.

A

Helm's crime was "one of the most passive felonies a person could commit." State v. Helm, 287 N.W.2d, at 501 (Henderson, J., dissenting). It involved neither violence nor threat of violence to any person. The \$100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft.¹⁸ It is easy to see why such a

¹⁸If Helm had been convicted simply of taking \$100 from a cash register, S.D. Codified Laws §22-30A-1 (1979), or defrauding someone of \$100, §22-30A-3, or obtaining \$100 through extortion, §22-30A-4(1), or blackmail, §22-30A-4(3), or using a false credit card to obtain \$100, §22-30A-8.1, or embezzling \$100, §22-30A-10, he would not be in prison today. All of these offenses would

Footnote continued on next page.

what about
prostitution
you can
many just
lie there
see Robinson
v. California

crime is viewed by society as among the less serious offenses. See Rossi et al., 39 Am. Soc. Rev., at 229.

Helm, of course, was not charged simply with uttering a "no account" check, but also with being an habitual offender.¹⁹ And a State is justified in punishing a recidivist more severely than it punishes a first offender. Helm's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor.²⁰ All were nonviolent and none was a crime against a person. As the State conceded at oral argument, the three third-degree burglary convictions could have been the result of stealing three loaves of bread. *+ two little fishes. (It was probably a Buick Riviera)* Tr. of Oral Arg. 16. There was also no minimum amount in the statute against obtaining money under false pretenses. See n. 2, supra. Helm's "grand larceny" may have been no more than

have been petty theft, a misdemeanor. §22-30A-17 (amended 1982). Similarly, if Helm had written a \$100 check against insufficient funds, rather than a nonexistent account, he would have been guilty of a misdemeanor. §§22-41-1. Under South Dakota law there is no distinction between writing a "no account" check for a large sum and writing a "no account" check for a small sum. §22-41-1.2.

¹⁹We must focus on the principal felony--the felony that triggers the life sentence--since Helm already has paid the penalty for each of his prior offenses. But we recognize that Helm's prior convictions are relevant to the sentencing decision.

²⁰Helm, who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance any of the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have any incentive to pursue clearly needed treatment for his alcohol problem.

This footnote picks up an earlier suggestion that it is not the disproportionate penalty but the State's decision not to pursue REHABILITATION THAT IS THE ROOT OF THIS PROBLEM.

Could it be said to show that S.D. has made certain judgments?
Doesn't this bring ~~the~~ substantive due process in the back door - We say that Stokes (over what else is proportionality?)

the theft of a chicken. See n. 3, supra. On its face, Helm's most serious crime was a felony case of driving while intoxicated, but he served barely nine months for that offense, Tr. of Oral Arg. 17. Such a short sentence²¹ suggests that the particular circumstances of Helm's conduct were not considered to be so serious by the South Dakota authorities.

Helm's present sentence is life imprisonment without possibility of parole.²² Barring executive clemency, see infra, at ___, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in Rummel v. Estelle. Rummel was likely to have been eligible for parole within 12 years of his initial confinement,²³ a fact on which the Court relied heavily. See 445 U.S., at 280-281. Helm's sentence is more severe than any other sentence the State could have imposed on any criminal for any crime. See note 6, supra. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

²¹The sentence was well below that authorized for even the least serious felony in South Dakota. See note 6, supra. It was also shorter than the sentences Helm served for other minor crimes. See Tr. of Oral Arg. 14.

²²We raise no question as to the general validity of sentences without possibility of parole. The only issue before us is whether, in the circumstances of this case and in light of the constitutional principle of proportionality, the sentence imposed on this petitioner violates the Eighth Amendment.

²³We note that Rummel was, in fact, released within eight months of the Court's decision in his case. See L.A. Times, Nov. 16, 1980, p. 1, col. 3. Wize

We next consider the sentences that could be imposed on other criminals in the same jurisdiction. When Helm was sentenced, a South Dakota court was required to impose a life sentence for murder, S.D. Codified Laws §22-16-12 (1979) (amended 1980), and was authorized to impose a life sentence for treason, §22-8-1, first degree manslaughter, §22-16-15, kidnapping, §22-19-1, and first degree arson, 22-33-1. No other crime was punishable so severely on the first offense. Attempted murder, §22-4-1(5), placing an explosive device on an aircraft, §22-14A-5, and first degree rape, §22-22-1 (amended 1980 and 1982), were only Class 2 felonies. Aggravated riot, §22-10-5, was only a Class 3 felony. Distribution of heroin, §§22-42-2 (amended 1982), 34-20B-13(7) (1977), and aggravated assault, §22-18-1.1 (amended 1980 and 1981), were only Class 4 felonies.

Helm's habitual offender status complicates our analysis, but relevant comparisons are still possible. Under §22-7-7, the penalty for a second or third felony is increased by one class. Thus a life sentence was mandatory when a second or third conviction was for treason, first degree manslaughter, kidnapping, or first degree arson, and a life sentence would have been authorized when a second or third conviction was for such crimes as attempted murder, placing an explosive device on an aircraft, or first degree rape. Finally, §22-7-8, under which Helm was sentenced, authorized life imprisonment after three prior convictions, regardless of the crimes.

In sum, there were a handful of crimes that were necessarily punished by life imprisonment: murder; and treason, first

degree manslaughter, kidnapping, or first degree arson on a second or third offense. There was a larger group for which life imprisonment was authorized in the discretion of the sentencing judge, including: treason, first degree manslaughter, kidnapping, or first degree arson; attempted murder, placing an explosive device on an aircraft, or first degree rape on a second or third offense; and any felony after three prior offenses. Finally, there was a large group of very serious offenses for which life imprisonment was not authorized, including a third offense of heroin dealing or aggravated assault.

In any rational system, criminals committing these offenses would be thought more deserving of punishment than one uttering a "no account" check--even when the bad-check writer had already committed six ^{"L.H.R."} ~~minor~~ felonies. Furthermore, there is no indication in the record that any habitual offender other than Helm has ever been given the maximum sentence on the basis of comparable crimes. It is more likely that the possibility of life imprisonment under §22-7-8 generally is reserved for criminals such as fourth-time heroin dealers, while habitual bad-check writers receive more lenient treatment.²⁴ We can only conclude

²⁴The State contends that §22-7-8 is more lenient than the Texas habitual offender statute in Rummel, for life imprisonment under §22-7-8 is discretionary rather than mandatory. Brief for Petitioner 22. Helm, however, has challenged only his own sentence. No one suggests that §22-7-8 may not be applied constitutionally to fourth-time heroin dealers or other violent criminals. Thus we do not question the legislature's judgment. Unlike in Rummel, a lesser sentence here could have been entirely consistent with both the statute and the Eighth Amendment. See Note, Disproportionality in Sentences of Imprisonment, 79 Colum. Footnote continued on next page.

This last sentence is not clear to me.

would a lesser sentence in Rummel have been unconstitutional? no - but inconsistent w/ TEX statute.

that Helm has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.

Finally, we compare the sentences imposed for commission of the same crime in other jurisdictions. The Court of Appeals found that "Helm could have received a life sentence without parole for his offense in only one other state, Nevada," 684 F.2d, at 586, and we have no reason to doubt its finding. See Tr. of Oral Arg. 21. At the very least, therefore, it is clear that Helm could not have received such a severe sentence in 48 of the 50 States. But even under Nevada law, a life sentence without possibility of parole is merely authorized in these circumstances. See Nev. Rev. Stat. §207.010(2) (1981). We are not advised that any defendant such as Helm, whose prior offenses were so minor, actually has received the maximum penalty in Nevada.²⁵ It appears that Helm was treated more severely than he would have been in any other State.

L. Rev. 1119, 1160 (1979).

²⁵Under Nev. Rev. Stat. §207.010(2), a court is authorized to impose a sentence of "imprisonment in the state prison for life with or without possibility of parole. If the penalty fixed by the court is life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of 10 years has been served." It appears that most sentences imposed under §207.010(2) permit parole, even when the prior crimes are far more serious than Helm's. See, e.g., Rusling v. State, 96 Nev. 778, 617 P.2d 1302 (1980) (possession of a firearm by an ex-felon, two instances of driving an automobile without the owner's consent, four first degree burglaries, two sales of marijuana, two sales of a restricted dangerous drug, one sale of heroin, one escape from state prison, and one second degree burglary).

B

The State argues that the present case is essentially the same as Rummel v. Estelle, for the possibility of parole in that case is matched by the possibility of executive clemency here. The State reasons that the Governor could commute Helm's sentence to a term of years. We conclude, however, that the South Dakota commutation system is fundamentally different from the parole system that was before us in Rummel.

As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. See, e.g., Greenholz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) (detailing Nebraska parole procedures); Morrissey v. Brewer, 408 U.S. 471, 477 (1972) ("the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system"). Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an ad hoc exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards. See, e.g., Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981).

We explicitly have recognized the distinction between parole and commutation in our prior cases.²⁶ Writing on behalf

Footnote(s) 26 will appear on following pages.

of the Morrissey Court, for example, CHIEF JUSTICE BURGER contrasted the two possibilities: "Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals." 408 U.S., at 477. In Dumschat, THE CHIEF JUSTICE similarly explained that "there is a vast difference between a denial of parole ... and a state's refusal to commute a lawful sentence." 452 U.S., at 466.

The Texas and South Dakota systems in particular are very different. In Rummel, the Court did not rely simply on the existence of some system of parole. Rather it looked to the provisions of the system presented, including the fact that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." 445 U.S., at 280. A Texas prisoner became eligible for parole when his calendar time served plus "good conduct" time equaled one-third of the maximum sentence imposed or 20 years, whichever is less. Tex. Code Crim. Proc. Ann., Art.

²⁶In Rummel itself the Court implicitly recognized that the possibility of commutation is not equivalent to the possibility of parole. The Court carefully "distinguish[ed] Rummel from a person sentenced under a recidivist statute like [Miss. Code Ann. §99-19-83 (Supp. 1979)], which provides for a sentence of life without parole." 445 U.S., at 281. But the Mississippi Constitution empowers the Governor to grant pardons in "all criminal and penal cases, excepting those of treason and impeachment." Art. 5, §124. The Mississippi Supreme Court has long recognized that the power to pardon includes the power to commute a convict's sentence. See Whittington v. Stevens, 221 Miss. 598, 603-604, 73 So.2d 137, 139-140 (1954). The Rummel Court gave no weight to the possibility of executive clemency.

42.12, §15(b) (Vernon 1979). An entering prisoner earned 20 days good-time per 30 days served, Brief for Respondent in Rummel, O.T. 1979, No. 78-6386, p. 16, and this could be increased to 30 days good-time per 30 days served, Tex. Rev. Civ. Stat. Ann., Art. 6181-1, §§2-3 (Vernon Supp. 1982). Thus Rummel could have been eligible for parole in as few as 10 years, and could have expected to become eligible, in the normal course of events, in only 12 years.

In South Dakota commutation is more difficult to obtain than parole. For example, the board of pardons and paroles is authorized to make commutation recommendations to the Governor, see n. 7, supra, but §24-13-4 provides that "no recommendation for the commutation of ... a life sentence, or for a pardon ..., shall be made by less than the unanimous vote of all members of the board." In fact, no life sentence has been commuted in over eight years, App. 29, while parole ^{where available, authorized,} has been granted regularly during that period, Tr. of Oral Arg. 8-9. Furthermore, even if Helm's sentence were commuted, he merely would be eligible to be considered for parole.²⁷ Not only is there no guarantee that he would be paroled, but the South Dakota parole system is far more stringent than the one before us in Rummel. Helm would have to serve three-fourths of his revised sentence before he would be eligible for parole, §24-15-5, and the provision for good-time

²⁷The most recent commutation of a life sentence in South Dakota occurred in 1975. The record indicates, however, that the prisoner in question has still not been paroled. App. 29.

credits is far less generous, §24-5-1.²⁸

The possibility of commutation is nothing more than a hope for "an ad hoc exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

V

The Constitution requires us to examine Helm's sentence to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment. The judgment of the Court of Appeals is accordingly

Affirmed.

²⁸Assume, for example, that Helm had been sentenced to a term of 40 years--his approximate life expectancy in 1979. Even if Helm were a model prisoner, he would not have been eligible for parole until he had served over 21 years. This is more than twice as long as the Rummel minimum. And this comparison is generous to South Dakota's position. If Rummel had been sentenced to 40 years rather than life, he could have been eligible for parole in less than 7 years.

Michael Starley
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Solem v. Helm, No. 82-492

'83 MAY 25 P7:41

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

I

By 1975 the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.¹ In 1972 he

¹In 1969 third-degree burglary was defined in at least two sections of the South Dakota criminal code:

"A person breaking into any dwelling house in the nighttime with intent to commit a crime but under such circumstances as do not constitute burglary in the first degree, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. §22-32-8 (1967) (repealed 1976).

"A person breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof, or any building or part of any building, booth, tent, railroad car, vessel, vehicle as defined in §32-14-1, or any structure or erection in which any property is kept, with intent to commit larceny or any felony, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. §22-32-9 (1967) (repealed 1976).

In 1964 and 1966 the third-degree burglary definition was essentially the same. See S.D. Code §13.3703 (1939 ed., supp. 1960); 1965 S.D. Laws, ch. 32. Third-degree burglary was punishable by "imprisonment in the state penitentiary for any term not exceeding fifteen years." S.D. Comp. Laws Ann. §22-32-10 (1967) (previously codified at S.D. Code §13.3705(3) (1939)) (repealed 1976).

was convicted of obtaining money under false pretenses.² In 1973 he was convicted of grand larceny.³ And in 1975 he was convicted of third-offense driving while intoxicated.⁴ The record contains no details about the circumstances of any of these offenses, ex-

²In 1972 the relevant statute provided:

"Every person who designedly, by color or aid of any false token or writing, or other false pretense, ... obtains from any person any money or property ... is punishable by imprisonment in the state penitentiary not exceeding three years or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both such fine and imprisonment." S.D. Comp. Laws Ann. §22-41-4 (1967) (repealed 1976).

³In 1973 South Dakota defined "larceny" as "the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof." S.D. Comp. Laws Ann. §22-37-1 (1967) (repealed 1976). Grand larceny and petit larceny were distinguished as follows:

"Grand larceny is larceny committed in any of the following cases:

(1) When the property taken is of a value exceeding fifty dollars;

(2) When such property, although not of a value exceeding fifty dollars, is taken from the person of another;

(3) When such property is livestock.

Larceny in other cases is petit larceny." S.D. Comp. Laws Ann. §22-37-2 (1967) (repealed 1976).

Grand larceny was then punishable by "imprisonment in the state penitentiary not exceeding ten years or by imprisonment in the county jail not exceeding one year." S.D. Comp. Laws Ann. §22-37-3 (1967) (repealed 1976).

⁴A third offense of driving while under the influence of alcohol is a felony in South Dakota. S.D. Codified Laws §32-23-4 (1976). See 1973 S.D. Laws, ch. 195, §7 (enacting version of §32-23-4 in force in 1975).

cept that they were all nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case.

In 1979 Helm was charged with uttering a "no account" check for \$100.⁵ The only details we have of the crime are those given by Helm to the state trial court:

"I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places." State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980) (Henderson, J., dissenting) (quoting Helm).

After offering this explanation, Helm pleaded guilty.

Ordinarily the maximum punishment for uttering a "no account" check would have been five years imprisonment in the state penitentiary and a five thousand dollar fine. See S.D. Comp. Laws Ann. §22-6-1(6) (1967 ed., supp. 1978) (now codified at S.D. Codified Laws §22-6-1(7) (Supp. 1982)). As a result of his criminal record, however, Helm was subject to South Dakota's recidivist statute:

"When a defendant has been convicted of at least three prior convictions [sic] in addition to the principal felony, the sentence for the principal felony shall be

⁵The governing statute provides, in relevant part:

"Any person who, for himself or as an agent or 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 §22-41-1.2 (1979).

enhanced to the sentence for a Class 1 felony." S.D. Codified Laws §22-7-8 (1979) (amended 1981).

The maximum penalty for a "Class 1 felony" was life imprisonment in the state penitentiary and a twenty-five thousand dollar fine.⁶ S.D. Comp. Laws Ann. §22-6-1(2) (1967 ed., supp. 1978) (now codified at S.D. Codified Laws §22-6-1(3) (Supp. 1982)).

⁶When Helm was sentenced in April 1979, South Dakota law classified felonies as follows:

"Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished from each other by the respective maximum penalties hereinafter set forth which are authorized upon conviction:

- (1) Class A felony: life imprisonment in the state penitentiary. A lesser sentence may not be given for a Class A felony;
- (2) Class 1 felony: life imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;
- (3) Class 2 felony: twenty-five years imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;
- (4) Class 3 felony: fifteen years imprisonment in the state penitentiary. In addition, a fine of fifteen thousand dollars may be imposed;
- (5) Class 4 felony: ten years imprisonment in the state penitentiary. In addition, a fine of ten thousand dollars may be imposed;
- (6) Class 5 felony: five years imprisonment in the state penitentiary. In addition, a fine of five thousand dollars may be imposed; and
- (7) Class 6 felony: two years imprisonment in the state penitentiary or a fine of two thousand dollars, or both.

"Nothing in this section shall limit increased sentences for habitual criminals

"Except in cases where punishment is prescribed by law, every offense declared to be a felony and not otherwise classified is a Class 6 felony." S.D. Comp. Laws Ann. §22-6-1 (1967 ed., supp. 1978) (amended 1979 and 1980).

Moreover, South Dakota law explicitly provides that parole is unavailable: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S.D. Codified Laws §24-15-4 (1979). The Governor⁷ is authorized to pardon prisoners, or to commute their sentences, S.D. Const., Art. IV, §3, but no other relief from sentence is available even to a rehabilitated prisoner.

Immediately after accepting Helm's guilty plea, the South Dakota Circuit Court sentenced Helm to life imprisonment under §22-7-8. The court explained:

"I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over." State v. Helm, 287 N.W.2d, at 500 (Henderson, J., dissenting) (quoting S.D. Circuit Court, Seventh Judicial Circuit, Pennington County (Parker, J.)).

The South Dakota Supreme Court, in a 3-2 decision, affirmed the sentence despite Helm's argument that it violated the Eighth Amendment. State v. Helm, supra.

After Helm had served two years in the state penitentiary, he requested the Governor to commute his sentence to a fixed term of years. Such a commutation would have had the effect of

⁷The board of pardons and paroles is authorized to make recommendations to the Governor, S.D. Codified Laws §24-14-1 (1979); §24-14-5; S.D. Executive Order 82-04 (Apr. 12, 1982), but the Governor is not bound by the recommendation, §24-14-5.

making Helm eligible to be considered for parole when he had served three-fourths of his new sentence. See S.D. Codified Laws §24-15-5(3) (1979). The Governor denied Helm's request in May 1981. App. 26.

In November 1981, Helm sought habeas relief in the United States District Court for the District of South Dakota. Helm argued, among other things, that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. Although the District Court recognized that the sentence was harsh, it concluded that this Court's recent decision in Rummel v. Estelle, 445 U.S. 263 (1980), was dispositive. It therefore denied the writ.

The United States Court of Appeals for the Eighth Circuit reversed. 684 F.2d 582 (1982). The Court of Appeals noted that Rummel v. Estelle was distinguishable. Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabilitation as a goal of the criminal justice system. The Court of Appeals examined the nature of Helm's offenses, the nature of his sentence, and the sentence he could have received in other States for the same offense. It concluded, on the basis of this examination, that Helm's sentence was "grossly disproportionate to the nature of the offense." 684 F.2d, at 587. It therefore directed the District Court to issue the writ unless the State resentenced Helm. Ibid.

In view of the important Eighth Amendment question presented by this case, we granted certiorari. 459 U.S. ____ (1982). We now affirm.

II

The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

A

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that "amercements"⁸ may not be excessive.⁹ And the principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275). These were not hollow

⁸An amercement was similar to a modern-day fine. It was the most common criminal sanction in thirteenth century England. See 2 F. Pollock & F. Maitland, *The History of English Law* 513-515 (2d ed. 1909).

⁹Chapter 20 declared that "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." See 1 S.D. Codified Laws, p. 4 (1978) (translation of Magna Carta). According to Maitland, "there was no clause in Magna Carta more grateful to the mass of the people" F. Maitland, *Pleas of the Crown for the County of Gloucester* xxxiv (1884). Chapter 21 granted the same rights to the nobility, and chapter 22 granted the same rights to the clergy.

guarantees, for the royal courts relied on them to invalidate disproportionate punishments. See, e.g., Le Gras v. Bailiff of Bishop of Winchester, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), reprinted in 52 Selden Society 3 (1934). When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional. See, e.g., Hodges v. Humkin, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K.B. 1615) (Croke, J.) ("imprisonment ought always to be according to the quality of the offence").

The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 W. & M., sess. 2, ch. 2 (1689). Although the precise scope of this provision is uncertain, it at least incorporated "the longstanding principle of English law that the punishment ... should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959); see 4 W. Blackstone, *Commentaries* *16-19 (1769); see also id., at *16-17 (in condemning "punishments of unreasonable severity," uses "cruel" to mean severe or excessive). Indeed, barely three months after the Bill of Rights was adopted, the House of Lords declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon, was excessive and exorbitant, against magna charta, the common right of the subject, and against the

law of the land." Earl of Devon's Case, 11 State Trials 133, 136 (1689).

When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights,¹⁰ they also adopted the English principle of proportionality. The people were guaranteed the rights they had possessed as English subjects--including the right to be free from excessive punishments.

B

The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.¹¹ In the leading case of Weems v. United States, 217 U.S. 349 (1910), the defendant had been convicted of falsifying a public document and sentenced to 15 years of "cadena temporal," a form of imprisonment that included hard labor in chains and permanent civil disabilities. The Court noted "that it is a precept of justice that punishment for crime should be graduated and proportioned to

¹⁰This language had earlier been incorporated in the Virginia Declaration of Rights, Art. I, §9, authored by George Mason.

¹¹In O'Neil v. Vermont, 144 U.S. 323 (1892), the defendant had been convicted of 307 counts of "selling intoxicating liquor without authority," and sentenced to a term of over 54 years. The majority did not reach O'Neil's contention that this sentence was unconstitutional, for he did not include the point in his assignment of errors or in his brief. Id., at 331. Furthermore, the majority noted that the Eighth Amendment "does not apply to the States." Id., at 332. Accordingly the Court dismissed the writ of error for want of a federal question. Id., at 336-337. The dissent, however, reached the Eighth Amendment question, observing that it "is directed ... against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." Id., at 339-340 (Field, J., dissenting).

offense," id., at 367, and held that the sentence violated the Eighth Amendment. The Court endorsed the principle of proportionality as a constitutional standard, see, e.g., id., at 372-373, and determined that the sentence before it was "cruel in its excess of imprisonment," id., at 377.

The Court next applied the principle to invalidate a criminal sentence in Robinson v. California, 370 U.S. 660 (1962).¹² A 90-day sentence was found to be excessive for the crime of being "addicted to the use of narcotics." The Court explained that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." Id., at 667. Thus there was no question of an inherently barbaric punishment. "But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." Ibid.

Most recently, the Court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. Enmund v. Florida, 458 U.S. ____ (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) ("sentence of death is grossly disproportionate and excessive punishment for the crime of rape"); id.,

¹²Members of the Court continued to recognize the principle of proportionality in the meantime. See, e.g., Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion); id., at 111 (BRENNAN, J., concurring); id., at 125-126 (Frankfurter, J., dissenting).

at 601 (POWELL, J., concurring in the judgment in part and dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman"). And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, e.g., Hutto v. Finney, 437 U.S. 678, 685 (1978); Ingraham v. Wright, 430 U.S. 651, 667 (1977); Gregg v. Georgia, 428 U.S. 153, 171-172 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); cf. Hutto v. Davis, 454 U.S. 370, 374, and n. 3 (1982) (per curiam) (recognizing that some prison sentences may be constitutionally disproportionate); Rummel v. Estelle, 445 U.S., at 274, n. 11 (same).

C

There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences.¹³ The constitutional language itself suggests no exception for imprisonment. We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, Ingraham v. Wright, 430 U.S., at 664, and the text is explicit that bail and fines may not be excessive.

¹³According to Rummel v. Estelle, 445 U.S. 263 (1980), "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies ... the length of sentence actually imposed is purely a matter of legislative prerogative." Id., at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible. To the extent that the State makes this argument here, we find it meritless.

It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. See Hodges v. Humkin, supra. And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis. See, e.g., Weems, 217 U.S., at 377; cf. Hutto v. Finney, 437 U.S., at 685 ("Confinement in a prison ... is a form of punishment subject to scrutiny under Eighth Amendment standards").

When we have applied the proportionality principle in capital cases, we have drawn no distinction with imprisonment. See Gregg v. Georgia, 428 U.S., at 176 (opinion of Stewart, POWELL, and STEVENS, JJ.). It is true that the "penalty of death differs from all other forms of criminal punishment, not in degree but in kind." Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). As a result, "our decisions [in] capital cases are of limited assistance in deciding the constitutionality of the punishment" in a noncapital case. Rummel v. Estelle, 445 U.S., at 272. All this means, however, is that, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare,"¹⁴ ibid. (emphasis added); see Hutto v. Davis,

¹⁴In Enmund, for example, the Court found the death penalty to be excessive for felony murder in the circumstances of that case.
Footnote continued on next page.

454 U.S., at 374. It does not mean that proportionality analysis is entirely inapplicable in noncapital cases.

In sum, we hold that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.¹⁵ But no penalty is per se constitutional. As the Court noted in Robinson v. California, 370 U.S., at 667, a single day in prison may be unconstitutional in some circumstances.

III

A

In reviewing sentences under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized.¹⁶ First, we look to the gravity of the offense and

But clearly no sentence short of death would be unconstitutional for Enmund's crime.

¹⁵In view of the substantial deference properly due to legislatures and sentencing courts, most reviewing courts normally will not be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

¹⁶As the Court has indicated, no one factor will be dispositive. See Hutto v. Davis, 454 U.S. 370, 373-374 n. 2 (1982) (*per curiam*); Rummel v. Estelle, 445 U.S., at 275-276. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. No single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment.

the harshness of the penalty. In Enmund, for example, the Court examined the circumstances of the defendant's crime in great detail. 458 U.S., at ____ - _____. In Coker the Court considered the seriousness of the crime of rape, and compared it to other crimes, such as murder. 433 U.S., at 597-598 (plurality opinion); id., at 603 (POWELL, J., concurring in the judgment in part and dissenting in part). In Robinson the emphasis was placed on the nature of the "crime." 370 U.S., at 666-667. And in Weems, the Court's opinion commented in two separate places on the pettiness of the offense. 217 U.S., at 363 and 365. Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate. See, e.g., Coker, 433 U.S., at 598 (plurality opinion); Weems, 217 U.S., at 366-367.

Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. Thus in Enmund the Court noted that all of the other felony murderers on death row in Florida were more culpable than the petitioner there. 458 U.S., at _____. The Weems Court identified an impressive list of more serious crimes that were subject to less serious penalties. 217 U.S., at 380-381.

Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. In Enmund the Court conducted an extensive review of capital punishment statutes and determined that "only about a third of American jurisdictions would ever permit a defendant

[such as Enmund] to be sentenced to die." 458 U.S., at _____. Even in those jurisdictions, however, the death penalty was almost never imposed under similar circumstances. Id., at _____. The Court's review of foreign law also supported its conclusion. Id., at _____, n. 22. The analysis in Coker was essentially the same. 433 U.S., at 593-597. And in Weems the Court relied on the fact that, under federal law, a similar crime was punishable by only two year's imprisonment and a fine. 217 U.S., at 380. Cf. Trop v. Dulles, 356 U.S. 86, 102-103 (1958) (plurality opinion).

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (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.

B

Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments--just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. Thus in Enmund the Court determined that the petitioner's conduct was not so serious as his accomplices' conduct. Indeed, there are widely shared

views as to the relative seriousness of crimes. See Rossi, Waite, Bose & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 Am. Soc. Rev. 224, 237 (1974). For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence. Cf. Tr. of Oral Arg. 16 (the State recognizes that the criminal law is more protective of people than property).

There are other widely accepted principles that courts may apply in measuring the harm caused or threatened to the victim or society. The absolute magnitude of the crime may be relevant. Stealing a million dollars is viewed as more serious than stealing a hundred dollars--a point recognized in statutes distinguishing petty theft from grand theft. See, e.g., S.D. Codified Laws §22-30A-17 (Supp. 1982). Few would dispute that a lesser included offense should not be punished more severely than the greater offense. Thus a court is justified in viewing assault with intent to murder as more serious than simple assault. See Roberts v. Collins, 544 F.2d 168, 169-170 (CA4 1976) (*per curiam*), *cert. denied*, 430 U.S. 973 (1977). Cf. Dembowski v. State, 251 Ind. 250, 252, 240 N.E.2d 815, 817 (1968) (armed robbery more serious than robbery); Cannon v. Gladden, 203 Or. 629, 632, 281 P.2d 233, 235 (1955) (rape more serious than assault with intent to commit rape). It is also widely recognized that attempts are less serious than completed crimes. See, e.g., S.D. Codified Laws §22-4-1 (1979); 4 Blackstone *15. Similarly, an

accessory after the fact should not be subject to a higher penalty than the principal. See, e.g., 18 U.S.C. §3.

Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In Enmund the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices. 458 U.S., at _____. Most would agree that negligent conduct is less serious than intentional conduct. South Dakota, for example, ranks criminal acts in ascending order of seriousness as follows: negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts. S.D. Codified Laws §22-1-2(1)(f) (Supp. 1982). A court is also entitled to look at a defendant's motive in committing a crime. Thus a murder may be viewed as more serious when committed pursuant to a contract. See, e.g., Mass. Gen. Laws Ann., ch. 279, §69(a)(5) (West Supp. 1982); cf. 4 Blackstone *15; In re Foss, 10 Cal.3d 910, 519 P.2d 1073 (1974).

This list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.

C

Application of the factors that we identify also assumes that courts are able to compare different sentences. This assumption, too, is justified. The easiest comparison, of course, is between capital punishment and noncapital punishments, for the

death penalty is different from other punishments in kind rather than degree.¹⁷ For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence,¹⁸ but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

The Sixth Amendment right to a jury trial is an example. In Williams v. Florida, 399 U.S. 78 (1970), the Court upheld a criminal conviction returned by a unanimous 6-member jury, and in Apodaca v. Oregon, 406 U.S. 404 (1972), we upheld a conviction returned by ten members of a 12-member jury. In Ballew v. Georgia, 435 U.S. 223 (1978), however, we reversed a conviction returned by a unanimous 5-member jury. JUSTICE BLACKMUN "readily admit[ted] that we d[id] not pretend to discern a clear line between six members and five." Id., at 239 (opinion of BLACKMUN, J.). He nevertheless found a difference between them of "constitutional significance." Ibid.; cf. id., at 245-246 (POWELL, J., concurring in the judgment). And the following Term, in Burch v. Louisiana, 441 U.S. 130 (1979), we reversed a conviction returned

¹⁷There is also a clear line between sentences of imprisonment and sentences involving no deprivation of liberty. See Argersinger v. Hamlin, 407 U.S. 25 (1972).

¹⁸The possibility of parole may complicate the comparison, depending upon the time and conditions of its availability.

by five members of a 6-member jury:

"[W]e do not pretend the ability to discern a priori a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases. But ... it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved." Id., at 137 (citations omitted).

Another Sixth Amendment case illustrates the line-drawing function of the judiciary, and offers guidance on the method by which some lines may be drawn. In Baldwin v. New York, 399 U.S. 66 (1970), the Court determined that a defendant has a right to a jury trial "where imprisonment for more than six months is authorized." Id., at 69 (plurality opinion). In choosing the 6-month standard, the plurality relied almost exclusively on the fact that only New York City denied the right to a jury trial for an offense punishable by more than six months. As JUSTICE WHITE explained:

"This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn--on the basis of the possible penalty alone--between offenses that are and that are not regarded as 'serious' for purposes of trial by jury." Id., at 72-73.

In short, Baldwin clearly demonstrates that a court properly may distinguish one sentence of imprisonment from another. It also supports our holding that courts properly may look to the practices in other jurisdictions in deciding where lines between sentences should be drawn.

IV

It remains to apply the analytical framework established by our prior decisions to the case before us. We first consider the relevant criteria, viewing Helm's sentence as life imprisonment without possibility of parole. We then consider the State's argument that the possibility of commutation is sufficient to save an otherwise unconstitutional sentence.

A

Helm's crime was "one of the most passive felonies a person could commit." State v. Helm, 287 N.W.2d, at 501 (Henderson, J., dissenting). It involved neither violence nor threat of violence to any person. The \$100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft.¹⁹ It is easy to see why such a crime is viewed by society as among the less serious offenses. See Rossi et al., 39 Am. Soc. Rev., at 229.

¹⁹If Helm had been convicted simply of taking \$100 from a cash register, S.D. Codified Laws §22-30A-1 (1979), or defrauding someone of \$100, §22-30A-3, or obtaining \$100 through extortion, §22-30A-4(1), or blackmail, §22-30A-4(3), or using a false credit card to obtain \$100, §22-30A-8.1, or embezzling \$100, §22-30A-10, he would not be in prison today. All of these offenses would have been petty theft, a misdemeanor. §22-30A-17 (amended 1982). Similarly, if Helm had written a \$100 check against insufficient funds, rather than a nonexistent account, he would have been guilty of a misdemeanor. §§22-41-1. Curiously, under South Dakota law there is no distinction between writing a "no account" check for a large sum and writing a "no account" check for a small sum. §22-41-1.2.

Helm, of course, was not charged simply with uttering a "no account" check, but also with being an habitual offender.²⁰ And a State is justified in punishing a recidivist more severely than it punishes a first offender. Helm's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor.²¹ All were nonviolent and none was a crime against a person. Indeed, there was no minimum amount in either the burglary or the false pretenses statutes, see nn. 1 and 2, supra, and the minimum amount covered by ^{the} grand larceny statute was fairly small, see n. 3, supra.²²

Helm's present sentence is life imprisonment without possibility of parole.²³ Barring executive clemency, see infra,

²⁰We must focus on the principal felony--the felony ^{of course,} that triggers the life sentence--since Helm already has paid the penalty for each of his prior offenses. But we recognize that Helm's prior convictions are relevant to the sentencing decision.

²¹Helm, who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have any incentive to pursue clearly needed treatment for his alcohol problem.

²²As suggested at oral argument, the third-degree burglary statute covered entering a building with the intent to steal a loaf of bread. Tr. of Oral Arg. 14-16. It appears that the grand larceny statute would have covered the theft of a chicken.

²³Every life sentence in South Dakota ~~is without~~ is without possibility of parole. See supra, at _____. We raise no question as to the general validity of sentences without possibility of parole. The only issue before us is whether, in the circumstances of this case and in light of the constitutional principle

Footnote continued on next page.

at ____, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in Rummel v. Estelle. Rummel was likely to have been eligible for parole within 12 years of his initial confinement,²⁴ a fact on which the Court relied heavily. See 445 U.S., at 280-281. Helm's sentence is more severe than any other sentence the State could have imposed on any criminal for any crime. See note 6, supra. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

We next consider the sentences that could be imposed on other criminals in the same jurisdiction. When Helm was sentenced, a South Dakota court was required to impose a life sentence for murder, S.D. Codified Laws §22-16-12 (1979) (amended 1980), and was authorized to impose a life sentence for treason, §22-8-1, first degree manslaughter, §22-16-15, first degree arson, §22-33-1, and kidnapping, S.D. Comp. Laws Ann. §22-19-1 (1967 ed., supp. 1978) (amended 1979). No other crime was punishable so severely on the first offense. Attempted murder, S.D. Codified Laws §22-4-1(5) (1979), placing an explosive device on an aircraft, §22-14A-5, and first degree rape, §22-22-1 (amended 1980 and 1982), were only Class 2 felonies. Aggravated riot,

of proportionality, the sentence imposed on this petitioner violates the Eighth Amendment.

²⁴We note that Rummel was, in fact, released within eight months of the Court's decision in his case. See L.A. Times, Nov. 16, 1980, p. 1, col. 3.

§22-10-5, was only a Class 3 felony. Distribution of heroin, §§22-42-2 (amended 1982), 34-20B-13(7) (1977), and aggravated assault, §22-18-1.1 (amended 1980 and 1981), were only Class 4 felonies.

Helm's habitual offender status complicates our analysis, but relevant comparisons are still possible. Under §22-7-7, the penalty for a second or third felony is increased by one class. Thus a life sentence was mandatory when a second or third conviction was for treason, first degree manslaughter, kidnapping, or first degree arson, and a life sentence would have been authorized when a second or third conviction was for such crimes as attempted murder, placing an explosive device on an aircraft, or first degree rape. Finally, §22-7-8, under which Helm was sentenced, authorized life imprisonment after three prior convictions, regardless of the crimes.

In sum, there were a handful of crimes that were necessarily punished by life imprisonment: murder; and treason, first degree manslaughter, kidnapping, or first degree arson on a second or third offense. There was a larger group for which life imprisonment was authorized in the discretion of the sentencing judge, including: treason, first degree manslaughter, kidnapping, or first degree arson; attempted murder, placing an explosive device on an aircraft, or first degree rape on a second or third offense; and any felony after three prior offenses. Finally, there was a large group of very serious offenses for which life imprisonment was not authorized, including a third offense of heroin dealing or aggravated assault.

Criminals committing any of these offenses ordinarily would be thought more deserving of punishment than one uttering a "no account" check--even when the bad-check writer had already committed six minor felonies. Furthermore, there is no indication in the record that any habitual offender other than Helm has ever been given the maximum sentence on the basis of comparable crimes. It is more likely that the possibility of life imprisonment under §22-7-8 generally is reserved for criminals such as fourth-time heroin dealers, while habitual bad-check writers receive more lenient treatment.²⁵ In any event, Helm has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.

Finally, we compare the sentences imposed for commission of the same crime in other jurisdictions. The Court of Appeals found that "Helm could have received a life sentence without parole for his offense in only one other state, Nevada," 684 F.2d, at 586, and we have no reason to doubt this finding. See Tr. of Oral Arg. 21. At the very least, therefore, it is clear that Helm could not have received such a severe sentence in 48 of the

²⁵The State contends that §22-7-8 is more lenient than the Texas habitual offender statute in Rummel, for life imprisonment under §22-7-8 is discretionary rather than mandatory. Brief for Petitioner 22. Helm, however, has challenged only his own sentence. No one suggests that §22-7-8 may not be applied constitutionally to fourth-time heroin dealers or other violent criminals. Thus we do not question the legislature's judgment. Unlike in Rummel, a lesser sentence here could have been entirely consistent with both the statute and the Eighth Amendment. See Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1160 (1979).

50 States. But even under Nevada law, a life sentence without possibility of parole is merely authorized in these circumstances. See Nev. Rev. Stat. §207.010(2) (1981). We are not advised that any defendant such as Helm, whose prior offenses were so minor, actually has received the maximum penalty in Nevada.²⁶ It appears that Helm was treated more severely than he would have been in any other State.

B

The State argues that the present case is essentially the same as Rummel v. Estelle, for the possibility of parole in that case is matched by the possibility of executive clemency here. The State reasons that the Governor could commute Helm's sentence to a term of years. We conclude, however, that the South Dakota commutation system is fundamentally different from the parole system that was before us in Rummel.

As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular

²⁶Under §207.010(2), a Nevada court is authorized to impose a sentence of "imprisonment in the state prison for life with or without possibility of parole. If the penalty fixed by the court is life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of 10 years has been served." It appears that most sentences imposed under §207.010(2) permit parole, even when the prior crimes are far more serious than Helm's. See, e.g., Rusling v. State, 96 Nev. 778, 617 P.2d 1302 (1980) (possession of a firearm by an ex-felon, two instances of driving an automobile without the owner's consent, four first degree burglaries, two sales of marijuana, two sales of a restricted dangerous drug, one sale of heroin, one escape from state prison, and one second degree burglary).

part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. See, e.g., Greenholz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) (detailing Nebraska parole procedures); Morrissey v. Brewer, 408 U.S. 471, 477 (1972) ("the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system"). Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an ad hoc exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards. See, e.g., Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981).

We explicitly have recognized the distinction between parole and commutation in our prior cases.²⁷ Writing on behalf of the Morrissey Court, for example, CHIEF JUSTICE BURGER contrasted the two possibilities: "Rather than being an ad hoc exer-

²⁷In Rummel itself the Court implicitly recognized that the possibility of commutation is not equivalent to the possibility of parole. The Court carefully "distinguish[ed] Rummel from a person sentenced under a recidivist statute like [Miss. Code Ann. §99-19-83 (Supp. 1979)], which provides for a sentence of life without parole." 445 U.S., at 281. But the Mississippi Constitution empowers the Governor to grant pardons in "all criminal and penal cases, excepting those of treason and impeachment." Art. 5, §124. The Mississippi Supreme Court has long recognized that the power to pardon includes the power to commute a convict's sentence. See Whittington v. Stevens, 221 Miss. 598, 603-604, 73 So.2d 137, 139-140 (1954).

cise of clemency, parole is an established variation on imprisonment of convicted criminals." 408 U.S., at 477. In Dumschat, THE CHIEF JUSTICE similarly explained that "there is a vast difference between a denial of parole ... and a state's refusal to commute a lawful sentence." 452 U.S., at 466.

The Texas and South Dakota systems in particular are very different. In Rummel, the Court did not rely simply on the existence of some system of parole. Rather it looked to the provisions of the system presented, including the fact that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." 445 U.S., at 280. A Texas prisoner became eligible for parole when his calendar time served plus "good conduct" time equaled one-third of the maximum sentence imposed or 20 years, whichever is less. Tex. Code Crim. Proc. Ann., Art. 42.12, §15(b) (Vernon 1979). An entering prisoner earned 20 days good-time per 30 days served, Brief for Respondent in Rummel, O.T. 1979, No. 78-6386, p. 16, and this could be increased to 30 days good-time per 30 days served, Tex. Rev. Civ. Stat. Ann., Art. 6181-1, §§2-3 (Vernon Supp. 1982). Thus Rummel could have been eligible for parole in as few as 10 years, and could have expected to become eligible, in the normal course of events, in only 12 years.

In South Dakota commutation is more difficult to obtain than parole. For example, the board of pardons and paroles is authorized to make commutation recommendations to the Governor,

see n. 7, supra, but §24-13-4 provides that "no recommendation for the commutation of ... a life sentence, or for a pardon ..., shall be made by less than the unanimous vote of all members of the board." In fact, no life sentence has been commuted in over eight years, App. 29, while parole--where authorized--has been granted regularly during that period, Tr. of Oral Arg. 8-9. Furthermore, even if Helm's sentence were commuted, he merely would be eligible to be considered for parole.²⁸ Not only is there no guarantee that he would be paroled, but the South Dakota parole system is far more stringent than the one before us in Rummel. Helm would have to serve three-fourths of his revised sentence before he would be eligible for parole, §24-15-5, and the provision for good-time credits is far less generous, §24-5-1.²⁹

The possibility of commutation is nothing more than a hope for "an ad hoc exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

²⁸The most recent commutation of a life sentence in South Dakota occurred in 1975. The record indicates, however, that the prisoner in question has still not been paroled. App. 29.

²⁹Assume, for example, that in 1979 the Governor had commuted Helm's sentence to a term of 40 years (his approximate life expectancy). Even if Helm were a model prisoner, he would not have been eligible for parole until he had served over 21 years--more than twice the Rummel minimum. And this comparison is generous to South Dakota's position. If Rummel had been sentenced to 40 years rather than life, he could have been eligible for parole in less than 7 years.

V

The Constitution requires us to examine Helm's sentence to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment. The judgment of the Court of Appeals is accordingly

Affirmed.

Reviewed
L.F.P.

third draft: Solem v. Helm, No. 82-492

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

I

By 1975 the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.¹ In 1972 he was convicted of obtaining money under false pretenses.² In 1973

¹In 1969 third-degree burglary was defined in at least two sections of the South Dakota criminal code:

"A person breaking into any dwelling house in the nighttime with intent to commit a crime but under such circumstances as do not constitute burglary in the first degree, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. §22-32-8 (1967) (repealed 1976).

"A person breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof, or any building or part of any building, booth, tent, railroad car, vessel, vehicle as defined in §32-14-1, or any structure or erection in which any property is kept, with intent to commit larceny or any felony, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. §22-32-9 (1967) (repealed 1976).

In 1964 and 1966 the third-degree burglary definition was essentially the same. See S.D. Code §13.3703 (1939 ed., supp. 1960); 1965 S.D. Laws, ch. 32. Third-degree burglary was punishable by "imprisonment in the state penitentiary for any term not exceeding fifteen years." S.D. Comp. Laws Ann. §22-32-10 (1967) (previously codified at S.D. Code §13.3705(3) (1939)) (repealed 1976).

he was convicted of grand larceny.³ And in 1975 he was convicted of third-offense driving while intoxicated.⁴ The record contains no details about the circumstances of any of these offenses, ex-

²In 1972 the relevant statute provided:

"Every person who designedly, by color or aid of any false token or writing, or other false pretense, ... obtains from any person any money or property ... is punishable by imprisonment in the state penitentiary not exceeding three years or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both such fine and imprisonment." S.D. Comp. Laws Ann. §22-41-4 (1967) (repealed 1976).

³In 1973 South Dakota defined "larceny" as "the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof." S.D. Comp. Laws Ann. §22-37-1 (1967) (repealed 1976). Grand larceny and petit larceny were distinguished as follows:

"Grand larceny is larceny committed in any of the following cases:

(1) When the property taken is of a value exceeding fifty dollars;

(2) When such property, although not of a value exceeding fifty dollars, is taken from the person of another;

(3) When such property is livestock.

Larceny in other cases is petit larceny." S.D. Comp. Laws Ann. §22-37-2 (1967) (repealed 1976).

Grand larceny was then punishable by "imprisonment in the state penitentiary not exceeding ten years or by imprisonment in the county jail not exceeding one year." S.D. Comp. Laws Ann. §22-37-3 (1967) (repealed 1976).

⁴A third offense of driving while under the influence of alcohol is a felony in South Dakota. S.D. Codified Laws §32-23-4 (1976). See 1973 S.D. Laws, ch. 195, §7 (enacting version of §32-23-4 in force in 1975).

cept that they were all nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case.

In 1979 Helm was charged with uttering a "no account" check for \$100.⁵ The only details we have of the crime are those given by Helm to the state trial court:

"I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places." State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980) (Henderson, J., dissenting) (quoting Helm).

After offering this explanation, Helm pleaded guilty.

Ordinarily the maximum punishment for uttering a "no account" check would have been five years imprisonment in the state penitentiary and a five thousand dollar fine. See S.D. ~~Codified-Comp.~~ Laws Ann. §22-6-1(6) (~~1979~~1967 ed., supp. 1978) (now codified at S.D. Codified Laws §22-6-1(7) (Supp. 1982)). As a result of his criminal record, however, Helm was subject to South Dakota's recidivist statute:

"When a defendant has been convicted of at least three prior convictions [sic] in addition to the principal felony, the sentence for the principal felony shall be

⁵The governing statute provides, in relevant part:

"Any person who, for himself or as an agent or 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 §22-41-1.2 (1979).

enhanced to the sentence for a Class 1 felony." S.D.
Codified Laws §22-7-8 (1979) (amended 1981).

The maximum penalty for a "Class 1 felony" was life imprisonment in the state penitentiary and a twenty-five thousand dollar fine.⁶ S.D. Comp. Laws Ann. §22-6-1(2) (1967 ed., supp. 1978) (now codified at S.D. Codified Laws §22-6-1(3) (Supp. 1982)).

