

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-492

TITLE HERMAN SOLEM, WARDEN, Petitioner  
v.

JERRY BUCKLEY HELM

PLACE Washington, D. C.

DATE March 29, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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HERMAN SOLEM, WARDEN, :  
Petitioner :

v. : No. 82-492

JERRY BUCKLEY HELM :

- - - - -x

Washington, D.C.  
Tuesday, March 29, 1983

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 11:10 o'clock a.m.

APPEARANCES:

MARK V. MEIERHENRY, ESQ., Attorney General of South.  
Dakota, Pierre, South Dakota; on behalf of the  
Petitioner.

JOHN J. BURNETT, ESQ., Rapid City, South Dakota;  
on behalf of the Respondent

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1                               P R O C E E D I N G S

2                   CHIEF JUSTICE BURGER: Mr. Attorney General, I  
3 think you may proceed whenever you are ready.

4                   ORAL ARGUMENT OF MARK V. MEIERHENRY, ESQ.,

5                   ON BEHALF OF THE PETITIONER

6                   MR. MEIERHENRY: Mr. Chief Justice, and may it  
7 please the Court, this is a case from the Eighth Circuit  
8 that basically began three years ago.

9                   Three years ago, a man by the name of Jerry  
10 Helm appeared before a Circuit Court Judge within the  
11 state of South Dakota and pled guilty to a felony. That  
12 felony happened to be his seventh felony within 15  
13 years. Judge Parker in that case, and the state of  
14 South Dakota had filed prior to that time its habitual  
15 criminal statute and the defendant pled guilty to be a  
16 habitual criminal and he was sentenced to life  
17 imprisonment.

18                  The state of South Dakota contends that two  
19 recent decisions of this Court take care of this  
20 situation and have affirmatively stated that this is a  
21 permissible sentence. Those two cases, Hutto versus  
22 Davis and Rummel versus Estelle, in our opinion were  
23 ignored by the Eighth Circuit.

24                  The Eighth Circuit reversed the District Court  
25 within South Dakota after it had upheld the state of



1 South Dakota Supreme Court's decision, which decided  
2 this was a permissible sentence and it did not violate  
3 the Eighth Amendment.

4           The state of South Dakota petitioned for writ  
5 of certiorari, was granted. The question before this  
6 Court is whether a statutorily-authorized sentence of  
7 life imprisonment without parole but with the right of  
8 commutation for a non-violent habitual offender's  
9 seventh felony constitutes cruel and unusual punishment  
10 under the Eighth and Fourteenth Amendments.

11           Mr. Helm has been an active criminal. He is  
12 certainly an habitual criminal. He has been convicted  
13 three times of burglary -- in 1964, '66, and '69; of  
14 obtaining money under false pretenses in '72; of grand  
15 larceny in '73; a third offense, driving while  
16 intoxicated, which requires three offenses within four  
17 years, by the way, in 1975.

18           The basic crime for which this case rests on  
19 was writing a no-account check, which is a felony in  
20 South Dakota, as in most other states, and it was for  
21 the amount of \$100.

22           South Dakota's habitual offender statute, we  
23 have two. One is for the first and second felony. It  
24 allows a circuit court judge to basically double  
25 whatever the statutory sentence is. When an individual

1 commits their fourth sentence, our court or our circuit  
2 court can sentence an individual anywhere from one day  
3 to life. In this particular case he was given life  
4 imprisonment and, as is pointed out in the briefs, in  
5 South Dakota life imprisonment requires that the  
6 governor commute that to a term of years prior to the  
7 time that parole begins.

8           We submit that this Court has decided this  
9 case in Rummel versus Estelle. It is just like the  
10 state of Texas, only in effect a mirror image. In  
11 Texas, the parole board allows a parole, it must be  
12 approved by the governor. Ours is the other way around,  
13 that the governor must first commute it to a term of  
14 years, then assigns it to the parole board.

15           I also want to point out that the state of  
16 South Dakota is more lenient than Texas. Texas  
17 requires, the legislature requires, a mandatory life  
18 sentence. Here it is left to the discretion of the  
19 sentencing judge.

20           These two cases -- I might point out that in  
21 this case, as in the Rummel case, the defendant does not  
22 challenge the habitual criminal statute of South Dakota,  
23 nor does he contend that that statute is unfairly or  
24 unconstitutionally applied as to his client. He simply  
25 states that this is cruel and unusual punishment.

1           The Eighth Circuit, at the oral argument,  
2   noted that this life sentence for this individual on his  
3   seventh felony within 15 years was a black day in legal  
4   jurisprudence and that it was -- it eventually held that  
5   it was cruel and unusual.

6           QUESTION: Attorney General, you mentioned  
7   about this life imprisonment and parole. I understood  
8   this was without parole.

9           MR. MEIERHENRY: That's correct. The -- but  
10   under -- in the state of South Dakota, and I think the  
11   appendix to the brief shows that, about 50 percent of  
12   the time those people who get life sentences are  
13   paroled, or at least over the period that the Eighth  
14   Circuit asked for the information.

15           The process in South Dakota, and I think you  
16   can see that in the lower judges' statements to the  
17   defendant, that an individual --

18           QUESTION: It confused me.

19           MR. MEIERHENRY: Well, an individual can be  
20   commuted and in South Dakota that's the normal process.  
21   For example, in Texas they have a little different  
22   procedure. There the Board of Pardons and Paroles  
23   acts. Then the governor must approve their actions. In  
24   our state, if someone gets a life sentence there is a  
25   series of requests for commutation. If the individual

1 is a man like Mr. Helm, maybe eventually the governor  
2 will be convinced he's rehabilitated himself in prison,  
3 will commute his sentence.

4 Once it's commuted to a term of years, it then  
5 is just like any other individual in the state  
6 penitentiary.

7 QUESTION: Well, is this to say that every  
8 sentence which is just a life sentence remains without  
9 possibility of parole unless the governor commutes?