⁶When Helm was sentenced in April 1979, South Dakota law classified felonies as follows:

"Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished from each other by the respective maximum penalties hereinafter set forth which are authorized upon conviction:

- (1) Class A felony: life imprisonment in the state penitentiary. A lesser sentence may not be given for a Class A felony;
- (2) Class 1 felony: life imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;
- (3) Class 2 felony: twenty-five years imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;
- (4) Class 3 felony: fifteen years imprisonment in the state penitentiary. In addition, a fine of fifteen thousand dollars may be imposed;
- (5) Class 4 felony: ten years imprisonment in the state penitentiary. In addition, a fine of ten thousand dollars may be imposed;
- (6) Class 5 felony: five years imprisonment in the state penitentiary. In addition, a fine of five thousand dollars may be imposed; and
- (7) Class 6 felony: two years imprisonment in the state penitentiary or a fine of two thousand dollars, or both.

"Nothing in this section shall limit increased sentences for habitual criminals

"Except in cases where punishment is prescribed by law, every offense declared to be a felony and not otherwise classified is a Class 6 felony." S.D. Comp. Laws Ann. §22-6-1 (1967 ed., supp. 1978) (amended 1979 and 1980).

Moreover, South Dakota law explicitly provides that parole is unavailable: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S.D. Codified Laws §24-15-4 (1979). The Governor⁷ is authorized to pardon prisoners, or to commute their sentences, S.D. Const., Art. IV, §3, but no other relief from sentence is available even to a rehabilitated prisoner.

Immediately after accepting Helm's guilty plea, the South Dakota Circuit Court sentenced Helm to life imprisonment under §22-7-8. The court explained:

"I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over." State v. Helm, 287 N.W.2d, at 500 (Henderson, J., dissenting) (quoting S.D. Circuit Court, Seventh Judicial Circuit, Pennington County (Parker, J.)).

The South Dakota Supreme Court, in a 3-2 decision, affirmed the sentence despite Helm's argument that it violated the Eighth Amendment. State v. Helm, supra.

After Helm had served two years in the state penitentiary, he requested the Governor to commute his sentence to a fixed term of years. Such a commutation would have had the effect of

⁷The board of pardons and paroles is authorized to make recommendations to the Governor, S.D. Codified Laws §24-14-1 (1979); §24-14-5; S.D. Executive Order 82-04 (Apr. 12, 1982), but the Governor is not bound by the recommendation, §24-14-5.

making Helm eligible to be considered for parole when he had served three-fourths of his new sentence. See S.D. Codified Laws §24-15-5(3) (1979). The Governor denied Helm's request in May 1981. App. 26.

In November 1981, Helm sought habeas relief in the United States District Court for the District of South Dakota. Helm argued, among other things, that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. Although the District Court recognized that the sentence was harsh, it concluded that this Court's recent decision in Rummel v. Estelle, 445 U.S. 263 (1980), was dispositive. It therefore denied the writ.

The United States Court of Appeals for the Eighth Circuit reversed. 684 F.2d 582 (1982). The Court of Appeals noted that Rummel v. Estelle was distinguishable. Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabilitation as a goal of the criminal justice system. The Court of Appeals examined the nature of Helm's offenses, the nature of his sentence, and the sentence he could have received in other States for the same offense. It concluded, on the basis of this examination, that Helm's sentence was "grossly disproportionate to the nature of the offense." 684 F.2d, at 587. It therefore directed the District Court to issue the writ unless the State resentenced Helm. Ibid.

~~Recognizing~~-In view of the important Eighth Amendment question presented ~~in-by~~ this case, we granted certiorari. 459 U.S. ____ (1982). We now affirm.

II

The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

A

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence.⁸ In 1215, ~~for example,~~ three chapters of Magna Carta were devoted to the rule that "amercements"⁹ may not be excessive.¹⁰ And the principle was repeated and extended in the

⁸~~The principle is by no means original to the common law--it was a recognized limitation on punishments in biblical times. See Exodus 21:23-25, Leviticus 24:19-20, Deuteronomy 19:19, 21.~~

⁹An amercement was similar to a modern-day fine. It was the most common criminal sanction in thirteenth century England. See 2 F. Pollock & F. Maitland, *The History of English Law* 513-515 (2d ed. 1909).

¹⁰Chapter 20 declared that "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." See 1 S.D. *Codified Laws*, p. 4 (1978) (translation of Magna Carta). According to Maitland, "there was no clause in Magna Carta more grateful to the mass of the people" F. Maitland, *Pleas of the Crown for the County of Gloucester* xxxiv (1884). Chapter 21 granted the

Footnote continued on next page.

First Statute of Westminster, 3 Edw. I, ch. 6 (1275). These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments. See, e.g., Le Gras v. Bailiff of Bishop of Winchester, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), reprinted in 52 Selden Society 3 (1934). When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional. See, e.g., Hodges v. Humkin, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K.B. 1615) (Croke, J.) ("imprisonment ought always to be according to the quality of the offence").

The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 W. & M., sess. 2, ch. 2 (1689). Although the precise scope of this provision is uncertain, it at least incorporated "the longstanding principle of English law that the punishment ... should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959); see 4 W. Blackstone, *Commentaries* *16-19 (1769); see also id., at *16-17 (in condemning "punishments of unreasonable severity," uses "cruel" to mean severe or excessive). Indeed, barely three months after the Bill of Rights was adopted, the House of Lords declared that a "fine

same rights to the nobility, and chapter 22 granted the same rights to the clergy.

of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon, was excessive and exorbitant, against magna charta, the common right of the subject, and against the law of the land." Earl of Devon's Case, 11 State Trials 133, 136 (1689).

When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights,¹¹ they also adopted the English principle of proportionality. The people were guaranteed the rights they had possessed as English subjects--including the right to be free from excessive punishments.

B

The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.¹² In the leading case of Weems v. United States, 217 U.S. 349 (1910), the defendant had been convicted of falsifying a public document and sentenced to 15 years of "cadena temporal," a form of impris-

¹¹This language had earlier been incorporated in the Virginia Declaration of Rights, Art. I, §9, *authored by George Mason*.

¹²In O'Neil v. Vermont, 144 U.S. 323 (1892), the defendant had been convicted of 307 counts of "selling intoxicating liquor without authority," and sentenced to a term of over 54 years. The majority did not reach O'Neil's contention that this sentence was unconstitutional, for he did not include the point in his assignment of errors or in his brief. Id., at 331. Furthermore, the majority noted that the Eighth Amendment "does not apply to the States." Id., at 332. Accordingly the Court dismissed the writ of error for want of a federal question. Id., at 336-337. The dissent, however, reached the Eighth Amendment question, observing that it "is directed ... against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." Id., at 339-340 (Field, J., dissenting).

onment that included hard labor in chains and permanent civil disabilities. The Court noted "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense," id., at 367, and held that the sentence violated the Eighth Amendment. The Court endorsed the principle of proportionality as a constitutional standard, see, e.g., id., at 372-373, and determined that the sentence before it was "cruel in its excess of imprisonment," id., at 377.

The Court next applied the principle to invalidate a criminal sentence in Robinson v. California, 370 U.S. 660 (1962).¹³ A 90-day sentence was found to be excessive for the crime of being "addicted to the use of narcotics." The Court explained that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." Id., at 667. Thus there was no question of an inherently barbaric punishment. "But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." Ibid.

Most recently, the Court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. Enmund v. Florida, 458 U.S. ____ (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend ~~to take~~ that a life be tak-

¹³Members of the Court continued to recognize the principle of proportionality in the meantime. See, e.g., Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion); id., at 111 (BRENNAN, J., concurring); id., at 125-126 (Frankfurter, J., dissenting).

en or that lethal force be used); Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) ("sentence of death is grossly disproportionate and excessive punishment for the crime of rape"); id., at 601 (POWELL, J., concurring in the judgment in part and dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman"). And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, e.g., Hutto v. Finney, 437 U.S. 678, 685 (1978); Ingraham v. Wright, 430 U.S. 651, 667 (1977); Gregg v. Georgia, 428 U.S. 153, 171-172 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); cf. Hutto v. Davis, 454 U.S. 370, 374, and n. 3 (1982) (per curiam) (recognizing that some prison sentences may be constitutionally disproportionate); Rummel v. Estelle, 445 U.S., at 274, n. 11 (same).

C

There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences.¹⁴ The constitutional language itself suggests

¹⁴According to Rummel v. Estelle, 445 U.S. 263 (1980), "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies ... the length of sentence actually imposed is purely a matter of legislative prerogative." Id., at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible.

To the extent that the State ~~seeks to make~~ this argument here, we ~~reject it~~. ~~Although courts should be reluctant to invalidate legislative judgments, we have a constitutional duty to ensure~~

Footnote continued on next page.

find it meritless.

and of course we have this duty.

Make, in view of what is said on p. 14, I'd omit this.

no exception for imprisonment. We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, Ingraham v. Wright, 430 U.S., at 664, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. See Hodges v. Humkin, supra. And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis. See, e.g., Weems, 217 U.S., at 377; cf. Hutto v. Finney, 437 U.S., at 685 ("Confinement in a prison ... is a form of punishment subject to scrutiny under Eighth Amendment standards").

When we have applied the proportionality principle in capital cases, we have drawn no distinction with imprisonment. See Gregg v. Georgia, 428 U.S., at 176 (opinion of Stewart, POWELL, and STEVENS, JJ.). It is true that the "penalty of death differs from all other forms of criminal punishment, not in degree but in kind." Furman v. Georgia, 408 U.S. 238, 306 (1972)

hardly be rational:
~~that legislative judgments are consistent with the Eighth Amendment. See Enmund v. Florida, 458 U.S. (1982).~~

The class of "crimes concededly classified and classifiable as felonies" is of little assistance as an Eighth Amendment standard. Since the definition of a felony is invariably based on its legal consequences, ~~see, e.g., 18 U.S.C. §1(1), the effect of this standard would be absurd: when a State concededly may punish a crime by imprisonment for a year, it could punish the crime by life imprisonment without possibility of parole.~~

Mike: We need HAB's vote. He joined Rummel. As you suggest, we should not ~~also~~ attack it directly. Let's see what dissent says first

(Stewart, J., concurring). As a result, "our decisions [in] capital cases are of limited assistance in deciding the constitutionality of the punishment" in a noncapital case. Rummel v. Estelle, 445 U.S., at 272. All this means, however, is that, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare,"¹⁵ ibid. (emphasis added); see Hutto v. Davis, 454 U.S., at 374. It does not mean that proportionality analysis is entirely inapplicable in noncapital cases.

In sum, we hold that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. ~~As a matter of theory, therefore, every sentence is subject to~~ challenge on constitutional grounds. Reviewing courts ^{of course} should grant ^{substantial} ~~considerable~~ deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.¹⁶ ~~--Thus-in-most-cases-it~~

¹⁵In Enmund, for example, the Court found the death penalty to be excessive for felony murder in the circumstances of that case. But clearly no sentence short of death would be unconstitutional for Enmund's crime.

¹⁶In view of the substantial deference properly due to legislatures and sentencing courts, most reviewing courts ^{normally} will not be ~~not be~~ required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate. In Badders v. United States, 240 U.S. 391, 394 (1916), for example, the Court had little difficulty in determining that seven concurrent five-year terms and a \$7,000 fine was not an unconstitutional sentence for seven counts of mail fraud. We anticipate that in the vast majority of cases, reviewing courts could dispose of a proportionality claim in similar fashion.

Mike - I am
inclined to
omit. The note
is stronger w/o
the example

~~will not require extended analysis to determine that a sentence is not constitutionally disproportionate. See, e.g., Badders v. United States, 240 U.S. 391, 394 (1916) (seven concurrent five-year terms and \$7,000 fine for seven counts of mail fraud).~~ But no penalty is per se constitutional. As the Court noted in Robinson v. California, 370 U.S., at 667, a single day in prison may be unconstitutional in some circumstances.

III

A

In reviewing sentences under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized.¹⁷ First, we look to the gravity of the offense and the harshness of the penalty. In Enmund, for example, the Court examined the circumstances of the defendant's crime in great detail. 458 U.S., at ____ - _____. In Coker the Court considered the seriousness of the crime of rape, and compared it to other crimes, such as murder. 433 U.S., at 597-598 (plurality opinion); id., at 603 (POWELL, J., concurring in the judgment in part and dissenting in part). In Robinson the emphasis was placed on the nature of the "crime." 370 U.S., at 666-667. And

¹⁷~~As the Court has recognized in the past, no one factor will be dispositive. See Hutto v. Davis, 454 U.S. 370, 373-374 n. 2 (1982) (per curiam); Rummel v. Estelle, 445 U.S., at 275-276. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. No single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment.~~ *indicated,*

in Weems, the Court's opinion commented in two separate places on the pettiness of the offense. 217 U.S., at 363 and 365. Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate. See, e.g., Coker, 433 U.S., at 598 (plurality opinion); Weems, 217 U.S., at 366-367.

Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. Thus in Enmund the Court noted that all of the other felony murderers on death row in Florida were more culpable than the petitioner there. 458 U.S., at _____. The Weems Court identified an impressive list of more serious crimes that were subject to less serious penalties. 217 U.S., at 380-381.

Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. In Enmund the Court conducted an extensive review of capital punishment statutes and determined that "only about a third of American jurisdictions would ever permit a defendant [such as Enmund] to be sentenced to die." 458 U.S., at _____. Even in those jurisdictions, however, the death penalty was almost never imposed under similar circumstances. Id., at _____. The Court's review of foreign law also supported its conclusion. Id., at _____, n. 22. The analysis in Coker was essentially the same. 433 U.S., at 593-597. And in Weems the Court relied on the fact that, under federal law, a similar crime was punishable by only two year's imprisonment and a fine. 217 U.S., at 380.

Cf. Trop v. Dulles, 356 U.S. 86, 102-103 (1958) (plurality opinion).

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (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.

B

Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments--just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. Thus in Enmund the Court determined that the petitioner's conduct was not so serious as his accomplices' conduct. Indeed, there are widely shared views as to the relative seriousness of crimes. See Rossi, Waite, Bose & Berk, The Seriousness of Crimes: Normative Structure and Individual Differences, 39 Am. Soc. Rev. 224, 237 (1974). For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence. Cf. Tr. of Oral Arg. 16 (State recognizes that law protects people ^{in more} ~~before~~ ^{than} property).

The criminal

line of

Make - An Capital punishment is imposed for a single murder. This sentence could get us in trouble

accepted

There are other widely ~~held~~^{accepted} principles that courts may apply in measuring the harm caused or threatened to the victim or society. The absolute magnitude of the crime may be relevant. Stealing a million dollars is viewed as more serious than stealing a hundred dollars--a point recognized in statutes distinguishing petty theft from grand theft. See, e.g., S.D. Codified Laws §22-30A-17 (Supp. 1982). ~~Other things being equal, murdering two people is more serious than murdering one. See, e.g.,~~ Mass. Gen. Laws Ann., ch. 279, §69(a)(8) (West Supp. 1982). Few would dispute that a lesser included offense should not be punished more severely than the greater offense. Thus a court is justified in viewing assault with intent to murder as more serious than simple assault. See Roberts v. Collins, 544 F.2d 168, 169-170 (CA4 1976) (per curiam), cert. denied, 430 U.S. 973 (1977). Cf. Dembowski v. State, 251 Ind. 250, 252, 240 N.E.2d 815, 817 (1968) (armed robbery more serious than robbery); Cannon v. Gladden, 203 Or. 629, 632, 281 P.2d 233, 235 (1955) (rape more serious than assault with intent to commit rape). It is also widely recognized that attempts are less serious than completed crimes. See, e.g., S.D. Codified Laws §22-4-1 (1979); 4 Blackstone *15. Similarly, an accessory after the fact should not be subject to a higher penalty than the principal. See, e.g., 18 U.S.C. §3.

Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In Enmund the Court looked at the petitioner's lack of intent to kill ~~to-in~~ determineing that he was less culpable than his accom-

plices. 458 U.S., at _____. Most would agree that negligent conduct is less serious than intentional conduct. South Dakota, for example, ranks criminal acts in ascending order of seriousness as follows: negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts. S.D. Codified Laws §22-1-2(1)(f) (Supp. 1982). A court is also entitled to look at a defendant's motive in committing a crime. ~~As-Blackstone-observed, "theft, in case-of-hunger, is far more worthy of compassion, than when committed through avarice, or to supply one in luxurious excesses,"~~
~~4-Blackstone-*15, cf. In re Foss, 10 Cal.3d 910, 519 P.2d 1073 (1974) - (furnishing heroin to fellow addict going through withdrawal not so serious as sale for profit).~~ Similarly, Thus a murder ^{may be viewed as} is more serious when ^{it} is committed pursuant to a contract. See, e.g., Mass. Gen. Laws Ann., ch. 279, §69(a)(5) (West Supp. 1982); cf. 4 Blackstone *15; In re Foss, 10 Cal.3d 910, 519 P.2d 1073 (1974).

This list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.

C

Application of the factors that we identify also assumes that courts are able to compare different sentences. This assumption, too, is justified. The easiest comparison, of course, is between capital punishment and noncapital punishments, for the

2
death penalty is different from other punishments in kind rather than degree.¹⁸ For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence,¹⁹ but in most cases it would be more difficult to decide ~~whether~~ ^{that} the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

The Sixth Amendment right to a jury trial is an example. In Williams v. Florida, 399 U.S. 78 (1970), the Court upheld a criminal conviction returned by a unanimous 6-member jury, and in Apodaca v. Oregon, 406 U.S. 404 (1972), we upheld a conviction returned by ten members of a 12-member jury. In Ballew v. Georgia, 435 U.S. 223 (1978), however, we reversed a conviction returned by a unanimous 5-member jury. JUSTICE BLACKMUN "readily admit[ted] that we d[id] not pretend to discern a clear line between six members and five." Id., at 239 (opinion of BLACKMUN, J.). He nevertheless found a difference between them of "constitutional significance." Ibid.; cf. id., at 245-246 (POWELL, J., concurring in the judgment). And the following Term, in Burch v. Louisiana, 441 U.S. 130 (1979), we reversed a conviction returned

¹⁸There is also a clear line between sentences of imprisonment and sentences involving no deprivation of liberty. See Argersinger v. Hamlin, 407 U.S. 25 (1972).

¹⁹The possibility of parole may complicate the comparison, depending upon the time and conditions of its availability.

by five members of a 6-member jury:

"[W]e do not pretend the ability to discern a priori a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases. But ... it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved." Id., at 137 (citations omitted).

Another Sixth Amendment case illustrates the line-drawing function of the judiciary, and offers guidance on the method by which some lines may be drawn. In Baldwin v. New York, 399 U.S. 66 (1970), the Court determined that a defendant has a right to a jury trial "where imprisonment for more than six months is authorized." Id., at 69 (plurality opinion). In choosing the 6-month standard, the plurality relied almost exclusively on the fact that only New York City denied the right to a jury trial for an offense punishable by more than six months. As JUSTICE WHITE explained:

"This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn--on the basis of the possible penalty alone--between offenses that are and that are not regarded as 'serious' for purposes of trial by jury." Id., at 72-73.

In short, Baldwin clearly demonstrates that a court properly may distinguish one sentence of imprisonment from another. It also supports our holding that courts ^{properly may} ~~should~~ look to the practices in other jurisdictions in deciding where lines between sentences should be drawn.

IV

It remains to apply the analytical framework established by our prior decisions to the case before us. We first consider the relevant criteria, viewing Helm's sentence as life imprisonment without possibility of parole. We then consider the State's argument that the possibility of commutation is sufficient to save an otherwise unconstitutional sentence.

A

Helm's crime was "one of the most passive felonies a person could commit." State v. Helm, 287 N.W.2d, at 501 (Henderson, J., dissenting). It involved neither violence nor threat of violence to any person. The \$100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft.²⁰ It is easy to see why such a crime is viewed by society as among the less serious offenses. See Rossi et al., 39 Am. Soc. Rev., at 229.

²⁰ If Helm had been convicted simply of taking \$100 from a cash register, S.D. Codified Laws §22-30A-1 (1979), or defrauding someone of \$100, §22-30A-3, or obtaining \$100 through extortion, §22-30A-4(1), or blackmail, §22-30A-4(3), or using a false credit card to obtain \$100, §22-30A-8.1, or embezzling \$100, §22-30A-10, he would not be in prison today. All of these offenses would have been petty theft, a misdemeanor. §22-30A-17 (amended 1982). Similarly, if Helm had written a \$100 check against insufficient funds, rather than a nonexistent account, he would have been guilty of a misdemeanor. §§22-41-1. Under South Dakota law there is no distinction between writing a "no account" check for a large sum and writing a "no account" check for a small sum. §22-41-1.2.

Curiously,

Helm, of course, was not charged simply with uttering a "no account" check, but also with being an habitual offender.²¹ And a State is justified in punishing a recidivist more severely than it punishes a first offender. Helm's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor.²² All were nonviolent and none was a crime against a person. As the State conceded at oral argument, the three third-degree burglary convictions could have been the result of stealing three loaves of bread. Tr. of Oral Arg. 16. There was also no minimum amount in the statute against obtaining money under false pretenses. See n. 2, supra. Helm's "grand larceny" may have been no more than the theft of a chicken. See n. 3, supra. On its face, Helm's most serious crime was a felony case of driving while intoxicated, but he served barely nine months for that offense, Tr. of Oral Arg. 17. ²³ Such a short sentence²³ suggests that the particu-

²¹We must focus on the principal felony--the felony that triggers the life sentence--since Helm already has paid the penalty for each of his prior offenses. But we recognize that Helm's prior convictions are relevant to the sentencing decision.

²²Helm, who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance any of the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have any incentive to pursue clearly needed treatment for his alcohol problem.

²³The sentence was well below that authorized for even the least serious felony in South Dakota. See note 6, supra. It was also shorter than the sentences Helm served for other minor crimes. See Tr. of Oral Arg. 14.

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lar circumstances of Helm's conduct were not considered to be so
very serious by the South Dakota authorities.

Helm's present sentence is life imprisonment without possibility of parole.²⁴ Barring executive clemency, see infra, at ___, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in Rummel v. Estelle. Rummel was likely to have been eligible for parole within 12 years of his initial confinement,²⁵ a fact on which the Court relied heavily. See 445 U.S., at 280-281. Helm's sentence is more severe than any other sentence the State could have imposed on any criminal for any crime. See note 6, supra. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

We next consider the sentences that could be imposed on other criminals in the same jurisdiction. When Helm was sentenced, a South Dakota court was required to impose a life sentence for murder, S.D. Codified Laws §22-16-12 (1979) (amended 1980), and was authorized to impose a life sentence for treason, §22-8-1, first degree manslaughter, §22-16-15, first degree ar-

²⁴We raise no question as to the general validity of sentences without possibility of parole. The only issue before us is whether, in the circumstances of this case and in light of the constitutional principle of proportionality, the sentence imposed on this petitioner violates the Eighth Amendment.

²⁵We note that Rummel was, in fact, released within eight months of the Court's decision in his case. See L.A. Times, Nov. 16, 1980, p. 1, col. 3.

* Couldnt the recidivist penalty of life w/o parole be imposed for all of these crimes. If so the sentence I question above is wrong. Make clear when life w/o parole may be imposed

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son, §22-33-1, and kidnapping, S.D. Comp. Laws Ann. §22-19-1
(1967 ed., supp. 1978) (amended 1979), -and-first-degree-arson,
22-33-1. No other crime was punishable so severely on the first
offense. Attempted murder, S.D. Codified Laws §22-4-1(5) (1979),
placing an explosive device on an aircraft, §22-14A-5, and first
degree rape, §22-22-1 (amended 1980 and 1982), were only Class 2
felonies. Aggravated riot, §22-10-5, was only a Class 3 felony.
Distribution of heroin, §§22-42-2 (amended 1982), 34-20B-13(7)
(1977), and aggravated assault, §22-18-1.1 (amended 1980 and
1981), were only Class 4 felonies.

w/out parole?
Helm's habitual offender status complicates our analy-
sis, but relevant comparisons are still possible. Under §22-7-7,
the penalty for a second or third felony is increased by one
class. Thus a life sentence was mandatory when a second or third
conviction was for treason, first degree manslaughter, kidnap-
ping, or first degree arson, and a life sentence would have been
authorized when a second or third conviction was for such crimes
as attempted murder, placing an explosive device on an aircraft,
or first degree rape. Finally, §22-7-8, under which Helm was
sentenced, authorized life imprisonment after three prior convic-
tions, regardless of the crimes.

mandatory life?
In sum, there were a handful of crimes that were neces-
sarily punished by life imprisonment: murder; and treason, first
degree manslaughter, kidnapping, or first degree arson on a sec-
ond or third offense. There was a larger group for which life
imprisonment was authorized in the discretion of the sentencing
judge, including: treason, first degree manslaughter, kidnapping,

or first degree arson; attempted murder, placing an explosive device on an aircraft, or first degree rape on a second or third offense; and any felony after three prior offenses. Finally, there was a large group of very serious offenses for which life imprisonment was not authorized, including a third offense of heroin dealing or aggravated assault.

~~In any rational system,~~ Criminals committing any of these offenses ordinarily would be thought more deserving of punishment than one uttering a "no account" check--even when the bad-check writer had already committed six minor felonies. Furthermore, there is no indication in the record that any habitual offender other than Helm has ever been given the maximum sentence ^{w/o parole?} on the basis of comparable crimes. It is more likely that the possibility of life imprisonment under §22-7-8 generally is reserved for criminals such as fourth-time heroin dealers, while habitual bad-check writers receive more lenient treatment.²⁶ ~~we can only conclude that~~ In any event, Helm has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.

²⁶The State contends that §22-7-8 is more lenient than the Texas habitual offender statute in Rummel, for life imprisonment under §22-7-8 is discretionary rather than mandatory. Brief for Petitioner 22. Helm, however, has challenged only his own sentence. No one suggests that §22-7-8 may not be applied constitutionally to fourth-time heroin dealers or other violent criminals. Thus we do not question the legislature's judgment. Unlike in Rummel, a lesser sentence here could have been entirely consistent with both the statute and the Eighth Amendment. See Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1160 (1979).

Finally, we compare the sentences imposed for commission of the same crime in other jurisdictions. The Court of Appeals found that "Helm could have received a life sentence without parole for his offense in only one other state, Nevada," 684 F.2d, at 586, and we have no reason to doubt ~~its~~-this finding. See Tr. of Oral Arg. 21. At the very least, therefore, it is clear that Helm could not have received such a severe sentence in 48 of the 50 States. But even under Nevada law, a life sentence without possibility of parole is merely authorized in these circumstances. See Nev. Rev. Stat. §207.010(2) (1981). We are not advised that any defendant such as Helm, whose prior offenses were so minor, actually has received the maximum penalty in Nevada.²⁷ It appears that Helm was treated more severely than he would have been in any other State.

B

The State argues that the present case is essentially the same as Rummel v. Estelle, for the possibility of parole in

²⁷Under Nev.-Rev.-Stat.-§207.010(2), a Nevada court is authorized to impose a sentence of "imprisonment in the state prison for life with or without possibility of parole. If the penalty fixed by the court is life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of 10 years has been served." It appears that most sentences imposed under §207.010(2) permit parole, even when the prior crimes are far more serious than Helm's. See, e.g., Rusling v. State, 96 Nev. 778, 617 P.2d 1302 (1980) (possession of a firearm by an ex-felon, two instances of driving an automobile without the owner's consent, four first degree burglaries, two sales of marijuana, two sales of a restricted dangerous drug, one sale of heroin, one escape from state prison, and one second degree burglary).

that case is matched by the possibility of executive clemency here. The State reasons that the Governor could commute Helm's sentence to a term of years. We conclude, however, that the South Dakota commutation system is fundamentally different from the parole system that was before us in Rummel.

As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. See, e.g., Greenholz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) (detailing Nebraska parole procedures); Morrissey v. Brewer, 408 U.S. 471, 477 (1972) ("the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system"). Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an ad hoc exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards. See, e.g., Connecticut Board of Pardons v. Dumschat, 452 U.S. 458 (1981).

We explicitly have recognized the distinction between parole and commutation in our prior cases.²⁸ Writing on behalf

²⁸In Rummel itself the Court implicitly recognized that the possibility of commutation is not equivalent to the possibility
Footnote continued on next page.

of the Morrissey Court, for example, CHIEF JUSTICE BURGER contrasted the two possibilities: "Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals." 408 U.S., at 477. In Dumschat, THE CHIEF JUSTICE similarly explained that "there is a vast difference between a denial of parole ... and a state's refusal to commute a lawful sentence." 452 U.S., at 466.

The Texas and South Dakota systems in particular are very different. In Rummel, the Court did not rely simply on the existence of some system of parole. Rather it looked to the provisions of the system presented, including the fact that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." 445 U.S., at 280. A Texas prisoner became eligible for parole when his calendar time served plus "good conduct" time equaled one-third of the maximum sentence imposed or 20 years, whichever is less. Tex. Code Crim. Proc. Ann., Art. 42.12, §15(b) (Vernon 1979). An entering prisoner earned 20 days

of parole. The Court carefully "distinguish[ed] Rummel from a person sentenced under a recidivist statute like [Miss. Code Ann. §99-19-83 (Supp. 1979)], which provides for a sentence of life without parole." 445 U.S., at 281. But the Mississippi Constitution empowers the Governor to grant pardons in "all criminal and penal cases, excepting those of treason and impeachment." Art. 5, §124. The Mississippi Supreme Court has long recognized that the power to pardon includes the power to commute a convict's sentence. See Whittington v. Stevens, 221 Miss. 598, 603-604, 73 So.2d 137, 139-140 (1954).--~~The Rummel Court gave no weight to the possibility of executive clemency.~~

good-time per 30 days served, Brief for Respondent in Rummel, O.T. 1979, No. 78-6386, p. 16, and this could be increased to 30 days good-time per 30 days served, Tex. Rev. Civ. Stat. Ann., Art. 6181-1, §§2-3 (Vernon Supp. 1982). Thus Rummel could have been eligible for parole in as few as 10 years, and could have expected to become eligible, in the normal course of events, in only 12 years.

In South Dakota commutation is more difficult to obtain than parole. For example, the board of pardons and paroles is authorized to make commutation recommendations to the Governor, see n. 7, supra, but §24-13-4 provides that "no recommendation for the commutation of ... a life sentence, or for a pardon ..., shall be made by less than the unanimous vote of all members of the board." In fact, no life sentence has been commuted in over eight years, App. 29, while parole--where authorized--has been granted regularly during that period, Tr. of Oral Arg. 8-9. Furthermore, even if Helm's sentence were commuted, he merely would be eligible to be considered for parole.²⁹ Not only is there no guarantee that he would be paroled, but the South Dakota parole system is far more stringent than the one before us in Rummel. Helm would have to serve three-fourths of his revised sentence before he would be eligible for parole, §24-15-5, and the provision for good-time credits is far less generous, §24-5-1.³⁰

²⁹The most recent commutation of a life sentence in South Dakota occurred in 1975. The record indicates, however, that the prisoner in question has still not been paroled. App. 29.

Footnote(s) 30 will appear on following pages.

The possibility of commutation is nothing more than a hope for "an ad hoc exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

V

The Constitution requires us to examine Helm's sentence to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment. The judgment of the Court of Appeals is accordingly

Affirmed.

³⁰ Assume, for example, that in 1979 the Governor had commuted Helm's had-been-sentenced to a term of 40 years -- (his approximate life expectancy). -- in 1979. Even if Helm were a model prisoner, he would not have been eligible for parole until he had served over 21 years --- This is more than twice as long as the Rummel minimum. And this comparison is generous to South Dakota's position. If Rummel had been sentenced to 40 years rather than life, he could have been eligible for parole in less than 7 years.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

L. F. P.

From: Justice Powell

Circulated: MAY 27 1983

Recirculated:

*Make - This seems to be
in excellent shape. I raise a
question on p 8. Otherwise, I note
only a "fly-spect" change or two.*

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-492

HERMAN SOLEM, WARDEN, PETITIONER v. JERRY
BUCKLEY HELM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

I

By 1975 the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.¹ In 1972

¹ In 1969 third-degree burglary was defined in at least two sections of the South Dakota criminal code:

"A person breaking into any dwelling house in the nighttime with intent to commit a crime but under such circumstances as do not constitute burglary in the first degree, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. § 22-32-8 (1967) (repealed 1976).

"A person breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof, or any building or part of any building, booth, tent, railroad car, vessel, vehicle as defined in § 32-14-1, or any structure or erection in which any property is kept, with intent to commit larceny or any felony, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. § 22-32-9 (1967) (repealed 1976).

In 1964 and 1966 the third-degree burglary definition was essentially the same. See S.D. Code § 13.3703 (1969 ed., supp. 1960); 1965 S.D. Laws, ch. 32. Third-degree burglary was punishable by "imprisonment in the state penitentiary for any term not exceeding fifteen years." S.D. Comp. Laws Ann. § 22-32-10 (1967) (previously codified at S.D. Code § 13.3705(3)).

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he was convicted of obtaining money under false pretenses.² In 1973 he was convicted of grand larceny.³ And in 1975 he was convicted of third-offense driving while intoxicated.⁴ The record contains no details about the circumstances of any of these offenses, except that they were all nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case.

In 1979 Helm was charged with uttering a "no account" check for \$100.⁵ The only details we have of the crime are those given by Helm to the state trial court:

(1939)) (repealed 1976).

² In 1972 the relevant statute provided:

"Every person who designedly, by color or aid of any false token or writing, or other false pretense, . . . obtains from any person any money or property . . . is punishable by imprisonment in the state penitentiary not exceeding three years or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both such fine and imprisonment." S.D. Comp. Laws Ann. § 22-41-4 (1967) (repealed 1976).

³ In 1973 South Dakota defined "larceny" as "the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof." S.D. Comp. Laws Ann. § 22-37-1 (1967) (repealed 1976). Grand larceny and petit larceny were distinguished as follows:

"Grand larceny is larceny committed in any of the following cases:

- (1) When the property taken is of a value exceeding fifty dollars;
- (2) When such property, although not of a value exceeding fifty dollars, is taken from the person of another;
- (3) When such property is livestock.

Larceny in other cases is petit larceny." S.D. Comp. Laws Ann. § 22-37-2 (1967) (repealed 1976).

Grand larceny was then punishable by "imprisonment in the state penitentiary not exceeding ten years or by imprisonment in the county jail not exceeding one year." S.D. Comp. Laws Ann. § 22-37-3 (1967) (repealed 1976).

⁴ A third offense of driving while under the influence of alcohol is a felony in South Dakota. S.D. Codified Laws § 32-23-4 (1976). See 1973 S.D. Laws, ch. 195, § 7 (enacting version of § 32-23-4 in force in 1975).

⁵ The governing statute provides, in relevant part:

"I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places.'" *State v. Helm*, 287 N. W. 2d 497, 501 (S.D. 1980) (Henderson, J., dissenting) (quoting Helm).

After offering this explanation, Helm pleaded guilty.

Ordinarily the maximum punishment for uttering a "no account" check would have been five years imprisonment in the state penitentiary and a five thousand dollar fine. See S.D. Comp. Laws Ann. § 22-6-1(6) (1967 ed., supp. 1978) (now codified at S.D. Codified Laws § 22-6-1(7) (Supp. 1982)). As a result of his criminal record, however, Helm was subject to South Dakota's recidivist statute:

"When a defendant has been convicted of at least three prior convictions [*sic*] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." S.D. Codified Laws § 22-7-8 (1979) (amended 1981).

The maximum penalty for a "Class 1 felony" was life imprisonment in the state penitentiary and a twenty-five thousand dollar fine.⁶ S.D. Comp. Laws Ann. § 22-6-1(2) (1967 ed.,

⁶"Any person who, for himself or as an agent or 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 § 22-41-1.2 (1979).

⁷When Helm was sentenced in April 1979, South Dakota law classified felonies as follows:

"Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished from each other by the respective maximum penalties hereinafter set forth which are authorized upon conviction:

supp. 1978) (now codified at S.D. Codified Laws § 22-6-1(3) (Supp. 1982)). Moreover, South Dakota law explicitly provides that parole is unavailable: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S.D. Codified Laws § 24-15-4 (1979). The Governor⁷ is authorized to pardon prisoners, or to commute their sentences, S.D. Const., Art. IV, § 3, but no other relief from sentence is available even to a rehabilitated prisoner.

Immediately after accepting Helm's guilty plea, the South Dakota Circuit Court sentenced Helm to life imprisonment under § 22-7-8. The court explained:

"I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record

(1) Class A felony: life imprisonment in the state penitentiary. A lesser sentence may not be given for a Class A felony;

(2) Class 1 felony: life imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;

(3) Class 2 felony: twenty-five years imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;

(4) Class 3 felony: fifteen years imprisonment in the state penitentiary. In addition, a fine of fifteen thousand dollars may be imposed;

(5) Class 4 felony: ten years imprisonment in the state penitentiary. In addition, a fine of ten thousand dollars may be imposed;

(6) Class 5 felony: five years imprisonment in the state penitentiary. In addition, a fine of five thousand dollars may be imposed; and

(7) Class 6 felony: two years imprisonment in the state penitentiary or a fine of two thousand dollars, or both.

"Nothing in this section shall limit increased sentences for habitual criminals

"Except in cases where punishment is prescribed by law, every offense declared to be a felony and not otherwise classified is a Class 6 felony." S.D. Comp. Laws Ann. § 22-6-1 (1967 ed., supp. 1978) (amended 1979 and 1980).

⁷The board of pardons and paroles is authorized to make recommendations to the Governor, S.D. Codified Laws § 24-14-1 (1979); § 24-14-5; S.D. Executive Order 82-04 (Apr. 12, 1982), but the Governor is not bound by the recommendation, § 24-14-5.

would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over.'" *State v. Helm*, 287 N. W. 2d, at 500 (Henderson, J., dissenting) (quoting S.D. Circuit Court, Seventh Judicial Circuit, Pennington County (Parker, J.)).

The South Dakota Supreme Court, in a 3-2 decision, affirmed the sentence despite Helm's argument that it violated the Eighth Amendment. *State v. Helm, supra*.

After Helm had served two years in the state penitentiary, he requested the Governor to commute his sentence to a fixed term of years. Such a commutation would have had the effect of making Helm eligible to be considered for parole when he had served three-fourths of his new sentence. See S.D. Codified Laws § 24-15-5(3) (1979). The Governor denied Helm's request in May 1981. App. 26.

In November 1981, Helm sought habeas relief in the United States District Court for the District of South Dakota. Helm argued, among other things, that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. Although the District Court recognized that the sentence was harsh, it concluded that this Court's recent decision in *Rummel v. Estelle*, 445 U. S. 263 (1980), was dispositive. It therefore denied the writ.

The United States Court of Appeals for the Eighth Circuit reversed. 684 F. 2d 582 (1982). The Court of Appeals noted that *Rummel v. Estelle* was distinguishable. Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabilitation as a goal of the criminal justice system. The Court of Appeals examined the nature of Helm's offenses, the nature of his sentence, and the sentence he could have received in other States for the

same offense. It concluded, on the basis of this examination, that Helm's sentence was "grossly disproportionate to the nature of the offense." 684 F. 2d, at 587. It therefore directed the District Court to issue the writ unless the State resentenced Helm. *Ibid.*

In view of the important Eighth Amendment question presented by this case, we granted certiorari. 459 U. S. — (1982). We now affirm.

II

The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

A

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that "amercements"³ may not be excessive.⁴ And the principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275). These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments. See, e. g., *Le Gras v. Bailiff of Bishop of Winches-*

³ An amercement was similar to a modern-day fine. It was the most common criminal sanction in thirteenth century England. See 2 F. Pollock & F. Maitland, *The History of English Law* 513-515 (2d ed. 1909).

⁴ Chapter 20 declared that "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." See 1 S.D. Codified Laws, p. 4 (1978) (translation of Magna Carta). According to Maitland, "there was no clause in Magna Carta more grateful to the mass of the people. . . ." F. Maitland, *Pleas of the Crown for the County of Gloucester* xxxiv (1884). Chapter 21 granted the same rights to the nobility, and chapter 22 granted the same rights to the clergy.

Mike -
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sanction in
1275 was not
a fine. There
was no common
currency then
in England, and
few "freemen"
owned much of
anything. Offenses
were severely
punished. Are
we right in n 8?

ter, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), reprinted in 52 Selden Society 3 (1934). When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional. See, e. g., *Hodges v. Humkin*, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K.B. 1615) (Croke, J.) ("imprisonment ought always to be according to the quality of the offence").

The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 W. & M., sess. 2, ch. 2 (1689). Although the precise scope of this provision is uncertain, it at least incorporated "the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959); see 4 W. Blackstone, *Commentaries* *16-19 (1769); see also *id.*, at *16-17 (in condemning "punishments of unreasonable severity," uses "cruel" to mean severe or excessive). Indeed, barely three months after the Bill of Rights was adopted, the House of Lords declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon, was excessive and exorbitant, against magna charta, the common right of the subject, and against the law of the land." *Earl of Devon's Case*, 11 State Trials 133, 136 (1689).

When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights,¹⁰ they also adopted the English principle of proportionality. The people were guaranteed the rights they had possessed as English subjects—including the right to be free from excessive punishments.

¹⁰ This language had earlier been incorporated in the Virginia Declaration of Rights, Art. I, §9, authored by George Mason.

See A. Howard, *The Road From Runnymede: Magna Carta and Constitutionalism in America* 207 (1968).

B

The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.¹¹ In the leading case of *Weems v. United States*, 217 U. S. 349 (1910), the defendant had been convicted of falsifying a public document and sentenced to 15 years of "cadena temporal," a form of imprisonment that included hard labor in chains and permanent civil disabilities. The Court noted "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense," *id.*, at 367, and held that the sentence violated the Eighth Amendment. The Court endorsed the principle of proportionality as a constitutional standard, see, e. g., *id.*, at 372-373, and determined that the sentence before it was "cruel in its excess of imprisonment," *id.*, at 377.

The Court next applied the principle to invalidate a criminal sentence in *Robinson v. California*, 370 U. S. 660 (1962).¹² A 90-day sentence was found to be excessive for the crime of being "addicted to the use of narcotics." The Court explained that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual."

¹¹ In *O'Neil v. Vermont*, 144 U. S. 323 (1892), the defendant had been convicted of 307 counts of "selling intoxicating liquor without authority," and sentenced to a term of over 54 years. The majority did not reach O'Neil's contention that this sentence was unconstitutional, for he did not include the point in his assignment of errors or in his brief. *Id.*, at 331. Furthermore, the majority noted that the Eighth Amendment "does not apply to the States." *Id.*, at 332. Accordingly the Court dismissed the writ of error for want of a federal question. *Id.*, at 336-337. The dissent, however, reached the Eighth Amendment question, observing that it "is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.*, at 339-340 (Field, J., dissenting).

¹² Members of the Court continued to recognize the principle of proportionality in the meantime. See, e. g., *Trop v. Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion); *id.*, at 111 (BRENNAN, J., concurring); *id.*, at 125-126 (Frankfurter, J., dissenting).

Id., at 667. Thus there was no question of an inherently barbaric punishment. "But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Ibid.*

Most recently, the Court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. *Enmund v. Florida*, 458 U. S. — (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used); *Coker v. Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion) ("sentence of death is grossly disproportionate and excessive punishment for the crime of rape"); *id.*, at 601 (POWELL, J., concurring in the judgment in part and dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman"). And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, e. g., *Hutto v. Finney*, 437 U. S. 678, 685 (1978); *Ingraham v. Wright*, 430 U. S. 651, 667 (1977); *Gregg v. Georgia*, 428 U. S. 153, 171-172 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); cf. *Hutto v. Davis*, 454 U. S. 370, 374, and n. 3 (1982) (*per curiam*) (recognizing that some prison sentences may be constitutionally disproportionate); *Rummel v. Estelle*, 445 U. S., at 274, n. 11 (same).

C

There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences.¹³ The constitutional language itself suggests no

¹³ According to *Rummel v. Estelle*, 445 U. S. 263 (1980), "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . the length of sentence actually imposed is purely a matter of legislative prerogative."

exception for imprisonment. We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, *Ingraham v. Wright*, 430 U. S., at 664, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. See *Hodges v. Humkin*, *supra*. And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis. See, e. g., *Weems*, 217 U. S., at 377; cf. *Hutto v. Finney*, 437 U. S., at 685 ("Confinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards").

When we have applied the proportionality principle in capital cases, we have drawn no distinction with imprisonment. See *Gregg v. Georgia*, 428 U. S., at 176 (opinion of Stewart, POWELL, and STEVENS, JJ.). It is true that the "penalty of death differs from all other forms of criminal punishment, not in degree but in kind." *Furman v. Georgia*, 408 U. S. 238, 306 (1972) (Stewart, J., concurring). As a result, "our decisions [in] capital cases are of limited assistance in deciding the constitutionality of the punishment" in a noncapital case. *Rummel v. Estelle*, 445 U. S., at 272. All this means, however, is that, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare,"¹⁴ *ibid.* (emphasis added);

Id., at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible. To the extent that the State makes this argument here, we find it meritless.

¹⁴ In *Enmund*, for example, the Court found the death penalty to be excessive for felony murder in the circumstances of that case. But clearly no

see *Hutto v. Davis*, 454 U. S., at 374. It does not mean that proportionality analysis is entirely inapplicable in noncapital cases.

In sum, we hold that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.¹⁵ But no penalty is *per se* constitutional. As the Court noted in *Robinson v. California*, 370 U. S., at 667, a single day in prison may be unconstitutional in some circumstances.

III

A

In reviewing sentences under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized.¹⁶ First, we look to the gravity of the offense and the harshness of the penalty. In *Enmund*, for example, the Court examined the circumstances of the defendant's crime in great detail. 458 U. S., at ———. In *Coker* the Court considered the seriousness of the crime of rape, and compared it to other crimes, such as murder. 433

sentence short of death would be unconstitutional for Enmund's crime.

¹⁵ In view of the substantial deference properly due to legislatures and sentencing courts, most reviewing courts normally will not be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

¹⁶ As the Court has indicated, no one factor will be dispositive. See *Hutto v. Davis*, 454 U. S. 370, 373-374 n. 2 (1982) (*per curiam*); *Rummel v. Estelle*, 445 U. S., at 275-276. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. No single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment.

U. S., at 597–598 (plurality opinion); *id.*, at 603 (POWELL, J., concurring in the judgment in part and dissenting in part). In *Robinson* the emphasis was placed on the nature of the “crime.” 370 U. S., at 666–667. And in *Weems*, the Court’s opinion commented in two separate places on the pettiness of the offense. 217 U. S., at 363 and 365. Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate. See, e. g., *Coker*, 433 U. S., at 598 (plurality opinion); *Weems*, 217 U. S., at 366–367.

Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. Thus in *Enmund* the Court noted that all of the other felony murderers on death row in Florida were more culpable than the petitioner there. 458 U. S., at —. The *Weems* Court identified an impressive list of more serious crimes that were subject to less serious penalties. 217 U. S., at 380–381.

Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. In *Enmund* the Court conducted an extensive review of capital punishment statutes and determined that “only about a third of American jurisdictions would ever permit a defendant [such as *Enmund*] to be sentenced to die.” 458 U. S., at —. Even in those jurisdictions, however, the death penalty was almost never imposed under similar circumstances. *Id.*, at —. The Court’s review of foreign law also supported its conclusion. *Id.*, at —, n. 22. The analysis in *Coker* was essentially the same. 433 U. S., at 593–597. And in *Weems* the Court relied on the fact that, under federal law, a similar crime was punishable by only two year’s imprisonment and a fine. 217 U. S., at 380. Cf. *Trop v. Dulles*, 356 U. S. 86, 102–103 (1958) (plurality opinion).

In sum, a court’s proportionality analysis under the Eighth Amendment should be guided by objective criteria, including

(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.