10 MR. MEIERHENRY: That's correct, Your Honor.  
11 Once the governor commutes it to a term of years,  
12 whether it's ten years or 40 years --

13 QUESTION: And how many offenses can result in  
14 life sentences?

15 MR. MEIERHENRY: Well, anything that's a Class  
16 1 felony in South Dakota, which would include murder,  
17 rape -- the more serious offenses, Your Honor. And, of  
18 course, this habitual offender becomes a Class 1  
19 felony.

20 For example, if, like in Hutto versus Davis,  
21 the judge would have given Mr. Helm 40 years, under the  
22 rules of South Dakota, he would have, before he's  
23 eligible for parole, would have to serve 30 years. In  
24 other words, he would have gotten out of prison when he  
25 was 66, 70 years old, assuming that he had done things



1 properly.

2 So it's our view or the state of South  
3 Dakota's view that this Court has already decided this  
4 factual situation. It's determined that there's a  
5 difference between the death penalty and any term of  
6 years, and in this case a life sentence is simply a term  
7 of years measured by an individual's life.

8 This Court also discussed, and other courts  
9 have discussed, the possibility of parole. You have it  
10 in this case, only it's not called parole. It's called  
11 commutation. In both instances it is executive  
12 leniency.

13 QUESTION: Yes, but isn't there a difference  
14 in the parole situation? It's really routinely given to  
15 a very significant number of people, whereas here  
16 nobody's gotten it for the last ten or 12 years, as I  
17 understand it.

18 MR. MEIERHENRY: Well, I think the record  
19 would show since 1975, and I think --

20 QUESTION: It is correct nobody's gotten it  
21 since 1975?

22 MR. MEIERHENRY: That's correct. But over the  
23 period of time --

24 QUESTION: I suppose there have been people  
25 who have been put on parole in South Dakota since 1975.

1 MR. MEIERHENRY: There have.

2 QUESTION: Probably quite a lot of them.

3 MR. MEIERHENRY: There have. The average stay  
4 in our South Dakota penitentiary is about 2-1/2 years.

5 QUESTION: Would you -- because I had not  
6 found it in the record, at the beginning you recited the  
7 convictions. Could you tell me again what were they?  
8 In '64 it was a burglary, was it?

9 MR. MEIERHENRY: Yes, sir. I'll repeat them.  
10 There were three burglary convictions -- 1964, 1966,  
11 1969.

12 In 1972, while out for a short period of time  
13 he was convicted of obtaining money under false  
14 pretenses. Again, he was out of prison in 1973, grand  
15 larceny. 1975, third offense, driving while  
16 intoxicated, which in South Dakota requires three  
17 convictions for driving while intoxicated within a  
18 four-year period. He's actually got more than that.

19 QUESTION: And then this \$100 check item.

20 MR. MEIERHENRY: And then the \$100 no-account  
21 check in 1979.

22 QUESTION: So then it's correct that from 1973  
23 on, he had one conviction for drunken driving, which  
24 probably had meant there were a couple others before,  
25 because it was a felony, and the \$100 check. In ten

1 years he had those two convictions.

2 MR. MEIERHENRY: Well, from '73 to '79 -- he's  
3 been in prison, Justice, since '79, so in that six-year  
4 period he was convicted of three felonies, and you must  
5 remember that he was in prison during part of that  
6 time. I calculated he commits a serious misdemeanor or  
7 felony every 5.3 months he's out of prison, so he's a  
8 rather active and, I think, the perfect habitual  
9 criminal example.

10 QUESTION: Mr. Attorney General, as I read  
11 your statute, am I correct that if somebody commits a  
12 felony and it's shown that he's had three prior -- I  
13 mean, four prior misdemeanor convictions he can get  
14 life?

15 MR. MEIERHENRY: No, he can't.

16 QUESTION: Under this statute?

17 MR. MEIERHENRY: No, he can't.

18 QUESTION: It says convictions.

19 MR. MEIERHENRY: I know it, and that was  
20 changed in '82. I think it's one of those things under  
21 state law --

22 QUESTION: Good.

23 MR. MEIERHENRY: -- that everybody assumed we  
24 -- that it was meant by a felony conviction, but that  
25 was changed. No individual -- it has to be a felony in

1 South Dakota. It's always been that way. In 1982 they  
2 did amend our statute, which was not published in time  
3 for this.

4 QUESTION: I have changed my notes.

5 MR. MEIERHENRY: Okay.

6 QUESTION: General, were the burglaries  
7 third-degree burglaries?

8 MR. MEIERHENRY: They were.

9 QUESTION: Would you describe those for us?

10 MR. MEIERHENRY: Well, the record's not real  
11 clear, but I believe they were just third-degree  
12 burglaries. That's the information that was within the  
13 record that the circuit court judge --

14 QUESTION: What is the statutory definition of  
15 a third-degree burglary?

16 MR. MEIERHENRY: It's breaking -- in South  
17 Dakota it's breaking and entering into a building that's  
18 not inhabited.

19 QUESTION: That's unoccupied.

20 MR. MEIERHENRY: Unoccupied.

21 QUESTION: What, like a stable or --

22 MR. MEIERHENRY: Could be a liquor store. It  
23 could be a grocery store. It could be a filling  
24 station. It could be a stable.

25 QUESTION: Was any violence involved in any of



1 the burglaries?

2 MR. MEIERHENRY: Well, by its definition there  
3 was breakings, but not to a human being, no, sir.

4 QUESTION: Right. What about the grand  
5 larceny? What's the definition of that in South Dakota?

6 MR. MEIERHENRY: That's a -- taking property  
7 over \$200.

8 QUESTION: Over \$200?

9 MR. MEIERHENRY: Over \$200. Let's see, in  
10 1973 -- my memory's not precise -- it might have still  
11 been \$100. At some point in the '70s --

12 QUESTION: It seems to me I read somewhere it  
13 was \$50 at the time.

14 MR. MEIERHENRY: Well, it is now \$200, but in  
15 1973 it could have been \$50. I'm not precise, but we  
16 had to account for inflation, I guess, and so during the  
17 '70s it did go up.