B

Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments—just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. Thus in *Enmund* the Court determined that the petitioner's conduct was not ~~so~~ serious as his accomplices' conduct. Indeed, there are widely shared views as to the relative seriousness of crimes. See Rossi, Waite, Bose & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 Am. Soc. Rev. 224, 237 (1974). For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence. Cf. Tr. of Oral Arg. 16 (the State recognizes that the criminal law is more protective of people than property).

There are other widely accepted principles that courts may apply in measuring the harm caused or threatened to the victim or society. The absolute magnitude of the crime may be relevant. Stealing a million dollars is viewed as more serious than stealing a hundred dollars—a point recognized in statutes distinguishing petty theft from grand theft. See, e. g., S.D. Codified Laws §22-30A-17 (Supp. 1982). Few would dispute that a lesser included offense should not be punished more severely than the greater offense. Thus a court is justified in viewing assault with intent to murder as more serious than simple assault. See *Roberts v. Collins*, 544 F. 2d 168, 169-170 (CA4 1976) (*per curiam*), *cert. denied*, 430 U. S. 973 (1977). Cf. *Dembowski v. State*, 251 Ind. 250,

252, 240 N. E. 2d 815, 817 (1968) (armed robbery more serious than robbery); *Cannon v. Gladden*, 203 Or. 629, 632, 281 P. 2d 233, 235 (1955) (rape more serious than assault with intent to commit rape). It is also widely recognized that attempts are less serious than completed crimes. See, e. g., S.D. Codified Laws § 22-4-1 (1979); 4 Blackstone *15. Similarly, an accessory after the fact should not be subject to a higher penalty than the principal. See, e. g., 18 U. S. C. § 3.

Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In *Enmund* the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices. 458 U. S., at —. Most would agree that negligent conduct is less serious than intentional conduct. South Dakota, for example, ranks criminal acts in ascending order of seriousness as follows: negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts. S.D. Codified Laws § 22-1-2(1)(f) (Supp. 1982). A court is also entitled to look at a defendant's motive in committing a crime. Thus a murder may be viewed as more serious when committed pursuant to a contract. See, e. g., Mass. Gen. Laws Ann., ch. 279, § 69(a)(5) (West Supp. 1982); cf. 4 Blackstone *15; *In re Foss*, 10 Cal.3d 910, 519 P. 2d 1073 (1974).

This list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.

C

Application of the factors that we identify also assumes that courts are able to compare different sentences. This assumption, too, is justified. The easiest comparison, of course, is between capital punishment and noncapital punish-

ments, for the death penalty is different from other punishments in kind rather than degree.¹⁷ For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence,¹⁸ but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

The Sixth Amendment right to a jury trial is an example. In *Williams v. Florida*, 399 U. S. 78 (1970), the Court upheld a criminal conviction returned by a unanimous 6-member jury, and in *Apodaca v. Oregon*, 406 U. S. 404 (1972), we upheld a conviction returned by ten members of a 12-member jury. In *Ballew v. Georgia*, 435 U. S. 223 (1978), however, we reversed a conviction returned by a unanimous 5-member jury. JUSTICE BLACKMUN "readily admit[ted] that we d[id] not pretend to discern a clear line between six members and five." *Id.*, at 239 (opinion of BLACKMUN, J.). He nevertheless found a difference between them of "constitutional significance." *Ibid.*; cf. *id.*, at 245-246 (POWELL, J., concurring in the judgment). And the following Term, in *Burch v. Louisiana*, 441 U. S. 130 (1979), we reversed a conviction returned by five members of a 6-member jury:

"[W]e do not pretend the ability to discern *a priori* a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases. But . . . it is inevitable that lines must be drawn

¹⁷ There is also a clear line between sentences of imprisonment and sentences involving no deprivation of liberty. See *Argersinger v. Hamlin*, 407 U. S. 25 (1972).

¹⁸ The possibility of parole may complicate the comparison, depending upon the time and conditions of its availability.

somewhere if the substance of the jury trial right is to be preserved." *Id.*, at 137 (citations omitted).

Another Sixth Amendment case illustrates the line-drawing function of the judiciary, and offers guidance on the method by which some lines may be drawn. In *Baldwin v. New York*, 399 U. S. 66 (1970), the Court determined that a defendant has a right to a jury trial "where imprisonment for more than six months is authorized." *Id.*, at 69 (plurality opinion). In choosing the 6-month standard, the plurality relied almost exclusively on the fact that only New York City denied the right to a jury trial for an offense punishable by more than six months. As JUSTICE WHITE explained:

"This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone—between offenses that are and that are not regarded as 'serious' for purposes of trial by jury." *Id.*, at 72-73.

In short, *Baldwin* clearly demonstrates that a court properly may distinguish one sentence of imprisonment from another. It also supports our holding that courts properly may look to the practices in other jurisdictions in deciding where lines between sentences should be drawn.

IV

It remains to apply the analytical framework established by our prior decisions to the case before us. We first consider the relevant criteria, viewing Helm's sentence as life imprisonment without possibility of parole. We then consider the State's argument that the possibility of commutation is sufficient to save an otherwise unconstitutional sentence.

A

Helm's crime was "one of the most passive felonies a person could commit." *State v. Helm*, 287 N. W. 2d, at 501

(Henderson, J., dissenting). It involved neither violence nor threat of violence to any person. The \$100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft.¹⁹ It is easy to see why such a crime is viewed by society as among the less serious offenses. See Rossi et al., 39 Am. Soc. Rev., at 229.

Helm, of course, was not charged simply with uttering a "no account" check, but also with being an habitual offender.²⁰ And a State is justified in punishing a recidivist more severely than it punishes a first offender. Helm's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor.²¹ All were nonviolent and none was a crime against a person. Indeed, there was no minimum amount in either the burglary or the false pretenses statutes, see nn. 1 and 2,

¹⁹ If Helm had been convicted simply of taking \$100 from a cash register, S.D. Codified Laws § 22-30A-1 (1979), or defrauding someone of \$100, § 22-30A-3, or obtaining \$100 through extortion, § 22-30A-4(1), or blackmail, § 22-30A-4(3), or using a false credit card to obtain \$100, § 22-30A-8.1, or embezzling \$100, § 22-30A-10, he would not be in prison today. All of these offenses would have been petty theft, a misdemeanor. § 22-30A-17 (amended 1982). Similarly, if Helm had written a \$100 check against insufficient funds, rather than a nonexistent account, he would have been guilty of a misdemeanor. §§ 22-41-1. Curiously, under South Dakota law there is no distinction between writing a "no account" check for a large sum and writing a "no account" check for a small sum. § 22-41-1.2.

²⁰ We must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision.

²¹ Helm, who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have any incentive to pursue clearly needed treatment for his alcohol problem.

*or other
methods of
rehabilitation*

supra, and the minimum amount covered by grand larceny statute was fairly small, see n. 3, *supra*.²²

Helm's present sentence is life imprisonment without possibility of parole.²³ Barring executive clemency, see *infra*, at —, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in *Rummel v. Estelle*. Rummel was likely to have been eligible for parole within 12 years of his initial confinement,²⁴ a fact on which the Court relied heavily. See 445 U. S., at 280–281. Helm's sentence is more severe than any [REDACTED] sentence the State could have imposed on any criminal for any crime. See note 6, *supra*. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

other than life imprisonment without possibility of parole that

We next consider the sentences that could be imposed on other criminals in the same jurisdiction. When Helm was sentenced, a South Dakota court was required to impose a life sentence for murder, S.D. Codified Laws § 22-16-12 (1979) (amended 1980), and was authorized to impose a life sentence for treason, § 22-8-1, first degree manslaughter, § 22-16-15, first degree arson, § 22-33-1, and kidnapping, S.D. Comp. Laws Ann. § 22-19-1 (1967 ed., supp. 1978) (amended 1979). No other crime was punishable so severely on the first offense. Attempted murder, S.D. Codified Laws

²² As suggested at oral argument, the third-degree burglary statute covered entering a building with the intent to steal a loaf of bread. Tr. of Oral Arg. 14–16. It appears that the grand larceny statute would have covered the theft of a chicken.

²³ Every life sentence in South Dakota is without possibility of parole. See *supra*, at —. We raise no question as to the general validity of sentences without possibility of parole. The only issue before us is whether, in the circumstances of this case and in light of the constitutional principle of proportionality, the sentence imposed on this petitioner violates the Eighth Amendment.

²⁴ We note that Rummel was, in fact, released within eight months of the Court's decision in his case. See L.A. Times, Nov. 16, 1980, p. 1, col. 3.

§ 22-4-1(5) (1979), placing an explosive device on an aircraft, § 22-14A-5, and first degree rape, § 22-22-1 (amended 1980 and 1982), were only Class 2 felonies. Aggravated riot, § 22-10-5, was only a Class 3 felony. Distribution of heroin, §§ 22-42-2 (amended 1982), 34-20B-13(7) (1977), and aggravated assault, § 22-18-1.1 (amended 1980 and 1981), were only Class 4 felonies.

Helm's habitual offender status complicates our analysis, but relevant comparisons are still possible. Under § 22-7-7, the penalty for a second or third felony is increased by one class. Thus a life sentence was mandatory when a second or third conviction was for treason, first degree manslaughter, kidnapping, or first degree arson, and a life sentence would have been authorized when a second or third conviction was for such crimes as attempted murder, placing an explosive device on an aircraft, or first degree rape. Finally, § 22-7-8, under which Helm was sentenced, authorized life imprisonment after three prior convictions, regardless of the crimes.

In sum, there were a handful of crimes that were necessarily punished by life imprisonment: murder; and treason, first degree manslaughter, kidnapping, or first degree arson on a second or third offense. There was a larger group for which life imprisonment was authorized in the discretion of the sentencing judge, including: treason, first degree manslaughter, kidnapping, or first degree arson; attempted murder, placing an explosive device on an aircraft, or first degree rape on a second or third offense; and any felony after three prior offenses. Finally, there was a large group of very serious offenses for which life imprisonment was not authorized, including a third offense of heroin dealing or aggravated assault.

Criminals committing any of these offenses ordinarily would be thought more deserving of punishment than one uttering a "no account" check—even when the bad-check writer had already committed six minor felonies. Furthermore, there is no indication in the record that any habitual offender

other than Helm has ever been given the maximum sentence on the basis of comparable crimes. It is more likely that the possibility of life imprisonment under § 22-7-8 generally is reserved for criminals such as fourth-time heroin dealers, while habitual bad-check writers receive more lenient treatment.²⁵ In any event, Helm has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.

Finally, we compare the sentences imposed for commission of the same crime in other jurisdictions. The Court of Appeals found that "Helm could have received a life sentence without parole for his offense in only one other state, Nevada," 684 F. 2d, at 586, and we have no reason to doubt this finding. See Tr. of Oral Arg. 21. At the very least, therefore, it is clear that Helm could not have received such a severe sentence in 48 of the 50 States. But even under Nevada law, a life sentence without possibility of parole is merely authorized in these circumstances. See Nev. Rev. Stat. § 207.010(2) (1981). We are not advised that any defendant such as Helm, whose prior offenses were so minor, actually has received the maximum penalty in Nevada.²⁶ It

²⁵ The State contends that § 22-7-8 is more lenient than the Texas habitual offender statute in *Rummel*, for life imprisonment under § 22-7-8 is discretionary rather than mandatory. Brief for Petitioner 22. Helm, however, has challenged only his own sentence. No one suggests that § 22-7-8 may not be applied constitutionally to fourth-time heroin dealers or other violent criminals. Thus we do not question the legislature's judgment. Unlike in *Rummel*, a lesser sentence here could have been entirely consistent with both the statute and the Eighth Amendment. See Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1160 (1979).

²⁶ Under § 207.010(2), a Nevada court is authorized to impose a sentence of "imprisonment in the state prison for life with or without possibility of parole. If the penalty fixed by the court is life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of 10 years has been served." It appears that most sentences imposed under § 207.010(2) permit parole, even when the prior crimes are far more serious than Helm's. See, e. g., *Rusling v. State*, 96 Nev. 778, 617 P. 2d 1302

appears that Helm was treated more severely than he would have been in any other State.

B

The State argues that the present case is essentially the same as *Rummel v. Estelle*, for the possibility of parole in that case is matched by the possibility of executive clemency here. The State reasons that the Governor could commute Helm's sentence to a term of years. We conclude, however, that the South Dakota commutation system is fundamentally different from the parole system that was before us in *Rummel*.

As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. See, e. g., *Greenholz v. Nebraska Penal Inmates*, 442 U. S. 1 (1979) (detailing Nebraska parole procedures); *Morrissey v. Brewer*, 408 U. S. 471, 477 (1972) ("the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system"). Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards. See, e. g., *Connecticut Board of Pardons v. Dumschat*, 452 U. S. 458 (1981).

We explicitly have recognized the distinction between parole and commutation in our prior cases.²⁷ Writing on behalf

(1980) (possession of a firearm by an ex-felon, two instances of driving an automobile without the owner's consent, four first degree burglaries, two sales of marijuana, two sales of a restricted dangerous drug, one sale of heroin, one escape from state prison, and one second degree burglary).

²⁷ In *Rummel* itself the Court implicitly recognized that the possibility of

of the *Morrissey* Court, for example, CHIEF JUSTICE BURGER contrasted the two possibilities: "Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals." 408 U. S., at 477. In *Dumschat*, THE CHIEF JUSTICE similarly explained that "there is a vast difference between a denial of parole . . . and a state's refusal to commute a lawful sentence." 452 U. S., at 466.

The Texas and South Dakota systems in particular are very different. In *Rummel*, the Court did not rely simply on the existence of some system of parole. Rather it looked to the provisions of the system presented, including the fact that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." 445 U. S., at 280. A Texas prisoner became eligible for parole when his calendar time served plus "good conduct" time equaled one-third of the maximum sentence imposed or 20 years, whichever is less. Tex. Code Crim. Proc. Ann., Art. 42.12, § 15(b) (Vernon 1979). An entering prisoner earned 20 days good-time per 30 days served, Brief for Respondent in *Rummel*, O. T. 1979, No. 78-6386, p. 16, and this could be increased to 30 days good-time per 30 days served, Tex. Rev. Civ. Stat. Ann., Art. 6181-1, §§ 2-3 (Vernon Supp. 1982). Thus *Rummel* could have been eligible for parole in as few as 10 years, and could have expected to become eligible, in the normal course of events, in only 12 years.

commutation is not equivalent to the possibility of parole. The Court carefully "distinguish[ed] *Rummel* from a person sentenced under a recidivist statute like [Miss. Code Ann. § 99-19-83 (Supp. 1979)], which provides for a sentence of life without parole." 445 U. S., at 281. But the Mississippi Constitution empowers the Governor to grant pardons in "all criminal and penal cases, excepting those of treason and impeachment." Art. 5, § 124. The Mississippi Supreme Court has long recognized that the power to pardon includes the power to commute a convict's sentence. See *Whittington v. Stevens*, 221 Miss. 598, 603-604, 73 So. 2d 137, 139-140 (1954).

In South Dakota commutation is more difficult to obtain than parole. For example, the board of pardons and paroles is authorized to make commutation recommendations to the Governor, see n. 7, *supra*, but § 24-13-4 provides that "no recommendation for the commutation of . . . a life sentence, or for a pardon . . . , shall be made by less than the unanimous vote of all members of the board." In fact, no life sentence has been commuted in over eight years, App. 29, while parole—where authorized—has been granted regularly during that period, Tr. of Oral Arg. 8-9. Furthermore, even if Helm's sentence were commuted, he merely would be eligible to be considered for parole.²⁸ Not only is there no guarantee that he would be paroled, but the South Dakota parole system is far more stringent than the one before us in *Rummel*. Helm would have to serve three-fourths of his revised sentence before he would be eligible for parole, § 24-15-5, and the provision for good-time credits is far less generous, § 24-5-1.²⁹

The possibility of commutation is nothing more than a hope for "an *ad hoc* exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

V

The Constitution requires us to examine Helm's sentence

²⁸ The most recent commutation of a life sentence in South Dakota occurred in 1975. The record indicates, however, that the prisoner in question has still not been paroled. App. 29.

²⁹ Assume, for example, that in 1979 the Governor had commuted Helm's sentence to a term of 40 years (his approximate life expectancy). Even if Helm were a model prisoner, he would not have been eligible for parole until he had served over 21 years—more than twice the *Rummel* minimum. And this comparison is generous to South Dakota's position. If *Rummel* had been sentenced to 40 years rather than life, he could have been eligible for parole in less than 7 years.

to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment. The judgment of the Court of Appeals is accordingly

Affirmed.

2#04926

Michael Sturley
* 23073

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

L.F.P.

From: Justice Powell

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-492

HERMAN SOLEM, WARDEN, PETITIONER v. JERRY
BUCKLEY HELM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

I

By 1975 the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.¹ In 1972

¹In 1969 third-degree burglary was defined in at least two sections of the South Dakota criminal code:

"A person breaking into any dwelling house in the nighttime with intent to commit a crime but under such circumstances as do not constitute burglary in the first degree, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. § 22-32-8 (1967) (repealed 1976).

"A person breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof, or any building or part of any building, booth, tent, railroad car, vessel, vehicle as defined in § 32-14-1, or any structure or erection in which any property is kept, with intent to commit larceny or any felony, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. § 22-32-9 (1967) (repealed 1976). In 1964 and 1966 the third-degree burglary definition was essentially the same. See S.D. Code § 13.3703 (1969 ed., supp. 1960); 1965 S.D. Laws, ch. 32. Third-degree burglary was punishable by "imprisonment in the state penitentiary for any term not exceeding fifteen years." S.D. Comp. Laws Ann. § 22-32-10 (1967) (previously codified at S.D. Code § 13.3705(3)).

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he was convicted of obtaining money under false pretenses.² In 1973 he was convicted of grand larceny.³ And in 1975 he was convicted of third-offense driving while intoxicated.⁴ The record contains no details about the circumstances of any of these offenses, except that they were all nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case.

In 1979 Helm was charged with uttering a "no account" check for \$100.⁵ The only details we have of the crime are those given by Helm to the state trial court:

(1939)) (repealed 1976).

² In 1972 the relevant statute provided:

"Every person who designedly, by color or aid of any false token or writing, or other false pretense, . . . obtains from any person any money or property . . . is punishable by imprisonment in the state penitentiary not exceeding three years or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both such fine and imprisonment." S.D. Comp. Laws Ann. § 22-41-4 (1967) (repealed 1976).

³ In 1973 South Dakota defined "larceny" as "the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof." S.D. Comp. Laws Ann. § 22-37-1 (1967) (repealed 1976). Grand larceny and petit larceny were distinguished as follows:

"Grand larceny is larceny committed in any of the following cases:

- (1) When the property taken is of a value exceeding fifty dollars;
- (2) When such property, although not of a value exceeding fifty dollars, is taken from the person of another;
- (3) When such property is livestock.

Larceny in other cases is petit larceny." S.D. Comp. Laws Ann. § 22-37-2 (1967) (repealed 1976).

Grand larceny was then punishable by "imprisonment in the state penitentiary not exceeding ten years or by imprisonment in the county jail not exceeding one year." S.D. Comp. Laws Ann. § 22-37-3 (1967) (repealed 1976).

⁴ A third offense of driving while under the influence of alcohol is a felony in South Dakota. S.D. Codified Laws § 32-23-4 (1976). See 1973 S.D. Laws, ch. 195, § 7 (enacting version of § 32-23-4 in force in 1975).

⁵ The governing statute provides, in relevant part:

"I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places." *State v. Helm*, 287 N. W. 2d 497, 501 (S.D. 1980) (Henderson, J., dissenting) (quoting Helm).

After offering this explanation, Helm pleaded guilty.

Ordinarily the maximum punishment for uttering a "no account" check would have been five years imprisonment in the state penitentiary and a five thousand dollar fine. See S.D. Comp. Laws Ann. § 22-6-1(6) (1967 ed., supp. 1978) (now codified at S.D. Codified Laws § 22-6-1(7) (Supp. 1982)). As a result of his criminal record, however, Helm was subject to South Dakota's recidivist statute:

"When a defendant has been convicted of at least three prior convictions [*sic*] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." S.D. Codified Laws § 22-7-8 (1979) (amended 1981).

The maximum penalty for a "Class 1 felony" was life imprisonment in the state penitentiary and a twenty-five thousand dollar fine.⁶ S.D. Comp. Laws Ann. § 22-6-1(2) (1967 ed.,

"Any person who, for himself or as an agent or 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 § 22-41-1.2 (1979).

⁶When Helm was sentenced in April 1979, South Dakota law classified felonies as follows:

"Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished from each other by the respective maximum penalties hereinafter set forth which are authorized upon conviction:

supp. 1978) (now codified at S.D. Codified Laws § 22-6-1(3) (Supp. 1982)). Moreover, South Dakota law explicitly provides that parole is unavailable: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S.D. Codified Laws § 24-15-4 (1979). The Governor⁷ is authorized to pardon prisoners, or to commute their sentences, S.D. Const., Art. IV, § 3, but no other relief from sentence is available even to a rehabilitated prisoner.

Immediately after accepting Helm's guilty plea, the South Dakota Circuit Court sentenced Helm to life imprisonment under § 22-7-8. The court explained:

"I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record

(1) Class A felony: life imprisonment in the state penitentiary. A lesser sentence may not be given for a Class A felony;

(2) Class 1 felony: life imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;

(3) Class 2 felony: twenty-five years imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;

(4) Class 3 felony: fifteen years imprisonment in the state penitentiary. In addition, a fine of fifteen thousand dollars may be imposed;

(5) Class 4 felony: ten years imprisonment in the state penitentiary. In addition, a fine of ten thousand dollars may be imposed;

(6) Class 5 felony: five years imprisonment in the state penitentiary. In addition, a fine of five thousand dollars may be imposed; and

(7) Class 6 felony: two years imprisonment in the state penitentiary or a fine of two thousand dollars, or both.

"Nothing in this section shall limit increased sentences for habitual criminals

"Except in cases where punishment is prescribed by law, every offense declared to be a felony and not otherwise classified is a Class 6 felony." S.D. Comp. Laws Ann. § 22-6-1 (1967 ed., supp. 1978) (amended 1979 and 1980).

⁷The board of pardons and paroles is authorized to make recommendations to the Governor, S.D. Codified Laws § 24-14-1 (1979); § 24-14-5; S.D. Executive Order 82-04 (Apr. 12, 1982), but the Governor is not bound by the recommendation, § 24-14-5.

would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over.'" *State v. Helm*, 287 N. W. 2d, at 500 (Henderson, J., dissenting) (quoting S.D. Circuit Court, Seventh Judicial Circuit, Pennington County (Parker, J.)).

The South Dakota Supreme Court, in a 3-2 decision, affirmed the sentence despite Helm's argument that it violated the Eighth Amendment. *State v. Helm, supra*.

After Helm had served two years in the state penitentiary, he requested the Governor to commute his sentence to a fixed term of years. Such a commutation would have had the effect of making Helm eligible to be considered for parole when he had served three-fourths of his new sentence. See S.D. Codified Laws § 24-15-5(3) (1979). The Governor denied Helm's request in May 1981. App. 26.

In November 1981, Helm sought habeas relief in the United States District Court for the District of South Dakota. Helm argued, among other things, that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. Although the District Court recognized that the sentence was harsh, it concluded that this Court's recent decision in *Rummel v. Estelle*, 445 U. S. 263 (1980), was dispositive. It therefore denied the writ.

The United States Court of Appeals for the Eighth Circuit reversed. 684 F. 2d 582 (1982). The Court of Appeals noted that *Rummel v. Estelle* was distinguishable. Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabilitation as a goal of the criminal justice system. The Court of Appeals examined the nature of Helm's offenses, the nature of his sentence, and the sentence he could have received in other States for the

If we granted cert to consider this

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SOLEM v. HELM

same offense. It concluded, on the basis of this examination, that Helm's sentence was "grossly disproportionate to the nature of the offense." 684 F. 2d, at 587. It therefore directed the District Court to issue the writ unless the State resentenced Helm. *Ibid.*

~~In view of the important Eighth Amendment question presented by this case, we granted certiorari.~~ 459 U. S. ____ (1982). We now affirm.

II

The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

A

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that "amercements"⁸ may not be excessive.⁹ And the principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275). These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments. See, e. g., *Le Gras v. Bailiff of Bishop of Winches-*

⁸ An amercement was similar to a modern-day fine. It was the most common criminal sanction in thirteenth century England. See 2 F. Pollock & F. Maitland, *The History of English Law* 513-515 (2d ed. 1909).

⁹ Chapter 20 declared that "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." See 1 S.D. Codified Laws, p. 4 (1978) (translation of Magna Carta). According to Maitland, "there was no clause in Magna Carta more grateful to the mass of the people . . ." F. Maitland, *Pleas of the Crown for the County of Gloucester* xxxiv (1884). Chapter 21 granted the same rights to the nobility, and chapter 22 granted the same rights to the clergy.

ter, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), reprinted in 52 Selden Society 3 (1934). When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional. See, e. g., *Hodges v. Humkin*, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K.B. 1615) (Croke, J.) ("imprisonment ought always to be according to the quality of the offence").

The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 W. & M., sess. 2, ch. 2 (1689). Although the precise scope of this provision is uncertain, it at least incorporated "the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959); see 4 W. Blackstone, *Commentaries* *16-19 (1769); see also *id.*, at *16-17 (in condemning "punishments of unreasonable severity," uses "cruel" to mean severe or excessive). Indeed, barely three months after the Bill of Rights was adopted, the House of Lords declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon, was excessive and exorbitant, against magna charta, the common right of the subject, and against the law of the land." *Earl of Devon's Case*, 11 State Trials 133, 136 (1689).

When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights,¹⁰ they also adopted the English principle of proportionality. The people were guaranteed the rights they had possessed as English subjects—including the right to be free from excessive punishments.

¹⁰ This language had earlier been incorporated in the Virginia Declaration of Rights, Art. I, § 9, authored by George Mason.

B

The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.¹¹ In the leading case of *Weems v. United States*, 217 U. S. 349 (1910), the defendant had been convicted of falsifying a public document and sentenced to 15 years of "cadena temporal," a form of imprisonment that included hard labor in chains and permanent civil disabilities. The Court noted "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense," *id.*, at 367, and held that the sentence violated the Eighth Amendment. The Court endorsed the principle of proportionality as a constitutional standard, see, e. g., *id.*, at 372-373, and determined that the sentence before it was "cruel in its excess of imprisonment," *id.*, at 377.

The Court next applied the principle to invalidate a criminal sentence in *Robinson v. California*, 370 U. S. 660 (1962).¹² A 90-day sentence was found to be excessive for the crime of being "addicted to the use of narcotics." The Court explained that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual."

¹¹ In *O'Neil v. Vermont*, 144 U. S. 323 (1892), the defendant had been convicted of 307 counts of "selling intoxicating liquor without authority," and sentenced to a term of over 54 years. The majority did not reach O'Neil's contention that this sentence was unconstitutional, for he did not include the point in his assignment of errors or in his brief. *Id.*, at 331. Furthermore, the majority noted that the Eighth Amendment "does not apply to the States." *Id.*, at 332. Accordingly the Court dismissed the writ of error for want of a federal question. *Id.*, at 336-337. The dissent, however, reached the Eighth Amendment question, observing that it "is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.*, at 339-340 (Field, J., dissenting).

¹² Members of the Court continued to recognize the principle of proportionality in the meantime. See, e. g., *Trop v. Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion); *id.*, at 111 (BRENNAN, J., concurring); *id.*, at 125-126 (Frankfurter, J., dissenting).

Id., at 667. Thus there was no question of an inherently barbaric punishment. "But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Ibid.*

Most recently, the Court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. *Enmund v. Florida*, 458 U. S. — (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used); *Coker v. Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion) ("sentence of death is grossly disproportionate and excessive punishment for the crime of rape"); *id.*, at 601 (POWELL, J., concurring in the judgment in part and dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman"). And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, e. g., *Hutto v. Finney*, 437 U. S. 678, 686 (1978); *Ingraham v. Wright*, 430 U. S. 651, 667 (1977); *Gregg v. Georgia*, 428 U. S. 153, 171-172 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); cf. *Hutto v. Davis*, 454 U. S. 370, 374, and n. 3 (1982) (*per curiam*) (recognizing that some prison sentences may be constitutionally disproportionate); *Rummel v. Estelle*, 445 U. S., at 274, n. 11 (same).

C

There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences.¹² The constitutional language itself suggests no

¹² According to *Rummel v. Estelle*, 445 U. S. 268 (1980), "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . the length of sentence actually imposed is purely a matter of legislative prerogative."

exception for imprisonment. We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, *Ingraham v. Wright*, 430 U. S., at 664, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. See *Hodges v. Humkin*, *supra*. And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis. See, e. g., *Weems*, 217 U. S., at 377; cf. *Hutto v. Finney*, 437 U. S., at 685 ("Confinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards").

When we have applied the proportionality principle in capital cases, we have drawn no distinction with imprisonment. See *Gregg v. Georgia*, 428 U. S., at 176 (opinion of Stewart, POWELL, and STEVENS, JJ.). It is true that the "penalty of death differs from all other forms of criminal punishment, not in degree but in kind." *Furman v. Georgia*, 408 U. S. 238, 306 (1972) (Stewart, J., concurring). As a result, "our decisions [in] capital cases are of limited assistance in deciding the constitutionality of the punishment" in a noncapital case. *Rummel v. Estelle*, 445 U. S., at 272. All this means, however, is that, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare,"¹⁴ *ibid.* (emphasis added);

Id., at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible. To the extent that the State makes this argument here, we find it meritless.

¹⁴ In *Enmund*, for example, the Court found the death penalty to be excessive for felony murder in the circumstances of that case. But clearly no

see *Hutto v. Davis*, 454 U. S., at 374. It does not mean that proportionality analysis is entirely inapplicable in noncapital cases.

In sum, we hold that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.¹⁵ But no penalty is *per se* constitutional. As the Court noted in *Robinson v. California*, 370 U. S., at 667, a single day in prison may be unconstitutional in some circumstances.

III

A

In reviewing sentences under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized.¹⁶ First, we look to the gravity of the offense and the harshness of the penalty. In *Enmund*, for example, the Court examined the circumstances of the defendant's crime in great detail. 458 U. S., at ———. In *Coker* the Court considered the seriousness of the crime of rape, and compared it to other crimes, such as murder. 433

sentence short of death would be ~~unconstitutional~~^{disproportionate} for Enmund's crime.

¹⁵ In view of the substantial deference properly due to legislatures and sentencing courts, most reviewing courts normally will not be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

¹⁶ As the Court has indicated, no one factor will be dispositive. See *Hutto v. Davis*, 454 U. S. 370, 373-374 n. 2 (1982) (*per curiam*); *Rummel v. Estelle*, 445 U. S., at 275-276. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. No single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment.

U. S., at 597-598 (plurality opinion); *id.*, at 603 (POWELL, J., concurring in the judgment in part and dissenting in part). In *Robinson* the emphasis was placed on the nature of the "crime." 370 U. S., at 666-667. And in *Weems*, the Court's opinion commented in two separate places on the pettiness of the offense. 217 U. S., at 363 and 365. Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate. See, *e. g.*, *Coker*, 433 U. S., at 598 (plurality opinion); *Weems*, 217 U. S., at 366-367.

Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. Thus in *Enmund* the Court noted that all of the other felony murderers on death row in Florida were more culpable than the petitioner there. 458 U. S., at —. The *Weems* Court identified an impressive list of more serious crimes that were subject to less serious penalties. 217 U. S., at 380-381.

Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. In *Enmund* the Court conducted an extensive review of capital punishment statutes and determined that "only about a third of American jurisdictions would ever permit a defendant [such as Enmund] to be sentenced to die." 458 U. S., at —. Even in those jurisdictions, however, the death penalty was almost never imposed under similar circumstances. *Id.*, at —. The Court's review of foreign law also supported its conclusion. *Id.*, at —, n. 22. The analysis in *Coker* was essentially the same. 433 U. S., at 593-597. And in *Weems* the Court relied on the fact that, under federal law, a similar crime was punishable by only two year's imprisonment and a fine. 217 U. S., at 380. Cf. *Trop v. Dulles*, 356 U. S. 86, 102-103 (1958) (plurality opinion).

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including

(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.

B

Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments—just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. Thus in *Enmund* the Court determined that the petitioner's conduct was not so serious as his accomplices' conduct. Indeed, there are widely shared views as to the relative seriousness of crimes. See Rossi, Waite, Bose & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 Am. Soc. Rev. 224, 237 (1974). For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence. Cf. Tr. of Oral Arg. 16 (the State recognizes that the criminal law is more protective of people than property).

There are other widely accepted principles that courts may apply in measuring the harm caused or threatened to the victim or society. The absolute magnitude of the crime may be relevant. Stealing a million dollars is viewed as more serious than stealing a hundred dollars—a point recognized in statutes distinguishing petty theft from grand theft. See, e. g., S.D. Codified Laws § 22-30A-17 (Supp. 1982). Few would dispute that a lesser included offense should not be punished more severely than the greater offense. Thus a court is justified in viewing assault with intent to murder as more serious than simple assault. See *Roberts v. Collins*, 544 F. 2d 168, 169-170 (CA4 1976) (*per curiam*), cert. denied, 430 U. S. 973 (1977). Cf. *Dembowski v. State*, 251 Ind. 250,

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252, 240 N. E. 2d 815, 817 (1968) (armed robbery more serious than robbery); *Cannon v. Gladden*, 203 Or. 629, 632, 281 P. 2d 233, 235 (1955) (rape more serious than assault with intent to commit rape). It ~~is~~ also widely recognized that attempts are less serious than completed crimes. See, e. g., S.D. Codified Laws § 22-4-1 (1979); 4 Blackstone *15. Similarly, an accessory after the fact should not be subject to a higher penalty than the principal. See, e. g., 18 U. S. C. § 3.

is generally

Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In *Enmund* the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices. 458 U. S., at —. Most would agree that negligent conduct is less serious than intentional conduct. South Dakota, for example, ranks criminal acts in ascending order of seriousness as follows: negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts. S.D. Codified Laws § 22-1-2(1)(f) (Supp. 1982). A court is ~~also~~ entitled to look at a defendant's motive in committing a crime. Thus a murder may be viewed as more serious when committed pursuant to a contract. See, e. g., Mass. Gen. Laws Ann., ch. 279, § 69(a)(5) (West Supp. 1982); cf. 4 Blackstone *15; *In re Foss*, 10 Cal.3d 910, 519 P. 2d 1073 (1974).

of course,

← Murder - is there a statutory difference between "knowing acts" & "intentional acts"?

This list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.

C

Application of the factors that we identify also assumes that courts are able to compare different sentences. This assumption, too, is justified. The easiest comparison, of course, is between capital punishment and noncapital punish-

ments, for the death penalty is different from other punishments in kind rather than degree.¹⁷ For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence,¹⁸ but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

The Sixth Amendment right to a jury trial is an example. In *Williams v. Florida*, 399 U. S. 78 (1970), the Court upheld a criminal conviction returned by a unanimous 6-member jury, and in *Apodaca v. Oregon*, 406 U. S. 404 (1972), we upheld a conviction returned by ten members of a 12-member jury. In *Ballew v. Georgia*, 435 U. S. 223 (1978), however, we reversed a conviction returned by a unanimous 5-member jury. JUSTICE BLACKMUN "readily admit[ted] that we d[id], not pretend to discern a clear line between six members and five." *Id.*, at 239 (opinion of BLACKMUN, J.). He nevertheless found a difference between them of "constitutional significance." *Ibid.*; cf. *id.*, at 245-246 (POWELL, J., concurring in the judgment). And the following Term, in *Burch v. Louisiana*, 441 U. S. 130 (1979), we reversed a conviction returned by five members of a 6-member jury:

"[W]e do not pretend the ability to discern *a priori* a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases. But . . . it is inevitable that lines must be drawn

¹⁷There is also a clear line between sentences of imprisonment and sentences involving no deprivation of liberty. See *Argersinger v. Hamlin*, 407 U. S. 25 (1972).

¹⁸The possibility of parole may complicate the comparison, depending upon the time and conditions of its availability.

somewhere if the substance of the jury trial right is to be preserved." *Id.*, at 137 (citations omitted).

Another Sixth Amendment case illustrates the line-drawing function of the judiciary, and offers guidance on the method by which some lines may be drawn. In *Baldwin v. New York*, 399 U. S. 66 (1970), the Court determined that a defendant has a right to a jury trial "where imprisonment for more than six months is authorized." *Id.*, at 69 (plurality opinion). In choosing the 6-month standard, the plurality relied almost exclusively on the fact that only New York City denied the right to a jury trial for an offense punishable by more than six months. As JUSTICE WHITE explained:

"This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone—between offenses that are and that are not regarded as 'serious' for purposes of trial by jury." *Id.*, at 72-73.

In short, *Baldwin* clearly demonstrates that a court properly may distinguish one sentence of imprisonment from another. It also supports our holding that courts properly may look to the practices in other jurisdictions in deciding where lines between sentences should be drawn.

IV

It remains to apply the analytical framework established by our prior decisions to the case before us. We first consider the relevant criteria, viewing Helm's sentence as life imprisonment without possibility of parole. We then consider the State's argument that the possibility of commutation is sufficient to save an otherwise unconstitutional sentence.

A

Helm's crime was "one of the most passive felonies a person could commit." *State v. Helm*, 287 N. W. 2d, at 501

(Henderson, J., dissenting). It involved neither violence nor threat of violence to any person. The \$100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft.¹⁹ It is easy to see why such a crime is viewed by society as among the less serious offenses. See Rossi et al., 39 Am. Soc. Rev., at 229.

Helm, of course, was not charged simply with uttering a "no account" check, but also with being an habitual offender.²⁰ And a State is justified in punishing a recidivist more severely than it punishes a first offender. Helm's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor.²¹ All were nonviolent and none was a crime against a person. Indeed, there was no minimum amount in either the burglary or the false pretenses statutes, see nn. 1 and 2,

¹⁹ If Helm had been convicted simply of taking \$100 from a cash register, S.D. Codified Laws § 22-30A-1 (1979), or defrauding someone of \$100, § 22-30A-3, or obtaining \$100 through extortion, § 22-30A-4(1), or blackmail, § 22-30A-4(3), or using a false credit card to obtain \$100, § 22-30A-8.1, or embezzling \$100, § 22-30A-10, he would not be in prison today. All of these offenses would have been petty theft, a misdemeanor. § 22-30A-17 (amended 1982). Similarly, if Helm had written a \$100 check against insufficient funds, rather than a nonexistent account, he would have been guilty of a misdemeanor. §§ 22-41-1. Curiously, under South Dakota law there is no distinction between writing a "no account" check for a large sum and writing a "no account" check for a small sum. § 22-41-1.2.

²⁰ We must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision.

²¹ Helm, who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have any incentive to pursue clearly needed treatment for his alcohol problem.

Make - It seems to me that the first & second Hs on this page are addressing the same point: the disproportionality of Helm's sentence when compared with other S.D. max. sentences.

82-492-OPINION

supra, and the minimum amount covered by ^{the} grand larceny statute was fairly small, see n. 3, *supra*.²²

Helm's present sentence is life imprisonment without possibility of parole.²³ Barring executive clemency, see *infra*, at —, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in *Rummel v. Estelle*. Rummel was likely to have been eligible for parole within 12 years of his initial confinement,²⁴ a fact on which the Court relied heavily. See 445 U. S., at 280-281. [Helm's sentence is more severe than any other sentence the State could have imposed on any criminal for any crime. See note 6, *supra*.] Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

~~We next consider the sentences~~ that could be imposed on other criminals in the same jurisdiction. When Helm was sentenced, a South Dakota court was required to impose a life sentence for murder, S.D. Codified Laws §22-16-12 (1979) (amended 1980), and was authorized to impose a life sentence for treason, §22-8-1, first degree manslaughter, §22-16-15, first degree arson, §22-33-1, and kidnapping, S.D. Comp. Laws Ann. §22-19-1 (1967 ed., supp. 1978) (amended 1979). No other crime was punishable so severely on the first offense. Attempted murder, S.D. Codified Laws

²² As suggested at oral argument, the third-degree burglary statute covered entering a building with the intent to steal a loaf of bread. Tr. of Oral Arg. 14-16. It appears that the grand larceny statute would have covered the theft of a chicken.

²³ Every life sentence in South Dakota is without possibility of parole. See *supra*, at —. We raise no question as to the general validity of sentences without possibility of parole. The only issue before us is whether, in the circumstances of this case and in light of the constitutional principle of proportionality, the sentence imposed on this petitioner violates the Eighth Amendment.

²⁴ We note that Rummel was, in fact, released within eight months of the Court's decision in his case. See L.A. Times, Nov. 16, 1980, p. 1, col. 3.

Then the lead sentence in 2nd H seems inaccurate

Make - you stand by this?

~~But~~ The comparative severity of Helm's sentence is accentuated by the maximum sentence

Mike - by adding the phrase
in pencil, it seems ~~clearer~~ clearer
that we are talking consistently about
habitual offenders

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SOLEM v. HELM

19

§ 22-4-1(5) (1979), placing an explosive device on an aircraft, § 22-14A-5, and first degree rape, § 22-22-1 (amended 1980 and 1982), were only Class 2 felonies. Aggravated riot, § 22-10-5, was only a Class 3 felony. Distribution of heroin, § 22-42-2 (amended 1982), 34-20B-13(7) (1977), and aggravated assault, § 22-18-1.1 (amended 1980 and 1981), were only Class 4 felonies.

Helm's habitual offender status complicates our analysis, but relevant comparisons are still possible. Under § 22-7-7, the penalty for a second or third felony is increased by one class. Thus a life sentence was mandatory when a second or third conviction was for treason, first degree manslaughter, kidnapping, or first degree arson, and a life sentence would have been authorized when a second or third conviction was for such crimes as attempted murder, placing an explosive device on an aircraft, or first degree rape. Finally, § 22-7-8, under which Helm was sentenced, authorized life imprisonment after three prior convictions, regardless of the crimes.

In sum, there were a handful of crimes that were necessarily punished by life imprisonment: murder; and treason, first degree manslaughter, kidnapping, or first degree arson on a second or third offense. There was a larger group for which life imprisonment was authorized in the discretion of the sentencing judge, including: treason, first degree manslaughter, kidnapping, or first degree arson; attempted murder, placing an explosive device on an aircraft, or first degree rape on a second or third offense; and any felony after three prior offenses. Finally, there was a large group of very serious offenses for which life imprisonment was not authorized, including a third offense of heroin dealing or aggravated assault.

Criminals committing any of these offenses ordinarily would be thought more deserving of punishment than one uttering a "no account" check—even when the bad-check writer had already committed six minor felonies. Furthermore, there is no indication in the record that any habitual offender

murder?
(see next ¶)

mandatorily

Moreover,

under the state's
habitual
offender
laws,

other than Helm has ever been given the maximum sentence on the basis of comparable crimes. It is more likely that the possibility of life imprisonment under § 22-7-8 generally is reserved for criminals such as fourth-time heroin dealers, while habitual bad-check writers receive more lenient treatment.²⁵ In any event, Helm has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.

Finally, we compare the sentences imposed for commission of the same crime in other jurisdictions. The Court of Appeals found that "Helm could have received a life sentence without parole for his offense in only one other state, Nevada," 684 F. 2d, at 586, and we have no reason to doubt this finding. See Tr. of Oral Arg. 21. At the very least, therefore, it is clear that Helm could not have received such a severe sentence in 48 of the 50 States. But even under Nevada law, a life sentence without possibility of parole is merely authorized in these circumstances. See Nev. Rev. Stat. § 207.010(2) (1981). We are not advised that any defendant such as Helm, whose prior offenses were so minor, actually has received the maximum penalty in Nevada.²⁶ It

²⁵ The State contends that § 22-7-8 is more lenient than the Texas habitual offender statute in *Rummel*, for life imprisonment under § 22-7-8 is discretionary rather than mandatory. Brief for Petitioner 22. Helm, however, has challenged only his own sentence. No one suggests that § 22-7-8 may not be applied constitutionally to fourth-time heroin dealers or other violent criminals. Thus we do not question the legislature's judgment. Unlike in *Rummel*, a lesser sentence here could have been entirely consistent with both the statute and the Eighth Amendment. See Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1160 (1979).

²⁶ Under § 207.010(2), a Nevada court is authorized to impose a sentence of "imprisonment in the state prison for life with or without possibility of parole. If the penalty fixed by the court is life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of 10 years has been served." It appears that most sentences imposed under § 207.010(2) permit parole, even when the prior crimes are far more serious than Helm's. See, e. g., *Rusling v. State*, 96 Nev. 778, 617 P. 2d 1302

appears that Helm was treated more severely than he would have been in any other State.

B

The State argues that the present case is essentially the same as *Rummel v. Estelle*, for the possibility of parole in that case is matched by the possibility of executive clemency here. The State reasons that the Governor could commute Helm's sentence to a term of years. We conclude, however, that the South Dakota commutation system is fundamentally different from the parole system that was before us in *Rummel*.

As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. See, e. g., *Greenholz v. Nebraska Penal Inmates*, 442 U. S. 1 (1979) (detailing Nebraska parole procedures); *Morrissey v. Brewer*, 408 U. S. 471, 477 (1972) ("the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system"). Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards. See, e. g., *Connecticut Board of Pardons v. Dumschat*, 452 U. S. 458 (1981).

We explicitly have recognized the distinction between parole and commutation in our prior cases.²⁷ Writing on behalf

(1980) (possession of a firearm by an ex-felon, two instances of driving an automobile without the owner's consent, four first degree burglaries, two sales of marijuana, two sales of a restricted dangerous drug, one sale of heroin, one escape from state prison, and one second degree burglary).

²⁷ In *Rummel* itself the Court implicitly recognized that the possibility of

of the *Morrissey* Court, for example, CHIEF JUSTICE BURGER contrasted the two possibilities: "Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals." 408 U. S., at 477. In *Dumaschat*, THE CHIEF JUSTICE similarly explained that "there is a vast difference between a denial of parole . . . and a state's refusal to commute a lawful sentence." 452 U. S., at 466.

The Texas and South Dakota systems in particular are very different. In *Rummel*, the Court did not rely simply on the existence of some system of parole. Rather it looked to the provisions of the system presented, including the fact that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." 445 U. S., at 280. A Texas prisoner became eligible for parole when his calendar time served plus "good conduct" time equaled one-third of the maximum sentence imposed or 20 years, whichever is less. Tex. Code Crim. Proc. Ann., Art. 42.12, § 15(b) (Vernon 1979). An entering prisoner earned 20 days good-time per 30 days served, Brief for Respondent in *Rummel*, O. T. 1979, No. 78-6386, p. 16, and this could be increased to 30 days good-time per 30 days served, Tex. Rev. Civ. Stat. Ann., Art. 6181-1, §§ 2-3 (Vernon Supp. 1982). Thus *Rummel* could have been eligible for parole in as few as 10 years, and could have expected to become eligible, in the normal course of events, in only 12 years.

commutation is not equivalent to the possibility of parole. The Court carefully "distinguish[ed] *Rummel* from a person sentenced under a recidivist statute like [Miss. Code Ann. § 99-19-83 (Supp. 1979)], which provides for a sentence of life without parole." 445 U. S., at 281. But the Mississippi Constitution empowers the Governor to grant pardons in "all criminal and penal cases, excepting those of treason and impeachment." Art. 5, § 124. The Mississippi Supreme Court has long recognized that the power to pardon includes the power to commute a convict's sentence. See *Whittington v. Stevens*, 221 Miss. 598, 603-604, 73 So. 2d 137, 139-140 (1954).