18 QUESTION: Was there a dollar value on the  
19 burglary in the third degree, or was it just any entry?

20 MR. MEIERHENRY: No. And I don't think  
21 that -- I guess the state of South Dakota -- But the  
22 dollar value, this Court's already held that in Texas we  
23 could look at \$280.

24 But I don't think the amount of the crime is  
25 important. I don't think it's a serious argument made --

1           QUESTION: You'd make the same argument if in  
2 each of the three burglaries he stole a quart of liquor?

3           MR. MEIERHENRY: Yes. It's the crime. As  
4 least in South Dakota, determined by the legislature, a  
5 burglary is a felony and it is such in most every state  
6 in the Union, as far as I know, and here is an  
7 individual that on six occasions, although our  
8 legislature said three strikes, he got six strikes, and  
9 I think the fact that there was no violence involved  
10 allowed and permitted the executive branch not to file  
11 an habitual criminal enhancement against him on his  
12 fourth felony, his fifth felony and his sixth felony.

13           It wasn't until the seventh felony that a  
14 prosecutor finally said, enough. I have a duty to  
15 protect the public. I have a duty to take an  
16 unrepentent thief off of the streets and keep him away.

17           QUESTION: May I ask how frequent -- I take it  
18 there was no pre-sentence report here either.

19           MR. MEIERHENRY: No, it was the --

20           QUESTION: Is that customary in your state?

21           MR. MEIERHENRY: It is not customary. It is  
22 only when on each and every occasion you have a right to  
23 one as a defendant.

24           QUESTION: He waived it.

25           MR. MEIERHENRY: He waived it.

1 QUESTION: He waived it.

2 QUESTION: He waived it, here, didn't he?

3 MR. MEIERHENRY: Yes, he did. And, of course,  
4 being an old defense lawyer myself, that's sometimes the  
5 wisest thing to do if you have a client like Mr. Helm,  
6 is just not tell the court the least amount possible  
7 because in this case, were he to have a pre-sentence,  
8 our record only goes back 15 years, so I can't argue to  
9 you what occurred before that.

10 But this gentleman's only 36 years old and so  
11 let's just go back the 15 years. Out of that period of  
12 time, he was in prison on various occasions a couple --  
13 17 months here and 24 months here. I think the court,  
14 from the record before it, was very justified in  
15 assuming that this man was not going to be  
16 rehabilitated.

17 The Eighth Circuit --

18 QUESTION: What would have happened if in each  
19 one of these burglaries he was stiff drunk and broke in  
20 just to lay down and go to sleep?

21 MR. MEIERHENRY: I doubt if --

22 QUESTION: Isn't that different from breaking  
23 in or blowing up a safe and destroying a building?

24 MR. MEIERHENRY: Well, the record --

25 QUESTION: Or killing somebody?

1           MR. MEIERHENRY: It's certainly different than  
2   killing somebody. I don't think we can make any quarrel  
3   about that. But as far as him breaking in and going to  
4   sleep, there's nothing in the record to indicate that.

5           QUESTION: But I'm saying it could have.

6           MR. MEIERHENRY: It could have been, but it  
7   wasn't, or we don't know.

8           QUESTION: And nobody seemed to be interested  
9   in it.

10          QUESTION: Mr. Attorney General, would that  
11   even constitute the offense of burglary? Doesn't it  
12   have to be breaking and entering with the intent to  
13   commit a felony or a theft therein?

14          MR. MEIERHENRY: It does.

15          QUESTION: And would sleeping constitute a  
16   felony or theft?

17          MR. MEIERHENRY: It does in our state. That  
18   would simply be what we would call a misdemeanor  
19   trespass punishable up to a year. But I guess -

20          QUESTION: Burglary 3 doesn't include that?

21          MR. MEIERHENRY: Yes. You have to have intent  
22   to commit a crime -- a crime.

23          QUESTION: A crime.

24          MR. MEIERHENRY: A crime. Stealing a bottle  
25   of whiskey is a misdemeanor in South Dakota.



1           QUESTION: All right. So he broke in and he  
2 stole a loaf of bread.

3           MR. MEIERHENRY: Um-hum.

4           QUESTION: That's it. Life imprisonment.

5           MR. MEIERHENRY: Only after there's three  
6 prior felonies.

7           QUESTION: Only after three loaves of bread.

8           MR. MEIERHENRY: Well, if you want to look at  
9 it this way. Of course, there is some individual who  
10 lost three loaves of bread and under our definition in  
11 South Dakota, which is a small state, we know that  
12 individuals like Mr. Helm, who have had six cracks at  
13 the penitentiary -- six times they've gone in there.  
14 They've been -- gone through the fish tank, as it's  
15 called, and they get their hair cut and they go through  
16 each step, and on six occasions that didn't seem to  
17 impede him at all.

18           Under the laws in South Dakota, we protect  
19 people first and property second, and it's clear that  
20 there is no logical way to protect the people of South  
21 Dakota, the innocent people of South Dakota, from Jerry  
22 Helm. The minute he gets out, and if we let him out --  
23 I figured it out -- with his life span, he's only got 37  
24 more felonies to go.

25           And I think that we have a duty to protect the

1 public from these 37 more felonies, if he keeps his  
2 batting average until the end.

3 QUESTION: May I ask one other question about  
4 his batting average?

5 MR. MEIERHENRY: Yes.

6 QUESTION: In '75 when he went in for drunken  
7 driving, how long was he sentenced then?

8 MR. MEIERHENRY: I know what he served. His  
9 sentence would not exceed three years, and he served  
10 nine months and, I believe, 17 days on that sentence.

11 QUESTION: Nine months. So then he was out  
12 about four years before he resumed his ill ways.

13 MR. MEIERHENRY: Until he was convicted. The  
14 state obviously --

15 QUESTION: Well, wasn't it rather promptly --  
16 the charge promptly disposed of in '79?

17 MR. MEIERHENRY: Yes, it was.

18 QUESTION: And when did the \$100 forgery  
19 occur?

20 MR. MEIERHENRY: It occurred three years ago,  
21 March of '79.

22 QUESTION: So he was out from '75 -- from late  
23 in '75, early '76, until '79 without resuming his evil  
24 ways.

25 MR. MEIERHENRY: He was not convicted during

1     that time.  What he did --

2                 QUESTION:  Well, there's nothing in the record  
3     to say he engaged in any misconduct for that three-year  
4     period.

5                 MR. MEIERHENRY:  That's right, but I don't  
6     think I can naively say he did not commit any crimes.  
7     He was not convicted of any crimes until 1979.

8                 QUESTION:  Well, what presumption should we  
9     make during that three-year period -- that he was out  
10    committing a lot of crimes, or that he was --

11                MR. MEIERHENRY:  No.  I don't think we can  
12    make any presumption.  He was not charged with any  
13    criminal activity during that period of time that was  
14    relevant to this charge.  If it was a misdemeanor, it's  
15    not relevant because only felonies are relevant.

16                We believe that the test that the majority  
17    adopted in Rummel should be used here.  This felony is  
18    classified as a felony, and it is classifiable as a  
19    felony, and the term and the punishment of years, as the  
20    court said or the majority said there, the length of the  
21    sentence is a matter of legislative prerogative.

22                In this case there are many instances where  
23    Mr. Helm has the opportunity before we need Federal  
24    court intervention.  The governor can commute him, which  
25    is a possibility.  Before he even started on this trail,

1 a prosecutor had to make a decision to charge him with  
2 an habitual offender offense. A circuit court judge in  
3 our state had to decide that this man could only, and  
4 society could only be protected by this punishment.

5           The state of South Dakota Supreme Court held  
6 three-to-two -- it was a close question there -- that  
7 this was appropriate for Mr. Helm. And I think in each  
8 case, for example, the Supreme Court of the state of  
9 South Dakota, understands and is aware that 50 percent  
10 of the time people who get life imprisonment in South  
11 Dakota, or approximately 50 percent, are commuted by the  
12 governor.

13           Ours is not a state known for long sentences.  
14 Ours is not a state that executive clemency is never  
15 used. In Texas it was denied, according to the report I  
16 read, 79 percent of the time. That's certainly not the  
17 indication in South Dakota, and yet this Court has held  
18 prior to this time it was acceptable.

19           We would simply ask that this Court follow, as  
20 we clearly read Rummel and as later the per curiam in  
21 Hutto versus Davis held, that this is a felony, that it  
22 is up to the legislature of the State of South Dakota to  
23 determine what is a proper punishment.

24           There is no allegation whatsoever that this  
25 man in any way will be treated cruelly or unusually in



1 our state penitentiary. He'll be cared for properly.  
2 He'll be fed properly. So it's only a matter of years,  
3 and certainly if in Hutto versus Davis 40 years for nine  
4 ounces of marijuana is acceptable, in this instance,  
5 after six felonies and on the seventh felony, and only  
6 then, that this individual be given the sentence of life  
7 imprisonment in South Dakota.

8 We think that any other decision would be a  
9 subjective decision and that the legislature of South  
10 Dakota has appropriately made this decision, as did the  
11 Circuit Court of South Dakota, as did the Supreme Court  
12 of South Dakota, to protect us from thieves.

13 I don't think we want violent people in our  
14 society. We don't. On the other hand, our society  
15 won't survive very well if we have 500 people like Jerry  
16 Helm in a state of our size, of 700,000. One can cause  
17 a lot of damage and I think that Jerry Helm is where he  
18 should be. I don't think he was treated unfairly or too  
19 cruelly.

20 If you can't learn in six times, seven times,  
21 in our society, I don't know that the populace of this  
22 country want to put up with these individuals. If he  
23 reforms, and I'm sure he went through AA every time he  
24 was in prison, I'm sure he went to church every time he  
25 was in prison and joined the Jaycees every time he was

1 in prison, and was reformed, and I'm sure he'll get out  
2 again.

3 But we need not under the Eighth Amendment  
4 declare it cruel and unusual to have a man who is  
5 certainly unusual in and of himself -- seven felony  
6 convictions within 15 years and only 36 or 37 years  
7 old.

8 Thank you.

9 QUESTION: General, I understand the Court of  
10 Appeals to the Eighth Circuit said that only one other  
11 state had laws that would enable or authorize a life  
12 sentence without parole for the type of recidivist that  
13 we have in this case. Do you agree with that?

14 MR. MEIERHENRY: I think they mentioned Nevada  
15 and I believe there's one other that skips my mind. But  
16 there are not a great deal. But I think so many of  
17 these things are without a difference because I don't  
18 see any difference between South Dakota and Texas.  
19 Actually, I think Texas has tougher habitual criminal  
20 statutes than we do.

21 Number one, we add a felony. Number two,  
22 we've got the court's discretion, the lower court  
23 discretion. In Texas, third one, automatic. Yes, you  
24 have parole on the other side. We have commutation of  
25 sentence. But Nevada is similar to us, to South Dakota.

1 CHIEF JUSTICE BURGER: Mr. Burnett.

2 ORAL ARGUMENT OF JOHN J. BURNETT, ESQ.

3 ON BEHALF OF RESPONDENT

4 MR. BURNETT: Mr. Chief Justice, may it please  
5 the Court, Mr. Helm has been deprived of his freedom for  
6 life by the punishment involved in this case.

7 The state of South Dakota argues that this  
8 Court should not even consider whether such an extremely  
9 harsh punishment has any relationship to the severity of  
10 the crimes that Mr. Helm was convicted of. Once a  
11 person commits a felony, no matter what the nature of  
12 that felony, according to Mr. Meierhenry, then that  
13 person forfeits his life, his liberty --

14 QUESTION: He didn't say one. It's seven.

15 MR. BURNETT: Your Honor, he said the felony  
16 and in accordance with his brief and in accordance with,  
17 as I understood, his argument to you --

18 QUESTION: But the issue here is whether seven  
19 felonies can invoke this statute without offending the  
20 Eighth Amendment, isn't it?