In South Dakota commutation is more difficult to obtain than parole. For example, the board of pardons and paroles is authorized to make commutation recommendations to the Governor, see n. 7, *supra*, but §24-13-4 provides that "no recommendation for the commutation of . . . a life sentence, or for a pardon . . . , shall be made by less than the unanimous vote of all members of the board." In fact, no life sentence has been commuted in over eight years, App. 29, while parole—where authorized—has been granted regularly during that period, Tr. of Oral Arg. 8-9. Furthermore, even if Helm's sentence were commuted, he merely would be eligible to be considered for parole.²⁸ Not only is there no guarantee that he would be paroled, but the South Dakota parole system is far more stringent than the one before us in *Rummel*. Helm would have to serve three-fourths of his revised sentence before he would be eligible for parole, §24-15-5, and the provision for good-time credits is far less generous, §24-5-1.²⁹

The possibility of commutation is nothing more than a hope for "an *ad hoc* exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

V

The Constitution requires us to examine Helm's sentence

²⁸The most recent commutation of a life sentence in South Dakota occurred in 1975. The record indicates, however, that the prisoner in question has still not been paroled. App. 29.

²⁹Assume, for example, that in 1979 the Governor had commuted Helm's sentence to a term of 40 years (his approximate life expectancy). Even if Helm were a model prisoner, he would not have been eligible for parole until he had served over 21 years—more than twice the *Rummel* minimum. And this comparison is generous to South Dakota's position. If *Rummel* had been sentenced to 40 years rather than life, he could have been eligible for parole in less than 7 years.

to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment. The judgment of the Court of Appeals is accordingly

Affirmed.

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Michael Starley

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SUPREME COURT OF THE UNITED STATES

No. 82-492

HERMAN SOLEM, WARDEN, PETITIONER *v.* JERRY
BUCKLEY HELM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

I

By 1975 the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.¹ In 1972

¹ In 1969 third-degree burglary was defined in at least two sections of the South Dakota criminal code:

"A person breaking into any dwelling house in the nighttime with intent to commit a crime but under such circumstances as do not constitute burglary in the first degree, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. § 22-32-8 (1967) (repealed 1976).

"A person breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof, or any building or part of any building, booth, tent, railroad car, vessel, vehicle as defined in § 32-14-1, or any structure or erection in which any property is kept, with intent to commit larceny or any felony, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. § 22-32-9 (1967) (repealed 1976).

In 1964 and 1966 the third-degree burglary definition was essentially the same. See S.D. Code § 13.3703 (1939 ed., supp. 1960); 1965 S.D. Laws, ch. 32. Third-degree burglary was punishable by "imprisonment in the state penitentiary for any term not exceeding fifteen years." S.D. Comp. Laws Ann. § 22-32-10 (1967) (previously codified at S.D. Code § 13.3705(3)).

he was convicted of obtaining money under false pretenses.² In 1973 he was convicted of grand larceny.³ And in 1975 he was convicted of third-offense driving while intoxicated.⁴ The record contains no details about the circumstances of any of these offenses, except that they were all nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case.

In 1979 Helm was charged with uttering a "no account" check for \$100.⁵ The only details we have of the crime are those given by Helm to the state trial court:

(1939)) (repealed 1976).

² In 1972 the relevant statute provided:

"Every person who designedly, by color or aid of any false token or writing, or other false pretense, . . . obtains from any person any money or property . . . is punishable by imprisonment in the state penitentiary not exceeding three years or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both such fine and imprisonment." S.D. Comp. Laws Ann. § 22-41-4 (1967) (repealed 1976).

³ In 1973 South Dakota defined "larceny" as "the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof." S.D. Comp. Laws Ann. § 22-37-1 (1967) (repealed 1976). Grand larceny and petit larceny were distinguished as follows:

"Grand larceny is larceny committed in any of the following cases:

- (1) When the property taken is of a value exceeding fifty dollars;
- (2) When such property, although not of a value exceeding fifty dollars, is taken from the person of another;
- (3) When such property is livestock.

Larceny in other cases is petit larceny." S.D. Comp. Laws Ann. § 22-37-2 (1967) (repealed 1976).

Grand larceny was then punishable by "imprisonment in the state penitentiary not exceeding ten years or by imprisonment in the county jail not exceeding one year." S.D. Comp. Laws Ann. § 22-37-3 (1967) (repealed 1976).

⁴ A third offense of driving while under the influence of alcohol is a felony in South Dakota. S.D. Codified Laws § 32-23-4 (1976). See 1973 S.D. Laws, ch. 195, § 7 (enacting version of § 32-23-4 in force in 1975).

⁵ The governing statute provides, in relevant part:

"I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places.'" *State v. Helm*, 287 N. W. 2d 497, 501 (S.D. 1980) (Henderson, J., dissenting) (quoting Helm).

After offering this explanation, Helm pleaded guilty.

Ordinarily the maximum punishment for uttering a "no account" check would have been five years imprisonment in the state penitentiary and a five thousand dollar fine. See S.D. Comp. Laws Ann. § 22-6-1(6) (1967 ed., supp. 1978) (now codified at S.D. Codified Laws § 22-6-1(7) (Supp. 1982)). As a result of his criminal record, however, Helm was subject to South Dakota's recidivist statute:

"When a defendant has been convicted of at least three prior convictions [*sic*] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." S.D. Codified Laws § 22-7-8 (1979) (amended 1981).

The maximum penalty for a "Class 1 felony" was life imprisonment in the state penitentiary and a twenty-five thousand dollar fine.⁶ S.D. Comp. Laws Ann. § 22-6-1(2) (1967 ed.,

⁶Any person who, for himself or as an agent or 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 § 22-41-1.2 (1979).

⁷When Helm was sentenced in April 1979, South Dakota law classified felonies as follows:

"Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished from each other by the respective maximum penalties hereinafter set forth which are authorized upon conviction:

supp. 1978) (now codified at S.D. Codified Laws § 22-6-1(3) (Supp. 1982)). Moreover, South Dakota law explicitly provides that parole is unavailable: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S.D. Codified Laws § 24-15-4 (1979). The Governor⁷ is authorized to pardon prisoners, or to commute their sentences, S.D. Const., Art. IV, § 3, but no other relief from sentence is available even to a rehabilitated prisoner.

Immediately after accepting Helm's guilty plea, the South Dakota Circuit Court sentenced Helm to life imprisonment under § 22-7-8. The court explained:

"I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record

(1) Class A felony: life imprisonment in the state penitentiary. A lesser sentence may not be given for a Class A felony;

(2) Class 1 felony: life imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;

(3) Class 2 felony: twenty-five years imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;

(4) Class 3 felony: fifteen years imprisonment in the state penitentiary. In addition, a fine of fifteen thousand dollars may be imposed;

(5) Class 4 felony: ten years imprisonment in the state penitentiary. In addition, a fine of ten thousand dollars may be imposed;

(6) Class 5 felony: five years imprisonment in the state penitentiary. In addition, a fine of five thousand dollars may be imposed; and

(7) Class 6 felony: two years imprisonment in the state penitentiary or a fine of two thousand dollars, or both.

"Nothing in this section shall limit increased sentences for habitual criminals

"Except in cases where punishment is prescribed by law, every offense declared to be a felony and not otherwise classified is a Class 6 felony." S.D. Comp. Laws Ann. § 22-6-1 (1967 ed., supp. 1978) (amended 1979 and 1980).

⁷The board of pardons and paroles is authorized to make recommendations to the Governor, S.D. Codified Laws § 24-14-1 (1979); § 24-14-5; S.D. Executive Order 82-04 (Apr. 12, 1982), but the Governor is not bound by the recommendation, § 24-14-5.

would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over.'" *State v. Helm*, 287 N. W. 2d, at 500 (Henderson, J., dissenting) (quoting S.D. Circuit Court, Seventh Judicial Circuit, Pennington County (Parker, J.)).

The South Dakota Supreme Court, in a 3-2 decision, affirmed the sentence despite Helm's argument that it violated the Eighth Amendment. *State v. Helm, supra*.

After Helm had served two years in the state penitentiary, he requested the Governor to commute his sentence to a fixed term of years. Such a commutation would have had the effect of making Helm eligible to be considered for parole when he had served three-fourths of his new sentence. See S.D. Codified Laws §24-15-5(3) (1979). The Governor denied Helm's request in May 1981. App. 26.

In November 1981, Helm sought habeas relief in the United States District Court for the District of South Dakota. Helm argued, among other things, that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. Although the District Court recognized that the sentence was harsh, it concluded that this Court's recent decision in *Rummel v. Estelle*, 445 U. S. 263 (1980), was dispositive. It therefore denied the writ.

The United States Court of Appeals for the Eighth Circuit reversed. 684 F. 2d 582 (1982). The Court of Appeals noted that *Rummel v. Estelle* was distinguishable. Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabilitation as a goal of the criminal justice system. The Court of Appeals examined the nature of Helm's offenses, the nature of his sentence, and the sentence he could have received in other States for the

¶ We granted certiorari to consider the

same offense. It concluded, on the basis of this examination, that Helm's sentence was "grossly disproportionate to the nature of the offense." 684 F. 2d, at 587. It therefore directed the District Court to issue the writ unless the State resentenced Helm. *Ibid.*

~~In view of the important~~ Eighth Amendment question presented by this case, ~~we granted certiorari.~~ 459 U. S. — (1982). We now affirm.

II

The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

A

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that "amercements"² may not be excessive.³ And the principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275). These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments. See, e. g., *Le Gras v. Bailiff of Bishop of Winches-*

² An amercement was similar to a modern-day fine. It was the most common criminal sanction in thirteenth century England. See 2 F. Pollock & F. Maitland, *The History of English Law* 513-515 (2d ed. 1909).

³ Chapter 20 declared that "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." See 1 S.D. Codified Laws, p. 4 (1978) (translation of Magna Carta). According to Maitland, "there was no clause in Magna Carta more grateful to the mass of the people . . ." F. Maitland, *Pleas of the Crown for the County of Gloucester* xxxiv (1884). Chapter 21 granted the same rights to the nobility, and chapter 22 granted the same rights to the clergy.

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ter, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), reprinted in 52 Selden Society 3 (1934). When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional. See, e. g., *Hodges v. Humkin*, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K.B. 1615) (Croke, J.) ("imprisonment ought always to be according to the quality of the offence").

The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 W. & M., sess. 2, ch. 2 (1689). Although the precise scope of this provision is uncertain, it at least incorporated "the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959); see 4 W. Blackstone, *Commentaries* *16-19 (1769); see also *id.*, at *16-17 (in condemning "punishments of unreasonable severity," uses "cruel" to mean severe or excessive). Indeed, barely three months after the Bill of Rights was adopted, the House of Lords declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon, was excessive and exorbitant, against magna charta, the common right of the subject, and against the law of the land." *Earl of Devon's Case*, 11 State Trials 133, 136 (1689).

When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights,¹⁰ they also adopted the English principle of proportionality. The people were guaranteed the rights they had possessed as English subjects—including the right to be free from excessive punishments.

¹⁰ This language had earlier been incorporated in the Virginia Declaration of Rights, Art. I, § 9, authored by George Mason.

See A. Howard, *The Road From Runnymede: Magna Carta and Constitutionalism in America* 207 (1968).

B

The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.¹¹ In the leading case of *Weems v. United States*, 217 U. S. 349 (1910), the defendant had been convicted of falsifying a public document and sentenced to 15 years of "cadena temporal," a form of imprisonment that included hard labor in chains and permanent civil disabilities. The Court noted "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense," *id.*, at 367, and held that the sentence violated the Eighth Amendment. The Court endorsed the principle of proportionality as a constitutional standard, see, e. g., *id.*, at 372-373, and determined that the sentence before it was "cruel in its excess of imprisonment," *id.*, at 377.

The Court next applied the principle to invalidate a criminal sentence in *Robinson v. California*, 370 U. S. 660 (1962).¹² A 90-day sentence was found to be excessive for the crime of being "addicted to the use of narcotics." The Court explained that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual."

¹¹ In *O'Neil v. Vermont*, 144 U. S. 323 (1892), the defendant had been convicted of 307 counts of "selling intoxicating liquor without authority," and sentenced to a term of over 54 years. The majority did not reach O'Neil's contention that this sentence was unconstitutional, for he did not include the point in his assignment of errors or in his brief. *Id.*, at 331. Furthermore, the majority noted that the Eighth Amendment "does not apply to the States." *Id.*, at 332. Accordingly the Court dismissed the writ of error for want of a federal question. *Id.*, at 336-337. The dissent, however, reached the Eighth Amendment question, observing that it "is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.*, at 339-340 (Field, J., dissenting).

¹² Members of the Court continued to recognize the principle of proportionality in the meantime. See, e. g., *Trop v. Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion); *id.*, at 111 (BRENNAN, J., concurring); *id.*, at 125-126 (Frankfurter, J., dissenting).

Id., at 667. Thus there was no question of an inherently barbaric punishment. "But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Ibid.*

Most recently, the Court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. *Enmund v. Florida*, 458 U. S. — (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used); *Coker v. Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion) ("sentence of death is grossly disproportionate and excessive punishment for the crime of rape"); *id.*, at 601 (POWELL, J., concurring in the judgment in part and dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman"). And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, e. g., *Hutto v. Finney*, 437 U. S. 678, 685 (1978); *Ingraham v. Wright*, 430 U. S. 651, 667 (1977); *Gregg v. Georgia*, 428 U. S. 153, 171-172 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); cf. *Hutto v. Davis*, 454 U. S. 370, 374, and n. 3 (1982) (*per curiam*) (recognizing that some prison sentences may be constitutionally disproportionate); *Rummel v. Estelle*, 445 U. S., at 274, n. 11 (same).

C

There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences.¹⁸ The constitutional language itself suggests no

¹⁸ According to *Rummel v. Estelle*, 445 U. S. 263 (1980), "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . the length of sentence actually imposed is purely a matter of legislative prerogative."

exception for imprisonment. We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, *Ingraham v. Wright*, 430 U. S., at 664, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. See *Hodges v. Humkin*, *supra*. And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis. See, e. g., *Weems*, 217 U. S., at 377; cf. *Hutto v. Finney*, 437 U. S., at 685 ("Confinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards").

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When we have applied the proportionality principle in capital cases, we have drawn no distinction with imprisonment. See *Gregg v. Georgia*, 428 U. S., at 176 (opinion of Stewart, POWELL, and STEVENS, JJ.). It is true that the "penalty of death differs from all other forms of criminal punishment, not in degree but in kind." *Furman v. Georgia*, 408 U. S. 238, 306 (1972) (Stewart, J., concurring). As a result, "our decisions [in] capital cases are of limited assistance in deciding the constitutionality of the punishment" in a noncapital case. *Rummel v. Estelle*, 445 U. S., at 272. All this means, however, is that, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare," *ibid.* (emphasis added);

Id., at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible. To the extent that the State makes this argument here, we find it meritless.

¹⁴ In *Enmund*, for example, the Court found the death penalty to be excessive for felony murder in the circumstances of that case. But clearly no

see *Hutto v. Davis*, 454 U. S., at 374. It does not mean that proportionality analysis is entirely inapplicable in noncapital cases.

In sum, we hold that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.¹⁶ But no penalty is *per se* constitutional. As the Court noted in *Robinson v. California*, 370 U. S., at 667, a single day in prison may be unconstitutional in some circumstances.

III

A

In reviewing sentences under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized.¹⁶ First, we look to the gravity of the offense and the harshness of the penalty. In *Enmund*, for example, the Court examined the circumstances of the defendant's crime in great detail. 458 U. S., at — — —. In *Coker* the Court considered the seriousness of the crime of rape, and compared it to other crimes, such as murder. 433

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sentence ~~of death~~ would be ~~disproportionate~~ for Enmund's crime.

¹⁶ In view of the substantial deference properly due to legislatures and sentencing courts, most reviewing courts normally will not be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

¹⁷ As the Court has indicated, no one factor will be dispositive. See *Hutto v. Davis*, 454 U. S. 370, 373-374 n. 2 (1982) (*per curiam*); *Rummel v. Estelle*, 445 U. S., at 275-276. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. No single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment.

→ See Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1376-1377 (1979).

U. S., at 597-598 (plurality opinion); *id.*, at 603 (POWELL, J., concurring in the judgment in part and dissenting in part). In *Robinson* the emphasis was placed on the nature of the "crime." 370 U. S., at 666-667. And in *Weems*, the Court's opinion commented in two separate places on the pettiness of the offense. 217 U. S., at 363 and 365. Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate. See, e. g., *Coker*, 433 U. S., at 598 (plurality opinion); *Weems*, 217 U. S., at 366-367.

Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. Thus in *Enmund* the Court noted that all of the other felony murderers on death row in Florida were more culpable than the petitioner there. 458 U. S., at —. The *Weems* Court identified an impressive list of more serious crimes that were subject to less serious penalties. 217 U. S., at 380-381.

Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. In *Enmund* the Court conducted an extensive review of capital punishment statutes and determined that "only about a third of American jurisdictions would ever permit a defendant [such as Enmund] to be sentenced to die." 458 U. S., at —. Even in those jurisdictions, however, the death penalty was almost never imposed under similar circumstances. *Id.*, at —. The Court's review of foreign law also supported its conclusion. *Id.*, at —, n. 22. The analysis in *Coker* was essentially the same. 433 U. S., at 593-597. And in *Weems* the Court relied on the fact that, under federal law, a similar crime was punishable by only two year's imprisonment and a fine. 217 U. S., at 380. Cf. *Trop v. Dulles*, 356 U. S. 86, 102-103 (1958) (plurality opinion).

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including

(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.

B

Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments—just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. Thus in *Enmund* the Court determined that the petitioner's conduct was not ~~so~~ serious as his accomplices' conduct. Indeed, there are widely shared views as to the relative seriousness of crimes. See Rossi, Waite, Bose & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 Am. Soc. Rev. 224, 237 (1974). For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence. Cf. Tr. of Oral Arg. 16 (the State recognizes that the criminal law is more protective of people than property).

There are other ~~well~~ accepted principles that courts may apply in measuring the harm caused or threatened to the victim or society. The absolute magnitude of the crime may be relevant. Stealing a million dollars is viewed as more serious than stealing a hundred dollars—a point recognized in statutes distinguishing petty theft from grand theft. See, e. g., S.D. Codified Laws § 22-30A-17 (Supp. 1982). Few would dispute that a lesser included offense should not be punished more severely than the greater offense. Thus a court is justified in viewing assault with intent to murder as more serious than simple assault. See *Roberts v. Collins*, 544 F. 2d 168, 169-170 (CA4 1976) (*per curiam*), *cert. denied*, 430 U. S. 973 (1977). Cf. *Dembowski v. State*, 251 Ind. 250,

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252, 240 N. E. 2d 815, 817 (1968) (armed robbery more serious than robbery); *Cannon v. Gladden*, 203 Or. 629, 632, 281 P. 2d 233, 235 (1955) (rape more serious than assault with intent to commit rape). It also ~~was~~ recognized that attempts are less serious than completed crimes. See, e. g., S.D. Codified Laws § 22-4-1 (1979); 4 Blackstone *15. Similarly, an accessory after the fact should not be subject to a higher penalty than the principal. See, e. g., 18 U. S. C. § 3.

Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In *Enmund* the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices. 458 U. S., at —. Most would agree that negligent conduct is less serious than intentional conduct. South Dakota, for example, ranks criminal acts in ascending order of seriousness as follows: negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts. S.D. Codified Laws § 22-1-2(1)(f) (Supp. 1982). A court is ~~not~~ entitled to look at a defendant's motive in committing a crime. Thus a murder may be viewed as more serious when committed pursuant to a contract. See, e. g., Mass. Gen. Laws Ann., ch. 279, § 69(a)(5) (West Supp. 1982); cf. 4 Blackstone *15; *In re Foss*, 10 Cal.3d 910, 519 P. 2d 1073 (1974).

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This list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.

C

Application of the factors that we identify also assumes that courts are able to compare different sentences. This assumption, too, is justified. The easiest comparison, of course, is between capital punishment and noncapital punish-

ments, for the death penalty is different from other punishments in kind rather than degree.¹⁷ For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence,¹⁸ but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

The Sixth Amendment right to a jury trial is an example. In *Williams v. Florida*, 399 U. S. 78 (1970), the Court upheld a criminal conviction returned by a unanimous 6-member jury, and in *Apodaca v. Oregon*, 406 U. S. 404 (1972), we upheld a conviction returned by ten members of a 12-member jury. In *Ballew v. Georgia*, 435 U. S. 223 (1978), however, we reversed a conviction returned by a unanimous 5-member jury. JUSTICE BLACKMUN "readily admit[ted] that we d[id] not pretend to discern a clear line between six members and five." *Id.*, at 239 (opinion of BLACKMUN, J.). He nevertheless found a difference between them of "constitutional significance." *Ibid.*; cf. *id.*, at 245-246 (POWELL, J., concurring in the judgment). And the following Term, in *Burch v. Louisiana*, 441 U. S. 130 (1979), we reversed a conviction returned by five members of a 6-member jury:

"[W]e do not pretend the ability to discern *a priori* a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases. But . . . it is inevitable that lines must be drawn

¹⁷ There is also a clear line between sentences of imprisonment and sentences involving no deprivation of liberty. See *Argersinger v. Hamlin*, 407 U. S. 25 (1972).

¹⁸ The possibility of parole may complicate the comparison, depending upon the time and conditions of its availability.

somewhere if the substance of the jury trial right is to be preserved." *Id.*, at 137 (citations omitted).

Another Sixth Amendment case illustrates the line-drawing function of the judiciary, and offers guidance on the method by which some lines may be drawn. In *Baldwin v. New York*, 399 U. S. 66 (1970), the Court determined that a defendant has a right to a jury trial "where imprisonment for more than six months is authorized." *Id.*, at 69 (plurality opinion). In choosing the 6-month standard, the plurality relied almost exclusively on the fact that only New York City denied the right to a jury trial for an offense punishable by more than six months. As JUSTICE WHITE explained:

"This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone—between offenses that are and that are not regarded as 'serious' for purposes of trial by jury." *Id.*, at 72-73.

In short, *Baldwin* clearly demonstrates that a court properly may distinguish one sentence of imprisonment from another. It also supports our holding that courts properly may look to the practices in other jurisdictions in deciding where lines between sentences should be drawn.

IV

It remains to apply the analytical framework established by our prior decisions to the case before us. We first consider the relevant criteria, viewing Helm's sentence as life imprisonment without possibility of parole. We then consider the State's argument that the possibility of commutation is sufficient to save an otherwise unconstitutional sentence.

A

Helm's crime was "one of the most passive felonies a person could commit." *State v. Helm*, 287 N. W. 2d, at 501

(Henderson, J., dissenting). It involved neither violence nor threat of violence to any person. The \$100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft.¹⁹ It is easy to see why such a crime is viewed by society as among the less serious offenses. See Rossi et al., 39 Am. Soc. Rev., at 229.

Helm, of course, was not charged simply with uttering a "no account" check, but also with being an habitual offender.²⁰ And a State is justified in punishing a recidivist more severely than it punishes a first offender. Helm's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor.²¹ All were nonviolent and none was a crime against a person. Indeed, there was no minimum amount in either the burglary or the false pretenses statutes, see nn. 1 and 2,

¹⁹ If Helm had been convicted simply of taking \$100 from a cash register, S.D. Codified Laws § 22-30A-1 (1979), or defrauding someone of \$100, § 22-30A-3, or obtaining \$100 through extortion, § 22-30A-4(1), or blackmail, § 22-30A-4(3), or using a false credit card to obtain \$100, § 22-30A-8.1, or embezzling \$100, § 22-30A-10, he would not be in prison today. All of these offenses would have been petty theft, a misdemeanor. § 22-30A-17 (amended 1982). Similarly, if Helm had written a \$100 check against insufficient funds, rather than a nonexistent account, he would have been guilty of a misdemeanor. §§ 22-41-1. Curiously, under South Dakota law there is no distinction between writing a "no account" check for a large sum and writing a "no account" check for a small sum. § 22-41-1.2.

²⁰ We must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision.

²¹ Helm, who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have any incentive to pursue clearly needed treatment for his alcohol problem.

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rehabilitation.

supra, and the minimum amount covered by grand larceny statute was fairly small, see n. 3, *supra*.²²

Helm's present sentence is life imprisonment without possibility of parole.²³ Barring executive clemency, see *infra*, at —, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in *Rummel v. Estelle*. Rummel was likely to have been eligible for parole within 12 years of his initial confinement,²⁴ a fact on which the Court relied heavily. See 445 U. S., at 280–281. Helm's sentence is ~~more~~ *the most* severe ~~than any other sentence~~ the State could have imposed on any criminal for any crime. See note 6, *supra*. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

We next consider the sentences that could be imposed on other criminals in the same jurisdiction. When Helm was sentenced, a South Dakota court was required to impose a life sentence for murder, S.D. Codified Laws §22-16-12 (1979) (amended 1980), and was authorized to impose a life sentence for treason, §22-8-1, first degree manslaughter, §22-16-15, first degree arson, §22-33-1, and kidnapping, S.D. Comp. Laws Ann. §22-19-1 (1967 ed., supp. 1978) (amended 1979). No other crime was punishable so severely on the first offense. Attempted murder, S.D. Codified Laws

²² As suggested at oral argument, the third-degree burglary statute covered entering a building with the intent to steal a loaf of bread. Tr. of Oral Arg. 14–16. It appears that the grand larceny statute would have covered the theft of a chicken.

²³ Every life sentence in South Dakota is without possibility of parole. See *supra*, at —. We raise no question as to the general validity of sentences without possibility of parole. The only issue before us is whether, in the circumstances of this case and in light of the constitutional principle of proportionality, the sentence imposed on this petitioner violates the Eighth Amendment.

²⁴ We note that Rummel was, in fact, released within eight months of the Court's decision in his case. See L.A. Times, Nov. 16, 1980, p. 1, col. 3.

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§ 22-4-1(5) (1979), placing an explosive device on an aircraft, § 22-14A-5, and first degree rape, § 22-22-1 (amended 1980 and 1982), were only Class 2 felonies. Aggravated riot, § 22-10-5, was only a Class 3 felony. Distribution of heroin, §§ 22-42-2 (amended 1982), 34-20B-13(7) (1977), and aggravated assault, § 22-18-1.1 (amended 1980 and 1981), were only Class 4 felonies.

Helm's habitual offender status complicates our analysis, but relevant comparisons are still possible. Under § 22-7-7, the penalty for a second or third felony is increased by one class. Thus a life sentence was mandatory when a second or third conviction was for treason, first degree manslaughter, kidnapping, or first degree arson, and a life sentence would have been authorized when a second or third conviction was for such crimes as attempted murder, placing an explosive device on an aircraft, or first degree rape. Finally, § 22-7-8, under which Helm was sentenced, authorized life imprisonment after three prior convictions, regardless of the crimes.

In sum, there were a handful of crimes that were necessarily punished by life imprisonment: murder and treason, first degree manslaughter, kidnapping, ~~or first degree arson on a second or third offense~~. There was a larger group for which life imprisonment was authorized in the discretion of the sentencing judge, including: treason, first degree manslaughter, kidnapping, ~~or first degree arson~~, attempted murder, placing an explosive device on an aircraft, ~~or first degree rape~~ on a second or third offense; and any felony after three prior offenses. Finally, there was a large group of very serious offenses for which life imprisonment was not authorized, including a third offense of heroin dealing or aggravated assault.

Criminals committing any of these offenses ordinarily would be thought more deserving of punishment than one uttering a "no account" check—even when the bad-check writer had already committed six minor felonies. ~~Furthermore~~, there is no indication in the record that any habitual offender

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other than Helm has ever been given the maximum sentence on the basis of comparable crimes. It is more likely that the possibility of life imprisonment under § 22-7-8 generally is reserved for criminals such as fourth-time heroin dealers, while habitual bad-check writers receive more lenient treatment.²⁵ In any event, Helm has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.

Finally, we compare the sentences imposed for commission of the same crime in other jurisdictions. The Court of Appeals found that "Helm could have received a life sentence without parole for his offense in only one other state, Nevada," 684 F. 2d, at 586, and we have no reason to doubt this finding. See Tr. of Oral Arg. 21. At the very least, therefore, it is clear that Helm could not have received such a severe sentence in 48 of the 50 States. But even under Nevada law, a life sentence without possibility of parole is merely authorized in these circumstances. See Nev. Rev. Stat. § 207.010(2) (1981). We are not advised that any defendant such as Helm, whose prior offenses were so minor, actually has received the maximum penalty in Nevada.²⁶ It

²⁵ The State contends that § 22-7-8 is more lenient than the Texas habitual offender statute in *Rummel*, for life imprisonment under § 22-7-8 is discretionary rather than mandatory. Brief for Petitioner 22. Helm, however, has challenged only his own sentence. No one suggests that § 22-7-8 may not be applied constitutionally to fourth-time heroin dealers or other violent criminals. Thus we do not question the legislature's judgment. Unlike in *Rummel*, a lesser sentence here could have been entirely consistent with both the statute and the Eighth Amendment. See Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1160 (1979).

²⁶ Under § 207.010(2), a Nevada court is authorized to impose a sentence of "imprisonment in the state prison for life with or without possibility of parole. If the penalty fixed by the court is life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of 10 years has been served." It appears that most sentences imposed under § 207.010(2) permit parole, even when the prior crimes are far more serious than Helm's. See, e. g., *Rusling v. State*, 96 Nev. 778, 617 P. 2d 1302

appears that Helm was treated more severely than he would have been in any other State.

B

The State argues that the present case is essentially the same as *Rummel v. Estelle*, for the possibility of parole in that case is matched by the possibility of executive clemency here. The State reasons that the Governor could commute Helm's sentence to a term of years. We conclude, however, that the South Dakota commutation system is fundamentally different from the parole system that was before us in *Rummel*.

As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. See, e. g., *Greenholz v. Nebraska Penal Inmates*, 442 U. S. 1 (1979) (detailing Nebraska parole procedures); *Morrissey v. Brewer*, 408 U. S. 471, 477 (1972) ("the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system"). Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards. See, e. g., *Connecticut Board of Pardons v. Dumschat*, 452 U. S. 458 (1981).

We explicitly have recognized the distinction between parole and commutation in our prior cases.²⁷ Writing on behalf

(1980) (possession of a firearm by an ex-felon, two instances of driving an automobile without the owner's consent, four first degree burglaries, two sales of marijuana, two sales of a restricted dangerous drug, one sale of heroin, one escape from state prison, and one second degree burglary).

²⁷ In *Rummel* itself the Court implicitly recognized that the possibility of

of the *Morrissey* Court, for example, CHIEF JUSTICE BURGER contrasted the two possibilities: "Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals." 408 U. S., at 477. In *Dumschat*, THE CHIEF JUSTICE similarly explained that "there is a vast difference between a denial of parole . . . and a state's refusal to commute a lawful sentence." 452 U. S., at 466.

The Texas and South Dakota systems in particular are very different. In *Rummel*, the Court did not rely simply on the existence of some system of parole. Rather it looked to the provisions of the system presented, including the fact that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." 445 U. S., at 280. A Texas prisoner became eligible for parole when his calendar time served plus "good conduct" time equaled one-third of the maximum sentence imposed or 20 years, whichever is less. Tex. Code Crim. Proc. Ann., Art. 42.12, § 15(b) (Vernon 1979). An entering prisoner earned 20 days good-time per 30 days served, Brief for Respondent in *Rummel*, O. T. 1979, No. 78-6386, p. 16, and this could be increased to 30 days good-time per 30 days served, Tex. Rev. Civ. Stat. Ann., Art. 6181-1, §§ 2-3 (Vernon Supp. 1982). Thus *Rummel* could have been eligible for parole in as few as 10 years, and could have expected to become eligible, in the normal course of events, in only 12 years.

commutation is not equivalent to the possibility of parole. The Court carefully "distinguish[ed] *Rummel* from a person sentenced under a recidivist statute like [Miss. Code Ann. § 99-19-83 (Supp. 1972)], which provides for a sentence of life without parole." 445 U. S., at 281. But the Mississippi Constitution empowers the Governor to grant pardons in "all criminal and penal cases, excepting those of treason and impeachment." Art. 5, § 124. The Mississippi Supreme Court has long recognized that the power to pardon includes the power to commute a convict's sentence. See *Whittington v. Stevens*, 221 Miss. 598, 603-604, 73 So. 2d 137, 139-140 (1954).

In South Dakota commutation is more difficult to obtain than parole. For example, the board of pardons and paroles is authorized to make commutation recommendations to the Governor, see n. 7, *supra*, but §24-13-4 provides that "no recommendation for the commutation of . . . a life sentence, or for a pardon . . . , shall be made by less than the unanimous vote of all members of the board." In fact, no life sentence has been commuted in over eight years, App. 29, while parole—where authorized—has been granted regularly during that period, Tr. of Oral Arg. 8-9. Furthermore, even if Helm's sentence were commuted, he merely would be eligible to be considered for parole.²⁸ Not only is there no guarantee that he would be paroled, but the South Dakota parole system is far more stringent than the one before us in *Rummel*. Helm would have to serve three-fourths of his revised sentence before he would be eligible for parole, §24-15-5, and the provision for good-time credits is ~~less~~ less generous, §24-5-1.²⁹

The possibility of commutation is nothing more than a hope for "an *ad hoc* exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

V

The Constitution requires us to examine Helm's sentence

²⁸ The most recent commutation of a life sentence in South Dakota occurred in 1975. The record indicates, however, that the prisoner in question ~~has still~~ not been paroled. App. 29.

²⁹ Assume, for example, that in 1979 the Governor had commuted Helm's sentence to a term of 40 years (his approximate life expectancy). Even if Helm were a model prisoner, he would not have been eligible for parole until he had served over 21 years—more than twice the *Rummel* minimum. And this comparison is generous to South Dakota's position. If *Rummel* had been sentenced to 40 years rather than life, he could have been eligible for parole in less than 7 years.

to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment. The judgment of the Court of Appeals is accordingly

Affirmed.

JUN 2 1983

changes on pp: 6-7, 10-11,
13-14, 17-20, 23

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: JUN 2 1983

Cg's dissent ignores (sets up "straw man"):
1. death penalty defunct

2nd DRAFT -10

2. Review
will be
exceedingly rare -

SUPREME COURT OF THE UNITED STATES

10
11

No. 82-492

HERMAN SOLEM, WARDEN, PETITIONER v. JERRY
BUCKLEY HELM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

I

By 1975 the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.¹ In 1972

¹ In 1969 third-degree burglary was defined in at least two sections of the South Dakota criminal code:

"A person breaking into any dwelling house in the nighttime with intent to commit a crime but under such circumstances as do not constitute burglary in the first degree, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. § 22-32-8 (1967) (repealed 1976).

"A person breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof, or any building or part of any building, booth, tent, railroad car, vessel, vehicle as defined in § 32-14-1, or any structure or erection in which any property is kept, with intent to commit larceny or any felony, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. § 22-32-9 (1967) (repealed 1976).

In 1964 and 1966 the third-degree burglary definition was essentially the same. See S.D. Code § 13.3703 (1939 ed., supp. 1960); 1965 S.D. Laws, ch. 32. Third-degree burglary was punishable by "imprisonment in the state penitentiary for any term not exceeding fifteen years." S.D. Comp. Laws Ann. § 22-32-10 (1967) (previously codified at S.D. Code § 13.3705(3)).

he was convicted of obtaining money under false pretenses.¹ In 1973 he was convicted of grand larceny.² And in 1975 he was convicted of third-offense driving while intoxicated.³ The record contains no details about the circumstances of any of these offenses, except that they were all nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case.

In 1979 Helm was charged with uttering a "no account" check for \$100.⁴ The only details we have of the crime are those given by Helm to the state trial court:

(1939)) (repealed 1976).

¹ In 1972 the relevant statute provided:

"Every person who designedly, by color or aid of any false token or writing, or other false pretense, . . . obtains from any person any money or property . . . is punishable by imprisonment in the state penitentiary not exceeding three years or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both such fine and imprisonment." S.D. Comp. Laws Ann. § 22-41-4 (1967) (repealed 1976).

² In 1973 South Dakota defined "larceny" as "the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof." S.D. Comp. Laws Ann. § 22-37-1 (1967) (repealed 1976). Grand larceny and petit larceny were distinguished as follows:

"Grand larceny is larceny committed in any of the following cases:

- (1) When the property taken is of a value exceeding fifty dollars;
- (2) When such property, although not of a value exceeding fifty dollars, is taken from the person of another;
- (3) When such property is livestock.

Larceny in other cases is petit larceny." S.D. Comp. Laws Ann. § 22-37-2 (1967) (repealed 1976).

Grand larceny was then punishable by "imprisonment in the state penitentiary not exceeding ten years or by imprisonment in the county jail not exceeding one year." S.D. Comp. Laws Ann. § 22-37-3 (1967) (repealed 1976).

³ A third offense of driving while under the influence of alcohol is a felony in South Dakota. S.D. Codified Laws § 32-23-4 (1976). See 1973 S.D. Laws, ch. 195, § 7 (enacting version of § 32-23-4 in force in 1975).

⁴ The governing statute provides, in relevant part:

"I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places.'" *State v. Helm*, 287 N. W. 2d 497, 501 (S.D. 1980) (Henderson, J., dissenting) (quoting Helm).

After offering this explanation, Helm pleaded guilty.

Ordinarily the maximum punishment for uttering a "no account" check would have been five years imprisonment in the state penitentiary and a five thousand dollar fine. See S.D. Comp. Laws Ann. § 22-6-1(6) (1967 ed., supp. 1978) (now codified at S.D. Codified Laws § 22-6-1(7) (Supp. 1982)). As a result of his criminal record, however, Helm was subject to South Dakota's recidivist statute:

"When a defendant has been convicted of at least three prior convictions [*sic*] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." S.D. Codified Laws § 22-7-8 (1979) (amended 1981).

The maximum penalty for a "Class 1 felony" was life imprisonment in the state penitentiary and a twenty-five thousand dollar fine.⁶ S.D. Comp. Laws Ann. § 22-6-1(2) (1967 ed.,

⁶"Any person who, for himself or as an agent or 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 § 22-41-1.2 (1979).

⁷When Helm was sentenced in April 1979, South Dakota law classified felonies as follows:

"Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished from each other by the respective maximum penalties hereinafter set forth which are authorized upon conviction:

supp. 1978) (now codified at S.D. Codified Laws § 22-6-1(3) (Supp. 1982)). Moreover, South Dakota law explicitly provides that parole is unavailable: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S.D. Codified Laws § 24-15-4 (1979). The Governor⁷ is authorized to pardon prisoners, or to commute their sentences, S.D. Const., Art. IV, § 3, but no other relief from sentence is available even to a rehabilitated prisoner.

Immediately after accepting Helm's guilty plea, the South Dakota Circuit Court sentenced Helm to life imprisonment under § 22-7-8. The court explained:

"I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record

(1) Class A felony: life imprisonment in the state penitentiary. A lesser sentence may not be given for a Class A felony;

(2) Class 1 felony: life imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;

(3) Class 2 felony: twenty-five years imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;

(4) Class 3 felony: fifteen years imprisonment in the state penitentiary. In addition, a fine of fifteen thousand dollars may be imposed;

(5) Class 4 felony: ten years imprisonment in the state penitentiary. In addition, a fine of ten thousand dollars may be imposed;

(6) Class 5 felony: five years imprisonment in the state penitentiary. In addition, a fine of five thousand dollars may be imposed; and

(7) Class 6 felony: two years imprisonment in the state penitentiary or a fine of two thousand dollars, or both.

"Nothing in this section shall limit increased sentences for habitual criminals

"Except in cases where punishment is prescribed by law, every offense declared to be a felony and not otherwise classified is a Class 6 felony." S.D. Comp. Laws Ann. § 22-6-1 (1967 ed., supp. 1978) (amended 1979 and 1980).

⁷The board of pardons and paroles is authorized to make recommendations to the Governor, S.D. Codified Laws § 24-14-1 (1979); § 24-14-5; S.D. Executive Order 82-04 (Apr. 12, 1982), but the Governor is not bound by the recommendation, § 24-14-5.

would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over.'" *State v. Helm*, 287 N. W. 2d, at 500 (Henderson, J., dissenting) (quoting S.D. Circuit Court, Seventh Judicial Circuit, Pennington County (Parker, J.)).

The South Dakota Supreme Court, in a 3-2 decision, affirmed the sentence despite Helm's argument that it violated the Eighth Amendment. *State v. Helm, supra*.

After Helm had served two years in the state penitentiary, he requested the Governor to commute his sentence to a fixed term of years. Such a commutation would have had the effect of making Helm eligible to be considered for parole when he had served three-fourths of his new sentence. See S.D. Codified Laws § 24-15-5(3) (1979). The Governor denied Helm's request in May 1981. App. 26.

In November 1981, Helm sought habeas relief in the United States District Court for the District of South Dakota. Helm argued, among other things, that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. Although the District Court recognized that the sentence was harsh, it concluded that this Court's recent decision in *Rummel v. Estelle*, 445 U. S. 263 (1980), was dispositive. It therefore denied the writ.

The United States Court of Appeals for the Eighth Circuit reversed. 684 F. 2d 582 (1982). The Court of Appeals noted that *Rummel v. Estelle* was distinguishable. Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabilitation as a goal of the criminal justice system. The Court of Appeals examined the nature of Helm's offenses, the nature of his sentence, and the sentence he could have received in other States for the

same offense. It concluded, on the basis of this examination, that Helm's sentence was "grossly disproportionate to the nature of the offense." 684 F. 2d, at 587. It therefore directed the District Court to issue the writ unless the State resentenced Helm. *Ibid.*

We granted certiorari to consider the Eighth Amendment question presented by this case. 459 U. S. — (1982). We now affirm.

II

The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

A

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that "amercements"⁸ may not be excessive.⁹ And the principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275). These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punish-

⁸ An amercement was similar to a modern-day fine. It was the most common criminal sanction in thirteenth century England. See 2 F. Pollock & F. Maitland, *The History of English Law* 513-515 (2d ed. 1909).

⁹ Chapter 20 declared that "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." See 1 S.D. Codified Laws, p. 4 (1978) (translation of Magna Carta). According to Maitland, "there was no clause in Magna Carta more grateful to the mass of the people . . ." F. Maitland, *Pleas of the Crown for the County of Gloucester* xxxiv (1884). Chapter 21 granted the same rights to the nobility, and chapter 22 granted the same rights to the clergy.

ments. See, e. g., *Le Gras v. Bailiff of Bishop of Winchester*, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), reprinted in 52 Selden Society 3 (1934). When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional. See, e. g., *Hodges v. Humkin*, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K.B. 1615) (Croke, J.) ("imprisonment ought always to be according to the quality of the offence").

The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 W. & M., sess. 2, ch. 2 (1689). Although the precise scope of this provision is uncertain, it at least incorporated "the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959); see 4 W. Blackstone, *Commentaries* *16-19 (1769); see also *id.*, at *16-17 (in condemning "punishments of unreasonable severity," uses "cruel" to mean severe or excessive). Indeed, barely three months after the Bill of Rights was adopted, the House of Lords declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon, was excessive and exorbitant, against magna charta, the common right of the subject, and against the law of the land." *Earl of Devon's Case*, 11 State Trials 133, 136 (1689).

When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights,¹⁰ they also adopted the

¹⁰ This language had earlier been incorporated in the Virginia Declaration of Rights, Art. I, §9, authored by George Mason. See A. Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 207 (1968).

English principle of proportionality. The people were guaranteed the rights they had possessed as English subjects—including the right to be free from excessive punishments.

B

The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.¹¹ In the leading case of *Weems v. United States*, 217 U. S. 349 (1910), the defendant had been convicted of falsifying a public document and sentenced to 15 years of "cadena temporal," a form of imprisonment that included hard labor in chains and permanent civil disabilities. The Court noted "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense," *id.*, at 367, and held that the sentence violated the Eighth Amendment. The Court endorsed the principle of proportionality as a constitutional standard, see, e. g., *id.*, at 372-373, and determined that the sentence before it was "cruel in its excess of imprisonment," *id.*, at 377.

The Court next applied the principle to invalidate a criminal sentence in *Robinson v. California*, 370 U. S. 660 (1962).¹² A 90-day sentence was found to be excessive for the crime of being "addicted to the use of narcotics." The

¹¹ In *O'Neil v. Vermont*, 144 U. S. 323 (1892), the defendant had been convicted of 307 counts of "selling intoxicating liquor without authority," and sentenced to a term of over 54 years. The majority did not reach O'Neil's contention that this sentence was unconstitutional, for he did not include the point in his assignment of errors or in his brief. *Id.*, at 331. Furthermore, the majority noted that the Eighth Amendment "does not apply to the States." *Id.*, at 332. Accordingly the Court dismissed the writ of error for want of a federal question. *Id.*, at 336-337. The dissent, however, reached the Eighth Amendment question, observing that it "is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.*, at 339-340 (Field, J., dissenting).

¹² Members of the Court continued to recognize the principle of proportionality in the meantime. See, e. g., *Trop v. Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion); *id.*, at 111 (BRENNAN, J., concurring); *id.*, at

Court explained that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." *Id.*, at 667. Thus there was no question of an inherently barbaric punishment. "But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Ibid.*

Most recently, the Court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. *Enmund v. Florida*, 458 U. S. — (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used); *Coker v. Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion) ("sentence of death is grossly disproportionate and excessive punishment for the crime of rape"); *id.*, at 601 (POWELL, J., concurring in the judgment in part and dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman"). And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, e. g., *Hutto v. Finney*, 437 U. S. 678, 685 (1978); *Ingraham v. Wright*, 430 U. S. 651, 667 (1977); *Gregg v. Georgia*, 428 U. S. 153, 171-172 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); cf. *Hutto v. Davis*, 454 U. S. 370, 374, and n. 3 (1982) (*per curiam*) (recognizing that some prison sentences may be constitutionally disproportionate); *Rummel v. Estelle*, 445 U. S., at 274, n. 11 (same).

C

There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences.¹² The constitutional language itself suggests no

125-126 (Frankfurter, J., dissenting).

¹² According to *Rummel v. Estelle*, 445 U. S. 263 (1980), "one could

exception for imprisonment. We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, *Ingraham v. Wright*, 430 U. S., at 664, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. See *Hodges v. Humkin*, *supra*. And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis. See, e. g., *Weems*, 217 U. S., at 377; cf. *Hutto v. Finney*, 437 U. S., at 685 ("Confinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards").

When we have applied the proportionality principle in capital cases, we have drawn no distinction with cases of imprisonment. See *Gregg v. Georgia*, 428 U. S., at 176 (opinion of Stewart, POWELL, and STEVENS, JJ.). It is true that the "penalty of death differs from all other forms of criminal punishment, not in degree but in kind." *Furman v. Georgia*, 408 U. S. 238, 306 (1972) (Stewart, J., concurring). As a result, "our decisions [in] capital cases are of limited assistance in deciding the constitutionality of the punishment" in a noncapital case. *Rummel v. Estelle*, 445 U. S., at 272. ~~All this means, however, is that, "[o]utside the context of capital punishment, successful challenges to the proportionality of~~

argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . the length of sentence actually imposed is purely a matter of legislative prerogative." *Id.*, at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible. To the extent that the State makes this argument here, we find it meritless.

*We agree,
therefore,*

particular sentences [will be] exceedingly rare,"¹⁴ *ibid.* (emphasis added); see *Hutto v. Davis*, 454 U. S., at 374. *It* does not mean that proportionality analysis is entirely inapplicable in noncapital cases.

In sum, we hold that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.¹⁵ But no penalty is *per se* constitutional. As the Court noted in *Robinson v. California*, 370 U. S., at 667, a single day in prison may be unconstitutional in some circumstances.

III

A

In reviewing sentences under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized.¹⁶ First, we look to the gravity of the offense and the harshness of the penalty. In *Enmund*, for example, the Court examined the circumstances of the defend-

¹⁴In *Enmund*, for example, the Court found the death penalty to be excessive for felony murder in the circumstances of that case. But clearly no sentence of imprisonment would be disproportionate for *Enmund*'s crime.

¹⁵In view of the substantial deference properly due to legislatures and sentencing courts, most reviewing courts normally will not be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

¹⁶As the Court has indicated, no one factor will be dispositive. See *Hutto v. Davis*, 454 U. S. 370, 373-374 n. 2 (1982) (*per curiam*); *Rummel v. Estelle*, 445 U. S., at 275-276. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. No single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment. See Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1376-1377 (1979).

as a matter of principle

But this
~~does~~

et al

A →

ant's crime in great detail. 458 U. S., at ———. In *Coker* the Court considered the seriousness of the crime of rape, and compared it to other crimes, such as murder. 433 U. S., at 597-598 (plurality opinion); *id.*, at 603 (POWELL, J., concurring in the judgment in part and dissenting in part). In *Robinson* the emphasis was placed on the nature of the "crime." 370 U. S., at 666-667. And in *Weems*, the Court's opinion commented in two separate places on the pettiness of the offense. 217 U. S., at 363 and 365. Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate. See, e. g., *Coker*, 433 U. S., at 598 (plurality opinion); *Weems*, 217 U. S., at 366-367.

Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. Thus in *Enmund* the Court noted that all of the other felony murderers on death row in Florida were more culpable than the petitioner there. 458 U. S., at ———. The *Weems* Court identified an impressive list of more serious crimes that were subject to less serious penalties. 217 U. S., at 380-381.

Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. In *Enmund* the Court conducted an extensive review of capital punishment statutes and determined that "only about a third of American jurisdictions would ever permit a defendant [such as *Enmund*] to be sentenced to die." 458 U. S., at ———. Even in those jurisdictions, however, the death penalty was almost never imposed under similar circumstances. *Id.*, at ———. The Court's review of foreign law also supported its conclusion. *Id.*, at ———, n. 22. The analysis in *Coker* was essentially the same. 433 U. S., at 593-597. And in *Weems* the Court relied on the fact that, under federal law, a similar crime was punishable by only two

year's imprisonment and a fine. 217 U. S., at 380. Cf. *Trop v. Dulles*, 356 U. S. 86, 102-103 (1958) (plurality opinion).

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (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.

B

Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments—just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. Thus in *Enmund* the Court determined that the petitioner's conduct was not as serious as his accomplices' conduct. Indeed, there are widely shared views as to the relative seriousness of crimes. See Rossi, Waite, Bose & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 Am. Soc. Rev. 224, 237 (1974). For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence. Cf. Tr. of Oral Arg. 16 (the State recognizes that the criminal law is more protective of people than property).

There are other accepted principles that courts may apply in measuring the harm caused or threatened to the victim or society. The absolute magnitude of the crime may be relevant. Stealing a million dollars is viewed as more serious than stealing a hundred dollars—a point recognized in statutes distinguishing petty theft from grand theft. See, e. g., S.D. Codified Laws § 22-30A-17 (Supp. 1982). Few would dispute that a lesser included offense should not be punished

more severely than the greater offense. Thus a court is justified in viewing assault with intent to murder as more serious than simple assault. See *Roberts v. Collins*, 544 F. 2d 168, 169-170 (CA4 1976) (*per curiam*), cert. denied, 430 U. S. 973 (1977). Cf. *Dembowski v. State*, 251 Ind. 250, 252, 240 N. E. 2d 815, 817 (1968) (armed robbery more serious than robbery); *Cannon v. Gladden*, 203 Or. 629, 632, 281 P. 2d 233, 235 (1955) (rape more serious than assault with intent to commit rape). It also is generally recognized that attempts are less serious than completed crimes. See, e. g., S.D. Codified Laws § 22-4-1 (1979); 4 Blackstone *15. Similarly, an accessory after the fact should not be subject to a higher penalty than the principal. See, e. g., 18 U. S. C. § 3.

Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In *Enmund* the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices. 458 U. S., at —. Most would agree that negligent conduct is less serious than intentional conduct. South Dakota, for example, ranks criminal acts in ascending order of seriousness as follows: negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts. S.D. Codified Laws § 22-1-2(1)(f) (Supp. 1982). A court, of course, is entitled to look at a defendant's motive in committing a crime. Thus a murder may be viewed as more serious when committed pursuant to a contract. See, e. g., Mass. Gen. Laws Ann., ch. 279, § 69(a)(5) (West Supp. 1982); cf. 4 Blackstone *15; *In re Foss*, 10 Cal.3d 910, 519 P. 2d 1073 (1974).

This list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.

C

Application of the factors that we identify also assumes

that courts are able to compare different sentences. This assumption, too, is justified. The easiest comparison, of course, is between capital punishment and noncapital punishments, for the death penalty is different from other punishments in kind rather than degree.¹⁷ For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence,¹⁸ but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

The Sixth Amendment right to a jury trial is an example. In *Williams v. Florida*, 399 U. S. 78 (1970), the Court upheld a criminal conviction returned by a unanimous 6-member jury, and in *Apodaca v. Oregon*, 406 U. S. 404 (1972), we upheld a conviction returned by ten members of a 12-member jury. In *Ballew v. Georgia*, 435 U. S. 223 (1978), however, we reversed a conviction returned by a unanimous 5-member jury. JUSTICE BLACKMUN "readily admit[ted] that we d[id] not pretend to discern a clear line between six members and five." *Id.*, at 239 (opinion of BLACKMUN, J.). He nevertheless found a difference between them of "constitutional significance." *Ibid.*; cf. *id.*, at 245-246 (POWELL, J., concurring in the judgment). And the following Term, in *Burch v. Louisiana*, 441 U. S. 130 (1979), we reversed a conviction returned by five members of a 6-member jury:

"[W]e do not pretend the ability to discern *a priori* a bright line below which the number of jurors participat-

¹⁷ There is also a clear line between sentences of imprisonment and sentences involving no deprivation of liberty. See *Argersinger v. Hamlin*, 407 U. S. 25 (1972).

¹⁸ The possibility of parole may complicate the comparison, depending upon the time and conditions of its availability.

ing in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases. But . . . it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved." *Id.*, at 137 (citations omitted).

Another Sixth Amendment case illustrates the line-drawing function of the judiciary, and offers guidance on the method by which some lines may be drawn. In *Baldwin v. New York*, 399 U. S. 66 (1970), the Court determined that a defendant has a right to a jury trial "where imprisonment for more than six months is authorized." *Id.*, at 69 (plurality opinion). In choosing the 6-month standard, the plurality relied almost exclusively on the fact that only New York City denied the right to a jury trial for an offense punishable by more than six months. As JUSTICE WHITE explained:

"This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone—between offenses that are and that are not regarded as 'serious' for purposes of trial by jury." *Id.*, at 72-73.

In short, *Baldwin* clearly demonstrates that a court properly may distinguish one sentence of imprisonment from another. It also supports our holding that courts properly may look to the practices in other jurisdictions in deciding where lines between sentences should be drawn.

IV

It remains to apply the analytical framework established by our prior decisions to the case before us. We first consider the relevant criteria, viewing Helm's sentence as life imprisonment without possibility of parole. We then consider the State's argument that the possibility of commutation is sufficient to save an otherwise unconstitutional

sentence.

A

Helm's crime was "one of the most passive felonies a person could commit." *State v. Helm*, 287 N. W. 2d, at 501 (Henderson, J., dissenting). It involved neither violence nor threat of violence to any person. The \$100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft.¹⁹ It is easy to see why such a crime is viewed by society as among the less serious offenses. See Rossi et al., 39 Am. Soc. Rev., at 229.

Helm, of course, was not charged simply with uttering a "no account" check, but also with being an habitual offender.²⁰ And a State is justified in punishing a recidivist more severely than it punishes a first offender. Helm's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor.²¹ All were nonviolent and none was a crime against a

¹⁹ If Helm had been convicted simply of taking \$100 from a cash register, S.D. Codified Laws § 22-30A-1 (1979), or defrauding someone of \$100, § 22-30A-3, or obtaining \$100 through extortion, § 22-30A-4(1), or blackmail, § 22-30A-4(3), or using a false credit card to obtain \$100, § 22-30A-8.1, or embezzling \$100, § 22-30A-10, he would not be in prison today. All of these offenses would have been petty theft, a misdemeanor. § 22-30A-17 (amended 1982). Similarly, if Helm had written a \$100 check against insufficient funds, rather than a nonexistent account, he would have been guilty of a misdemeanor. §§ 22-41-1. Curiously, under South Dakota law there is no distinction between writing a "no account" check for a large sum and writing a "no account" check for a small sum. § 22-41-1.2.

²⁰ We must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision.

²¹ Helm, who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of vio-

person. Indeed, there was no minimum amount in either the burglary or the false pretenses statutes, see nn. 1 and 2, *supra*, and the minimum amount covered by the grand larceny statute was fairly small, see n. 3, *supra*.²²

Helm's present sentence is life imprisonment without possibility of parole.²³ Barring executive clemency, see *infra*, at —, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in *Rummel v. Estelle*. Rummel was likely to have been eligible for parole within 12 years of his initial confinement,²⁴ a fact on which the Court relied heavily. See 445 U. S., at 280–281. Helm's sentence is the most severe punishment that the State could have imposed on any criminal for any crime. See note 6, *supra*. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

We next consider the sentences that could be imposed on other criminals in the same jurisdiction. When Helm was sentenced, a South Dakota court was required to impose a

lence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have an incentive to pursue clearly needed treatment for his alcohol problem, or any other program of rehabilitation.

²² As suggested at oral argument, the third-degree burglary statute covered entering a building with the intent to steal a loaf of bread. Tr. of Oral Arg. 14–16. It appears that the grand larceny statute would have covered the theft of a chicken.

²³ Every life sentence in South Dakota is without possibility of parole. See *supra*, at —. We raise no question as to the general validity of sentences without possibility of parole. The only issue before us is whether, in the circumstances of this case and in light of the constitutional principle of proportionality, the sentence imposed on this petitioner violates the Eighth Amendment.

²⁴ We note that Rummel was, in fact, released within eight months of the Court's decision in his case. See L.A. Times, Nov. 16, 1980, p. 1, col. 3.

life sentence for murder, S.D. Codified Laws § 22-16-12 (1979) (amended 1980), and was authorized to impose a life sentence for treason, § 22-8-1, first degree manslaughter, § 22-16-15, first degree arson, § 22-33-1, and kidnapping, S.D. Comp. Laws Ann. § 22-19-1 (1967 ed., supp. 1978) (amended 1979). No other crime was punishable so severely on the first offense. Attempted murder, S.D. Codified Laws § 22-4-1(5) (1979), placing an explosive device on an aircraft, § 22-14A-5, and first degree rape, § 22-22-1 (amended 1980 and 1982), were only Class 2 felonies. Aggravated riot was only a Class 3 felony. § 22-10-5. Distribution of heroin, §§ 22-42-2 (amended 1982), 34-20B-13(7) (1977), and aggravated assault, § 22-18-1.1 (amended 1980 and 1981), were only Class 4 felonies.

Helm's habitual offender status complicates our analysis, but relevant comparisons are still possible. Under § 22-7-7, the penalty for a second or third felony is increased by one class. Thus a life sentence was mandatory when a second or third conviction was for treason, first degree manslaughter, first degree arson, or kidnapping, and a life sentence would have been authorized when a second or third conviction was for such crimes as attempted murder, placing an explosive device on an aircraft, or first degree rape. Finally, § 22-7-8, under which Helm was sentenced, authorized life imprisonment after three prior convictions, regardless of the crimes.

In sum, there were a handful of crimes that were necessarily punished by life imprisonment: murder, and, on a second or third offense, treason, first degree manslaughter, first degree arson, and kidnapping. There was a larger group for which life imprisonment was authorized in the discretion of the sentencing judge, including: treason, first degree manslaughter, first degree arson, and kidnapping; attempted murder, placing an explosive device on an aircraft, and first degree rape on a second or third offense; and any felony after three prior offenses. Finally, there was a large group of

very serious offenses for which life imprisonment was not authorized, including a third offense of heroin dealing or aggravated assault.

Criminals committing any of these offenses ordinarily would be thought more deserving of punishment than one uttering a "no account" check—even when the bad-check writer had already committed six minor felonies. Moreover, there is no indication in the record that any habitual offender other than Helm has ever been given the maximum sentence on the basis of comparable crimes. It is more likely that the possibility of life imprisonment under § 22-7-8 generally is reserved for criminals such as fourth-time heroin dealers, while habitual bad-check writers receive more lenient treatment.²⁸ In any event, Helm has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.

Finally, we compare the sentences imposed for commission of the same crime in other jurisdictions. The Court of Appeals found that "Helm could have received a life sentence without parole for his offense in only one other state, Nevada," 684 F. 2d, at 586, and we have no reason to doubt this finding. See Tr. of Oral Arg. 21. At the very least, therefore, it is clear that Helm could not have received such a severe sentence in 48 of the 50 States. But even under Nevada law, a life sentence without possibility of parole is merely authorized in these circumstances. See Nev. Rev.

²⁸ The State contends that § 22-7-8 is more lenient than the Texas habitual offender statute in *Rummel*, for life imprisonment under § 22-7-8 is discretionary rather than mandatory. Brief for Petitioner 22. Helm, however, has challenged only his own sentence. No one suggests that § 22-7-8 may not be applied constitutionally to fourth-time heroin dealers or other violent criminals. Thus we do not question the legislature's judgment. Unlike in *Rummel*, a lesser sentence here could have been entirely consistent with both the statute and the Eighth Amendment. See Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1160 (1979).

Stat. § 207.010(2) (1981). We are not advised that any defendant such as Helm, whose prior offenses were so minor, actually has received the maximum penalty in Nevada.²⁶ It appears that Helm was treated more severely than he would have been in any other State.

B

The State argues that the present case is essentially the same as *Rummel v. Estelle*, for the possibility of parole in that case is matched by the possibility of executive clemency here. The State reasons that the Governor could commute Helm's sentence to a term of years. We conclude, however, that the South Dakota commutation system is fundamentally different from the parole system that was before us in *Rummel*.

As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. See, e. g., *Greenholz v. Nebraska Penal Inmates*, 442 U. S. 1 (1979) (detailing Nebraska parole procedures); *Morrissey v. Brewer*, 408 U. S. 471, 477 (1972) ("the practice of releasing prisoners on parole

²⁶ Under § 207.010(2), a Nevada court is authorized to impose a sentence of "imprisonment in the state prison for life with or without possibility of parole. If the penalty fixed by the court is life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of 10 years has been served." It appears that most sentences imposed under § 207.010(2) permit parole, even when the prior crimes are far more serious than Helm's. See, e. g., *Rusling v. State*, 96 Nev. 778, 617 P. 2d 1302 (1980) (possession of a firearm by an ex-felon, two instances of driving an automobile without the owner's consent, four first degree burglaries, two sales of marijuana, two sales of a restricted dangerous drug, one sale of heroin, one escape from state prison, and one second degree burglary).

before the end of their sentences has become an integral part of the penological system"). Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards. See, e. g., *Connecticut Board of Pardons v. Dumschat*, 452 U. S. 458 (1981).

We explicitly have recognized the distinction between parole and commutation in our prior cases.²⁷ Writing on behalf of the *Morrissey* Court, for example, CHIEF JUSTICE BURGER contrasted the two possibilities: "Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals." 408 U. S., at 477. In *Dumschat*, THE CHIEF JUSTICE similarly explained that "there is a vast difference between a denial of parole . . . and a state's refusal to commute a lawful sentence." 452 U. S., at 466.

The Texas and South Dakota systems in particular are very different. In *Rummel*, the Court did not rely simply on the existence of some system of parole. Rather it looked to the provisions of the system presented, including the fact that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." 445 U. S., at 280. A Texas prisoner became eligible for parole when his calendar time

²⁷ In *Rummel* itself the Court implicitly recognized that the possibility of commutation is not equivalent to the possibility of parole. The Court carefully "distinguish[ed] *Rummel* from a person sentenced under a recidivist statute like [Miss. Code Ann. § 99-19-83 (Supp. 1979)], which provides for a sentence of life without parole." 445 U. S., at 281. But the Mississippi Constitution empowers the Governor to grant pardons in "all criminal and penal cases, excepting those of treason and impeachment." Art. 5, § 124. The Mississippi Supreme Court has long recognized that the power to pardon includes the power to commute a convict's sentence. See *Whittington v. Stevens*, 221 Miss. 598, 603-604, 73 So. 2d 137, 139-140 (1954).

served plus "good conduct" time equaled one-third of the maximum sentence imposed or 20 years, whichever is less. Tex. Code Crim. Proc. Ann., Art. 42.12, § 15(b) (Vernon 1979). An entering prisoner earned 20 days good-time per 30 days served, Brief for Respondent in *Rummel*, O. T. 1979, No. 78-6386, p. 16, and this could be increased to 30 days good-time per 30 days served, Tex. Rev. Civ. Stat. Ann., Art. 6181-1, §§ 2-3 (Vernon Supp. 1982). Thus *Rummel* could have been eligible for parole in as few as 10 years, and could have expected to become eligible, in the normal course of events, in only 12 years.

In South Dakota commutation is more difficult to obtain than parole. For example, the board of pardons and paroles is authorized to make commutation recommendations to the Governor, see n. 7, *supra*, but § 24-13-4 provides that "no recommendation for the commutation of . . . a life sentence, or for a pardon . . . , shall be made by less than the unanimous vote of all members of the board." In fact, no life sentence has been commuted in over eight years, App. 29, while parole—where authorized—has been granted regularly during that period, Tr. of Oral Arg. 8-9. Furthermore, even if Helm's sentence were commuted, he merely would be eligible to be considered for parole.²⁸ Not only is there no guarantee that he would be paroled, but the South Dakota parole system is far more stringent than the one before us in *Rummel*. Helm would have to serve three-fourths of his revised sentence before he would be eligible for parole, § 24-15-5, and the provision for good-time credits is less generous, § 24-5-1.²⁹

²⁸The most recent commutation of a life sentence in South Dakota occurred in 1975. The record indicates, however, that the prisoner in question still has not been paroled. App. 29.

²⁹Assume, for example, that in 1979 the Governor had commuted Helm's sentence to a term of 40 years (his approximate life expectancy). Even if Helm were a model prisoner, he would not have been eligible for parole until he had served over 21 years—more than twice the *Rummel* minimum. And this comparison is generous to South Dakota's position. If

The possibility of commutation is nothing more than a hope for "an *ad hoc* exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

V

The Constitution requires us to examine Helm's sentence to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment. The judgment of the Court of Appeals is accordingly

Affirmed.

Rummel had been sentenced to 40 years rather than life, he could have been eligible for parole in less than 7 years.

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Michael Starley

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SUPREME COURT OF THE UNITED STATES

No. 82-492

HERMAN SOLEM, WARDEN, PETITIONER *v.* JERRY
BUCKLEY HELM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

I

By 1975 the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.¹ In 1972

¹In 1969 third-degree burglary was defined in at least two sections of the South Dakota criminal code:

"A person breaking into any dwelling house in the nighttime with intent to commit a crime but under such circumstances as do not constitute burglary in the first degree, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. § 22-32-8 (1967) (repealed 1976).

"A person breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof, or any building or part of any building, booth, tent, railroad car, vessel, vehicle as defined in § 32-14-1, or any structure or erection in which any property is kept, with intent to commit larceny or any felony, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. § 22-32-9 (1967) (repealed 1976).

In 1964 and 1966 the third-degree burglary definition was essentially the same. See S.D. Code § 13.3703 (1939 ed., supp. 1960); 1965 S.D. Laws, ch. 32. Third-degree burglary was punishable by "imprisonment in the state penitentiary for any term not exceeding fifteen years." S.D. Comp. Laws Ann. § 22-32-10 (1967) (previously codified at S.D. Code § 13.3705(3)).

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he was convicted of obtaining money under false pretenses.² In 1973 he was convicted of grand larceny.³ And in 1975 he was convicted of third-offense driving while intoxicated.⁴ The record contains no details about the circumstances of any of these offenses, except that they were all nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case.

In 1979 Helm was charged with uttering a "no account" check for \$100.⁵ The only details we have of the crime are those given by Helm to the state trial court:

(1939)) (repealed 1976).

² In 1972 the relevant statute provided:

"Every person who designedly, by color or aid of any false token or writing, or other false pretense, . . . obtains from any person any money or property . . . is punishable by imprisonment in the state penitentiary not exceeding three years or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both such fine and imprisonment." S.D. Comp. Laws Ann. § 22-41-4 (1967) (repealed 1976).

³ In 1973 South Dakota defined "larceny" as "the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof." S.D. Comp. Laws Ann. § 22-37-1 (1967) (repealed 1976). Grand larceny and petit larceny were distinguished as follows:

"Grand larceny is larceny committed in any of the following cases:

- (1) When the property taken is of a value exceeding fifty dollars;
- (2) When such property, although not of a value exceeding fifty dollars, is taken from the person of another;
- (3) When such property is livestock.

Larceny in other cases is petit larceny." S.D. Comp. Laws Ann. § 22-37-2 (1967) (repealed 1976).

Grand larceny was then punishable by "imprisonment in the state penitentiary not exceeding ten years or by imprisonment in the county jail not exceeding one year." S.D. Comp. Laws Ann. § 22-37-3 (1967) (repealed 1976).

⁴ A third offense of driving while under the influence of alcohol is a felony in South Dakota. S.D. Codified Laws § 32-23-4 (1976). See 1973 S.D. Laws, ch. 195, § 7 (enacting version of § 32-23-4 in force in 1975).

⁵ The governing statute provides, in relevant part:

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"I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places.'" *State v. Helm*, 287 N. W. 2d 497, 501 (S.D. 1980) (Henderson, J., dissenting) (quoting Helm).

After offering this explanation, Helm pleaded guilty.

Ordinarily the maximum punishment for uttering a "no account" check would have been five years imprisonment in the state penitentiary and a five thousand dollar fine. See S.D. Comp. Laws Ann. § 22-6-1(6) (1967 ed., supp. 1978) (now codified at S.D. Codified Laws § 22-6-1(7) (Supp. 1982)). As a result of his criminal record, however, Helm was subject to South Dakota's recidivist statute:

"When a defendant has been convicted of at least three prior convictions [*sic*] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." S.D. Codified Laws § 22-7-8 (1979) (amended 1981).

The maximum penalty for a "Class 1 felony" was life imprisonment in the state penitentiary and a twenty-five thousand dollar fine.* S.D. Comp. Laws Ann. § 22-6-1(2) (1967 ed.,

"Any person who, for himself or as an agent or 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 § 22-41-1.2 (1979).

*When Helm was sentenced in April 1979, South Dakota law classified felonies as follows:

"Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished from each other by the respective maximum penalties hereinafter set forth which are authorized upon conviction:

\$5,000

\$25,000

supp. 1978) (now codified at S.D. Codified Laws § 22-6-1(3) (Supp. 1982)). Moreover, South Dakota law explicitly provides that parole is unavailable: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S.D. Codified Laws § 24-15-4 (1979). The Governor¹ is authorized to pardon prisoners, or to commute their sentences, S.D. Const., Art. IV, § 3, but no other relief from sentence is available even to a rehabilitated prisoner.

Immediately after accepting Helm's guilty plea, the South Dakota Circuit Court sentenced Helm to life imprisonment under § 22-7-8. The court explained:

"I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record

(1) Class A felony: life imprisonment in the state penitentiary. A lesser sentence may not be given for a Class A felony;

(2) Class 1 felony: life imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;

(3) Class 2 felony: twenty-five years imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;

(4) Class 3 felony: fifteen years imprisonment in the state penitentiary. In addition, a fine of fifteen thousand dollars may be imposed;

(5) Class 4 felony: ten years imprisonment in the state penitentiary. In addition, a fine of ten thousand dollars may be imposed;

(6) Class 5 felony: five years imprisonment in the state penitentiary. In addition, a fine of five thousand dollars may be imposed; and

(7) Class 6 felony: two years imprisonment in the state penitentiary or a fine of two thousand dollars, or both.

"Nothing in this section shall limit increased sentences for habitual criminals

"Except in cases where punishment is prescribed by law, every offense declared to be a felony and not otherwise classified is a Class 6 felony." S.D. Comp. Laws Ann. § 22-6-1 (1967 ed., supp. 1978) (amended 1979 and 1980).

¹The board of pardons and paroles is authorized to make recommendations to the Governor, S.D. Codified Laws § 24-14-1 (1979); § 24-14-5; S.D. Executive Order 82-04 (Apr. 12, 1982), but the Governor is not bound by the recommendation, § 24-14-5.

would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over." *State v. Helm*, 287 N. W. 2d, at 500 (Henderson, J., dissenting) (quoting S.D. Circuit Court, Seventh Judicial Circuit, Pennington County (Parker, J.)).

The South Dakota Supreme Court, in a 3-2 decision, affirmed the sentence despite Helm's argument that it violated the Eighth Amendment. *State v. Helm, supra*.

After Helm had served two years in the state penitentiary, he requested the Governor to commute his sentence to a fixed term of years. Such a commutation would have had the effect of making Helm eligible to be considered for parole when he had served three-fourths of his new sentence. See S.D. Codified Laws §24-15-5(3) (1979). The Governor denied Helm's request in May 1981. App. 26.

In November 1981, Helm sought habeas relief in the United States District Court for the District of South Dakota. Helm argued, among other things, that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. Although the District Court recognized that the sentence was harsh, it concluded that this Court's recent decision in *Rummel v. Estelle*, 445 U. S. 263 (1980), was dispositive. It therefore denied the writ.

The United States Court of Appeals for the Eighth Circuit reversed. 684 F. 2d 582 (1982). The Court of Appeals noted that *Rummel v. Estelle* was distinguishable. Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabilitation as a goal of the criminal justice system. The Court of Appeals examined the nature of Helm's offenses, the nature of his sentence, and the sentence he could have received in other States for the

same offense. It concluded, on the basis of this examination, that Helm's sentence was "grossly disproportionate to the nature of the offense." 684 F. 2d, at 587. It therefore directed the District Court to issue the writ unless the State resentenced Helm. *Ibid.*

We granted certiorari to consider the Eighth Amendment question presented by this case. 459 U. S. — (1982). We now affirm.

II

The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

A

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that "amercements"⁸ may not be excessive.⁹ And the principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275). These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punish-

⁸ An amercement was similar to a modern-day fine. It was the most common criminal sanction in thirteenth century England. See 2 F. Pollock & F. Maitland, *The History of English Law* 513-515 (2d ed. 1909).

⁹ Chapter 20 declared that "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." See 1 S.D. Codified Laws, p. 4 (1979) (translation of Magna Carta). According to Maitland, "there was no clause in Magna Carta more grateful to the mass of the people" F. Maitland, *Pleas of the Crown for the County of Gloucester* xxxiv (1884). Chapter 21 granted the same rights to the nobility, and chapter 22 granted the same rights to the clergy.

ments. See, e. g., *Le Gras v. Bailiff of Bishop of Winchester*, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), reprinted in 52 Selden Society 3 (1934). When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional. See, e. g., *Hodges v. Humkin*, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K.B. 1615) (Croke, J.) ("imprisonment ought always to be according to the quality of the offence").

The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 W. & M., sess. 2, ch. 2 (1689). Although the precise scope of this provision is uncertain, it at least incorporated "the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959); see 4 W. Blackstone, *Commentaries* *16-19 (1769); see also *id.*, at *16-17 (in condemning "punishments of unreasonable severity," uses "cruel" to mean severe or excessive). Indeed, barely three months after the Bill of Rights was adopted, the House of Lords declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon, was excessive and exorbitant, against magna charta, the common right of the subject, and against the law of the land." *Earl of Devon's Case*, 11 State Trials 133, 136 (1689).

When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights,¹⁰ they also adopted the

¹⁰ This language had earlier been incorporated in the Virginia Declaration of Rights, Art. I, § 9, authored by George Mason. See A. Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 207 (1968).

English principle of proportionality. The people were guaranteed the rights they had possessed as English subjects—including the right to be free from excessive punishments. 711

B

The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.¹¹ In the leading case of *Weems v. United States*, 217 U. S. 349 (1910), the defendant had been convicted of falsifying a public document and sentenced to 15 years of "cadena temporal," a form of imprisonment that included hard labor in chains and permanent civil disabilities. The Court noted "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense," *id.*, at 367, and held that the sentence violated the Eighth Amendment. The Court endorsed the principle of proportionality as a constitutional standard, see, e. g., *id.*, at 372-373, and determined that the sentence before it was "cruel in its excess of imprisonment," *id.*, at 377.

The Court next applied the principle to invalidate a criminal sentence in *Robinson v. California*, 370 U. S. 660 (1962).¹² A 90-day sentence was found to be excessive for the crime of being "addicted to the use of narcotics." The

¹¹ In *O'Neil v. Vermont*, 144 U. S. 323 (1892), the defendant had been convicted of 307 counts of "selling intoxicating liquor without authority," and sentenced to a term of over 54 years. The majority did not reach O'Neil's contention that this sentence was unconstitutional, for he did not include the point in his assignment of errors or in his brief. *Id.*, at 331. Furthermore, the majority noted that the Eighth Amendment "does not apply to the States." *Id.*, at 332. Accordingly the Court dismissed the writ of error for want of a federal question. *Id.*, at 336-337. The dissent, however, reached the Eighth Amendment question, observing that it "is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.*, at 339-340 (Field, J., dissenting).

¹² Members of the Court continued to recognize the principle of proportionality in the meantime. See, e. g., *Trop v. Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion); *id.*, at 111 (BRENNAN, J., concurring); *id.*, at

Court explained that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." *Id.*, at 667. Thus there was no question of an inherently barbaric punishment. "But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Ibid.*

Most recently, the Court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. *Enmund v. Florida*, 458 U. S. — (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used); *Coker v. Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion) ("sentence of death is grossly disproportionate and excessive punishment for the crime of rape"); *id.*, at 601 (POWELL, J., concurring in the judgment in part and dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman"). And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, e. g., *Hutto v. Finney*, 437 U. S. 678, 685 (1978); *Ingraham v. Wright*, 430 U. S. 651, 667 (1977); *Gregg v. Georgia*, 428 U. S. 153, 171-172 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); cf. *Hutto v. Davis*, 454 U. S. 370, 374, and n. 3 (1982) (*per curiam*) (recognizing that some prison sentences may be constitutionally disproportionate); *Rummel v. Estelle*, 445 U. S., at 274, n. 11 (same).

C

There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences.¹⁵ The constitutional language itself suggests no

125-128 (Frankfurter, J., dissenting).

¹⁵ According to *Rummel v. Estelle*, 445 U. S. 263 (1980), "one could

exception for imprisonment. We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, *Ingraham v. Wright*, 430 U. S., at 664, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. See *Hodges v. Humkin*, *supra*. And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis. See, e. g., *Weems*, 217 U. S., at 377; cf. *Hutto v. Finney*, 437 U. S., at 685 ("Confinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards").

When we have applied the proportionality principle in capital cases, we have drawn no distinction with cases of imprisonment. See *Gregg v. Georgia*, 428 U. S., at 176 (opinion of Stewart, POWELL, and STEVENS, JJ.). It is true that the "penalty of death differs from all other forms of criminal punishment, not in degree but in kind." *Furman v. Georgia*, 408 U. S. 238, 306 (1972) (Stewart, J., concurring). As a result, "our decisions [in] capital cases are of limited assistance in deciding the constitutionality of the punishment" in a noncapital case. *Rummel v. Estelle*, 445 U. S., at 272. All this means, however, is that, "[o]utside the context of capital punishment, successful challenges to the proportionality of

argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . the length of sentence actually imposed is purely a matter of legislative prerogative." *Id.*, at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible. To the extent that the State makes this argument here, we find it meritless.

particular sentences [will be] exceedingly rare,"¹⁴ *ibid.* (emphasis added); see *Hutto v. Davis*, 454 U. S., at 374. It does not mean that proportionality analysis is entirely inapplicable in noncapital cases.

In sum, we hold that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.¹⁵ But no penalty is *per se* constitutional. As the Court noted in *Robinson v. California*, 370 U. S., at 667, a single day in prison may be unconstitutional in some circumstances.

III


A

In reviewing sentences under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized.¹⁶ First, we look to the gravity of the offense and the harshness of the penalty. In *Enmund*, for example, the Court examined the circumstances of the defend-

¹⁴ In *Enmund*, for example, the Court found the death penalty to be excessive for felony murder in the circumstances of that case. But clearly no sentence of imprisonment would be disproportionate for Enmund's crime.

¹⁵ In view of the substantial deference properly due to legislatures and sentencing courts, most reviewing courts normally will not be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

¹⁶ As the Court has indicated, no one factor will be dispositive. See *Hutto v. Davis*, 454 U. S. 370, 373-374 n. 2 (1982) (*per curiam*); *Rummel v. Estelle*, 445 U. S., at 275-276. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. No single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment. See Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1825, 1376-1377 (1979).



ant's crime in great detail. 458 U. S., at ———. In *Coker* the Court considered the seriousness of the crime of rape, and compared it to other crimes, such as murder. 433 U. S., at 597–598 (plurality opinion); *id.*, at 603 (POWELL, J., concurring in the judgment in part and dissenting in part). In *Robinson* the emphasis was placed on the nature of the “crime.” 370 U. S., at 666–667. And in *Weems*, the Court's opinion commented in two separate places on the pettiness of the offense. 217 U. S., at 363 and 365. Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate. See, *e. g.*, *Coker*, 433 U. S., at 598 (plurality opinion); *Weems*, 217 U. S., at 366–367.

Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. Thus in *Enmund* the Court noted that all of the other felony murderers on death row in Florida were more culpable than the petitioner there. 458 U. S., at ———. The *Weems* Court identified an impressive list of more serious crimes that were subject to less serious penalties. 217 U. S., at 380–381.

Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. In *Enmund* the Court conducted an extensive review of capital punishment statutes and determined that “only about a third of American jurisdictions would ever permit a defendant [such as *Enmund*] to be sentenced to die.” 458 U. S., at ———. Even in those jurisdictions, however, the death penalty was almost never imposed under similar circumstances. *Id.*, at ———. The Court's review of foreign law also supported its conclusion. *Id.*, at ———, n. 22. The analysis in *Coker* was essentially the same. 433 U. S., at 593–597. And in *Weems* the Court relied on the fact that, under federal law, a similar crime was punishable by only two

year's imprisonment and a fine. 217 U. S., at 380. Cf. *Trop v. Dulles*, 356 U. S. 86, 102-103 (1958) (plurality opinion).

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (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.

B

Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments—just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. Thus in *Enmund* the Court determined that the petitioner's conduct was not as serious as his accomplices' conduct. Indeed, there are widely shared views as to the relative seriousness of crimes. See Rossi, Waite, Bose & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 Am. Soc. Rev. 224, 237 (1974). For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence. Cf. Tr. of Oral Arg. 16 (the State recognizes that the criminal law is more protective of people than property).

There are other accepted principles that courts may apply in measuring the harm caused or threatened to the victim or society. The absolute magnitude of the crime may be relevant. Stealing a million dollars is viewed as more serious than stealing a hundred dollars—a point recognized in statutes distinguishing petty theft from grand theft. See, e. g., S.D. Codified Laws § 22-30A-17 (Supp. 1982). Few would dispute that a lesser included offense should not be punished

more severely than the greater offense. Thus a court is justified in viewing assault with intent to murder as more serious than simple assault. See *Roberts v. Collins*, 544 F. 2d 168, 169-170 (CA4 1976) (*per curiam*), cert. denied, 430 U. S. 973 (1977). Cf. *Dembowski v. State*, 251 Ind. 250, 252, 240 N. E. 2d 815, 817 (1968) (armed robbery more serious than robbery); *Cannon v. Gladden*, 203 Or. 629, 632, 281 P. 2d 233, 235 (1955) (rape more serious than assault with intent to commit rape). It also is generally recognized that attempts are less serious than completed crimes. See, e. g., S.D. Codified Laws § 22-4-1 (1979); 4 Blackstone *15. Similarly, an accessory after the fact should not be subject to a higher penalty than the principal. See, e. g., 18 U. S. C. § 3.

Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In *Enmund* the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices. 458 U. S., at —. Most would agree that negligent conduct is less serious than intentional conduct. South Dakota, for example, ranks criminal acts in ascending order of seriousness as follows: negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts. S.D. Codified Laws § 22-1-2(1)(f) (Supp. 1982). A court, of course, is entitled to look at a defendant's motive in committing a crime. Thus a murder may be viewed as more serious when committed pursuant to a contract. See, e. g., Mass. Gen. Laws Ann., ch. 279, § 69(a)(5) (West Supp. 1982); cf. 4 Blackstone *15; *In re Foss*, 10 Cal.3d 910, 519 P. 2d 1073 (1974).

This list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.

C

Application of the factors that we identify also assumes

that courts are able to compare different sentences. This assumption, too, is justified. The easiest comparison, of course, is between capital punishment and noncapital punishments, for the death penalty is different from other punishments in kind rather than degree.¹⁷ For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence,¹⁸ but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

The Sixth Amendment right to a jury trial is an example. In *Williams v. Florida*, 399 U. S. 78 (1970), the Court upheld a criminal conviction returned by a unanimous 6-member jury, and in *Apodaca v. Oregon*, 406 U. S. 404 (1972), we upheld a conviction returned by ten members of a 12-member jury. In *Ballew v. Georgia*, 435 U. S. 223 (1978), however, we reversed a conviction returned by a unanimous 5-member jury. JUSTICE BLACKMUN "readily admit[ted] that we d[id] not pretend to discern a clear line between six members and five." *Id.*, at 239 (opinion of BLACKMUN, J.). He nevertheless found a difference between them of "constitutional significance." *Ibid.*; cf. *id.*, at 245-246 (POWELL, J., concurring in the judgment). And the following Term, in *Burch v. Louisiana*, 441 U. S. 130 (1979), we reversed a conviction returned by five members of a 6-member jury:

[W]e do not pretend the ability to discern *a priori* a bright line below which the number of jurors participat

¹⁷There is also a clear line between sentences of imprisonment and sentences involving no deprivation of liberty. See *Argersinger v. Hamlin*, 407 U. S. 25 (1972).

¹⁸The possibility of parole may complicate the comparison, depending upon the time and conditions of its availability.

ing in the trial or in the verdict would not permit the jury to function in the manner required by our prior cases. But . . . it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved." *Id.*, at 137 (citations omitted).

Another Sixth Amendment case illustrates the line-drawing function of the judiciary, and offers guidance on the method by which some lines may be drawn. *Baldwin v. New York*, 399 U. S. 66 (1970), the Court determined that a defendant has a right to a jury trial "where imprisonment for more than six months is authorized." *Id.*, at 69 (plurality opinion). In choosing the 6-month standard, the plurality relied almost exclusively on the fact that only New York City denied the right to a jury trial for an offense punishable by more than six months. As JUSTICE WHITE explained:

"This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone—between offenses that are and that are not regarded as 'serious' for purposes of trial by jury." *Id.*, at 72-73.

In short, *Baldwin* clearly demonstrates that a court properly may distinguish one sentence of imprisonment from another. It also supports our holding that courts properly may look to the practices in other jurisdictions in deciding where lines between sentences should be drawn.

IV

It remains to apply the analytical framework established by our prior decisions to the case before us. We first consider the relevant criteria, viewing Helm's sentence as life imprisonment without possibility of parole. We then consider the State's argument that the possibility of commutation is sufficient to save an otherwise unconstitutional

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A

Helm's crime was "one of the most passive felonies a person could commit." *State v. Helm*, 287 N. W. 2d, at 501 (Henderson, J., dissenting). It involved neither violence nor threat of violence to any person. The \$100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft.¹⁹ It is easy to see why such a crime is viewed by society as among the less serious offenses. See Rossi et al., 39 Am. Soc. Rev., at 229.

Helm, of course, was not charged simply with uttering a "no account" check, but also with being an habitual offender.²⁰ And a State is justified in punishing a recidivist more severely than it punishes a first offender. Helm's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor.²¹ All were nonviolent and none was a crime against a

¹⁹ If Helm had been convicted simply of taking \$100 from a cash register, S.D. Codified Laws § 22-30A-1 (1979), or defrauding someone of \$100, § 22-30A-3, or obtaining \$100 through extortion, § 22-30A-4(1), or blackmail, § 22-30A-4(3), or using a false credit card to obtain \$100, § 22-30A-8.1, or embezzling \$100, § 22-30A-10, he would not be in prison today. All of these offenses would have been petty theft, a misdemeanor. § 22-30A-17 (amended 1982). Similarly, if Helm had written a \$100 check against insufficient funds, rather than a nonexistent account, he would have been guilty of a misdemeanor. §§ 22-41-1. Curiously, under South Dakota law there is no distinction between writing a "no account" check for a large sum and writing a "no account" check for a small sum. § 22-41-1.2.

²⁰ We must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision.

²¹ Helm, who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of vio-

person. Indeed, there was no minimum amount in either the burglary or the false pretenses statutes, see nn. 1 and 2, *supra*, and the minimum amount covered by the grand larceny statute was fairly small, see n. 3, *supra*.²²

Helm's present sentence is life imprisonment without possibility of parole.²³ Barring executive clemency, see *infra*, at —, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in *Rummel v. Estelle*. Rummel was likely to have been eligible for parole within 12 years of his initial confinement,²⁴ a fact on which the Court relied heavily. See 445 U. S., at 280-281. Helm's sentence is the most severe punishment that the State could have imposed on any criminal for any crime. See note 6, *supra*. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

We next consider the sentences that could be imposed on other criminals in the same jurisdiction. When Helm was sentenced, a South Dakota court was required to impose a

lence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have an incentive to pursue clearly needed treatment for his alcohol problem, or any other program of rehabilitation.

²² As suggested at oral argument, the third-degree burglary statute covered entering a building with the intent to steal a loaf of bread. Tr. of Oral Arg. 14-16. It appears that the grand larceny statute would have covered the theft of a chicken.

²³ Every life sentence in South Dakota is without possibility of parole. See *supra*, at —. We raise no question as to the general validity of sentences without possibility of parole. The only issue before us is whether, in the circumstances of this case and in light of the constitutional principle of proportionality, the sentence imposed on this petitioner violates the Eighth Amendment.

²⁴ We note that Rummel was, in fact, released within eight months of the Court's decision in his case. See L.A. Times, Nov. 16, 1980, p. 1, col. 3.

life sentence for murder, S.D. Codified Laws §22-16-12 (1979) (amended 1980), and was authorized to impose a life sentence for treason, §22-8-1, first degree manslaughter, §22-16-15, first degree arson, §22-33-1, and kidnapping, S.D. Comp. Laws Ann. §22-19-1 (1967 ed., supp. 1978) (amended 1979). No other crime was punishable so severely on the first offense. Attempted murder, S.D. Codified Laws §22-4-1(5) (1979), placing an explosive device on an aircraft, §22-14A-5, and first degree rape, §22-22-1 (amended 1980 and 1982), were only Class 2 felonies. Aggravated riot was only a Class 3 felony. §22-10-5. Distribution of heroin, §§22-42-2 (amended 1982), 34-20B-13(7) (1977), and aggravated assault, §22-18-1.1 (amended 1980 and 1981), were only Class 4 felonies.

Helm's habitual offender status complicates our analysis, but relevant comparisons are still possible. Under §22-7-7, the penalty for a second or third felony is increased by one class. Thus a life sentence was mandatory when a second or third conviction was for treason, first degree manslaughter, first degree arson, or kidnapping, and a life sentence would have been authorized when a second or third conviction was for such crimes as attempted murder, placing an explosive device on an aircraft, or first degree rape. Finally, §22-7-8, under which Helm was sentenced, authorized life imprisonment after three prior convictions, regardless of the crimes. ||

In sum; there were a handful of crimes that were necessarily punished by life imprisonment: murder, and, on a second or third offense, treason, first degree manslaughter, first degree arson, and kidnapping. There was a larger group for which life imprisonment was authorized in the discretion of the sentencing judge, including: treason, first degree manslaughter, first degree arson, and kidnapping; attempted murder, placing an explosive device on an aircraft, and first degree rape on a second or third offense; and any felony after three prior offenses. Finally, there was a large group of

very serious offenses for which life imprisonment was not authorized, including a third offense of heroin dealing or aggravated assault.

Criminals committing any of these offenses ordinarily would be thought more deserving of punishment than one uttering a "no account" check—even when the bad-check writer had already committed six minor felonies. Moreover, there is no indication in the record that any habitual offender other than Helm has ever been given the maximum sentence on the basis of comparable crimes. It is more likely that the possibility of life imprisonment under § 22-7-8 generally is reserved for criminals such as fourth-time heroin dealers, while habitual bad-check writers receive more lenient treatment.²⁵ In any event, Helm has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.

Finally, we compare the sentences imposed for commission of the same crime in other jurisdictions. The Court of Appeals found that "Helm could have received a life sentence without parole for his offense in only one other state, Nevada," 684 F. 2d, at 586, and we have no reason to doubt this finding. See Tr. of Oral Arg. 21. At the very least, therefore, it is clear that Helm could not have received such a severe sentence in 48 of the 50 States. But even under Nevada law, a life sentence without possibility of parole is merely authorized in these circumstances. See Nev. Rev.

²⁵The State contends that § 22-7-8 is more lenient than the Texas habitual offender statute in *Rummel*, for life imprisonment under § 22-7-8 is discretionary rather than mandatory. Brief for Petitioner 22. Helm, however, has challenged only his own sentence. No one suggests that § 22-7-8 may not be applied constitutionally to fourth-time heroin dealers or other violent criminals. Thus we do not question the legislature's judgment. Unlike in *Rummel*, a lesser sentence here could have been entirely consistent with both the statute and the Eighth Amendment. See Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1160 (1979).

Stat. § 207.010(2) (1981). We are not advised that any defendant such as Helm, whose prior offenses were so minor, actually has received the maximum penalty in Nevada.²⁶ It appears that Helm was treated more severely than he would have been in any other State.

B

The State argues that the present case is essentially the same as *Rummel v. Estelle*, for the possibility of parole in that case is matched by the possibility of executive clemency here. The State reasons that the Governor could commute Helm's sentence to a term of years. We conclude, however, that the South Dakota commutation system is fundamentally different from the parole system that was before us in *Rummel*.

As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. See, e. g., *Greenholz v. Nebraska Penal Inmates*, 442 U. S. 1 (1979) (detailing Nebraska parole procedures); *Morrissey v. Brewer*, 408 U. S. 471, 477 (1972) ("the practice of releasing prisoners on parole

²⁶ Under § 207.010(2), a Nevada court is authorized to impose a sentence of "imprisonment in the state prison for life with or without possibility of parole. If the penalty fixed by the court is life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of 10 years has been served." It appears that most sentences imposed under § 207.010(2) permit parole, even when the prior crimes are far more serious than Helm's. See, e. g., *Rustling v. State*, 96 Nev. 778, 617 P. 2d 1302 (1980) (possession of a firearm by an ex-felon, two instances of driving an automobile without the owner's consent, four first degree burglaries, two sales of marijuana, two sales of a restricted dangerous drug, one sale of heroin, one escape from state prison, and one second degree burglary).

before the end of their sentences has become an integral part of the penological system"). Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards. See, e. g., *Connecticut Board of Pardons v. Dumschat*, 452 U. S. 458 (1981).

We explicitly have recognized the distinction between parole and commutation in our prior cases.²⁷ Writing on behalf of the *Morrissey* Court, for example, CHIEF JUSTICE BURGER contrasted the two possibilities: "Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals." 408 U. S., at 477. In *Dumschat*, THE CHIEF JUSTICE similarly explained that "there is a vast difference between a denial of parole . . . and a state's refusal to commute a lawful sentence." 452 U. S., at 466.