21 MR. BURNETT: Yes, Your Honor. That's what  
22 the issue is here.

23 QUESTION: What you'll have to do is tell us  
24 why the Rummel case doesn't control, don't you?

25 MR. BURNETT: Yes, Your Honor. Of course,

1 Rummel v. Estelle, this Court did uphold the life  
2 sentence on a Texas recidivist convicted of three prior  
3 felonies, but in Rummel this Court refrained from  
4 applying the proportionality principle espoused in the  
5 cases of Coker v. Georgia, and Weems v. United States.

6 Now the reason this Court felt compelled to  
7 hold back from applying a proportionality analysis in  
8 that case was because the punishments involved in Weems  
9 and Coker could be clearly distinguished, a bright line  
10 could be drawn between those punishments and traditional  
11 forms of imprisonment, while no such bright line could  
12 be drawn between Rummel's punishment and traditional  
13 forms of imprisonment.

14 In this case, there is no such fear of a more  
15 extensive intrusion into the line-drawing process of the  
16 legislature, as there was in Rummel, because a bright  
17 line can be drawn in this case and between traditional  
18 forms of imprisonment.

19 In Rummel, Your Honor, this Court, in  
20 distinguishing his sentence from the death penalty  
21 involved in Coker, quoted Justice Stewart in Furman v.  
22 Georgia to the effect that the penalty of death differs  
23 in kind from other forms of punishment. It is unique in  
24 its total irrevokability. It is unique in its rejection  
25 of rehabilitation as a basic goal of criminal justice,



1 and it is unique in its absolute renunciation of all  
2 that is embodied in our concept of humanity.

3 Now those points brought out by Justice  
4 Stewart's opinion, quoted in Rummel, Rummel's sentence  
5 was distinguishable from the death penalty on. His  
6 eligibility for parole in 12 years meant that his  
7 sentence was not irrevokable and his eligibility for  
8 parole in less than 12 years meant that his sentence did  
9 not reject his rehabilitation completely.

10 However, Mr. Helm is never eligible under  
11 South Dakota law for parole. Consequently, his sentence  
12 of life imprisonment means he will be sentenced to life  
13 imprisonment unless there is the extremely unlikely  
14 possibility that the governor of South Dakota or one of  
15 the governors of South Dakota, who have not commuted a  
16 single life sentence since 1975, will somehow decide to  
17 commute his sentence.

18 Consequently, his sentence approaches  
19 irrevokability of the death penalty, since his  
20 imprisonment for life cannot even be revoked by the  
21 possibility of parole. Also, his sentence rejects his  
22 rehabilitation completely. I don't think there's any  
23 way anybody could argue a life sentence without parole  
24 is a sentence based or considers rehabilitation at all.

25 QUESTION: Do you really think he was -- do

1     you think he was a prime candidate for rehabilitation?

2                 MR. BURNETT: Your Honor, I think it was  
3     certainly not justified on the basis of his record to  
4     totally rule out the fact of his rehabilitation. I  
5     think right now --

6                 QUESTION: That's, of course, the judgment  
7     that the South Dakota legislature made, saying that in  
8     these circumstances of multiple felonies that they would  
9     rule out that possibility. I take it you say that the  
10    Eighth Amendment forbids that.

11                MR. BURNETT: Your Honor, what I'm saying is  
12    that the Eighth Amendment requires -- I think there were  
13    two tests laid out in Coker. It requires that a  
14    punishment be not grossly proportionate to the offense  
15    and that it make -- well, then, of course, a negligible  
16    contribution test also.

17                My contention is, Your Honor, and I think it's  
18    based on decisions of this Court, that the  
19    proportionality requirement of the Coker test, also  
20    mentioned in Weems v. United States, the punishment must  
21    be graduated in proportion to the offense, that that  
22    puts a limit in accordance with the rehabilitative  
23    rationale of punishment on the extent to which the state  
24    can use utilitarian rationale in imposing a punishment.

25                QUESTION: Suppose this had been his

1   fourteenth conviction instead of his seventh felony  
2   conviction.  What would your view be of it then?

3               MR. BURNETT:  If it had been a sixteenth  
4   felony conviction?

5               QUESTION:  Yes.

6               MR. BURNETT:  I'm not sure what my position  
7   would be then, Your Honor.  I'm just stating that it was  
8   seven felonies -- I mean, it could have been -- when you  
9   get to some point I think that --

10              QUESTION:  Let's move it up to twenty then.

11              MR. BURNETT:  To twenty.

12              QUESTION:  To twenty.

13              MR. BURNETT:  I don't know.  I just know that  
14   seven, life imprisonment without parole for seven would  
15   be cruel and unusual punishment.  Now twenty, I think it  
16   would -- still in that circumstance I would be  
17   interested in knowing what the felony convictions were  
18   and what the circumstances behind each of those felony  
19   convictions were before I think it would be appropriate  
20   to rule out and reject completely rehabilitation as a  
21   basic goal of his punishment.

22              QUESTION:  Mr. Burnett, if Mr. Helm had been  
23   sentenced not to life but to 50 years in prison without  
24   possibility of parole, would you say we had to apply  
25   proportionality analysis?

1 MR. BURNETT: Fifty years without possibility  
2 of parole. Again, I would have to -- I'd have a  
3 difficult time answering that question. I think he  
4 would then, under those circumstances, have a  
5 possibility of being out before the end of his life.

6 QUESTION: What if he were 60 years old?

7 MR. BURNETT: If he were 60 years old and  
8 you're talking reform, the sentence would effectively  
9 then probably deprive him of his freedom for life. I  
10 would -- again, without knowing anything more about it,  
11 I would say that I would definitely have problems with a  
12 sentence like that. I'd have to look at it more, but I  
13 could see that it could be analogized to this, then.

14 QUESTION: You would suggest that the Court  
15 would have to apply proportionality analysis to terms of  
16 years as well, then, I take it?

17 MR. BURNETT: Excuse me, Your Honor?

18 QUESTION: Your argument suggests that this  
19 Court would have to apply your same proportionality  
20 analysis even to sentences for specified terms of  
21 years.

22 MR. BURNETT: What I'm saying, Your Honor, is  
23 if a sentence cannot be clear -- if you can clearly  
24 distinguish a sentence from traditional sentences of  
25 imprisonment, which a term of year sentence normally is,



1 then a bright line could be drawn between that sentence  
2 and the proportionality test, as applied in Coker should  
3 apply.

4 In other words, Rummel v. Estelle is  
5 distinguishable from that sentence. Now what -- I'm  
6 addressing your question, too. I think I can imagine if  
7 you, like for instance a sentence for a term of years,  
8 for 895 years, with no eligibility for parole, would, in  
9 my estimation, be a life sentence without parole, just  
10 called a different name.

11 QUESTION: Well, so would any sentence. So  
12 would any sentence without parole that exceeded the  
13 man's life expectancy.

14 MR. BURNETT: Well, if you could know for sure  
15 what his life expectancy would be --

16 QUESTION: Well, you go to the tables.

17 MR. BURNETT: Okay. Well, you could predict  
18 on the tables, but even then what I'm stating, Your  
19 Honor, is that the sentence that is designed to ensure  
20 that a person is in prison for the rest of his life,  
21 that does not consider his rehabilitation completely,  
22 that rejects his rehabilitation completely, that that  
23 sentence cannot be clearly distinguishable from the  
24 death penalty, as was the sentence involved in Rummel.

25 And such a sentence is clearly distinguishable

1 from traditional forms of imprisonment. I don't think  
2 most sentences of imprisonment, and most traditional  
3 forms of imprisonment are not designed to keep someone  
4 in prison for the rest of his life, and I think that is  
5 why parole has achieved such a prominent role in our  
6 system of criminal justice, as has been pointed out by  
7 this Court in, for instance, *Morrissey v. Brewer*.

8 QUESTION: Mr. Burnett, what was the crime  
9 involved in *Coker*? Was it rape?

10 MR. BURNETT: In *Coker* it was rape, yes, Your  
11 Honor.

12 QUESTION: Well, under your analysis would you  
13 say that a state could not sentence a person who is  
14 found guilty of the sort of rape that was involved in  
15 *Coker* to life imprisonment without the possibility of  
16 parole?

17 MR. BURNETT: No, Your Honor. I'm not saying  
18 that.

19 QUESTION: What, then, is the distinction  
20 between seven of this kind of felonies and the rape, so  
21 far as rehabilitation is concerned? Supposing it was a  
22 21-year-old person convicted of rape?

23 MR. BURNETT: Your Honor, what I'm saying in  
24 this case is that the proportionality principle applied  
25 in *Coker* should be applied in this case. Now that also,

1 I think, is mentioned in Rummel and is also mentioned in  
2 Coker in applying that proportionality principle. It's  
3 important that the Court be informed by objective  
4 factors to the maximum extent possible.

5 Now there are three objective factors, I  
6 think, that have been identified. Number one, the  
7 nature of the offense. Now, for instance, rape, I think  
8 would contrast quite sharply from any of the offenses  
9 that Helm was convicted of. In other words, the first  
10 objective factor would be considering the nature of the  
11 offense in terms of the harm caused, the harmfulness of  
12 the offense, and the mens rea with which it was  
13 committed, comparing that with the punishment  
14 inflicted.

15 The second objective factor is comparing the  
16 sentence imposed in that jurisdiction with the sentences  
17 imposed in other jurisdictions. And the third, of  
18 course, is the sentence imposed on other criminals for  
19 different crimes within the same state.

20 Now I would not -- I'd have to subject the  
21 crime of rape. My suspicion right now is that all those  
22 objective factors would indicate that a life sentence  
23 without parole would be warranted for that particular --

24 QUESTION: But under your test, if only two  
25 states in fact impose that sort of a punishment, those

1 two would be lopped off by your test.

2 MR. BURNETT: No, Your Honor. The combined --  
3 that's just one of the three objective factors that I'd  
4 use. There is only one other state where Helm could  
5 have been sentenced to life imprisonment without parole  
6 for the offenses he was convicted of in this case.

7 But again I understand the concern with  
8 Federalism in applying just that interjurisdictional  
9 analysis. But it is one objective factor that the Court  
10 can apply in determining the question of whether a  
11 punishment is proportionate to the offense committed.

12 QUESTION: But wasn't this, your whole  
13 approach, pretty well rejected by the Court opinion in  
14 Rummel?

15 MR. BURNETT: My approach was rejected by the  
16 Court --

17 QUESTION: I mean, this breaking it down into  
18 numerous so-called objective factors. That was really  
19 the approach taken by the Court of Appeals for the  
20 Fourth Circuit in Hart against Coiner, as I recall, and  
21 I thought the Court opinion in Rummel rejected that.

22 MR. BURNETT: Your Honor, the Court opinion in  
23 Rummel, I think, it rejected that for one reason, and  
24 that was that Rummel's sentence could not be clearly  
25 separated, a bright line could not be drawn between



1 Rummel's sentence and traditional forms of  
2 imprisonment. Therefore, for the Court to say that his  
3 punishment was unconstitutional would involve the Court  
4 in the line-drawing process, preeminently the province  
5 of the legislature.

6 Therefore, the Court in Rummel distinguished  
7 Rummel's sentence from the death penalty in Coker. The  
8 reason that this case is different than Rummel and  
9 Rummel does not apply to this case is because when  
10 you're talking about life imprisonment without parole  
11 you are not talking about a sentence that's clearly  
12 distinguishable from the death penalty.

13 You're talking about a sentence that  
14 approaches the irrevokability of a death sentence.  
15 You're talking about a sentence that rejects  
16 rehabilitation completely, as the death penalty does.  
17 So for that reason the Court's fear in applying the  
18 proportionality analysis of intruding more extensively  
19 than was required in Weems and in Coker into the  
20 line-drawing process is not present in this case. So  
21 the reason that Rummel did not decide this case is  
22 because that fear in Rummel is not present.

23 Now Coker v. Georgia, when it talked about the  
24 objective factors -- and I think it was pointed out in  
25 Rummel -- that there was a certain degree of

1    subjectivity involved in at least two of the objective  
2    factors that were argued in Rummel and that are argued  
3    here -- the nature of the offense and the  
4    interjurisdictional comparisons.