The Texas and South Dakota systems in particular are very different. In *Rummel*, the Court did not rely simply on the existence of some system of parole. Rather it looked to the provisions of the system presented, including the fact that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." 445 U. S., at 280. A Texas prisoner became eligible for parole when his calendar time

²⁷ In *Rummel* itself the Court implicitly recognized that the possibility of commutation is not equivalent to the possibility of parole. The Court carefully "distinguish[ed] *Rummel* from a person sentenced under a recidivist statute like [Miss. Code Ann. § 99-19-83 (Supp. 1979)], which provides for a sentence of life without parole." 445 U. S., at 281. But the Mississippi Constitution empowers the Governor to grant pardons in "all criminal and penal cases, excepting those of treason and impeachment." Art. 5, § 124. The Mississippi Supreme Court has long recognized that the power to pardon includes the power to commute a convict's sentence. See *Whittington v. Stevens*, 221 Miss. 598, 603-604, 73 So. 2d 137, 139-140 (1954).

served plus "good conduct" time equaled one-third of the maximum sentence imposed or 20 years, whichever is less. Tex. Code Crim. Proc. Ann., Art. 42.12, § 15(b) (Vernon 1979). An entering prisoner earned 20 days good-time per 30 days served, Brief for Respondent in *Rummel*, O. T. 1979, No. 78-6386, p. 16, and this could be increased to 30 days good-time per 30 days served, Tex. Rev. Civ. Stat. Ann., Art. 6181-1, §§ 2-3 (Vernon Supp. 1982). Thus *Rummel* could have been eligible for parole in as few as 10 years, and could have expected to become eligible, in the normal course of events, in only 12 years.

In South Dakota commutation is more difficult to obtain than parole. For example, the board of pardons and paroles is authorized to make commutation recommendations to the Governor, see n. 7, *supra*, but § 24-13-4 provides that "no recommendation for the commutation of . . . a life sentence, or for a pardon . . . , shall be made by less than the unanimous vote of all members of the board." In fact, no life sentence has been commuted in over eight years, App. 29, while parole—where authorized—has been granted regularly during that period, Tr. of Oral Arg. 8-9. Furthermore, even if Helm's sentence were commuted, he merely would be eligible to be considered for parole.²² Not only is there no guarantee that he would be paroled, but the South Dakota parole system is far more stringent than the one before us in *Rummel*. Helm would have to serve three-fourths of his revised sentence before he would be eligible for parole, § 24-15-5, and the provision for good-time credits is less generous, § 24-5-1.²³

²² The most recent commutation of a life sentence in South Dakota occurred in 1975. The record indicates, however, that the prisoner in question still has not been paroled. App. 29.

²³ Assume, for example, that in 1979 the Governor had commuted Helm's sentence to a term of 40 years (his approximate life expectancy). Even if Helm were a model prisoner, he would not have been eligible for parole until he had served over 21 years—more than twice the *Rummel* minimum. And this comparison is generous to South Dakota's position. If

The possibility of commutation is nothing more than a hope for "an *ad hoc* exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

V

The Constitution requires us to examine Helm's sentence to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment. The judgment of the Court of Appeals is accordingly

Affirmed.

Rummel had been sentenced to 40 years rather than life, he could have been eligible for parole in less than 7 years.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

Master
6/24

From: **Justice Powell**

Circulated: _____

Recirculated: _____

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SUPREME COURT OF THE UNITED STATES

No. 82-492

HERMAN SOLEM, WARDEN, PETITIONER *v.*
JERRY BUCKLEY HELM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

I

By 1975 the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.¹ In 1972

¹In 1969 third-degree burglary was defined in at least two sections of the South Dakota criminal code:

"A person breaking into any dwelling house in the nighttime with intent to commit a crime but under such circumstances as do not constitute burglary in the first degree, is guilty of burglary in the third degree." S. D. Comp. Laws Ann. § 22-32-8 (1967) (repealed 1976).

"A person breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof, or any building or part of any building, booth, tent, railroad car, vessel, vehicle as defined in § 32-14-1, or any structure or erection in which any property is kept, with intent to commit larceny or any felony, is guilty of burglary in the third degree." S. D. Comp. Laws Ann. § 22-32-9 (1967) (repealed 1976).

In 1964 and 1966 the third-degree burglary definition was essentially the same. See S. D. Code § 13.3703 (1939 ed., supp. 1960); 1965 S. D. Laws, ch. 32. Third-degree burglary was punishable by "imprisonment in the state penitentiary for any term not exceeding fifteen years." S. D. Comp. Laws Ann. § 22-32-10 (1967) (previously codified at S. D. Code § 13.3705(3)).

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he was convicted of obtaining money under false pretenses.² In 1973 he was convicted of grand larceny.³ And in 1975 he was convicted of third-offense driving while intoxicated.⁴ The record contains no details about the circumstances of any of these offenses, except that they were all nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case.

In 1979 Helm was charged with uttering a "no account" check for \$100.⁵ The only details we have of the crime are those given by Helm to the state trial court:

(1939)) (repealed 1976).

² In 1972 the relevant statute provided:

"Every person who designedly, by color or aid of any false token or writing, or other false pretense, . . . obtains from any person any money or property . . . is punishable by imprisonment in the state penitentiary not exceeding three years or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both such fine and imprisonment." S. D. Comp. Laws Ann. § 22-41-4 (1967) (repealed 1976).

³ In 1973 South Dakota defined "larceny" as "the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof." S. D. Comp. Laws Ann. § 22-37-1 (1967) (repealed 1976). Grand larceny and petit larceny were distinguished as follows:

"Grand larceny is larceny committed in any of the following cases;

(1) When the property taken is of a value exceeding fifty dollars;

(2) When such property, although not of a value exceeding fifty dollars, is taken from the person of another;

(3) When such property is livestock.

Larceny in other cases is petit larceny." S. D. Comp. Laws Ann. § 22-37-2 (1967) (repealed 1976).

Grand larceny was then punishable by "imprisonment in the state penitentiary not exceeding ten years or by imprisonment in the county jail not exceeding one year." S. D. Comp. Laws Ann. § 22-37-3 (1967) (repealed 1976).

⁴ A third offense of driving while under the influence of alcohol is a felony in South Dakota. S. D. Codified Laws § 32-23-4 (1976). See 1973 S. D. Laws, ch. 195, § 7 (enacting version of § 32-23-4 in force in 1975).

⁵ The governing statute provides, in relevant part:

"Any person who, for himself or as an agent or representative of another

"I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places." *State v. Helm*, 287 N. W. 2d 497, 501 (S. D. 1980) (Henderson, J., dissenting) (quoting Helm).

After offering this explanation, Helm pleaded guilty.

Ordinarily the maximum punishment for uttering a "no account" check would have been five years imprisonment in the state penitentiary and a \$5,000 fine. See S. D. Comp. Laws Ann. § 22-6-1(6) (1967 ed., supp. 1978) (now codified at S. D. Codified Laws § 22-6-1(7) (Supp. 1982)). As a result of his criminal record, however, Helm was subject to South Dakota's recidivist statute:

"When a defendant has been convicted of at least three prior convictions [*sic*] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." S. D. Codified Laws § 22-7-8 (1979) (amended 1981).

The maximum penalty for a "Class 1 felony" was life imprisonment in the state penitentiary and a \$25,000 fine.⁶ S. D.

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 § 22-41-1.2 (1978).

⁶When Helm was sentenced in April 1979, South Dakota law classified felonies as follows:

"Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished from each other by the respective maximum penalties hereinafter set forth which are authorized upon conviction:

(1) Class A felony: life imprisonment in the state penitentiary. A lesser sentence may not be given for a Class A felony;

(2) Class 1 felony: life imprisonment in the state penitentiary. In addi-

Comp. Laws Ann. §22-6-1(2) (1967 ed., supp. 1978) (now codified at S. D. Codified Laws §22-6-1(3) (Supp. 1982)). Moreover, South Dakota law explicitly provides that parole is unavailable: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S. D. Codified Laws §24-15-4 (1979). The Governor⁷ is authorized to pardon prisoners, or to commute their sentences, S. D. Const., Art. IV, §3, but no other relief from sentence is available even to a rehabilitated prisoner.

Immediately after accepting Helm's guilty plea, the South Dakota Circuit Court sentenced Helm to life imprisonment under §22-7-8. The court explained:

"I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest

tion, a fine of twenty-five thousand dollars may be imposed;

(3) Class 2 felony: twenty-five years imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;

(4) Class 3 felony: fifteen years imprisonment in the state penitentiary. In addition, a fine of fifteen thousand dollars may be imposed;

(5) Class 4 felony: ten years imprisonment in the state penitentiary. In addition, a fine of ten thousand dollars may be imposed;

(6) Class 5 felony: five years imprisonment in the state penitentiary. In addition, a fine of five thousand dollars may be imposed; and

(7) Class 6 felony: two years imprisonment in the state penitentiary or a fine of two thousand dollars, or both.

"Nothing in this section shall limit increased sentences for habitual criminals

"Except in cases where punishment is prescribed by law, every offense declared to be a felony and not otherwise classified is a Class 6 felony." S. D. Comp. Laws Ann. §22-6-1 (1967 ed., supp. 1978) (amended 1979 and 1980).

⁷The board of pardons and paroles is authorized to make recommendations to the Governor, S. D. Codified Laws §24-14-1 (1979); §24-14-5; S. D. Executive Order 82-04 (Apr. 12, 1982), but the Governor is not bound by the recommendation, §24-14-5.

of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over.'" *State v. Helm*, 287 N. W. 2d, at 500 (Henderson, J., dissenting) (quoting S. D. Circuit Court, Seventh Judicial Circuit, Pennington County (Parker, J.)).

The South Dakota Supreme Court, in a 3-2 decision, affirmed the sentence despite Helm's argument that it violated the Eighth Amendment. *State v. Helm, supra*.

After Helm had served two years in the state penitentiary, he requested the Governor to commute his sentence to a fixed term of years. Such a commutation would have had the effect of making Helm eligible to be considered for parole when he had served three-fourths of his new sentence. See S. D. Codified Laws § 24-15-5(3) (1979). The Governor denied Helm's request in May 1981. App. 26.

In November 1981, Helm sought habeas relief in the United States District Court for the District of South Dakota. Helm argued, among other things, that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. Although the District Court recognized that the sentence was harsh, it concluded that this Court's recent decision in *Rummel v. Estelle*, 445 U. S. 263 (1980), was dispositive. It therefore denied the writ.

The United States Court of Appeals for the Eighth Circuit reversed. 684 F. 2d 582 (1982). The Court of Appeals noted that *Rummel v. Estelle* was distinguishable. Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabilitation as a goal of the criminal justice system. The Court of Appeals examined the nature of Helm's offenses, the nature of his sentence, and the sentence he could have received in other States for the same offense. It concluded, on the basis of this examination, that Helm's sentence was "grossly disproportionate to the na-

ture of the offense." 684 F. 2d, at 587. It therefore directed the District Court to issue the writ unless the State resentence Helm. *Ibid.*

We granted certiorari to consider the Eighth Amendment question presented by this case. 459 U. S. — (1982). We now affirm.

II

The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

A

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that "amercements"³ may not be excessive.⁴ And the principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275). These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments. See, e. g., *Le Gras v. Bailiff of Bishop of Winchester*, Y. B. Mich. 10 Edw. II, pl. 4 (C. P. 1316), reprinted in 52 Selden Society 3 (1934). When prison sentences became the

³ An amercement was similar to a modern-day fine. It was the most common criminal sanction in ~~thirteenth~~ century England. See 2 F. Pollock & F. Maitland, *The History of English Law* 513-515 (2d ed. 1909).

⁴ Chapter 20 declared that "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." See 1 S. D. Codified Laws, p. 4 (1978) (translation of Magna Carta). According to Maitland, "there was no clause in Magna Carta more grateful to the mass of the people . . ." F. Maitland, *Pleas of the Crown for the County of Gloucester* xxxiv (1884). Chapter 21 granted the same rights to the nobility, and chapter 22 granted the same rights to the clergy.

normal criminal sanctions, the common law recognized that these, too, must be proportional. See, e. g., *Hodges v. Humkin*, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K. B. 1615) (Croke, J.) ("imprisonment ought always to be according to the quality of the offence").

The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 W. & M., sess. 2, ch. 2 (1689). Although the precise scope of this provision is uncertain, it at least incorporated "the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959); see 4 W. Blackstone, *Commentaries* *16-19 (1769); see also *id.*, at *16-17 (in condemning "punishments of unreasonable severity," uses "cruel" to mean severe or excessive). Indeed, barely three months after the Bill of Rights was adopted, the House of Lords declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon, was excessive and exorbitant, against magna charta, the common right of the subject, and against the law of the land." *Earl of Devon's Case*, 11 State Trials 133, 136 (1689).

When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights,¹⁰ they also adopted the English principle of proportionality. The people were guaranteed the rights they had possessed as English subjects—including the right to be free from excessive punishments.

¹⁰This language had earlier been incorporated in the Virginia Declaration of Rights, Art. I, § 9, authored by George Mason. See A. Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 207 (1968).

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The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.¹¹ In the leading case of *Weems v. United States*, 217 U. S. 349 (1910), the defendant had been convicted of falsifying a public document and sentenced to 15 years of "cadena temporal," a form of imprisonment that included hard labor in chains and permanent civil disabilities. The Court noted "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense," *id.*, at 367, and held that the sentence violated the Eighth Amendment. The Court endorsed the principle of proportionality as a constitutional principle, *id.*, at 372-373, and determined that the sentence was "cruel in its excess of imprisonment,"

"accessories" was one of the words used by the *Weems* Court. It covers the shackles, the forced labor, the civil disabilities, etc. I think shackles alone is too narrow. How about

"accompaniments" — another term used by the Court?

applied the principle to invalidate a criminal sentence in *Robinson v. California*, 370 U. S. 660 (1962). That sentence was found to be excessive for "addicted to the use of narcotics." The Court held that "imprisonment for ninety days is not, in itself, punishment which is either cruel or unusual."

In *Robinson*, 144 U. S. 323 (1892), the defendant had been convicted of "selling intoxicating liquor without authority," and sentenced to a term of over 54 years. The majority did not reach the question of whether this sentence was unconstitutional, for he did not assign error or in his brief. *Id.*, at 331. The majority noted that the Eighth Amendment "does not prohibit excessive punishment," *id.*, at 332. Accordingly the Court dismissed the writ as a federal question. *Id.*, at 336-337. The dissent, however, raised the Eighth Amendment question, observing that it "is a question of whether the punishment is excessive in length or is disproportionate to the offences charged." *Id.*, at 337 (dissenting).

The Court continued to recognize the principle of proportionality. See, e. g., *Trop v. Dulles*, 356 U. S. 86, 100 (1958); *id.*, at 111 (BRENNAN, J., concurring); *id.*, at 111 (dissenting).

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Id., at 667. Thus there was no question of an inherently barbaric punishment. "But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Ibid.*

Most recently, the Court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. *Enmund v. Florida*, 458 U. S. — (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used); *Coker v. Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion) ("sentence of death is grossly disproportionate and excessive punishment for the crime of rape"); *id.*, at 601 (POWELL, J., concurring in the judgment in part and dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman"). And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, e. g., *Hutto v. Finney*, 437 U. S. 678, 685 (1978); *Ingraham v. Wright*, 430 U. S. 651, 667 (1977); *Gregg v. Georgia*, 428 U. S. 153, 171-172 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); cf. *Hutto v. Davis*, 454 U. S. 370, 374, and n. 3 (1982) (*per curiam*) (recognizing that some prison sentences may be constitutionally disproportionate); *Rummel v. Estelle*, 445 U. S., at 274, n. 11 (same).

C

There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences.¹³ The constitutional language itself suggests no

¹³ According to *Rummel v. Estelle*, 445 U. S. 263 (1980), "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . the length of sentence actually imposed is purely a matter of legislative prerogative."

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exception for imprisonment. We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, *Ingraham v. Wright*, 430 U. S., at 664, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. See *Hodges v. Humkin*, *supra*. And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis. See, e. g., *Weems*, 217 U. S., at 377; cf. *Hutto v. Finney*, 437 U. S., at 685 ("Confinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards").

When we have applied the proportionality principle in capital cases, we have drawn no distinction with cases of imprisonment. See *Gregg v. Georgia*, 428 U. S., at 176 (opinion of Stewart, POWELL, and STEVENS, JJ.). It is true that the "penalty of death differs from all other forms of criminal punishment, not in degree but in kind." *Furman v. Georgia*, 408 U. S. 238, 306 (1972) (Stewart, J., concurring). As a result, "our decisions [in] capital cases are of limited assistance in deciding the constitutionality of the punishment" in a noncapital case. *Rummel v. Estelle*, 445 U. S., at 272. All this means, however, is that, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare,"¹⁴ *ibid.* (em-

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Id., at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible. To the extent that the State makes this argument here, we find it meritless.

¹⁴ In *Enmund*, for example, the Court found the death penalty to be excessive for felony murder in the circumstances of that case. But clearly no

phasis added); see *Hutto v. Davis*, 454 U. S., at 374. It does not mean that proportionality analysis is entirely inapplicable in noncapital cases.

In sum, we hold that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.¹⁵ But no penalty is *per se* constitutional. As the Court noted in *Robinson v. California*, 370 U. S., at 667, a single day in prison may be unconstitutional in some circumstances.

III

A

In reviewing sentences under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized.¹⁶ First, we look to the gravity of the offense and the harshness of the penalty. In *Enmund*, for example, the Court examined the circumstances of the defendant's crime in great detail. 458 U. S., at — — —. In *Coker* the Court considered the seriousness of the crime of

sentence of imprisonment would be disproportionate for *Enmund*'s crime.

¹⁵ In view of the substantial deference properly due to legislatures and sentencing courts, most reviewing courts normally will not be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

¹⁶ As the Court has indicated, no one factor will be dispositive. See *Hutto v. Davis*, 454 U. S. 370, 373-374 n. 2 (1982) (*per curiam*); *Rummel v. Estelle*, 445 U. S., at 275-276. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. No single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment. See Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L. J. 1325, 1376-1377 (1979).

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rape, and compared it to other crimes, such as murder. 433 U. S., at 597-598 (plurality opinion); *id.*, at 603 (POWELL, J., concurring in the judgment in part and dissenting in part). In *Robinson* the emphasis was placed on the nature of the "crime." 370 U. S., at 666-667. And in *Weems*, the Court's opinion commented in two separate places on the pettiness of the offense. 217 U. S., at 363 and 365. Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate. See, e. g., *Coker*, 433 U. S., at 598 (plurality opinion); *Weems*, 217 U. S., at 366-367.

Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. Thus in *Enmund* the Court noted that all of the other felony murderers on death row in Florida were more culpable than the petitioner there. 458 U. S., at —. The *Weems* Court identified an impressive list of more serious crimes that were subject to less serious penalties. 217 U. S., at 380-381.

Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. In *Enmund* the Court conducted an extensive review of capital punishment statutes and determined that "only about a third of American jurisdictions would ever permit a defendant [such as *Enmund*] to be sentenced to die." 458 U. S., at —. Even in those jurisdictions, however, the death penalty was almost never imposed under similar circumstances. *Id.*, at —. The Court's review of foreign law also supported its conclusion. *Id.*, at —, n. 22. The analysis in *Coker* was essentially the same. 433 U. S., at 593-597. And in *Weems* the Court relied on the fact that, under federal law, a similar crime was punishable by only two year's imprisonment and a fine. 217 U. S., at 380. Cf. *Trop v. Dulles*, 356 U. S. 86, 102-103 (1958) (plurality opinion).

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (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.

B

Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments—just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. Thus in *Enmund* the Court determined that the petitioner's conduct was not as serious as his accomplices' conduct. Indeed, there are widely shared views as to the relative seriousness of crimes. See Rossi, Waite, Bose & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 Am. Soc. Rev. 224, 237 (1974). For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence. Cf. Tr. of Oral Arg. 16 (the State recognizes that the criminal law is more protective of people than property).

There are other accepted principles that courts may apply in measuring the harm caused or threatened to the victim or society. The absolute magnitude of the crime may be relevant. Stealing a million dollars is viewed as more serious than stealing a hundred dollars—a point recognized in statutes distinguishing petty theft from grand theft. See, e. g., S. D. Codified Laws § 22-30A-17 (Supp. 1982). Few would dispute that a lesser included offense should not be punished more severely than the greater offense. Thus a court is justified in viewing assault with intent to murder as more seri-

ous than simple assault. See *Roberts v. Collins*, 544 F. 2d 168, 169-170 (CA4 1976) (*per curiam*), cert. denied, 430 U. S. 973 (1977). Cf. *Dembowski v. State*, 251 Ind. 250, 252, 240 N. E. 2d 815, 817 (1968) (armed robbery more serious than robbery); *Cannon v. Gladden*, 203 Or. 629, 632, 281 P. 2d 233, 235 (1955) (rape more serious than assault with intent to commit rape). It also is generally recognized that attempts are less serious than completed crimes. See, *e. g.*, S. D. Codified Laws § 22-4-1 (1979); 4 Blackstone *15. Similarly, an accessory after the fact should not be subject to a higher penalty than the principal. See, *e. g.*, 18 U. S. C. § 3.

Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In *Enmund* the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices. 458 U. S., at —. Most would agree that negligent conduct is less serious than intentional conduct. South Dakota, for example, ranks criminal acts in ascending order of seriousness as follows: negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts. S. D. Codified Laws § 22-1-2(1)(f) (Supp. 1982). A court, of course, is entitled to look at a defendant's motive in committing a crime. Thus a murder may be viewed as more serious when committed pursuant to a contract. See, *e. g.*, Mass. Gen. Laws Ann., ch. 279, § 69(a)(5) (West Supp. 1982); cf. 4 Blackstone *15; *In re Foss*, 10 Cal.3d 910, 519 P. 2d 1073 (1974).

This list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.

C

Application of the factors that we identify also assumes that courts are able to compare different sentences. This assumption, too, is justified. The easiest comparison, of

course, is between capital punishment and noncapital punishments, for the death penalty is different from other punishments in kind rather than degree.¹⁷ For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence,¹⁸ but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

The Sixth Amendment right to a jury trial is an example. *Baldwin v. New York*, 399 U. S. 66 (1970), in particular, illustrates the line-drawing function of the judiciary, and offers guidance on the method by which some lines may be drawn. There the Court determined that a defendant has a right to a jury trial "where imprisonment for more than six months is authorized." *Id.*, at 69 (plurality opinion). In choosing the 6-month standard, the plurality relied almost exclusively on the fact that only New York City denied the right to a jury trial for an offense punishable by more than six months. As JUSTICE WHITE explained:

"This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone—between offenses that are and that are not regarded as 'serious' for purposes of trial by jury." *Id.*, at 72-73.

In short, *Baldwin* clearly demonstrates that a court properly

¹⁷ There is also a clear line between sentences of imprisonment and sentences involving no deprivation of liberty. See *Argersinger v. Hamlin*, 407 U. S. 25 (1972).

¹⁸ The possibility of parole may complicate the comparison, depending upon the time and conditions of its availability.

of the unique facts of each case.
As here, any defendant can claim
that his trial was not speedy
enough — but few will ever be
successful.

Make - Speedy
trial is a good
example, add a
note as you
suggested.

H15R

Corner

The dissent hits
us on line-
drawing. IF
you'd like,
I could add
a discussion
here of the
Speedy Trial
Clause cases.
That's a context
in which
courts have
to draw lines
on the basis

may distinguish one sentence of imprisonment from another. It also supports our holding that courts properly may look to the practices in other jurisdictions in deciding where lines between sentences should be drawn.

IV

It remains to apply the analytical framework established by our prior decisions to the case before us. We first consider the relevant criteria, viewing Helm's sentence as life imprisonment without possibility of parole. We then consider the State's argument that the possibility of commutation is sufficient to save an otherwise unconstitutional sentence.

A

Helm's crime was "one of the most passive felonies a person could commit." *State v. Helm*, 287 N. W. 2d, at 501 (Henderson, J., dissenting). It involved neither violence nor threat of violence to any person. The \$100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft.¹⁹ It is easy to see why such a crime is viewed by society as among the less serious offenses. See Rossi et al., 39 Am. Soc. Rev., at 229.

Helm, of course, was not charged simply with uttering a

¹⁹ If Helm had been convicted simply of taking \$100 from a cash register, S. D. Codified Laws § 22-30A-1 (1979), or defrauding someone of \$100, § 22-30A-3, or obtaining \$100 through extortion, § 22-30A-4(1), or blackmail, § 22-30A-4(3), or using a false credit card to obtain \$100, § 22-30A-8.1, or embezzling \$100, § 22-30A-10, he would not be in prison today. All of these offenses would have been petty theft, a misdemeanor. § 22-30A-17 (amended 1982). Similarly, if Helm had written a \$100 check against insufficient funds, rather than a nonexistent account, he would have been guilty of a misdemeanor. §§ 22-41-1. Curiously, under South Dakota law there is no distinction between writing a "no account" check for a large sum and writing a "no account" check for a small sum. § 22-41-1.2.

"no account" check, but also with being an habitual offender.²⁰ And a State is justified in punishing a recidivist more severely than it punishes a first offender. Helm's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor.²¹ All were nonviolent and none was a crime against a person. Indeed, there was no minimum amount in either the burglary or the false pretenses statutes, see nn. 1 and 2, *supra*, and the minimum amount covered by the grand larceny statute was fairly small, see n. 3, *supra*.²²

Helm's present sentence is life imprisonment without possibility of parole.²³ Barring executive clemency, see *infra*, at —, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in *Rummel v. Estelle*. Rummel was likely to have been eligible for parole within 12 years of his

²⁰ We must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision.

²¹ Helm, who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have an incentive to pursue clearly needed treatment for his alcohol problem, or any other program of rehabilitation.

²² As suggested at oral argument, the third-degree burglary statute covered entering a building with the intent to steal a loaf of bread. Tr. of Oral Arg. 14-16. It appears that the grand larceny statute would have covered the theft of a chicken.

²³ Every life sentence in South Dakota is without possibility of parole. See *supra*, at —. We raise no question as to the general validity of sentences without possibility of parole. The only issue before us is whether, in the circumstances of this case and in light of the constitutional principle of proportionality, the sentence imposed on this petitioner violates the Eighth Amendment.

initial confinement,²⁴ a fact on which the Court relied heavily. See 445 U. S., at 280-281. Helm's sentence is the most severe punishment that the State could have imposed on any criminal for any crime. See note 6, *supra*. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

We next consider the sentences that could be imposed on other criminals in the same jurisdiction. When Helm was sentenced, a South Dakota court was required to impose a life sentence for murder, S. D. Codified Laws § 22-16-12 (1979) (amended 1980), and was authorized to impose a life sentence for treason, § 22-8-1, first degree manslaughter, § 22-16-15, first degree arson, § 22-33-1, and kidnapping, S. D. Comp. Laws Ann. § 22-19-1 (1967 ed., supp. 1978) (amended 1979). No other crime was punishable so severely on the first offense. Attempted murder, S. D. Codified Laws § 22-4-1(5) (1979), placing an explosive device on an aircraft, § 22-14A-5, and first degree rape, § 22-22-1 (amended 1980 and 1982), were only Class 2 felonies. Aggravated riot was only a Class 3 felony. § 22-10-5. Distribution of heroin, §§ 22-42-2 (amended 1982), 34-20B-13(7) (1977), and aggravated assault, § 22-18-1.1 (amended 1980 and 1981), were only Class 4 felonies.

Helm's habitual offender status complicates our analysis, but relevant comparisons are still possible. Under § 22-7-7, the penalty for a second or third felony is increased by one class. Thus a life sentence was mandatory when a second or third conviction was for treason, first degree manslaughter, first degree arson, or kidnapping, and a life sentence would have been authorized when a second or third conviction was for such crimes as attempted murder, placing an explosive device on an aircraft, or first degree rape. Finally, § 22-7-8, under which Helm was sentenced, authorized life imprisonment after three prior convictions, regardless of the crimes.

²⁴ We note that Rummel was, in fact, released within eight months of the Court's decision in his case. See L.A. Times, Nov. 16, 1980, p. 1, col. 8.

In sum, there were a handful of crimes that were necessarily punished by life imprisonment: murder, and, on a second or third offense, treason, first degree manslaughter, first degree arson, and kidnapping. There was a larger group for which life imprisonment was authorized in the discretion of the sentencing judge, including: treason, first degree manslaughter, first degree arson, and kidnapping; attempted murder, placing an explosive device on an aircraft, and first degree rape on a second or third offense; and any felony after three prior offenses. Finally, there was a large group of very serious offenses for which life imprisonment was not authorized, including a third offense of heroin dealing or aggravated assault.

Criminals committing any of these offenses ordinarily would be thought more deserving of punishment than one uttering a "no account" check—even when the bad-check writer had already committed six minor felonies. Moreover, there is no indication in the record that any habitual offender other than Helm has ever been given the maximum sentence on the basis of comparable crimes. It is more likely that the possibility of life imprisonment under § 22-7-8 generally is reserved for criminals such as fourth-time heroin dealers, while habitual bad-check writers receive more lenient treatment.²⁶ In any event, Helm has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.

Finally, we compare the sentences imposed for commission

²⁶The State contends that § 22-7-8 is more lenient than the Texas habitual offender statute in *Rummel*, for life imprisonment under § 22-7-8 is discretionary rather than mandatory. Brief for Petitioner 22. Helm, however, has challenged only his own sentence. No one suggests that § 22-7-8 may not be applied constitutionally to fourth-time heroin dealers or other violent criminals. Thus we do not question the legislature's judgment. Unlike in *Rummel*, a lesser sentence here could have been entirely consistent with both the statute and the Eighth Amendment. See Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1160 (1979).

of the same crime in other jurisdictions. The Court of Appeals found that "Helm could have received a life sentence without parole for his offense in only one other state, Nevada," 684 F. 2d, at 586, and we have no reason to doubt this finding. See Tr. of Oral Arg. 21. At the very least, therefore, it is clear that Helm could not have received such a severe sentence in 48 of the 50 States. But even under Nevada law, a life sentence without possibility of parole is merely authorized in these circumstances. See Nev. Rev. Stat. § 207.010(2) (1981). We are not advised that any defendant such as Helm, whose prior offenses were so minor, actually has received the maximum penalty in Nevada.³⁶ It appears that Helm was treated more severely than he would have been in any other State.

B

The State argues that the present case is essentially the same as *Rummel v. Estelle*, for the possibility of parole in that case is matched by the possibility of executive clemency here. The State reasons that the Governor could commute Helm's sentence to a term of years. We conclude, however, that the South Dakota commutation system is fundamentally different from the parole system that was before us in *Rummel*.

As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regu-

³⁶ Under § 207.010(2), a Nevada court is authorized to impose a sentence of "imprisonment in the state prison for life with or without possibility of parole. If the penalty fixed by the court is life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of 10 years has been served." It appears that most sentences imposed under § 207.010(2) permit parole, even when the prior crimes are far more serious than Helm's. See, e. g., *Rusling v. State*, 96 Nev. 778, 617 P. 2d 1302 (1980) (possession of a firearm by an ex-felon, two instances of driving an automobile without the owner's consent, four first degree burglaries, two sales of marijuana, two sales of a restricted dangerous drug, one sale of heroin, one escape from state prison, and one second degree burglary).

lar part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. See, e. g., *Greenholz v. Nebraska Penal Inmates*, 442 U. S. 1 (1979) (detailing Nebraska parole procedures); *Morrissey v. Brewer*, 408 U. S. 471, 477 (1972) ("the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system"). Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards. See, e. g., *Connecticut Board of Pardons v. Dumschat*, 452 U. S. 458 (1981).

We explicitly have recognized the distinction between parole and commutation in our prior cases.²⁷ Writing on behalf of the *Morrissey* Court, for example, CHIEF JUSTICE BURGER contrasted the two possibilities: "Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals." 408 U. S., at 477. In *Dumschat*, THE CHIEF JUSTICE similarly explained that "there is a vast difference between a denial of parole . . . and a state's refusal to commute a lawful sentence." 452 U. S., at 466.

The Texas and South Dakota systems in particular are

²⁷ In *Rummel* itself the Court implicitly recognized that the possibility of commutation is not equivalent to the possibility of parole. The Court carefully "distinguish[ed] Rummel from a person sentenced under a recidivist statute like [Miss. Code Ann. § 99-19-83 (Supp. 1979)], which provides for a sentence of life without parole." 445 U. S., at 281. But the Mississippi Constitution empowers the Governor to grant pardons in "all criminal and penal cases, excepting those of treason and impeachment." Art. 5, § 124. The Mississippi Supreme Court has long recognized that the power to pardon includes the power to commute a convict's sentence. See *Whittington v. Stevens*, 221 Miss. 598, 603-604, 73 So. 2d 137, 139-140 (1954).

very different. In *Rummel*, the Court did not rely simply on the existence of some system of parole. Rather it looked to the provisions of the system presented, including the fact that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." 445 U. S., at 280. A Texas prisoner became eligible for parole when his calendar time served plus "good conduct" time equaled one-third of the maximum sentence imposed or 20 years, whichever is less. Tex. Code Crim. Proc. Ann., Art. 42.12, § 15(b) (Vernon 1979). An entering prisoner earned 20 days good-time per 30 days served, Brief for Respondent in *Rummel*, O. T. 1979, No. 78-6386, p. 16, and this could be increased to 30 days good-time per 30 days served, Tex. Rev. Civ. Stat. Ann., Art. 6181-1, §§ 2-3 (Vernon Supp. 1982). Thus *Rummel* could have been eligible for parole in as few as 10 years, and could have expected to become eligible, in the normal course of events, in only 12 years.

In South Dakota commutation is more difficult to obtain than parole. For example, the board of pardons and paroles is authorized to make commutation recommendations to the Governor, see n. 7, *supra*, but § 24-13-4 provides that "no recommendation for the commutation of . . . a life sentence, or for a pardon . . . , shall be made by less than the unanimous vote of all members of the board." In fact, no life sentence has been commuted in over eight years,²⁸ App. 29, while parole—where authorized—has been granted regularly during that period, Tr. of Oral Arg. 8-9. Furthermore, even if Helm's sentence were commuted, he merely would be eligible to be considered for parole.²⁹ Not only is there no guarantee that he would be paroled, but the South Dakota parole

27.5

²⁸The most recent commutation of a life sentence in South Dakota occurred in 1975. The record indicates, however, that the prisoner in question still has not been paroled. App. 29.

← see rider
for n. 27.5

Put this
first
sentence
into n 27.5

system is far more stringent than the one before us in *Rummel*. Helm would have to serve three-fourths of his revised sentence before he would be eligible for parole, § 24-15-5, and the provision for good-time credits is less generous, § 24-5-1.²⁰

The possibility of commutation is nothing more than a hope for "an *ad hoc* exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

V

The Constitution requires us to examine Helm's sentence to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.²¹ The judgment of the Court of Appeals is accordingly

Affirmed.

²⁰ Assume, for example, that in 1979 the Governor had commuted Helm's sentence to a term of 40 years (his approximate life expectancy). Even if Helm were a model prisoner, he would not have been eligible for parole until he had served over 21 years—more than twice the *Rummel* minimum. And this comparison is generous to South Dakota's position. If *Rummel* had been sentenced to 40 years rather than life, he could have been eligible for parole in less than 7 years.

see rider for n. 30

30

Excellent

Revised footnote 10, on page 7:

¹⁰The Eighth Amendment was based directly on Art. I, §9 of the Virginia Declaration of Rights (1776), authored by George Mason. He, in turn, had adopted verbatim the language of the English Bill of Rights. There can be no doubt that the Declaration of Rights guaranteed at least "the liberties and privileges of Englishmen." See A. Nevins, *The American States During and After the Revolution* 146 (1924) (Declaration of Rights "was a restatement of English principles--the principles of Magna Charta ... and the Revolution of 1688"); A. Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 205-207 (1968). As Mason himself had explained earlier:

"We claim Nothing but the Liberties & Privileges of Englishmen, in the same Degree, as if we had still continued among our Bretheren in Great Britain.... We have received [these rights] from our Ancestors, and, with God's Leave, we will transmit them, unimpaired to our Posterity." Letter to "the Committee of Merchants in London" (June 6, 1766), reprinted in 1 *The Papers of George Mason* 71 (Rutland ed. 1970).

Cf. the Fairfax County Resolves (1774) (colonists entitled to all "Privileges, Immunities and Advantages" of the English Constitution), reprinted in 1 *The Papers of George Mason* 201.

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SUPREME COURT OF THE UNITED STATES

No. 82-492

HERMAN SOLEM, WARDEN, PETITIONER *v.*
JERRY BUCKLEY HELM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

I

By 1975 the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.¹ In 1972

¹In 1969 third-degree burglary was defined in at least two sections of the South Dakota criminal code:

"A person breaking into any dwelling house in the nighttime with intent to commit a crime but under such circumstances as do not constitute burglary in the first degree, is guilty of burglary in the third degree." S. D. Comp. Laws Ann. § 22-32-8 (1967) (repealed 1976).

"A person breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof, or any building or part of any building, booth, tent, railroad car, vessel, vehicle as defined in § 22-14-1, or any structure or erection in which any property is kept, with intent to commit larceny or any felony, is guilty of burglary in the third degree." S. D. Comp. Laws Ann. § 22-32-9 (1967) (repealed 1976).

In 1964 and 1966 the third-degree burglary definition was essentially the same. See S. D. Code § 13.3703 (1939 ed., supp. 1960); 1965 S. D. Laws, ch. 32. Third-degree burglary was punishable by "imprisonment in the state penitentiary for any term not exceeding fifteen years." S. D. Comp. Laws Ann. § 22-32-10 (1967) (previously codified at S. D. Code § 13.3705(3)).

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

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he was convicted of obtaining money under false pretenses.² In 1973 he was convicted of grand larceny.³ And in 1975 he was convicted of third-offense driving while intoxicated.⁴ The record contains no details about the circumstances of any of these offenses, except that they were all nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case.

In 1979 Helm was charged with uttering a "no account" check for \$100.⁵ The only details we have of the crime are those given by Helm to the state trial court:

(1989)) (repealed 1976).

² In 1972 the relevant statute provided:

"Every person who designedly, by color or aid of any false token or writing, or other false pretense, . . . obtains from any person any money or property . . . is punishable by imprisonment in the state penitentiary not exceeding three years or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both such fine and imprisonment." S. D. Comp. Laws Ann. § 22-41-4 (1967) (repealed 1976).

³ In 1973 South Dakota defined "larceny" as "the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof." S. D. Comp. Laws Ann. § 22-37-1 (1967) (repealed 1976). Grand larceny and petit larceny were distinguished as follows:

"Grand larceny is larceny committed in any of the following cases:

- (1) When the property taken is of a value exceeding fifty dollars;
- (2) When such property, although not of a value exceeding fifty dollars, is taken from the person of another;
- (3) When such property is livestock.

Larceny in other cases is petit larceny." S. D. Comp. Laws Ann. § 22-37-2 (1967) (repealed 1976).

Grand larceny was then punishable by "imprisonment in the state penitentiary not exceeding ten years or by imprisonment in the county jail not exceeding one year." S. D. Comp. Laws Ann. § 22-37-3 (1967) (repealed 1976).

⁴ A third offense of driving while under the influence of alcohol is a felony in South Dakota. S. D. Codified Laws § 32-23-4 (1976). See 1973 S. D. Laws, ch. 185, § 7 (enacting version of § 32-23-4 in force in 1975).

⁵ The governing statute provides, in relevant part:

"Any person who, for himself or as an agent or representative of another

"I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places." *State v. Helm*, 287 N. W. 2d 497, 501 (S. D. 1980) (Henderson, J., dissenting) (quoting Helm).

After offering this explanation, Helm pleaded guilty.

Ordinarily the maximum punishment for uttering a "no account" check would have been five years imprisonment in the state penitentiary and a \$5,000 fine. See S. D. Comp. Laws Ann. § 22-6-1(6) (1967 ed., supp. 1978) (now codified at S. D. Codified Laws § 22-6-1(7) (Supp. 1982)). As a result of his criminal record, however, Helm was subject to South Dakota's recidivist statute:

"When a defendant has been convicted of at least three prior convictions [*sic*] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." S. D. Codified Laws § 22-7-8 (1979) (amended 1981).

The maximum penalty for a "Class 1 felony" was life imprisonment in the state penitentiary and a \$25,000 fine.⁶ S. D.

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 § 22-41-1.2 (1979).

"When Helm was sentenced in April 1979, South Dakota law classified felonies as follows:

"Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished from each other by the respective maximum penalties hereinafter set forth which are authorized upon conviction:

(1) Class A felony: life imprisonment in the state penitentiary. A lesser sentence may not be given for a Class A felony;

(2) Class 1 felony: life imprisonment in the state penitentiary. In addi-

Comp. Laws Ann. §22-6-1(2) (1967 ed., supp. 1978) (now codified at S. D. Codified Laws §22-6-1(3) (Supp. 1982)). Moreover, South Dakota law explicitly provides that parole is unavailable: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S. D. Codified Laws §24-15-4 (1979). The Governor⁷ is authorized to pardon prisoners, or to commute their sentences, S. D. Const., Art. IV, §3, but no other relief from sentence is available even to a rehabilitated prisoner.

Immediately after accepting Helm's guilty plea, the South Dakota Circuit Court sentenced Helm to life imprisonment under §22-7-8. The court explained:

"I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest

tion, a fine of twenty-five thousand dollars may be imposed;

(3) Class 2 felony: twenty-five years imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;

(4) Class 3 felony: fifteen years imprisonment in the state penitentiary. In addition, a fine of fifteen thousand dollars may be imposed;

(5) Class 4 felony: ten years imprisonment in the state penitentiary. In addition, a fine of ten thousand dollars may be imposed;

(6) Class 5 felony: five years imprisonment in the state penitentiary. In addition, a fine of five thousand dollars may be imposed; and

(7) Class 6 felony: two years imprisonment in the state penitentiary or a fine of two thousand dollars, or both.

"Nothing in this section shall limit increased sentences for habitual criminals

"Except in cases where punishment is prescribed by law, every offense declared to be a felony and not otherwise classified is a Class 6 felony." S. D. Comp. Laws Ann. §22-6-1 (1967 ed., supp. 1978) (amended 1979 and 1980).

⁷ The board of pardons and paroles is authorized to make recommendations to the Governor, S. D. Codified Laws §24-14-1 (1979); §24-14-5; S. D. Executive Order 82-04 (Apr. 12, 1982), but the Governor is not bound by the recommendation, §24-14-5.

of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over.'" *State v. Helm*, 287 N. W. 2d, at 500 (Henderson, J., dissenting) (quoting S. D. Circuit Court, Seventh Judicial Circuit, Pennington County (Parker, J.)).

The South Dakota Supreme Court, in a 3-2 decision, affirmed the sentence despite Helm's argument that it violated the Eighth Amendment. *State v. Helm, supra*.

After Helm had served two years in the state penitentiary, he requested the Governor to commute his sentence to a fixed term of years. Such a commutation would have had the effect of making Helm eligible to be considered for parole when he had served three-fourths of his new sentence. See S. D. Codified Laws § 24-15-5(3) (1979). The Governor denied Helm's request in May 1981. App. 26.

In November 1981, Helm sought habeas relief in the United States District Court for the District of South Dakota. Helm argued, among other things, that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. Although the District Court recognized that the sentence was harsh, it concluded that this Court's recent decision in *Rummel v. Estelle*, 445 U. S. 263 (1980), was dispositive. It therefore denied the writ.

The United States Court of Appeals for the Eighth Circuit reversed. 684 F. 2d 582 (1982). The Court of Appeals noted that *Rummel v. Estelle* was distinguishable. Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabilitation as a goal of the criminal justice system. The Court of Appeals examined the nature of Helm's offenses, the nature of his sentence, and the sentence he could have received in other States for the same offense. It concluded, on the basis of this examination, that Helm's sentence was "grossly disproportionate to the na-

ture of the offense." 684 F. 2d, at 587. It therefore directed the District Court to issue the writ unless the State resentenced Helm. *Ibid.*

We granted certiorari to consider the Eighth Amendment question presented by this case. 459 U. S. — (1982). We now affirm.

II

The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

A

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that "amercements"³ may not be excessive.⁴ And the principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275). These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments. See, e. g., *Le Gras v. Bailiff of Bishop of Winchester*, Y. B. Mich. 10 Edw. II, pl. 4 (C. P. 1316), reprinted in 52 Selden Society 3 (1934). When prison sentences became the

³An amercement was similar to a modern-day fine. It was the most common criminal sanction in ~~thirteenth~~ century England. See 2 F. Pollock & F. Maitland, *The History of English Law* 518-515 (2d ed. 1909).

⁴Chapter 20 declared that "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." See 1 S. D. Codified Laws, p. 4 (1978) (translation of Magna Carta). According to Maitland, "there was no clause in Magna Carta more grateful to the mass of the people . . ." F. Maitland, *Pleas of the Crown for the County of Gloucester* xxxiv (1884). Chapter 21 granted the same rights to the nobility, and chapter 22 granted the same rights to the clergy.

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normal criminal sanctions, the common law recognized that these, too, must be proportional. See, e. g., *Hodges v. Humkin*, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K. B. 1615) (Croke, J.) ("imprisonment ought always to be according to the quality of the offence").

The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 W. & M., sess. 2, ch. 2 (1689). Although the precise scope of this provision is uncertain, it at least incorporated "the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959); see 4 W. Blackstone, *Commentaries* *16-19 (1769); see also *id.*, at *16-17 (in condemning "punishments of unreasonable severity," uses "cruel" to mean severe or excessive). Indeed, barely three months after the Bill of Rights was adopted, the House of Lords declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon, was excessive and exorbitant, against magna charta, the common right of the subject, and against the law of the land." *Earl of Devon's Case*, 11 State Trials 133, 136 (1689).

When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights,¹⁰ they also adopted the English principle of proportionality. ~~The people were guaranteed the rights they had possessed as English subjects~~—including the right to be free from excessive punishments.

¹⁰ This language had earlier been incorporated in the Virginia Declaration of Rights, Art. 1, § 8, authored by George Mason. See A. Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 207 (1968).

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The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.¹¹ In the leading case of *Weems v. United States*, 217 U. S. 349 (1910), the defendant had been convicted of falsifying a public document and sentenced to 15 years of "cadena temporal," a form of imprisonment that included hard labor in chains and permanent civil disabilities. The Court noted "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense," *id.*, at 367, and held that the sentence violated the Eighth Amendment. The Court endorsed the principle of proportionality as a constitutional standard, see, *e. g.*, *id.*, at 372-373, and determined that the sentence before it was "cruel in its excess of imprisonment," *id.*, at 377.

The Court next applied the principle to invalidate a criminal sentence in *Robinson v. California*, 370 U. S. 660 (1962).¹² A 90-day sentence was found to be excessive for the crime of being "addicted to the use of narcotics." The Court explained that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual."

¹¹ In *O'Neil v. Vermont*, 144 U. S. 323 (1892), the defendant had been convicted of 307 counts of "selling intoxicating liquor without authority," and sentenced to a term of over 54 years. The majority did not reach O'Neil's contention that this sentence was unconstitutional, for he did not include the point in his assignment of errors or in his brief. *Id.*, at 331. Furthermore, the majority noted that the Eighth Amendment "does not apply to the States." *Id.*, at 332. Accordingly the Court dismissed the writ of error for want of a federal question. *Id.*, at 336-337. The dissent, however, reached the Eighth Amendment question, observing that it "is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.*, at 339-340 (Field, J., dissenting).

¹² Members of the Court continued to recognize the principle of proportionality in the meantime. See, *e. g.*, *Trop v. Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion); *id.*, at 111 (BRENNAN, J., concurring); *id.*, at 125-126 (Frankfurter, J., dissenting).

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Id., at 667. Thus there was no question of an inherently barbaric punishment. "But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Ibid.*

Most recently, the Court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. *Enmund v. Florida*, 458 U. S. — (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used); *Coker v. Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion) ("sentence of death is grossly disproportionate and excessive punishment for the crime of rape"); *id.*, at 601 (POWELL, J., concurring in the judgment in part and dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman"). And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, e. g., *Hutto v. Finney*, 437 U. S. 678, 685 (1978); *Ingraham v. Wright*, 430 U. S. 651, 667 (1977); *Gregg v. Georgia*, 428 U. S. 153, 171-172 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); cf. *Hutto v. Davis*, 454 U. S. 370, 374, and n. 3 (1982) (*per curiam*) (recognizing that some prison sentences may be constitutionally disproportionate); *Rummel v. Estelle*, 445 U. S., at 274, n. 11 (same).

C

There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences.* The constitutional language itself suggests no

* According to *Rummel v. Estelle*, 445 U. S. 263 (1980), "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies . . . the length of sentence actually imposed is purely a matter of legislative prerogative."

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exception for imprisonment. We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, *Ingraham v. Wright*, 430 U. S., at 664, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. See *Hodges v. Humkin*, *supra*. And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis. See, e. g., *Weems*, 217 U. S., at 377; cf. *Hutto v. Finney*, 437 U. S., at 685 ("Confinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards").

When we have applied the proportionality principle in capital cases, we have drawn no distinction with cases of imprisonment. See *Gregg v. Georgia*, 428 U. S., at 176 (opinion of Stewart, POWELL, and STEVENS, JJ.). It is true that the "penalty of death differs from all other forms of criminal punishment, not in degree but in kind." *Furman v. Georgia*, 408 U. S. 238, 306 (1972) (Stewart, J., concurring). As a result, "our decisions [in] capital cases are of limited assistance in deciding the constitutionality of the punishment" in a noncapital case. *Rummel v. Estelle*, 445 U. S., at 272. ~~this means, however, is that, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare,"~~ *ibid.* (em-

Id. at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible. To the extent that the State makes this argument here, we find it meritless.

*In *Enmund*, for example, the Court found the death penalty to be excessive for felony murder in the circumstances of that case. But clearly no

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phasis added); see *Hutto v. Davis*, 454 U. S., at 374. It does not mean that proportionality analysis is entirely inapplicable in noncapital cases.

In sum, we hold that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is *per se* constitutional. As the Court noted in *Robinson v. California*, 370 U. S., at 667, a single day in prison may be unconstitutional in some circumstances.

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III

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When

In reviewing sentences under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized. First, we look to the gravity of the offense and the harshness of the penalty. In *Enmund*, for example, the Court examined the circumstances of the defendant's crime in great detail. 458 U. S., at ———. In *Coker* the Court considered the seriousness of the crime of

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sentence of imprisonment would be disproportionate for *Enmund*'s crime.

In view of the substantial deference properly due to legislatures and sentencing courts, most reviewing courts normally will not be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

As the Court has indicated, no one factor will be dispositive. See *Hutto v. Davis*, 454 U. S. 370, 373-374 n. 2 (1982) (*per curiam*); *Rummel v. Estelle*, 445 U. S., at 275-276. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. No single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment. See Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L. J. 1326, 1376-1377 (1979).

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rape, and compared it to other crimes, such as murder. 433 U. S., at 597-598 (plurality opinion); *id.*, at 603 (POWELL, J., concurring in the judgment in part and dissenting in part). In *Robinson* the emphasis was placed on the nature of the "crime." 370 U. S., at 666-667. And in *Weems*, the Court's opinion commented in two separate places on the pettiness of the offense. 217 U. S., at 363 and 365. Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate. See, e. g., *Coker*, 433 U. S., at 598 (plurality opinion); *Weems*, 217 U. S., at 366-367.

Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. Thus in *Enmund* the Court noted that all of the other felony murderers on death row in Florida were more culpable than the petitioner there. 458 U. S., at —. The *Weems* Court identified an impressive list of more serious crimes that were subject to less serious penalties. 217 U. S., at 380-381.

Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. In *Enmund* the Court conducted an extensive review of capital punishment statutes and determined that "only about a third of American jurisdictions would ever permit a defendant [such as *Enmund*] to be sentenced to die." 458 U. S., at —. Even in those jurisdictions, however, the death penalty was almost never imposed under similar circumstances. *Id.*, at —. The Court's review of foreign law also supported its conclusion. *Id.*, at —, n. 22. The analysis in *Coker* was essentially the same. 433 U. S., at 593-597. And in *Weems* the Court relied on the fact that, under federal law, a similar crime was punishable by only two year's imprisonment and a fine. 217 U. S., at 380. Cf. *Trop v. Dulles*, 356 U. S. 86, 102-103 (1958) (plurality opinion).

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (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.

B

Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments—just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. Thus in *Enmund* the Court determined that the petitioner's conduct was not as serious as his accomplices' conduct. Indeed, there are widely shared views as to the relative seriousness of crimes. See Rossi, Waite, Bose & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 Am. Soc. Rev. 224, 237 (1974). For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence. Cf. Tr. of Oral Arg. 16 (the State recognizes that the criminal law is more protective of people than property).

There are other accepted principles that courts may apply in measuring the harm caused or threatened to the victim or society. The absolute magnitude of the crime may be relevant. Stealing a million dollars is viewed as more serious than stealing a hundred dollars—a point recognized in statutes distinguishing petty theft from grand theft. See, e. g., S. D. Codified Laws § 22-30A-17 (Supp. 1982). Few would dispute that a lesser included offense should not be punished more severely than the greater offense. Thus a court is justified in viewing assault with intent to murder as more seri-

ous than simple assault. See *Roberts v. Collins*, 544 F. 2d 168, 169-170 (CA4 1976) (*per curiam*), cert. denied, 430 U. S. 973 (1977). Cf. *Dembowski v. State*, 251 Ind. 250, 252, 240 N. E. 2d 815, 817 (1968) (armed robbery more serious than robbery); *Cannon v. Gladden*, 203 Or. 629, 632, 281 P. 2d 233, 235 (1955) (rape more serious than assault with intent to commit rape). It also is generally recognized that attempts are less serious than completed crimes. See, e. g., S. D. Codified Laws § 22-4-1 (1979); 4 Blackstone *15. Similarly, an accessory after the fact should not be subject to a higher penalty than the principal. See, e. g., 18 U. S. C. § 3.

Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In *Enmund* the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices. 458 U. S., at —. Most would agree that negligent conduct is less serious than intentional conduct. South Dakota, for example, ranks criminal acts in ascending order of seriousness as follows: negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts. S. D. Codified Laws § 22-1-2(1)(f) (Supp. 1982). A court, of course, is entitled to look at a defendant's motive in committing a crime. Thus a murder may be viewed as more serious when committed pursuant to a contract. See, e. g., Mass. Gen. Laws Ann., ch. 279, § 69(a)(5) (West Supp. 1982); cf. 4 Blackstone *15; *In re Foss*, 10 Cal.3d 910, 519 P. 2d 1073 (1974).

This list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.

C

Application of the factors that we identify also assumes that courts are able to compare different sentences. This assumption, too, is justified. The easiest comparison, of

course, is between capital punishment and noncapital punishments, for the death penalty is different from other punishments in kind rather than degree. For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

The Sixth Amendment right to a jury trial is an example. *Baldwin v. New York*, 399 U. S. 66 (1970), in particular, illustrates the line-drawing function of the judiciary, and offers guidance on the method by which some lines may be drawn. There the Court determined that a defendant has a right to a jury trial "where imprisonment for more than six months is authorized." *Id.*, at 69 (plurality opinion). In choosing the 6-month standard, the plurality relied almost exclusively on the fact that only New York City denied the right to a jury trial for an offense punishable by more than six months. As JUSTICE WHITE explained:

"This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone—between offenses that are and that are not regarded as 'serious' for purposes of trial by jury." *Id.*, at 72-73.

In short, *Baldwin* clearly demonstrates that a court properly

There is also a clear line between sentences of imprisonment and sentences involving no deprivation of liberty. See *Argersinger v. Hamlin*, 407 U. S. 25 (1972).

The possibility of parole may complicate the comparison, depending upon the time and conditions of its availability.

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may distinguish one sentence of imprisonment from another. It also supports our holding that courts properly may look to the practices in other jurisdictions in deciding where lines between sentences should be drawn.

IV

It remains to apply the analytical framework established by our prior decisions to the case before us. We first consider the relevant criteria, viewing Helm's sentence as life imprisonment without possibility of parole. We then consider the State's argument that the possibility of commutation is sufficient to save an otherwise unconstitutional sentence.

A

Helm's crime was "one of the most passive felonies a person could commit." *State v. Helm*, 287 N. W. 2d, at 501 (Henderson, J., dissenting). It involved neither violence nor threat of violence to any person. The \$100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft. It is easy to see why such a crime is viewed by society as among the less serious offenses. See Rossi et al., 39 Am. Soc. Rev., at 229.

Helm, of course, was not charged simply with uttering a

20 • If Helm had been convicted simply of taking \$100 from a cash register, S. D. Codified Laws § 22-30A-1 (1979), or defrauding someone of \$100, § 22-30A-3, or obtaining \$100 through extortion, § 22-30A-4(1), or blackmail, § 22-30A-4(3), or using a false credit card to obtain \$100, § 22-30A-8.1, or embezzling \$100, § 22-30A-10, he would not be in prison today. All of these offenses would have been petty theft, a misdemeanor. § 22-30A-17 (amended 1982). Similarly, if Helm had written a \$100 check against insufficient funds, rather than a nonexistent account, he would have been guilty of a misdemeanor. §§ 22-41-1. Curiously, under South Dakota law there is no distinction between writing a "no account" check for a large sum and writing a "no account" check for a small sum. § 22-41-1.2.

"no account" check, but also with being an habitual offender. And a State is justified in punishing a recidivist more severely than it punishes a first offender. Helm's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor. All were nonviolent and none was a crime against a person. Indeed, there was no minimum amount in either the burglary or the false pretenses statutes, see nn. 1 and 2, *supra*, and the minimum amount covered by the grand larceny statute was fairly small, see n. 3, *supra*.

Helm's present sentence is life imprisonment without possibility of parole. Barring executive clemency, see *infra*, at —, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in *Rummel v. Estelle*. Rummel was likely to have been eligible for parole within 12 years of his

— We must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision.

Helm, who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have an incentive to pursue clearly needed treatment for his alcohol problem, or any other program of rehabilitation.

As suggested at oral argument, the third-degree burglary statute covered entering a building with the intent to steal a loaf of bread. Tr. of Oral Arg. 14-16. It appears that the grand larceny statute would have covered the theft of a chicken.

Every life sentence in South Dakota is without possibility of parole. See *supra*, at —. We raise no question as to the general validity of sentences without possibility of parole. The only issue before us is whether, in the circumstances of this case and in light of the constitutional principle of proportionality, the sentence imposed on this petitioner violates the Eighth Amendment.

initial confinement,^{*} a fact on which the Court relied heavily. See 445 U. S., at 280-281. Helm's sentence is the most severe punishment that the State could have imposed on any criminal for any crime. See ~~note~~ 6, *supra*. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

We next consider the sentences that could be imposed on other criminals in the same jurisdiction. When Helm was sentenced, a South Dakota court was required to impose a life sentence for murder, S. D. Codified Laws § 22-16-12 (1979) (amended 1980), and was authorized to impose a life sentence for treason, § 22-8-1, first degree manslaughter, § 22-16-15, first degree arson, § 22-33-1, and kidnapping, S. D. Comp. Laws Ann. § 22-19-1 (1967 ed., supp. 1978) (amended 1979). No other crime was punishable so severely on the first offense. Attempted murder, S. D. Codified Laws § 22-4-1(5) (1979), placing an explosive device on an aircraft, § 22-14A-5, and first degree rape, § 22-22-1 (amended 1980 and 1982), were only Class 2 felonies. Aggravated riot was only a Class 3 felony. § 22-10-5. Distribution of heroin, §§ 22-42-2 (amended 1982), 34-20B-13(7) (1977), and aggravated assault, § 22-18-1.1 (amended 1980 and 1981), were only Class 4 felonies.

Helm's habitual offender status complicates our analysis, but relevant comparisons are still possible. Under § 22-7-7, the penalty for a second or third felony is increased by one class. Thus a life sentence was mandatory when a second or third conviction was for treason, first degree manslaughter, first degree arson, or kidnapping, and a life sentence would have been authorized when a second or third conviction was for such crimes as attempted murder, placing an explosive device on an aircraft, or first degree rape. Finally, § 22-7-8, under which Helm was sentenced, authorized life imprisonment after three prior convictions, regardless of the crimes.

^{*}We note that Rummel was, in fact, released within eight months of the Court's decision in his case. See L.A. Times, Nov. 16, 1980, p. 1, col. 3.

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In sum, there were a handful of crimes that were necessarily punished by life imprisonment: murder, and, on a second or third offense, treason, first degree manslaughter, first degree arson, and kidnapping. There was a larger group for which life imprisonment was authorized in the discretion of the sentencing judge, including: treason, first degree manslaughter, first degree arson, and kidnapping; attempted murder, placing an explosive device on an aircraft, and first degree rape on a second or third offense; and any felony after three prior offenses. Finally, there was a large group of very serious offenses for which life imprisonment was not authorized, including a third offense of heroin dealing or aggravated assault.

Criminals committing any of these offenses ordinarily would be thought more deserving of punishment than one uttering a "no account" check—even when the bad-check writer had already committed six minor felonies. Moreover, there is no indication in the record that any habitual offender other than Helm has ever been given the maximum sentence on the basis of comparable crimes. It is more likely that the possibility of life imprisonment under § 22-7-8 generally is reserved for criminals such as fourth-time heroin dealers, while habitual bad-check writers receive more lenient treatment. In any event, Helm has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.

Finally, we compare the sentences imposed for commission

26 The State contends that § 22-7-8 is more lenient than the Texas habitual offender statute in *Rummel*, for life imprisonment under § 22-7-8 is discretionary rather than mandatory. Brief for Petitioner 22. Helm, however, has challenged only his own sentence. No one suggests that § 22-7-8 may not be applied constitutionally to fourth-time heroin dealers or other violent criminals. Thus we do not question the legislature's judgment. Unlike in *Rummel*, a lesser sentence here could have been entirely consistent with both the statute and the Eighth Amendment. See Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1160 (1979).

of the same crime in other jurisdictions. The Court of Appeals found that "Helm could have received a life sentence without parole for his offense in only one other state, Nevada," 684 F. 2d, at 586, and we have no reason to doubt this finding. See Tr. of Oral Arg. 21. At the very least, therefore, it is clear that Helm could not have received such a severe sentence in 48 of the 50 States. But even under Nevada law, a life sentence without possibility of parole is merely authorized in these circumstances. See Nev. Rev. Stat. §207.010(2) (1981). We are not advised that any defendant such as Helm, whose prior offenses were so minor, actually has received the maximum penalty in Nevada.* It appears that Helm was treated more severely than he would have been in any other State.

B

The State argues that the present case is essentially the same as *Rummel v. Estelle*, for the possibility of parole in that case is matched by the possibility of executive clemency here. The State reasons that the Governor could commute Helm's sentence to a term of years. We conclude, however, that the South Dakota commutation system is fundamentally different from the parole system that was before us in *Rummel*.

As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regu-

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*Under § 207.010(2), a Nevada court is authorized to impose a sentence of "imprisonment in the state prison for life with or without possibility of parole. If the penalty fixed by the court is life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of 10 years has been served." It appears that most sentences imposed under § 207.010(2) permit parole, even when the prior crimes are far more serious than Helm's. See, e. g., *Rusling v. State*, 96 Nev. 778, 617 P. 2d 1302 (1980) (possession of a firearm by an ex-felon, two instances of driving an automobile without the owner's consent, four first degree burglaries, two sales of marijuana, two sales of a restricted dangerous drug, one sale of heroin, one escape from state prison, and one second degree burglary).

27

lar part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. See, e. g., *Greenholz v. Nebraska Penal Inmates*, 442 U. S. 1 (1979) (detailing Nebraska parole procedures); *Morrissey v. Brewer*, 408 U. S. 471, 477 (1972) ("the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system"). Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards. See, e. g., *Connecticut Board of Pardons v. Dumschat*, 452 U. S. 458 (1981).

We explicitly have recognized the distinction between parole and commutation in our prior cases. Writing on behalf of the *Morrissey* Court, for example, CHIEF JUSTICE BURGER contrasted the two possibilities: "Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals." 408 U. S., at 477. In *Dumschat*, THE CHIEF JUSTICE similarly explained that "there is a vast difference between a denial of parole . . . and a state's refusal to commute a lawful sentence." 452 U. S., at 466.

The Texas and South Dakota systems in particular are

In *Rummel* itself the Court implicitly recognized that the possibility of commutation is not equivalent to the possibility of parole. The Court carefully "distinguish[ed] Rummel from a person sentenced under a recidivist statute like [Miss. Code Ann. § 99-19-83 (Supp. 1979)], which provides for a sentence of life without parole." 445 U. S., at 281. But the Mississippi Constitution empowers the Governor to grant pardons in "all criminal and penal cases, excepting those of treason and impeachment." Art. 5, § 124. The Mississippi Supreme Court has long recognized that the power to pardon includes the power to commute a convict's sentence. See *Whittington v. Stevens*, 221 Miss. 598, 603-604, 73 So. 2d 137, 139-140 (1954).

very different. In *Rummel*, the Court did not rely simply on the existence of some system of parole. Rather it looked to the provisions of the system presented, including the fact that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." 445 U. S., at 280. A Texas prisoner became eligible for parole when his calendar time served plus "good conduct" time equaled one-third of the maximum sentence imposed or 20 years, whichever is less. Tex. Code Crim. Proc. Ann., Art. 42.12, § 15(b) (Vernon 1979). An entering prisoner earned 20 days good-time per 30 days served, Brief for Respondent in *Rummel*, O. T. 1979, No. 78-6386, p. 16, and this could be increased to 30 days good-time per 30 days served, Tex. Rev. Civ. Stat. Ann., Art. 6181-1, §§ 2-3 (Vernon Supp. 1982). Thus *Rummel* could have been eligible for parole in as few as 10 years, and could have expected to become eligible, in the normal course of events, in only 12 years.

In South Dakota commutation is more difficult to obtain than parole. For example, the board of pardons and paroles is authorized to make commutation recommendations to the Governor, see n. 7, *supra*, but § 24-13-4 provides that "no recommendation for the commutation of . . . a life sentence, or for a pardon . . . , shall be made by less than the unanimous vote of all members of the board." In fact, no life sentence has been commuted in over eight years, App. 29, while parole—where authorized—has been granted regularly during that period, Tr. of Oral Arg. 8-9. Furthermore, even if Helm's sentence were commuted, he merely would be eligible to be considered for parole.* Not only is there no guarantee that he would be paroled, but the South Dakota parole

*The most recent commutation of a life sentence in South Dakota occurred in 1973. The record indicates, however, that the prisoner in question still has not been paroled. App. 29.

new note 29 is on

HN29R ✓

new note 30 is on

HN30R ✓

system is far more stringent than the one before us in *Rummel*. Helm would have to serve three-fourths of his revised sentence before he would be eligible for parole, § 24-15-5, and the provision for good-time credits is less generous, § 24-5-1. (31) ✓

The possibility of commutation is nothing more than a hope for "an *ad hoc* exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

V

The Constitution requires us to examine Helm's sentence to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment. ✓ The judgment of the Court of Appeals is accordingly

Affirmed.

(31)

Assume, for example, that in 1979 the Governor had commuted Helm's sentence to a term of 40 years (his approximate life expectancy). Even if Helm were a model prisoner, he would not have been eligible for parole until he had served over 21 years—more than twice the *Rummel* minimum. And this comparison is generous to South Dakota's position. If *Rummel* had been sentenced to 40 years rather than life, he could have been eligible for parole in less than 7 years.

new note 32 on

HN32R ✓

pp. 1, 6-13, 16-26

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: **JUN 27 1983** _____

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-492

HERMAN SOLEM, WARDEN, PETITIONER *v.*
JERRY BUCKLEY HELM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

I

By 1975 the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.¹ In 1972

¹ In 1969 third-degree burglary was defined in at least two sections of the South Dakota criminal code:

"A person breaking into any dwelling house in the nighttime with intent to commit a crime but under such circumstances as do not constitute burglary in the first degree, is guilty of burglary in the third degree." S. D. Comp. Laws Ann. § 22-32-8 (1967) (repealed 1976).

"A person breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof, or any building or part of any building, booth, tent, railroad car, vessel, vehicle as defined in § 32-14-1, or any structure or erection in which any property is kept, with intent to commit larceny or any felony, is guilty of burglary in the third degree." S. D. Comp. Laws Ann. § 22-32-9 (1967) (repealed 1976).

In 1964 and 1966 the third-degree burglary definition was essentially the same. See S. D. Code § 13.3703 (1939 ed., supp. 1960); 1965 S. D. Laws, ch. 32. Third-degree burglary was punishable by "imprisonment in the state penitentiary for any term not exceeding fifteen years." S. D. Comp. Laws Ann. § 22-32-10 (1967) (previously codified at S. D. Code § 13.3705(3)).

he was convicted of obtaining money under false pretenses.² In 1973 he was convicted of grand larceny.³ And in 1975 he was convicted of third-offense driving while intoxicated.⁴ The record contains no details about the circumstances of any of these offenses, except that they were all nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case.

In 1979 Helm was charged with uttering a "no account" check for \$100.⁵ The only details we have of the crime are those given by Helm to the state trial court:

(1939)) (repealed 1976).

² In 1972 the relevant statute provided:

"Every person who designedly, by color or aid of any false token or writing, or other false pretense, . . . obtains from any person any money or property . . . is punishable by imprisonment in the state penitentiary not exceeding three years or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both such fine and imprisonment." S. D. Comp. Laws Ann. § 22-41-4 (1967) (repealed 1976).

³ In 1973 South Dakota defined "larceny" as "the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof." S. D. Comp. Laws Ann. § 22-37-1 (1967) (repealed 1976). Grand larceny and petit larceny were distinguished as follows:

"Grand larceny is larceny committed in any of the following cases:

- (1) When the property taken is of a value exceeding fifty dollars;
- (2) When such property, although not of a value exceeding fifty dollars, is taken from the person of another;
- (3) When such property is livestock.

Larceny in other cases is petit larceny." S. D. Comp. Laws Ann. § 22-37-2 (1967) (repealed 1976).

Grand larceny was then punishable by "imprisonment in the state penitentiary not exceeding ten years or by imprisonment in the county jail not exceeding one year." S. D. Comp. Laws Ann. § 22-37-3 (1967) (repealed 1976).

⁴ A third offense of driving while under the influence of alcohol is a felony in South Dakota. S. D. Codified Laws § 32-23-4 (1976). See 1973 S. D. Laws, ch. 195, § 7 (enacting version of § 32-23-4 in force in 1975).

⁵ The governing statute provides, in relevant part:

"Any person who, for himself or as an agent or representative of another

"I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places.'" *State v. Helm*, 287 N. W. 2d 497, 501 (S. D. 1980) (Henderson, J., dissenting) (quoting Helm).

After offering this explanation, Helm pleaded guilty.

Ordinarily the maximum punishment for uttering a "no account" check would have been five years imprisonment in the state penitentiary and a \$5,000 fine. See S. D. Comp. Laws Ann. § 22-6-1(6) (1967 ed., supp. 1978) (now codified at S. D. Codified Laws § 22-6-1(7) (Supp. 1982)). As a result of his criminal record, however, Helm was subject to South Dakota's recidivist statute:

"When a defendant has been convicted of at least three prior convictions [*sic*] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." S. D. Codified Laws § 22-7-8 (1979) (amended 1981).

The maximum penalty for a "Class 1 felony" was life imprisonment in the state penitentiary and a \$25,000 fine.⁶ S. D.

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 § 22-41-1.2 (1979).

⁶When Helm was sentenced in April 1979, South Dakota law classified felonies as follows:

"Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished from each other by the respective maximum penalties hereinafter set forth which are authorized upon conviction:

(1) Class A felony: life imprisonment in the state penitentiary. A lesser sentence may not be given for a Class A felony;

(2) Class 1 felony: life imprisonment in the state penitentiary. In addi-

Comp. Laws Ann. § 22-6-1(2) (1967 ed., supp. 1978) (now codified at S. D. Codified Laws § 22-6-1(3) (Supp. 1982)). Moreover, South Dakota law explicitly provides that parole is unavailable: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S. D. Codified Laws § 24-15-4 (1979). The Governor¹ is authorized to pardon prisoners, or to commute their sentences, S. D. Const., Art. IV, § 3, but no other relief from sentence is available even to a rehabilitated prisoner.

Immediately after accepting Helm's guilty plea, the South Dakota Circuit Court sentenced Helm to life imprisonment under § 22-7-8. The court explained:

"I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest

tion, a fine of twenty-five thousand dollars may be imposed;

(3) Class 2 felony: twenty-five years imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;

(4) Class 3 felony: fifteen years imprisonment in the state penitentiary. In addition, a fine of fifteen thousand dollars may be imposed;

(5) Class 4 felony: ten years imprisonment in the state penitentiary. In addition, a fine of ten thousand dollars may be imposed;

(6) Class 5 felony: five years imprisonment in the state penitentiary. In addition, a fine of five thousand dollars may be imposed; and

(7) Class 6 felony: two years imprisonment in the state penitentiary or a fine of two thousand dollars, or both.

"Nothing in this section shall limit increased sentences for habitual criminals

"Except in cases where punishment is prescribed by law, every offense declared to be a felony and not otherwise classified is a Class 6 felony." S. D. Comp. Laws Ann. § 22-6-1 (1967 ed., supp. 1978) (amended 1979 and 1980).

¹The board of pardons and paroles is authorized to make recommendations to the Governor, S. D. Codified Laws § 24-14-1 (1979); § 24-14-5; S. D. Executive Order 82-04 (Apr. 12, 1982), but the Governor is not bound by the recommendation, § 24-14-5.

of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over.'" *State v. Helm*, 287 N. W. 2d, at 500 (Henderson, J., dissenting) (quoting S. D. Circuit Court, Seventh Judicial Circuit, Pennington County (Parker, J.)).

The South Dakota Supreme Court, in a 3-2 decision, affirmed the sentence despite Helm's argument that it violated the Eighth Amendment. *State v. Helm, supra*.

After Helm had served two years in the state penitentiary, he requested the Governor to commute his sentence to a fixed term of years. Such a commutation would have had the effect of making Helm eligible to be considered for parole when he had served three-fourths of his new sentence. See S. D. Codified Laws § 24-15-5(3) (1979). The Governor denied Helm's request in May 1981. App. 26.

In November 1981, Helm sought habeas relief in the United States District Court for the District of South Dakota. Helm argued, among other things, that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. Although the District Court recognized that the sentence was harsh, it concluded that this Court's recent decision in *Rummel v. Estelle*, 445 U. S. 263 (1980), was dispositive. It therefore denied the writ.

The United States Court of Appeals for the Eighth Circuit reversed. 684 F. 2d 582 (1982). The Court of Appeals noted that *Rummel v. Estelle* was distinguishable. Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabilitation as a goal of the criminal justice system. The Court of Appeals examined the nature of Helm's offenses, the nature of his sentence, and the sentence he could have received in other States for the same offense. It concluded, on the basis of this examination, that Helm's sentence was "grossly disproportionate to the na-

ture of the offense." 684 F. 2d, at 587. It therefore directed the District Court to issue the writ unless the State resentenced Helm. *Ibid.*

We granted certiorari to consider the Eighth Amendment question presented by this case. 459 U. S. — (1982). We now affirm.

II

The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

A

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that "amercements"⁸ may not be excessive.⁹ And the principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275). These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments. See, e. g., *Le Gras v. Bailiff of Bishop of Winchester*, Y. B. Mich. 10 Edw. II, pl. 4 (C. P. 1316), reprinted in 52 Selden Society 3 (1934). When prison sentences became the

⁸ An amercement was similar to a modern-day fine. It was the most common criminal sanction in 13th century England. See 2 F. Pollock & F. Maitland, *The History of English Law* 513-515 (2d ed. 1909).

⁹ Chapter 20 declared that "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." See 1 S. D. Codified Laws, p. 4 (1978) (translation of Magna Carta). According to Maitland, "there was no clause in Magna Carta more grateful to the mass of the people . . ." F. Maitland, *Pleas of the Crown for the County of Gloucester* xxxiv (1884). Chapter 21 granted the same rights to the nobility, and chapter 22 granted the same rights to the clergy.

normal criminal sanctions, the common law recognized that these, too, must be proportional. See, *e. g.*, *Hodges v. Humkin*, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K. B. 1615) (Croke, J.) ("imprisonment ought always to be according to the quality of the offence").

The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 W. & M., sess. 2, ch. 2 (1689). Although the precise scope of this provision is uncertain, it at least incorporated "the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959); see 4 W. Blackstone, *Commentaries* *16-19 (1769); see also *id.*, at *16-17 (in condemning "punishments of unreasonable severity," uses "cruel" to mean severe or excessive). Indeed, barely three months after the Bill of Rights was adopted, the House of Lords declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon, was excessive and exorbitant, against magna charta, the common right of the subject, and against the law of the land." *Earl of Devon's Case*, 11 State Trials, 133, 136 (1689).

When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights,¹⁰ they also adopted the

¹⁰The Eighth Amendment was based directly on Art. I, § 9 of the Virginia Declaration of Rights (1776), authored by George Mason. He, in turn, had adopted verbatim the language of the English Bill of Rights. There can be no doubt that the Declaration of Rights guaranteed at least the liberties and privileges of Englishmen. See A. Nevins, *The American States During and After the Revolution* 146 (1924) (Declaration of Rights "was a restatement of English principles—the principles of Magna Charta . . . and the Revolution of 1688"); A. Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 205-207 (1968). As Mason

English principle of proportionality. Indeed, one of the consistent themes of the era was that Americans had all the rights of English subjects. See, *e. g.*, 1 J. Continental Congress 83 (Ford ed. 1904) (Address to the People of Great Britain, Oct. 21, 1774) ("we claim all the benefits secured to the subject by the English constitution"); 1 American Archives 700 (4th series 1837) (Georgia Resolutions, Aug. 10, 1774) ("his Majesty's subjects in *America* . . . are entitled to the same rights, privileges, and immunities with their fellow-subjects in *Great Britain*"). Thus our Bill of Rights was designed in part to ensure that these rights were preserved. Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.

B

The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.¹¹ In the

himself had explained: "We claim Nothing but the Liberties & Privileges of Englishmen, in the same Degree, as if we had still continued among our Brethren in Great Britain. . . . We have received [these rights] from our Ancestors, and, with God's Leave, we will transmit them, unimpaired to our Posterity." Letter to "the Committee of Merchants in London" (June 6, 1766), reprinted in 1 The Papers of George Mason 71 (Rutland ed. 1970); cf. the Fairfax County Resolves (1774) (colonists entitled to all "Privileges, Immunities and Advantages" of the English Constitution), reprinted in 1 The Papers of George Mason 201.

¹¹ In *O'Neil v. Vermont*, 144 U. S. 323 (1892), the defendant had been convicted of 307 counts of "selling intoxicating liquor without authority," and sentenced to a term of over 54 years. The majority did not reach O'Neil's contention that this sentence was unconstitutional, for he did not include the point in his assignment of errors or in his brief. *Id.*, at 331. Furthermore, the majority noted that the Eighth Amendment "does not apply to the States." *Id.*, at 332. Accordingly the Court dismissed the writ of error for want of a federal question. *Id.*, at 336-337. The dissent,

leading case of *Weems v. United States*, 217 U. S. 349 (1910), the defendant had been convicted of falsifying a public document and sentenced to 15 years of "cadena temporal," a form of imprisonment that included hard labor in chains and permanent civil disabilities. The Court noted "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense," *id.*, at 367, and held that the sentence violated the Eighth Amendment. The Court endorsed the principle of proportionality as a constitutional standard, see, *e. g.*, *id.*, at 372-373, and determined that the sentence before it was "cruel in its excess of imprisonment," *id.*, at 377, as well as in its shackles and restrictions.

The Court next applied the principle to invalidate a criminal sentence in *Robinson v. California*, 370 U. S. 660 (1962).¹² A 90-day sentence was found to be excessive for the crime of being "addicted to the use of narcotics." The Court explained that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." *Id.*, at 667. Thus there was no question of an inherently barbaric punishment. "But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Ibid.*

Most recently, the Court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. *Enmund v. Florida*, 458 U. S. — (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that a life be

however, reached the Eighth Amendment question, observing that it "is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.*, at 339-340 (Field, J., dissenting).

¹² Members of the Court continued to recognize the principle of proportionality in the meantime. See, *e. g.*, *Trop v. Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion); *id.*, at 111 (BRENNAN, J., concurring); *id.*, at 125-126 (Frankfurter, J., dissenting).

taken or that lethal force be used); *Coker v. Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion) ("sentence of death is grossly disproportionate and excessive punishment for the crime of rape"); *id.*, at 601 (POWELL, J., concurring in the judgment in part and dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman"). And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, e. g., *Hutto v. Finney*, 437 U. S. 678, 685 (1978); *Ingraham v. Wright*, 430 U. S. 651, 667 (1977); *Gregg v. Georgia*, 428 U. S. 153, 171-172 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); cf. *Hutto v. Davis*, 454 U. S. 370, 374, and n. 3 (1982) (*per curiam*) (recognizing that some prison sentences may be constitutionally disproportionate); *Rummel v. Estelle*, 445 U. S., at 274, n. 11 (same).¹³

C

There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences.¹⁴ The constitutional language itself suggests no

¹³ The dissent charges that "the Court blithely discards any concept of *stare decisis*." *Post*, at 1; cf. *id.*, at 2, 8-9, 14. On the contrary, our decision is entirely consistent with this Court's prior cases—including *Rummel v. Estelle*, 445 U. S. 263 (1980). See n. 32, *infra*. It is rather the dissent that would discard prior precedent. Its assertion that the Eighth Amendment establishes only a narrow principle of proportionality is contrary to the entire line of cases cited in the text.

¹⁴ According to *Rummel v. Estelle*, "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of sentence actually imposed is purely a matter of legislative prerogative." 445 U. S., at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible. To the extent that the

exception for imprisonment. We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, *Ingraham v. Wright*, 430 U. S., at 664, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. See *Hodges v. Humkin*, *supra*. And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis. See, e. g., *Weems*, 217 U. S., at 377; cf. *Hutto v. Finney*, 437 U. S., at 685 ("Confinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards").

When we have applied the proportionality principle in capital cases, we have drawn no distinction with cases of imprisonment. See *Gregg v. Georgia*, 428 U. S., at 176 (opinion of Stewart, POWELL, and STEVENS, JJ.). It is true that the "penalty of death differs from all other forms of criminal punishment, not in degree but in kind." *Furman v. Georgia*, 408 U. S. 238, 306 (1972) (Stewart, J., concurring). As a result, "our decisions [in] capital cases are of limited assistance in deciding the constitutionality of the punishment" in a non-capital case. *Rummel v. Estelle*, 445 U. S., at 272. We agree, therefore, that, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare,"¹⁸ *ibid.* (empha-

State—or the dissent, see *post*, at 4—makes this argument here, we find it meritless.

¹⁸ In *Enmund*, for example, the Court found the death penalty to be excessive for felony murder in the circumstances of that case. But clearly no

sis added); see *Hutto v. Davis*, 454 U. S., at 374. This does not mean, however, that proportionality analysis is entirely inapplicable in noncapital cases.

In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.¹⁶ But no penalty is *per se* constitutional. As the Court noted in *Robinson v. California*, 370 U. S., at 667, a single day in prison may be unconstitutional in some circumstances.

III

A

When sentences are reviewed under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized.¹⁷ First, we look to the gravity of the

sentence of imprisonment would be disproportionate for Enmund's crime.

¹⁶ Contrary to the dissent's suggestions, *post*, at 2, 12, we do not adopt or imply approval of a general rule of appellate review of sentences. Absent ~~authority~~ authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

¹⁷ The dissent concedes—as it must—that some sentences of imprisonment are so disproportionate that they are unconstitutional under the Cruel and Unusual Punishments Clause. *Post*, at 8, n. 3; cf. *id.*, at 7, n. 2. It offers no guidance, however, as to how courts are to judge these admittedly rare cases. We reiterate the objective factors that our cases have recognized. See, e. g., *Coker v. Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion). As the Court has indicated, no one factor will be dispositive

specific

offense and the harshness of the penalty. In *Enmund*, for example, the Court examined the circumstances of the defendant's crime in great detail. 458 U. S., at ———. In *Coker* the Court considered the seriousness of the crime of rape, and compared it to other crimes, such as murder. 433 U. S., at 597–598 (plurality opinion); *id.*, at 603 (POWELL, J., concurring in the judgment in part and dissenting in part). In *Robinson* the emphasis was placed on the nature of the "crime." 370 U. S., at 666–667. And in *Weems*, the Court's opinion commented in two separate places on the pettiness of the offense. 217 U. S., at 363 and 365. Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate. See, e. g., *Coker*, 433 U. S., at 598 (plurality opinion); *Weems*, 217 U. S., at 366–367.

Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. Thus in *Enmund* the Court noted that all of the other felony murderers on death row in Florida were more culpable than the petitioner there. 458 U. S., at ———. The *Weems* Court identified an impressive list of more serious crimes that were subject to less serious penalties. 217 U. S., at 380–381.

Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. In *Enmund* the Court conducted an extensive review

in a given case. See *Hutto v. Davis*, 454 U. S. 370, 373–374 n. 2 (1982) (*per curiam*); *Rummel v. Estelle*, 445 U. S., at 275–276. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. Thus no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment. See Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L. J. 1825, 1876–1877 (1979). But a combination of objective factors can make such analysis possible.

of capital punishment statutes and determined that "only about a third of American jurisdictions would ever permit a defendant [such as Enmund] to be sentenced to die." 458 U. S., at —. Even in those jurisdictions, however, the death penalty was almost never imposed under similar circumstances. *Id.*, at —. The Court's review of foreign law also supported its conclusion. *Id.*, at —, n. 22. The analysis in *Coker* was essentially the same. 433 U. S., at 593-597. And in *Weems* the Court relied on the fact that, under federal law, a similar crime was punishable by only two year's imprisonment and a fine. 217 U. S., at 380. Cf. *Trop v. Dulles*, 356 U. S. 86, 102-103 (1958) (plurality opinion).

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (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.

B

Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments—just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. Thus in *Enmund* the Court determined that the petitioner's conduct was not as serious as his accomplices' conduct. Indeed, there are widely shared views as to the relative seriousness of crimes. See Rossi, Waite, Bose & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 Am. Soc. Rev. 224, 237 (1974). For example, as the criminal laws make clear, nonviolent crimes are less serious than

crimes marked by violence or the threat of violence. Cf. Tr. of Oral Arg. 16 (the State recognizes that the criminal law is more protective of people than property).

There are other accepted principles that courts may apply in measuring the harm caused or threatened to the victim or society. The absolute magnitude of the crime may be relevant. Stealing a million dollars is viewed as more serious than stealing a hundred dollars—a point recognized in statutes distinguishing petty theft from grand theft. See, e. g., S. D. Codified Laws § 22-30A-17 (Supp. 1982). Few would dispute that a lesser included offense should not be punished more severely than the greater offense. Thus a court is justified in viewing assault with intent to murder as more serious than simple assault. See *Roberts v. Collins*, 544 F. 2d 168, 169-170 (CA4 1976) (*per curiam*), cert. denied, 430 U. S. 973 (1977). Cf. *Dembowski v. State*, 251 Ind. 250, 252, 240 N. E. 2d 815, 817 (1968) (armed robbery more serious than robbery); *Cannon v. Gladden*, 203 Or. 629, 632, 281 P. 2d 233, 235 (1955) (rape more serious than assault with intent to commit rape). It also is generally recognized that attempts are less serious than completed crimes. See, e. g., S. D. Codified Laws § 22-4-1 (1979); 4 Blackstone *15. Similarly, an accessory after the fact should not be subject to a higher penalty than the principal. See, e. g., 18 U. S. C. § 3.

Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In *Enmund* the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices. 458 U. S., at —. Most would agree that negligent conduct is less serious than intentional conduct. South Dakota, for example, ranks criminal acts in ascending order of seriousness as follows: negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts. S. D. Codified Laws § 22-1-2(1)(f) (Supp. 1982). A court, of course, is entitled to look at a defendant's motive in committing a crime.

Thus a murder may be viewed as more serious when committed pursuant to a contract. See, *e. g.*, Mass. Gen. Laws Ann., ch. 279, § 69(a)(5) (West Supp. 1982); cf. 4 Blackstone *15; *In re Foss*, 10 Cal.3d 910, 519 P. 2d 1073 (1974).

This list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.

C

Application of the factors that we identify also assumes that courts are able to compare different sentences. This assumption, too, is justified. The easiest comparison, of course, is between capital punishment and noncapital punishments, for the death penalty is different from other punishments in kind rather than degree.¹³ For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence,¹⁴ but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

The Sixth Amendment offers two good examples. A State is constitutionally required to provide an accused with a speedy trial, *Klopfer v. North Carolina*, 386 U. S. 213 (1967), but the delay that is permissible must be determined on a case-by-case basis. "[A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the par-

¹³There is also a clear line between sentences of imprisonment and sentences involving no deprivation of liberty. See *Argersinger v. Hamlin*, 407 U. S. 25 (1972).

¹⁴The possibility of parole may complicate the comparison, depending upon the time and conditions of its availability.

#

particular context of the case. . . .” *Barker v. Wingo*, 407 U. S. 514, 522 (1972) (unanimous opinion). In *Barker*, we identified some of the objective factors that courts should consider in determining whether a particular delay was excessive. *Id.*, at 530. None of these factors is “either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant.” *Id.*, at 533. Thus the type of inquiry that a court should conduct to determine if a given sentence is constitutionally disproportionate is similar to the type of inquiry required by the Speedy Trial Clause.

The right to a jury trial is another example. *Baldwin v. New York*, 399 U. S. 66 (1970), in particular, illustrates the line-drawing function of the judiciary, and offers guidance on the method by which some lines may be drawn. There the Court determined that a defendant has a right to a jury trial “where imprisonment for more than six months is authorized.” *Id.*, at 69 (plurality opinion). In choosing the 6-month standard, the plurality relied almost exclusively on the fact that only New York City denied the right to a jury trial for an offense punishable by more than six months. As JUSTICE WHITE explained:

“This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone—between offenses that are and that are not regarded as ‘serious’ for purposes of trial by jury.” *Id.*, at 72–73.

In short, *Baldwin* clearly demonstrates that a court properly may distinguish one sentence of imprisonment from another. It also supports our holding that courts properly may look to the practices in other jurisdictions in deciding where lines between sentences should be drawn.

IV

It remains to apply the analytical framework established by our prior decisions to the case before us. We first consider the relevant criteria, viewing Helm's sentence as life imprisonment without possibility of parole. We then consider the State's argument that the possibility of commutation is sufficient to save an otherwise unconstitutional sentence.

A

Helm's crime was "one of the most passive felonies a person could commit." *State v. Helm*, 287 N. W. 2d, at 501 (Henderson, J., dissenting). It involved neither violence nor threat of violence to any person. The \$100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft.²⁰ It is easy to see why such a crime is viewed by society as among the less serious offenses. See Rossi et al., 39 Am. Soc. Rev., at 229.

Helm, of course, was not charged simply with uttering a "no account" check, but also with being an habitual offender.²¹

²⁰ If Helm had been convicted simply of taking \$100 from a cash register, S. D. Codified Laws § 22-30A-1 (1979), or defrauding someone of \$100, § 22-30A-3, or obtaining \$100 through extortion, § 22-30A-4(1), or blackmail, § 22-30A-4(3), or using a false credit card to obtain \$100, § 22-30A-8.1, or embezzling \$100, § 22-30A-10, he would not be in prison today. All of these offenses would have been petty theft, a misdemeanor. § 22-30A-17 (amended 1982). Similarly, if Helm had written a \$100 check against insufficient funds, rather than a nonexistent account, he would have been guilty of a misdemeanor. §§ 22-41-1. Curiously, under South Dakota law there is no distinction between writing a "no account" check for a large sum and writing a "no account" check for a small sum. § 22-41-1.2.

²¹ We must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision.

And a State is justified in punishing a recidivist more severely than it punishes a first offender. Helm's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor.²² All were nonviolent and none was a crime against a person. Indeed, there was no minimum amount in either the burglary or the false pretenses statutes, see nn. 1 and 2, *supra*, and the minimum amount covered by the grand larceny statute was fairly small, see n. 3, *supra*.²³

Helm's present sentence is life imprisonment without possibility of parole.²⁴ Barring executive clemency, see *infra*, at ~~A~~, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in *Rummel v. Estelle*. Rummel was likely to have been eligible for parole within 12 years of his initial confinement,²⁵ a fact on which the Court relied heavily. See 445 U. S., at 280-281. Helm's sentence is the most se-

²² Helm, who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have an incentive to pursue clearly needed treatment for his alcohol problem, or any other program of rehabilitation.

²³ As suggested at oral argument, the third-degree burglary statute covered entering a building with the intent to steal a loaf of bread. Tr. of Oral Arg. 14-16. It appears that the grand larceny statute would have covered the theft of a chicken.

²⁴ Every life sentence in South Dakota is without possibility of parole. See *supra*, at 4. We raise no question as to the general validity of sentences without possibility of parole. The only issue before us is whether, in the circumstances of this case and in light of the constitutional principle of proportionality, the sentence imposed on this petitioner violates the Eighth Amendment.

²⁵ We note that Rummel was, in fact, released within eight months of the Court's decision in his case. See L.A. Times, Nov. 16, 1980, p. 1, col. 3.

vere punishment that the State could have imposed on any criminal for any crime. See n. 6, *supra*. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

We next consider the sentences that could be imposed on other criminals in the same jurisdiction. When Helm was sentenced, a South Dakota court was required to impose a life sentence for murder, S. D. Codified Laws §22-16-12 (1979) (amended 1980), and was authorized to impose a life sentence for treason, §22-8-1, first degree manslaughter, §22-16-15, first degree arson, §22-33-1, and kidnapping, S. D. Comp. Laws Ann. §22-19-1 (1967 ed., supp. 1978) (amended 1979). No other crime was punishable so severely on the first offense. Attempted murder, S. D. Codified Laws §22-4-1(5) (1979), placing an explosive device on an aircraft, §22-14A-5, and first degree rape, §22-22-1 (amended 1980 and 1982), were only Class 2 felonies. Aggravated riot was only a Class 3 felony. §22-10-5. Distribution of heroin, §§22-42-2 (amended 1982), 34-20B-13(7) (1977), and aggravated assault, §22-18-1.1 (amended 1980 and 1981), were only Class 4 felonies.

Helm's habitual offender status complicates our analysis, but relevant comparisons are still possible. Under §22-7-7, the penalty for a second or third felony is increased by one class. Thus a life sentence was mandatory when a second or third conviction was for treason, first degree manslaughter, first degree arson, or kidnapping, and a life sentence would have been authorized when a second or third conviction was for such crimes as attempted murder, placing an explosive device on an aircraft, or first degree rape. Finally, §22-7-8, under which Helm was sentenced, authorized life imprisonment after three prior convictions, regardless of the crimes.