5            In Coker v. Georgia, this Court said to the  
6    maximum extent possible. Also, in Coker v. Georgia, it  
7    was stated that objective factors cannot determine this  
8    controversy entirely, for the Constitution contemplates  
9    our own judgment should be brought to bear.

10           Now what -- I'm telling Your Honors that  
11    interjurisdictional comparison does indicate by itself  
12    that the sentence in this case is unconstitutional,  
13    disproportionate to the punishment compared to every  
14    other state in the country.

15           Number two, analyzing that with the two other  
16    objective factors, which also indicate that his sentence  
17    is grossly disproportionate to the punishment, those  
18    three objective factors, utilizing them, do indicate --

19           QUESTION: In each case your argument seems to  
20    treat the offense as simply the seventh felony. That's  
21    your view, isn't it?

22           MR. BURNETT: Excuse me, Your Honor?

23           QUESTION: It's just the seventh felony, but  
24    his offense in the view, in the eyes of the legislature  
25    of South Dakota, his offense is a continuing life of

1 criminal conduct that endangers the safety and the  
2 peaceful life of the people of South Dakota.

3 MR. BURNETT: Your Honor, I do, as the  
4 Attorney General has said, I have not argued that the  
5 habitual offender, the enhancement of punishment for a  
6 prior offender, that that is in and of itself  
7 unconstitutional.

8 What I am pointing out, Your Honor, the reason  
9 that the last felony is so important is because he has  
10 already committed other crimes. He's already been  
11 punished for them. The fact that he commits another  
12 crime does indicate, in looking at the last felony, more  
13 moral blameworthiness, which I think is about the best  
14 justification I've heard for enhanced penalties for an  
15 habitual offender -- increased blameworthiness.

16 And you analyze that blameworthiness with the  
17 harm involved and so for that reason I think the last  
18 felony is more important than the other felonies. For  
19 instance, if the last felony was a rape or an offense  
20 involving a gun or some type of threat of -- violent  
21 offense, it would be different.

22 QUESTION: What if the last felony were his  
23 fourth third-degree burglary?

24 MR. BURNETT: The fourth third-degree  
25 burglary. I think all the -- excuse me. I think my

1 argument would be pretty much the same as it is here  
2 today. In South Dakota, entering structures with the  
3 intent to commit a crime is burglary. I think all the  
4 prior burglaries that Mr. Helm was involved in, although  
5 this doesn't appear in the record, I think they were all  
6 breaking into liquor stores.

7 But again the only thing the judge knew at the  
8 time of imposing the sentence on Mr. Helm was this. The  
9 last offense he was convicted on was a \$100 no-account  
10 check charge. The judge asked him to explain what  
11 happened. He needs a factual base for the plea.

12 Mr. Helm explains he was working in Sioux  
13 Falls. He got paid that day, ended up in Rapid City  
14 with more money than he started out with. He knew he  
15 must have done something wrong. He didn't remember  
16 exactly what. He had stopped several places. He was  
17 drinking. If he would have known about the check, he  
18 would have paid it.

19 The judge also, the only thing he knew about  
20 the prior felonies at the time of his sentencing was  
21 that they were all a product of Mr. Helm's alcoholism.

22 QUESTION: Is it a general practice to omit or  
23 to waive the pre-sentence reports?

24 MR. BURNETT: No, Your Honor, it's not.

25 QUESTION: Would it not be particularly



1 important to have a pre-sentence report on a seventh  
2 felony conviction with the invocation of the habitual  
3 criminal statute?

4 MR. BURNETT: I would think so, Your Honor.

5 QUESTION: He waived it here, didn't he?

6 MR. BURNETT: He did, Your Honor. I think the  
7 Eighth Circuit, in their opinion in this case, although  
8 knowing the fact that he had waived his right to a  
9 pre-sentence investigation, suggested that one be done  
10 in this case and I certainly think --

11 QUESTION: Under -- what authority did the  
12 Eighth Circuit have to make that sort of suggestion?

13 MR. BURNETT: What?

14 QUESTION: What authority did the Eighth  
15 Circuit have to make that sort of suggestion?

16 MR. BURNETT: No authority, Your Honor. It  
17 was just a suggestion that they made in the case in a  
18 footnote, I believe. There is no authority. No case is  
19 cited, nothing like that. It was just -- I think it was  
20 their feeling that in imposing such a drastic sentence,  
21 life in prison without parole, on the minimal knowledge  
22 that the judge had about the offender, and imposing a  
23 punishment that completely rejected his rehabilitation,  
24 that certain -- more things should be known about him in  
25 determining the punishment that should be imposed upon

1 him.

2 Now, as I mentioned, the first objective  
3 factor is the nature of the offenses. Now it's pointed  
4 out that the prior felonies of Mr. Helm in this case  
5 were, as I think the Court's already been informed,  
6 three third-degree burglaries, one grand theft, one  
7 obtaining money under false pretenses, and one third  
8 offense driving while intoxicated, and then the \$100  
9 no-account check.

10 None of those offenses involve violence. I  
11 know that this Court pointed out in Rummel v. Estelle  
12 that distinguishing between violent and non-violent  
13 crimes involves a subjective judgment more eminently the  
14 problem of the legislature.

15 One thing I could inform the Court of is that  
16 there have been surveys taken of the general  
17 population. One that I know was completed after Rummel  
18 was decided -- I think 28 Wayne Law Journal number 3 --  
19 indicated that the population as a whole in this country  
20 does draw a bright line between violent and non-violent  
21 crimes.

22 When that is combined with the fact of Mr.  
23 Helm's alcoholism and you consider the harm involved in  
24 his offenses with the mens rea that they were committed,  
25 I think -- and I would submit that alcoholism does

1 affect the mens rea with which an offense is committed --

2 QUESTION: Well, if it affects the mens rea  
3 sufficiently, the elements of the offense aren't made  
4 out, are they?

5 MR. BURNETT: No, they're not, Your Honor.

6 QUESTION: So presumably in each offense which  
7 he was found guilty of there was the necessary intent,  
8 whether or not he might have been drinking.