In sum, there were a handful of crimes that were necessarily punished by life imprisonment: murder, and, on a second or third offense, treason, first degree manslaughter, first de-

gree arson, and kidnapping. There was a larger group for which life imprisonment was authorized in the discretion of the sentencing judge, including: treason, first degree manslaughter, first degree arson, and kidnapping; attempted murder, placing an explosive device on an aircraft, and first degree rape on a second or third offense; and any felony after three prior offenses. Finally, there was a large group of very serious offenses for which life imprisonment was not authorized, including a third offense of heroin dealing or aggravated assault.

Criminals committing any of these offenses ordinarily would be thought more deserving of punishment than one uttering a "no account" check—even when the bad-check writer had already committed six minor felonies. Moreover, there is no indication in the record that any habitual offender other than Helm has ever been given the maximum sentence on the basis of comparable crimes. It is more likely that the possibility of life imprisonment under § 22-7-8 generally is reserved for criminals such as fourth-time heroin dealers, while habitual bad-check writers receive more lenient treatment.²⁰ In any event, Helm has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.

Finally, we compare the sentences imposed for commission of the same crime in other jurisdictions. The Court of Appeals found that "Helm could have received a life sentence

²⁰ The State contends that § 22-7-8 is more lenient than the Texas habitual offender statute in *Rummel*, for life imprisonment under § 22-7-8 is discretionary rather than mandatory. Brief for Petitioner 22. Helm, however, has challenged only his own sentence. No one suggests that § 22-7-8 may not be applied constitutionally to fourth-time heroin dealers or other violent criminals. Thus we do not question the legislature's judgment. Unlike in *Rummel*, a lesser sentence here could have been entirely consistent with both the statute and the Eighth Amendment. See Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1160 (1979).

without parole for his offense in only one other state, Nevada," 684 F. 2d, at 586, and we have no reason to doubt this finding. See Tr. of Oral Arg. 21. At the very least, therefore, it is clear that Helm could not have received such a severe sentence in 48 of the 50 States. But even under Nevada law, a life sentence without possibility of parole is merely authorized in these circumstances. See Nev. Rev. Stat. § 207.010(2) (1981). We are not advised that any defendant such as Helm, whose prior offenses were so minor, actually has received the maximum penalty in Nevada.²⁷ It appears that Helm was treated more severely than he would have been in any other State.

B

The State argues that the present case is essentially the same as *Rummel v. Estelle*, for the possibility of parole in that case is matched by the possibility of executive clemency here. The State reasons that the Governor could commute Helm's sentence to a term of years. We conclude, however, that the South Dakota commutation system is fundamentally different from the parole system that was before us in *Rummel*.

As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases.

²⁷ Under § 207.010(2), a Nevada court is authorized to impose a sentence of "imprisonment in the state prison for life with or without possibility of parole. If the penalty fixed by the court is life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of 10 years has been served." It appears that most sentences imposed under § 207.010(2) permit parole, even when the prior crimes are far more serious than Helm's. See, e. g., *Rusling v. State*, 96 Nev. 778, 617 P. 2d 1302 (1980) (possession of a firearm by an ex-felon, two instances of driving an automobile without the owner's consent, four first degree burglaries, two sales of marijuana, two sales of a restricted dangerous drug, one sale of heroin, one escape from state prison, and one second degree burglary).

The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. See, e. g., *Greenholz v. Nebraska Penal Inmates*, 442 U. S. 1 (1979) (detailing Nebraska parole procedures); *Morrissey v. Brewer*, 408 U. S. 471, 477 (1972) ("the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system"). Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards. See, e. g., *Connecticut Board of Pardons v. Dumschat*, 452 U. S. 458 (1981).

We explicitly have recognized the distinction between parole and commutation in our prior cases.²³ Writing on behalf of the *Morrissey* Court, for example, CHIEF JUSTICE BURGER contrasted the two possibilities: "Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals." 408 U. S., at 477. In *Dumschat*, THE CHIEF JUSTICE similarly explained that "there is a vast difference between a denial of parole . . . and a state's refusal to commute a lawful sentence." 452 U. S., at 466.

The Texas and South Dakota systems in particular are very different. In *Rummel*, the Court did not rely simply

²³ In *Rummel* itself the Court implicitly recognized that the possibility of commutation is not equivalent to the possibility of parole. The Court carefully "distinguish[ed] Rummel from a person sentenced under a recidivist statute like [Miss. Code Ann. § 99-19-83 (Supp. 1979)], which provides for a sentence of life without parole." 445 U. S., at 281. But the Mississippi Constitution empowers the Governor to grant pardons in "all criminal and penal cases, excepting those of treason and impeachment." Art. 5, § 124. The Mississippi Supreme Court has long recognized that the power to pardon includes the power to commute a convict's sentence. See *Whittington v. Stevens*, 221 Miss. 598, 603-604, 73 So. 2d 137, 139-140 (1954).

on the existence of some system of parole. Rather it looked to the provisions of the system presented, including the fact that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." 445 U. S., at 280. A Texas prisoner became eligible for parole when his calendar time served plus "good conduct" time equaled one-third of the maximum sentence imposed or 20 years, whichever is less. Tex. Code Crim. Proc. Ann., Art. 42.12, §15(b) (Vernon 1979). An entering prisoner earned 20 days good-time per 30 days served, Brief for Respondent in *Rummel*, O. T. 1979, No. 78-6386, p. 16, and this could be increased to 30 days good-time per 30 days served, Tex. Rev. Civ. Stat. Ann., Art. 6181-1, §§2-3 (Vernon Supp. 1982). Thus *Rummel* could have been eligible for parole in as few as 10 years, and could have expected to become eligible, in the normal course of events, in only 12 years.

In South Dakota commutation is more difficult to obtain than parole. For example, the board of pardons and paroles is authorized to make commutation recommendations to the Governor, see n. 7, *supra*, but §24-13-4 provides that "no recommendation for the commutation of . . . a life sentence, or for a pardon . . . , shall be made by less than the unanimous vote of all members of the board." In fact, no life sentence has been commuted in over eight years,²⁹ App. 29,

²⁹The most recent commutation of a life sentence in South Dakota occurred in 1975. App. 29. During the eight years since then, over 100 requests for commutation have been denied. See *id.*, at 22-26. Although 22 life sentences were commuted to terms of years between 1964 and 1975, see *id.*, at 29; but see n. 30, *infra*, we do not have complete figures on the number of requests that were denied during the same period. We are told only that at least 35 requests were denied. See app. 22-26. In any event, past practice in this respect—particularly the practice of a decade ago—is not a reliable indicator of future performance when the relevant decision is left to the unfettered discretion of each Governor. Indeed, the

while parole—where authorized—has been granted regularly during that period, Tr. of Oral Arg. 8-9. Furthermore, even if Helm's sentence were commuted, he merely would be eligible to be considered for parole.³⁰ Not only is there no guarantee that he would be paroled, but the South Dakota parole system is far more stringent than the one before us in *Rummel*. Helm would have to serve three-fourths of his revised sentence before he would be eligible for parole, § 24-15-5, and the provision for good-time credits is less generous, § 24-5-1.³¹

The possibility of commutation is nothing more than a hope for "an *ad hoc* exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

V

The Constitution requires us to examine Helm's sentence to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been

best indication we have of Helm's chance for commutation is the fact that his request already has been denied. *Id.*, at 26.

³⁰ The record indicates that the prisoner whose life sentence was commuted in 1975, see n. 29, *supra*, still has not been paroled. App. 29.

³¹ Assume, for example, that in 1979 the Governor had commuted Helm's sentence to a term of 40 years (his approximate life expectancy). Even if Helm were a model prisoner, he would not have been eligible for parole until he had served over 21 years—more than twice the *Rummel* minimum. And this comparison is generous to South Dakota's position. If *Rummel* had been sentenced to 40 years rather than life, he could have been eligible for parole in less than 7 years.

treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.³² The judgment of the Court of Appeals is accordingly

Affirmed.

³² Contrary to the suggestion in the dissent, *post*, at 2-9, our conclusion today is not inconsistent with *Rummel v. Estelle*. The *Rummel* Court recognized—as does the dissent, see *post*, at 8, n. 3—that some sentences of imprisonment are so disproportionate that they violate the Eighth Amendment. 445 U. S., at 274, n. 11. Indeed, *Hutto v. Davis*, 454 U. S., at 374, and n. 3, makes clear that *Rummel* should not be read to foreclose proportionality review of sentences of imprisonment. *Rummel* did reject a proportionality challenge to a particular sentence. But since the *Rummel* Court—like the dissent today—offered no standards for determining when an Eighth Amendment violation has occurred, it is controlling only in a similar factual situation. Here the facts are clearly distinguishable. Whereas *Rummel* was eligible for a reasonably early parole, Helm, at age 36, was sentenced to life with no possibility of parole. See *supra*, at ~~A~~ - ~~A~~, and ~~A~~ - ~~A~~.

19/20/22/25

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SUPREME COURT OF THE UNITED STATES

No. 82-492

HERMAN SOLEM, WARDEN, PETITIONER *v.*
JERRY BUCKLEY HELM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

[June 28, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

I

By 1975 the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.¹ In 1972

¹In 1969 third-degree burglary was defined in at least two sections of the South Dakota criminal code:

"A person breaking into any dwelling house in the nighttime with intent to commit a crime but under such circumstances as do not constitute burglary in the first degree, is guilty of burglary in the third degree." S. D. Comp. Laws Ann. § 22-32-8 (1967) (repealed 1976).

"A person breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof, or any building or part of any building, booth, tent, railroad car, vessel, vehicle as defined in § 32-14-1, or any structure or erection in which any property is kept, with intent to commit larceny or any felony, is guilty of burglary in the third degree." S. D. Comp. Laws Ann. § 22-32-9 (1967) (repealed 1976).

In 1964 and 1966 the third-degree burglary definition was essentially the same. See S. D. Code § 13.3703 (1939 ed., supp. 1960); 1965 S. D. Laws, ch. 32. Third-degree burglary was punishable by "imprisonment in the state penitentiary for any term not exceeding fifteen years." S. D. Comp. Laws Ann. § 22-32-10 (1967) (previously codified at S. D. Code § 13.3705(3)).

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he was convicted of obtaining money under false pretenses.² In 1973 he was convicted of grand larceny.³ And in 1975 he was convicted of third-offense driving while intoxicated.⁴ The record contains no details about the circumstances of any of these offenses, except that they were all nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case.

In 1979 Helm was charged with uttering a "no account" check for \$100.⁵ The only details we have of the crime are those given by Helm to the state trial court:

(1939)) (repealed 1976).

² In 1972 the relevant statute provided:

"Every person who designedly, by color or aid of any false token or writing, or other false pretense, . . . obtains from any person any money or property . . . is punishable by imprisonment in the state penitentiary not exceeding three years or in a county jail not exceeding one year, or by a fine not exceeding three times the value of the money or property so obtained, or by both such fine and imprisonment." S. D. Comp. Laws Ann. § 22-41-4 (1967) (repealed 1976).

³ In 1973 South Dakota defined "larceny" as "the taking of personal property accomplished by fraud or stealth and with intent to deprive another thereof." S. D. Comp. Laws Ann. § 22-37-1 (1967) (repealed 1976). Grand larceny and petit larceny were distinguished as follows:

"Grand larceny is larceny committed in any of the following cases:

- (1) When the property taken is of a value exceeding fifty dollars;
- (2) When such property, although not of a value exceeding fifty dollars, is taken from the person of another;
- (3) When such property is livestock.

Larceny in other cases is petit larceny." S. D. Comp. Laws Ann. § 22-37-2 (1967) (repealed 1976).

Grand larceny was then punishable by "imprisonment in the state penitentiary not exceeding ten years or by imprisonment in the county jail not exceeding one year." S. D. Comp. Laws Ann. § 22-37-3 (1967) (repealed 1976).

⁴ A third offense of driving while under the influence of alcohol is a felony in South Dakota. S. D. Codified Laws § 32-23-4 (1976). See 1973 S. D. Laws, ch. 195, § 7 (enacting version of § 32-23-4 in force in 1975).

⁵ The governing statute provides, in relevant part:

"Any person who, for himself or as an agent or representative of another

"I was working in Sioux Falls, and got my check that day, was drinking and I ended up here in Rapid City with more money than I had when I started. I knew I'd done something I didn't know exactly what. If I would have known this, I would have picked the check up. I was drinking and didn't remember, stopped several places.'" *State v. Helm*, 287 N. W. 2d 497, 501 (S. D. 1980) (Henderson, J., dissenting) (quoting Helm).

After offering this explanation, Helm pleaded guilty.

Ordinarily the maximum punishment for uttering a "no account" check would have been five years imprisonment in the state penitentiary and a \$5,000 fine. See S. D. Comp. Laws Ann. § 22-6-1(6) (1967 ed., supp. 1978) (now codified at S. D. Codified Laws § 22-6-1(7) (Supp. 1982)). As a result of his criminal record, however, Helm was subject to South Dakota's recidivist statute:

"When a defendant has been convicted of at least three prior convictions [*sic*] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony." S. D. Codified Laws § 22-7-8 (1979) (amended 1981).

The maximum penalty for a "Class 1 felony" was life imprisonment in the state penitentiary and a \$25,000 fine.⁶ S. D.

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 § 22-41-1.2 (1979).

⁶When Helm was sentenced in April 1979, South Dakota law classified felonies as follows:

"Except as otherwise provided by law, felonies are divided into the following seven classes which are distinguished from each other by the respective maximum penalties hereinafter set forth which are authorized upon conviction:

(1) Class A felony: life imprisonment in the state penitentiary. A lesser sentence may not be given for a Class A felony;

(2) Class 1 felony: life imprisonment in the state penitentiary. In addi-

Comp. Laws Ann. § 22-6-1(2) (1967 ed., supp. 1978) (now codified at S. D. Codified Laws § 22-6-1(3) (Supp. 1982)). Moreover, South Dakota law explicitly provides that parole is unavailable: "A person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles." S. D. Codified Laws § 24-15-4 (1979). The Governor¹ is authorized to pardon prisoners, or to commute their sentences, S. D. Const., Art. IV, § 3, but no other relief from sentence is available even to a rehabilitated prisoner.

Immediately after accepting Helm's guilty plea, the South Dakota Circuit Court sentenced Helm to life imprisonment under § 22-7-8. The court explained:

"I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest

tion, a fine of twenty-five thousand dollars may be imposed;

(3) Class 2 felony: twenty-five years imprisonment in the state penitentiary. In addition, a fine of twenty-five thousand dollars may be imposed;

(4) Class 3 felony: fifteen years imprisonment in the state penitentiary. In addition, a fine of fifteen thousand dollars may be imposed;

(5) Class 4 felony: ten years imprisonment in the state penitentiary. In addition, a fine of ten thousand dollars may be imposed;

(6) Class 5 felony: five years imprisonment in the state penitentiary. In addition, a fine of five thousand dollars may be imposed; and

(7) Class 6 felony: two years imprisonment in the state penitentiary or a fine of two thousand dollars, or both.

"Nothing in this section shall limit increased sentences for habitual criminals

"Except in cases where punishment is prescribed by law, every offense declared to be a felony and not otherwise classified is a Class 6 felony." S. D. Comp. Laws Ann. § 22-6-1 (1967 ed., supp. 1978) (amended 1979 and 1980).

¹The board of pardons and paroles is authorized to make recommendations to the Governor, S. D. Codified Laws § 24-14-1 (1979); § 24-14-5; S. D. Executive Order 82-04 (Apr. 12, 1982), but the Governor is not bound by the recommendation, § 24-14-5.

of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over.'" *State v. Helm*, 287 N. W. 2d, at 500 (Henderson, J., dissenting) (quoting S. D. Circuit Court, Seventh Judicial Circuit, Pennington County (Parker, J.)).

The South Dakota Supreme Court, in a 3-2 decision, affirmed the sentence despite Helm's argument that it violated the Eighth Amendment. *State v. Helm, supra*.

After Helm had served two years in the state penitentiary, he requested the Governor to commute his sentence to a fixed term of years. Such a commutation would have had the effect of making Helm eligible to be considered for parole when he had served three-fourths of his new sentence. See S. D. Codified Laws § 24-15-5(3) (1979). The Governor denied Helm's request in May 1981. App. 26.

In November 1981, Helm sought habeas relief in the United States District Court for the District of South Dakota. Helm argued, among other things, that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments. Although the District Court recognized that the sentence was harsh, it concluded that this Court's recent decision in *Rummel v. Estelle*, 445 U. S. 263 (1980), was dispositive. It therefore denied the writ.

The United States Court of Appeals for the Eighth Circuit reversed. 684 F. 2d 582 (1982). The Court of Appeals noted that *Rummel v. Estelle* was distinguishable. Helm's sentence of life without parole was qualitatively different from Rummel's life sentence with the prospect of parole because South Dakota has rejected rehabilitation as a goal of the criminal justice system. The Court of Appeals examined the nature of Helm's offenses, the nature of his sentence, and the sentence he could have received in other States for the same offense. It concluded, on the basis of this examination, that Helm's sentence was "grossly disproportionate to the na-

ture of the offense." 684 F. 2d, at 587. It therefore directed the District Court to issue the writ unless the State resentenced Helm. *Ibid.*

We granted certiorari to consider the Eighth Amendment question presented by this case. 459 U. S. — (1982). We now affirm.

II

The Eighth Amendment declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.

A

The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence. In 1215 three chapters of Magna Carta were devoted to the rule that "amercements"³ may not be excessive.⁴ And the principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275). These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments. See, e. g., *Le Gras v. Bailiff of Bishop of Winchester*, Y. B. Mich. 10 Edw. II, pl. 4 (C. P. 1316), reprinted in 52 Selden Society 3 (1934). When prison sentences became the

³ An amercement was similar to a modern-day fine. It was the most common criminal sanction in 13th century England. See 2 F. Pollock & F. Maitland, *The History of English Law* 513-515 (2d ed. 1909).

⁴ Chapter 20 declared that "[a] freeman shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it." See 1 S. D. Codified Laws, p. 4 (1978) (translation of Magna Carta). According to Maitland, "there was no clause in Magna Carta more grateful to the mass of the people . . ." F. Maitland, *Pleas of the Crown for the County of Gloucester* xxxiv (1884). Chapter 21 granted the same rights to the nobility, and chapter 22 granted the same rights to the clergy.

normal criminal sanctions, the common law recognized that these, too, must be proportional. See, *e. g.*, *Hodges v. Humkin*, 2 Bulst. 139, 140, 80 Eng. Rep. 1015, 1016 (K. B. 1615) (Croke, J.) ("imprisonment ought always to be according to the quality of the offence").

The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 W. & M., sess. 2, ch. 2 (1689). Although the precise scope of this provision is uncertain, it at least incorporated "the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959); see 4 W. Blackstone, *Commentaries* *16-19 (1769); see also *id.*, at *16-17 (in condemning "punishments of unreasonable severity," uses "cruel" to mean severe or excessive). Indeed, barely three months after the Bill of Rights was adopted, the House of Lords declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon, was excessive and exorbitant, against magna charta, the common right of the subject, and against the law of the land." *Earl of Devon's Case*, 11 State Trials 133, 136 (1689).

When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights,¹⁰ they also adopted the

¹⁰The Eighth Amendment was based directly on Art. I, § 9 of the Virginia Declaration of Rights (1776), authored by George Mason. He, in turn, had adopted verbatim the language of the English Bill of Rights. There can be no doubt that the Declaration of Rights guaranteed at least the liberties and privileges of Englishmen. See A. Nevins, *The American States During and After the Revolution* 146 (1924) (Declaration of Rights "was a restatement of English principles—the principles of Magna Charta . . . and the Revolution of 1688"); A. Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* 205-207 (1968). As Mason

English principle of proportionality. Indeed, one of the consistent themes of the era was that Americans had all the rights of English subjects. See, *e. g.*, 1 J. Continental Congress 83 (Ford ed. 1904) (Address to the People of Great Britain, Oct. 21, 1774) ("we claim all the benefits secured to the subject by the English constitution"); 1 American Archives 700 (4th series 1837) (Georgia Resolutions, Aug. 10, 1774) ("his Majesty's subjects in *America* . . . are entitled to the same rights, privileges, and immunities with their fellow-subjects in *Great Britain*"). Thus our Bill of Rights was designed in part to ensure that these rights were preserved. Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.

B

The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.¹¹ In the

himself had explained: "We claim Nothing but the Liberties & Privileges of Englishmen, in the same Degree, as if we had still continued among our Brethren in Great Britain. . . . We have received [these rights] from our Ancestors, and, with God's Leave, we will transmit them, unimpaired to our Posterity." Letter to "the Committee of Merchants in London" (June 6, 1766), reprinted in 1 The Papers of George Mason 71 (Rutland ed. 1970); cf. the Fairfax County Resolves (1774) (colonists entitled to all "Privileges, Immunities and Advantages" of the English Constitution), reprinted in 1 The Papers of George Mason 201.

¹¹ In *O'Neil v. Vermont*, 144 U. S. 323 (1892), the defendant had been convicted of 307 counts of "selling intoxicating liquor without authority," and sentenced to a term of over 54 years. The majority did not reach O'Neil's contention that this sentence was unconstitutional, for he did not include the point in his assignment of errors or in his brief. *Id.*, at 331. Furthermore, the majority noted that the Eighth Amendment "does not apply to the States." *Id.*, at 332. Accordingly the Court dismissed the writ of error for want of a federal question. *Id.*, at 336-337. The dissent,

leading case of *Weems v. United States*, 217 U. S. 349 (1910), the defendant had been convicted of falsifying a public document and sentenced to 15 years of "cadena temporal," a form of imprisonment that included hard labor in chains and permanent civil disabilities. The Court noted "that it is a precept of justice that punishment for crime should be graduated and proportioned to offense," *id.*, at 367, and held that the sentence violated the Eighth Amendment. The Court endorsed the principle of proportionality as a constitutional standard, see, e. g., *id.*, at 372-373, and determined that the sentence before it was "cruel in its excess of imprisonment," *id.*, at 377, as well as in its shackles and restrictions.

The Court next applied the principle to invalidate a criminal sentence in *Robinson v. California*, 370 U. S. 660 (1962).¹² A 90-day sentence was found to be excessive for the crime of being "addicted to the use of narcotics." The Court explained that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." *Id.*, at 667. Thus there was no question of an inherently barbaric punishment. "But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Ibid.*

Most recently, the Court has applied the principle of proportionality to hold capital punishment excessive in certain circumstances. *Enmund v. Florida*, 458 U. S. — (1982) (death penalty excessive for felony murder when defendant did not take life, attempt to take life, or intend that a life be

however, reached the Eighth Amendment question, observing that it "is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.*, at 339-340 (Field, J., dissenting).

¹² Members of the Court continued to recognize the principle of proportionality in the meantime. See, e. g., *Trop v. Dulles*, 356 U. S. 86, 100 (1958) (plurality opinion); *id.*, at 111 (BRENNAN, J., concurring); *id.*, at 125-126 (Frankfurter, J., dissenting).

taken or that lethal force be used); *Coker v. Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion) ("sentence of death is grossly disproportionate and excessive punishment for the crime of rape"); *id.*, at 601 (POWELL, J., concurring in the judgment in part and dissenting in part) ("ordinarily death is disproportionate punishment for the crime of raping an adult woman"). And the Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription. See, e. g., *Hutto v. Finney*, 437 U. S. 678, 685 (1978); *Ingraham v. Wright*, 430 U. S. 651, 667 (1977); *Gregg v. Georgia*, 428 U. S. 153, 171-172 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); cf. *Hutto v. Davis*, 454 U. S. 370, 374, and n. 3 (1982) (*per curiam*) (recognizing that some prison sentences may be constitutionally disproportionate); *Rummel v. Estelle*, 445 U. S., at 274, n. 11 (same).¹³

C

There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences.¹⁴ The constitutional language itself suggests no

¹³The dissent charges that "the Court blithely discards any concept of *stare decisis*." *Post*, at 1; cf. *id.*, at 2, 8-9, 14. On the contrary, our decision is entirely consistent with this Court's prior cases—including *Rummel v. Estelle*, 445 U. S. 263 (1980). See n. 32, *infra*. It is rather the dissent that would discard prior precedent. Its assertion that the Eighth Amendment establishes only a narrow principle of proportionality is contrary to the entire line of cases cited in the text.

¹⁴According to *Rummel v. Estelle*, "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of sentence actually imposed is purely a matter of legislative prerogative." 445 U. S., at 274 (emphasis added). The Court did not adopt the standard proposed, but merely recognized that the argument was possible. To the extent that the

exception for imprisonment. We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments, *Ingraham v. Wright*, 430 U. S., at 664, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms. See *Hodges v. Humkin*, *supra*. And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis. See, e. g., *Weems*, 217 U. S., at 377; cf. *Hutto v. Finney*, 437 U. S., at 685 ("Confinement in a prison . . . is a form of punishment subject to scrutiny under Eighth Amendment standards").

When we have applied the proportionality principle in capital cases, we have drawn no distinction with cases of imprisonment. See *Gregg v. Georgia*, 428 U. S., at 176 (opinion of Stewart, POWELL, and STEVENS, JJ.). It is true that the "penalty of death differs from all other forms of criminal punishment, not in degree but in kind." *Furman v. Georgia*, 408 U. S. 238, 306 (1972) (Stewart, J., concurring). As a result, "our decisions [in] capital cases are of limited assistance in deciding the constitutionality of the punishment" in a non-capital case. *Rummel v. Estelle*, 445 U. S., at 272. We agree, therefore, that, "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [will be] exceedingly rare,"¹⁵ *ibid.* (empha-

State—or the dissent, see *post*, at 4—makes this argument here, we find it meritless.

¹⁵ In *Enmund*, for example, the Court found the death penalty to be excessive for felony murder in the circumstances of that case. But clearly no

sis added); see *Hutto v. Davis*, 454 U. S., at 374. This does not mean, however, that proportionality analysis is entirely inapplicable in noncapital cases.

In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.¹⁶ But no penalty is *per se* constitutional. As the Court noted in *Robinson v. California*, 370 U. S., at 667, a single day in prison may be unconstitutional in some circumstances.

III

A

When sentences are reviewed under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized.¹⁷ First, we look to the gravity of the

sentence of imprisonment would be disproportionate for Enmund's crime.

¹⁶ Contrary to the dissent's suggestions, *post*, at 2, 12, we do not adopt or imply approval of a general rule of appellate review of sentences. Absent specific authority, it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence; rather, in applying the Eighth Amendment the appellate court decides only whether the sentence under review is within constitutional limits. In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.

¹⁷ The dissent concedes—as it must—that some sentences of imprisonment are so disproportionate that they are unconstitutional under the Cruel and Unusual Punishments Clause. *Post*, at 8, n. 3; cf. *id.*, at 7, n. 2. It offers no guidance, however, as to how courts are to judge these admittedly rare cases. We reiterate the objective factors that our cases have recognized. See, e. g., *Coker v. Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion). As the Court has indicated, no one factor will be dispositive

offense and the harshness of the penalty. In *Enmund*, for example, the Court examined the circumstances of the defendant's crime in great detail. 458 U. S., at ———. In *Coker* the Court considered the seriousness of the crime of rape, and compared it to other crimes, such as murder. 433 U. S., at 597–598 (plurality opinion); *id.*, at 603 (POWELL, J., concurring in the judgment in part and dissenting in part). In *Robinson* the emphasis was placed on the nature of the "crime." 370 U. S., at 666–667. And in *Weems*, the Court's opinion commented in two separate places on the pettiness of the offense. 217 U. S., at 363 and 365. Of course, a court must consider the severity of the penalty in deciding whether it is disproportionate. See, e. g., *Coker*, 433 U. S., at 598 (plurality opinion); *Weems*, 217 U. S., at 366–367.

Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. Thus in *Enmund* the Court noted that all of the other felony murderers on death row in Florida were more culpable than the petitioner there. 458 U. S., at ———. The *Weems* Court identified an impressive list of more serious crimes that were subject to less serious penalties. 217 U. S., at 380–381.

Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. In *Enmund* the Court conducted an extensive review

in a given case. See *Hutto v. Davis*, 454 U. S. 370, 373–374 n. 2 (1982) (*per curiam*); *Rummel v. Estelle*, 445 U. S., at 275–276. The inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences. Thus no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment. See Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L. J. 1325, 1376–1377 (1979). But a combination of objective factors can make such analysis possible.

of capital punishment statutes and determined that "only about a third of American jurisdictions would ever permit a defendant [such as Enmund] to be sentenced to die." 458 U. S., at —. Even in those jurisdictions, however, the death penalty was almost never imposed under similar circumstances. *Id.*, at —. The Court's review of foreign law also supported its conclusion. *Id.*, at —, n. 22. The analysis in *Coker* was essentially the same. 433 U. S., at 593-597. And in *Weems* the Court relied on the fact that, under federal law, a similar crime was punishable by only two year's imprisonment and a fine. 217 U. S., at 380. Cf. *Trop v. Dulles*, 356 U. S. 86, 102-103 (1958) (plurality opinion).

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (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.

B

Application of these factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments—just as legislatures must make them in the first instance. Comparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender. Thus in *Enmund* the Court determined that the petitioner's conduct was not as serious as his accomplices' conduct. Indeed, there are widely shared views as to the relative seriousness of crimes. See Rossi, Waite, Bose & Berk, *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 Am. Soc. Rev. 224, 237 (1974). For example, as the criminal laws make clear, nonviolent crimes are less serious than

crimes marked by violence or the threat of violence. Cf. Tr. of Oral Arg. 16 (the State recognizes that the criminal law is more protective of people than property).

There are other accepted principles that courts may apply in measuring the harm caused or threatened to the victim or society. The absolute magnitude of the crime may be relevant. Stealing a million dollars is viewed as more serious than stealing a hundred dollars—a point recognized in statutes distinguishing petty theft from grand theft. See, e. g., S. D. Codified Laws § 22-30A-17 (Supp. 1982). Few would dispute that a lesser included offense should not be punished more severely than the greater offense. Thus a court is justified in viewing assault with intent to murder as more serious than simple assault. See *Roberts v. Collins*, 544 F. 2d 168, 169-170 (CA4 1976) (*per curiam*), cert. denied, 430 U. S. 973 (1977). Cf. *Dembowski v. State*, 251 Ind. 250, 252, 240 N. E. 2d 815, 817 (1968) (armed robbery more serious than robbery); *Cannon v. Gladden*, 203 Or. 629, 632, 281 P. 2d 233, 235 (1955) (rape more serious than assault with intent to commit rape). It also is generally recognized that attempts are less serious than completed crimes. See, e. g., S. D. Codified Laws § 22-4-1 (1979); 4 Blackstone *15. Similarly, an accessory after the fact should not be subject to a higher penalty than the principal. See, e. g., 18 U. S. C. § 3.

Turning to the culpability of the offender, there are again clear distinctions that courts may recognize and apply. In *Enmund* the Court looked at the petitioner's lack of intent to kill in determining that he was less culpable than his accomplices. 458 U. S., at —. Most would agree that negligent conduct is less serious than intentional conduct. South Dakota, for example, ranks criminal acts in ascending order of seriousness as follows: negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts. S. D. Codified Laws § 22-1-2(1)(f) (Supp. 1982). A court, of course, is entitled to look at a defendant's motive in committing a crime.

Thus a murder may be viewed as more serious when committed pursuant to a contract. See, e. g., Mass. Gen. Laws Ann., ch. 279, § 69(a)(5) (West Supp. 1982); cf. 4 Blackstone *15; *In re Foss*, 10 Cal.3d 910, 519 P. 2d 1073 (1974).

This list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.

C

Application of the factors that we identify also assumes that courts are able to compare different sentences. This assumption, too, is justified. The easiest comparison, of course, is between capital punishment and noncapital punishments, for the death penalty is different from other punishments in kind rather than degree.¹⁸ For sentences of imprisonment, the problem is not so much one of ordering, but one of line-drawing. It is clear that a 25-year sentence generally is more severe than a 15-year sentence,¹⁹ but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not. Decisions of this kind, although troubling, are not unique to this area. The courts are constantly called upon to draw similar lines in a variety of contexts.

The Sixth Amendment offers two good examples. A State is constitutionally required to provide an accused with a speedy trial, *Klopfer v. North Carolina*, 386 U. S. 213 (1967), but the delay that is permissible must be determined on a case-by-case basis. "[A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the par-

¹⁸ There is also a clear line between sentences of imprisonment and sentences involving no deprivation of liberty. See *Argersinger v. Hamlin*, 407 U. S. 25 (1972).

¹⁹ The possibility of parole may complicate the comparison, depending upon the time and conditions of its availability.

ticular context of the case" *Barker v. Wingo*, 407 U. S. 514, 522 (1972) (unanimous opinion). In *Barker*, we identified some of the objective factors that courts should consider in determining whether a particular delay was excessive. *Id.*, at 530. None of these factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.*, at 533. Thus the type of inquiry that a court should conduct to determine if a given sentence is constitutionally disproportionate is similar to the type of inquiry required by the Speedy Trial Clause.

The right to a jury trial is another example. *Baldwin v. New York*, 399 U. S. 66 (1970), in particular, illustrates the line-drawing function of the judiciary, and offers guidance on the method by which some lines may be drawn. There the Court determined that a defendant has a right to a jury trial "where imprisonment for more than six months is authorized." *Id.*, at 69 (plurality opinion). In choosing the 6-month standard, the plurality relied almost exclusively on the fact that only New York City denied the right to a jury trial for an offense punishable by more than six months. As JUSTICE WHITE explained:

"This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn—on the basis of the possible penalty alone—between offenses that are and that are not regarded as 'serious' for purposes of trial by jury." *Id.*, at 72-73.

In short, *Baldwin* clearly demonstrates that a court properly may distinguish one sentence of imprisonment from another. It also supports our holding that courts properly may look to the practices in other jurisdictions in deciding where lines between sentences should be drawn.

IV

It remains to apply the analytical framework established by our prior decisions to the case before us. We first consider the relevant criteria, viewing Helm's sentence as life imprisonment without possibility of parole. We then consider the State's argument that the possibility of commutation is sufficient to save an otherwise unconstitutional sentence.

A

Helm's crime was "one of the most passive felonies a person could commit." *State v. Helm*, 287 N. W. 2d, at 501 (Henderson, J., dissenting). It involved neither violence nor threat of violence to any person. The \$100 face value of Helm's "no account" check was not trivial, but neither was it a large amount. One hundred dollars was less than half the amount South Dakota required for a felonious theft.²⁰ It is easy to see why such a crime is viewed by society as among the less serious offenses. See Rossi et al., 39 Am. Soc. Rev., at 229.

Helm, of course, was not charged simply with uttering a "no account" check, but also with being an habitual offender.²¹

²⁰ If Helm had been convicted simply of taking \$100 from a cash register, S. D. Codified Laws § 22-30A-1 (1979), or defrauding someone of \$100, § 22-30A-3, or obtaining \$100 through extortion, § 22-30A-4(1), or blackmail, § 22-30A-4(3), or using a false credit card to obtain \$100, § 22-30A-8.1, or embezzling \$100, § 22-30A-10, he would not be in prison today. All of these offenses would have been petty theft, a misdemeanor. § 22-30A-17 (amended 1982). Similarly, if Helm had written a \$100 check against insufficient funds, rather than a nonexistent account, he would have been guilty of a misdemeanor. §§ 22-41-1. Curiously, under South Dakota law there is no distinction between writing a "no account" check for a large sum and writing a "no account" check for a small sum. § 22-41-1.2.

²¹ We must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision.

And a State is justified in punishing a recidivist more severely than it punishes a first offender. Helm's status, however, cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor.²² All were nonviolent and none was a crime against a person. Indeed, there was no minimum amount in either the burglary or the false pretenses statutes, see nn. 1 and 2, *supra*, and the minimum amount covered by the grand larceny statute was fairly small, see n. 3, *supra*.²³

Helm's present sentence is life imprisonment without possibility of parole.²⁴ Barring executive clemency, see *infra*, at 22-25, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in *Rummel v. Estelle*. Rummel was likely to have been eligible for parole within 12 years of his initial confinement,²⁵ a fact on which the Court relied heavily. See 445 U. S., at 280-281. Helm's sentence is the most se-

²² Helm, who was 36 years old when he was sentenced, is not a professional criminal. The record indicates an addiction to alcohol, and a consequent difficulty in holding a job. His record involves no instance of violence of any kind. Incarcerating him for life without possibility of parole is unlikely to advance the goals of our criminal justice system in any substantial way. Neither Helm nor the State will have an incentive to pursue clearly needed treatment for his alcohol problem, or any other program of rehabilitation.

²³ As suggested at oral argument, the third-degree burglary statute covered entering a building with the intent to steal a loaf of bread. Tr. of Oral Arg. 14-16. It appears that the grand larceny statute would have covered the theft of a chicken.

²⁴ Every life sentence in South Dakota is without possibility of parole. See *supra*, at 4. We raise no question as to the general validity of sentences without possibility of parole. The only issue before us is whether, in the circumstances of this case and in light of the constitutional principle of proportionality, the sentence imposed on this petitioner violates the Eighth Amendment.

²⁵ We note that Rummel was, in fact, released within eight months of the Court's decision in his case. See L.A. Times, Nov. 16, 1980, p. 1, col. 3.

vere punishment that the State could have imposed on any criminal for any crime. See n. 6, *supra*. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

We next consider the sentences that could be imposed on other criminals in the same jurisdiction. When Helm was sentenced, a South Dakota court was required to impose a life sentence for murder, S. D. Codified Laws § 22-16-12 (1979) (amended 1980), and was authorized to impose a life sentence for treason, § 22-8-1, first degree manslaughter, § 22-16-15, first degree arson, § 22-33-1, and kidnapping, S. D. Comp. Laws Ann. § 22-19-1 (1967 ed., supp. 1978) (amended 1979). No other crime was punishable so severely on the first offense. Attempted murder, S. D. Codified Laws § 22-4-1(5) (1979), placing an explosive device on an aircraft, § 22-14A-5, and first degree rape, § 22-22-1 (amended 1980 and 1982), were only Class 2 felonies. Aggravated riot was only a Class 3 felony. § 22-10-5. Distribution of heroin, §§ 22-42-2 (amended 1982), 34-20B-13(7) (1977), and aggravated assault, § 22-18-1.1 (amended 1980 and 1981), were only Class 4 felonies.

Helm's habitual offender status complicates our analysis, but relevant comparisons are still possible. Under § 22-7-7, the penalty for a second or third felony is increased by one class. Thus a life sentence was mandatory when a second or third conviction was for treason, first degree manslaughter, first degree arson, or kidnapping, and a life sentence would have been authorized when a second or third conviction was for such crimes as attempted murder, placing an explosive device on an aircraft, or first degree rape. Finally, § 22-7-8, under which Helm was sentenced, authorized life imprisonment after three prior convictions, regardless of the crimes.

In sum, there were a handful of crimes that were necessarily punished by life imprisonment: murder, and, on a second or third offense, treason, first degree manslaughter, first de-

gree arson, and kidnapping. There was a larger group for which life imprisonment was authorized in the discretion of the sentencing judge, including: treason, first degree manslaughter, first degree arson, and kidnapping; attempted murder, placing an explosive device on an aircraft, and first degree rape on a second or third offense; and any felony after three prior offenses. Finally, there was a large group of very serious offenses for which life imprisonment was not authorized, including a third offense of heroin dealing or aggravated assault.

Criminals committing any of these offenses ordinarily would be thought more deserving of punishment than one uttering a "no account" check—even when the bad-check writer had already committed six minor felonies. Moreover, there is no indication in the record that any habitual offender other than Helm has ever been given the maximum sentence on the basis of comparable crimes. It is more likely that the possibility of life imprisonment under § 22-7-8 generally is reserved for criminals such as fourth-time heroin dealers, while habitual bad-check writers receive more lenient treatment.²⁸ In any event, Helm has been treated in the same manner as, or more severely than, criminals who have committed far more serious crimes.

Finally, we compare the sentences imposed for commission of the same crime in other jurisdictions. The Court of Appeals found that "Helm could have received a life sentence

²⁸ The State contends that § 22-7-8 is more lenient than the Texas habitual offender statute in *Rummel*, for life imprisonment under § 22-7-8 is discretionary rather than mandatory. Brief for Petitioner 22. Helm, however, has challenged only his own sentence. No one suggests that § 22-7-8 may not be applied constitutionally to fourth-time heroin dealers or other violent criminals. Thus we do not question the legislature's judgment. Unlike in *Rummel*, a lesser sentence here could have been entirely consistent with both the statute and the Eighth Amendment. See Note, Disproportionality in Sentences of Imprisonment, 79 Colum. L. Rev. 1119, 1160 (1979).

without parole for his offense in only one other state, Nevada," 684 F. 2d, at 586, and we have no reason to doubt this finding. See Tr. of Oral Arg. 21. At the very least, therefore, it is clear that Helm could not have received such a severe sentence in 48 of the 50 States. But even under Nevada law, a life sentence without possibility of parole is merely authorized in these circumstances. See Nev. Rev. Stat. § 207.010(2) (1981). We are not advised that any defendant such as Helm, whose prior offenses were so minor, actually has received the maximum penalty in Nevada.²⁷ It appears that Helm was treated more severely than he would have been in any other State.

B

The State argues that the present case is essentially the same as *Rummel v. Estelle*, for the possibility of parole in that case is matched by the possibility of executive clemency here. The State reasons that the Governor could commute Helm's sentence to a term of years. We conclude, however, that the South Dakota commutation system is fundamentally different from the parole system that was before us in *Rummel*.

As a matter of law, parole and commutation are different concepts, despite some surface similarities. Parole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases.

²⁷ Under § 207.010(2), a Nevada court is authorized to impose a sentence of "imprisonment in the state prison for life with or without possibility of parole. If the penalty fixed by the court is life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of 10 years has been served." It appears that most sentences imposed under § 207.010(2) permit parole, even when the prior crimes are far more serious than Helm's. See, e. g., *Rusling v. State*, 96 Nev. 778, 617 P. 2d 1302 (1980) (possession of a firearm by an ex-felon, two instances of driving an automobile without the owner's consent, four first degree burglaries, two sales of marijuana, two sales of a restricted dangerous drug, one sale of heroin, one escape from state prison, and one second degree burglary).

The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time. See, e. g., *Greenholz v. Nebraska Penal Inmates*, 442 U. S. 1 (1979) (detailing Nebraska parole procedures); *Morrissey v. Brewer*, 408 U. S. 471, 477 (1972) ("the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system"). Thus it is possible to predict, at least to some extent, when parole might be granted. Commutation, on the other hand, is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards. See, e. g., *Connecticut Board of Pardons v. Dumschat*, 452 U. S. 458 (1981).

We explicitly have recognized the distinction between parole and commutation in our prior cases.²⁸ Writing on behalf of the *Morrissey* Court, for example, CHIEF JUSTICE BURGER contrasted the two possibilities: "Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals." 408 U. S., at 477. In *Dumschat*, THE CHIEF JUSTICE similarly explained that "there is a vast difference between a denial of parole . . . and a state's refusal to commute a lawful sentence." 452 U. S., at 466.

The Texas and South Dakota systems in particular are very different. In *Rummel*, the Court did not rely simply

²⁸ In *Rummel* itself the Court implicitly recognized that the possibility of commutation is not equivalent to the possibility of parole. The Court carefully "distinguish[ed] *Rummel* from a person sentenced under a recidivist statute like [Miss. Code Ann. § 99-19-83 (Supp. 1979)], which provides for a sentence of life without parole." 445 U. S., at 281. But the Mississippi Constitution empowers the Governor to grant pardons in "all criminal and penal cases, excepting those of treason and impeachment." Art. 5, § 124. The Mississippi Supreme Court has long recognized that the power to pardon includes the power to commute a convict's sentence. See *Whittington v. Stevens*, 221 Miss. 598, 603-604, 73 So. 2d 137, 139-140 (1954).

on the existence of some system of parole. Rather it looked to the provisions of the system presented, including the fact that Texas had "a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically has allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." 445 U. S., at 280. A Texas prisoner became eligible for parole when his calendar time served plus "good conduct" time equaled one-third of the maximum sentence imposed or 20 years, whichever is less. Tex. Code Crim. Proc. Ann., Art. 42.12, § 15(b) (Vernon 1979). An entering prisoner earned 20 days good-time per 30 days served, Brief for Respondent in *Rummel*, O. T. 1979, No. 78-6386, p. 16, and this could be increased to 30 days good-time per 30 days served, Tex. Rev. Civ. Stat. Ann., Art. 6181-1, §§ 2-3 (Vernon Supp. 1982). Thus Rummel could have been eligible for parole in as few as 10 years, and could have expected to become eligible, in the normal course of events, in only 12 years.

In South Dakota commutation is more difficult to obtain than parole. For example, the board of pardons and paroles is authorized to make commutation recommendations to the Governor, see n. 7, *supra*, but § 24-13-4 provides that "no recommendation for the commutation of . . . a life sentence, or for a pardon . . . , shall be made by less than the unanimous vote of all members of the board." In fact, no life sentence has been commuted in over eight years,²⁹ App. 29,

²⁹The most recent commutation of a life sentence in South Dakota occurred in 1975. App. 29. During the eight years since then, over 100 requests for commutation have been denied. See *id.*, at 22-26. Although 22 life sentences were commuted to terms of years between 1964 and 1975, see *id.*, at 29; but see n. 30, *infra*, we do not have complete figures on the number of requests that were denied during the same period. We are told only that at least 35 requests were denied. See app. 22-26. In any event, past practice in this respect—particularly the practice of a decade ago—is not a reliable indicator of future performance when the relevant decision is left to the unfettered discretion of each Governor. Indeed, the

while parole—where authorized—has been granted regularly during that period, Tr. of Oral Arg. 8-9. Furthermore, even if Helm's sentence were commuted, he merely would be eligible to be considered for parole.³⁰ Not only is there no guarantee that he would be paroled, but the South Dakota parole system is far more stringent than the one before us in *Rummel*. Helm would have to serve three-fourths of his revised sentence before he would be eligible for parole, § 24-15-5, and the provision for good-time credits is less generous, § 24-5-1.³¹

The possibility of commutation is nothing more than a hope for "an *ad hoc* exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

V

The Constitution requires us to examine Helm's sentence to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes. He has been

best indication we have of Helm's chance for commutation is the fact that his request already has been denied. *Id.*, at 26.

³⁰ The record indicates that the prisoner whose life sentence was commuted in 1975, see n. 29, *supra*, still has not been paroled. App. 29.

³¹ Assume, for example, that in 1979 the Governor had commuted Helm's sentence to a term of 40 years (his approximate life expectancy). Even if Helm were a model prisoner, he would not have been eligible for parole until he had served over 21 years—more than twice the *Rummel* minimum. And this comparison is generous to South Dakota's position. If *Rummel* had been sentenced to 40 years rather than life, he could have been eligible for parole in less than 7 years.

treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State. We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.³² The judgment of the Court of Appeals is accordingly

Affirmed.

³² Contrary to the suggestion in the dissent, *post*, at 2-9, our conclusion today is not inconsistent with *Rummel v. Estelle*. The *Rummel* Court recognized—as does the dissent, *see post*, at 8, n. 3—that some sentences of imprisonment are so disproportionate that they violate the Eighth Amendment. 445 U. S., at 274, n. 11. Indeed, *Hutto v. Davis*, 454 U. S., at 374, and n. 3, makes clear that *Rummel* should not be read to foreclose proportionality review of sentences of imprisonment. *Rummel* did reject a proportionality challenge to a particular sentence. But since the *Rummel* Court—like the dissent today—offered no standards for determining when an Eighth Amendment violation has occurred, it is controlling only in a similar factual situation. Here the facts are clearly distinguishable. Whereas *Rummel* was eligible for a reasonably early parole, Helm, at age 36, was sentenced to life with no possibility of parole. See *supra*, at 19-20, and 22-25.