9 MR. BURNETT: Um-hum.

10 QUESTION: So I don't see why it would affect  
11 the mens rea.

12 MR. BURNETT: I'm just saying in terms of  
13 punishment, Your Honor. Alcoholism could affect the  
14 mens rea to the extent that it would totally obliterate  
15 mens rea, therefore affecting an element of the  
16 offense.

17 QUESTION: Well, but then he wouldn't be  
18 guilty of the offense.

19 MR. BURNETT: No, he wouldn't be guilty of the  
20 offense in that case. But what I'm saying is, even if  
21 it does not affect his mens rea to the extent to totally  
22 obliterate it, that still is a factor to be considered  
23 in assessing his moral blameworthiness for the  
24 commission of the act.

25 QUESTION: You say if he had been drinking and

1 then formed the intent to commit a burglary and  
2 committed the burglary, he is less blameworthy than  
3 someone who hadn't been drinking and formed the intent  
4 to commit a burglary and committed the burglary?

5 MR. BURNETT: In general, yes, Your Honor,  
6 because of --

7 QUESTION: You think that's implicit in the  
8 Eighth Amendment?

9 MR. BURNETT: I don't think it -- I think it's  
10 implicit in the Eighth Amendment to the extent -- and  
11 this is going to be rather involved -- but it's implicit  
12 in the Eighth Amendment to this extent, that the Eighth  
13 Amendment prohibits cruel and unusual punishment. That  
14 has been held by this Court to require that the  
15 punishment be graduated in proportion to the offense.

16 That that proportionality requirement requires  
17 distributive justice. That distributive justice --

18 QUESTION: What is distributive justice?

19 MR. BURNETT: It means that a person should be  
20 treated as an individual, that justice should be  
21 gauged -- his sentence should be gauged to his personal  
22 culpability, his personal blameworthiness for the  
23 offense that he did and the actual harm that was  
24 caused.

25 In other words, I think, for instance, in

1 Robinson v. California the state may be threatened a lot  
2 by drug addicts, but distributive justice requires that  
3 they cannot be treated as criminals unless they have  
4 done something voluntary.

5 QUESTION: Well, in this case at one time he  
6 was convicted of driving while drunk.

7 MR. BURNETT: Yes, Your Honor.

8 QUESTION: Well, that is close to a crime of  
9 violence, but by sheer accident it wasn't violence.  
10 Isn't that right?

11 MR. BURNETT: Well, if you're talking about a  
12 car accident, it was a sheer accident that wasn't --

13 QUESTION: I'm talking about driving while  
14 drunk, using a lethal weapon in the hand of a drunk is  
15 dangerous.

16 MR. BURNETT: Yes, Your Honor.

17 QUESTION: So that's in this case.

18 MR. BURNETT: Yes, Your Honor. I'm not trying  
19 to argue that --

20 QUESTION: Well, suppose he'd been convicted  
21 seven times of drunken driving. Would that entitle him  
22 to life imprisonment?

23 MR. BURNETT: Well, again, Your Honor, I think  
24 when you look at --

25 QUESTION: Well, put it this way. Three times



1 with a small car, four times with a truck.

2 MR. BURNETT: Well, I don't -- I'd still argue  
3 that I would have, I think, that there would still be  
4 problems under the Eighth Amendment in imposing a life  
5 sentence without parole for those. I'd have to know a  
6 lot more than just that, but I think that driving while  
7 intoxicated, although it was true the danger of the  
8 offense, I think there's no intent there to cause  
9 anybody any injury.

10 And that, I think, would be something that  
11 should be considered in determining what punishment  
12 should be imposed for that offense.

13 QUESTION: You mean there's no intent to do  
14 injury, yet you know what could happen.

15 MR. BURNETT: Well, Your Honor --

16 QUESTION: You are presumed to know that.

17 MR. BURNETT: Your Honor, I just --

18 QUESTION: You are presumed to know that a  
19 drunken driver does not have the same reflexes as a  
20 sober one. You are presumed to know that when you drive  
21 while drunk.

22 MR. BURNETT: Yes, Your Honor. It's just --  
23 the only thing I'm saying is this, Your Honor. I don't  
24 think that I could -- I don't think it could quite be  
25 compared, the mens rea of a person driving a car while

1 intoxicated with the mens rea of a person that, like,  
2 for instance, takes a gun into a store, give me all your  
3 money or I'll shoot you.

4 I think that you're talking about a more  
5 guilty frame of mind.

6 QUESTION: In both are the victims equally  
7 dead?

8 MR. BURNETT: Yes --

9 QUESTION: Whether he shoots a guy in a  
10 robbery or otherwise drives over him in a truck while  
11 drunk? The dead person is just as dead.

12 MR. BURNETT: That's certainly true, Your  
13 Honor.

14 QUESTION: May I ask one other factual  
15 question? How old was this man at the time of his first  
16 offense? There's some reference to his age, but I can't  
17 quite sort it out.

18 QUESTION: I think twenty-one by the  
19 mathematics of it.

20 MR. BURNETT: That's about what I was going to  
21 say. I couldn't -- I can't really recall right off the  
22 top of my head, but --

23 QUESTION: There's reference to his having  
24 been 35 or 36 years old, but I didn't know whether that  
25 was today or at the time of the last conviction or

1    what.

2           MR. BURNETT:  He's 40 today, because I think  
3   he was sentenced when he was 36, which would have been  
4   '79, so he's 40, I think, at this date.

5           QUESTION:  Okay.

6           MR. BURNETT:  Then, finally, the last  
7   objective factor that I mentioned, interjurisdictional  
8   approach, South Dakota -- the only people in South  
9   Dakota that could be -- receive a life sentence without  
10  parole, as Mr. Helm did, would be someone convicted of  
11  murder, first-degree manslaughter, first-degree arson or  
12  kidnapping.

13          All the offenses, then, for which a person can  
14  receive life imprisonment outside of the one Mr. Helm  
15  was convicted of, involve violence or the threat of  
16  violence or death to another person.  Mr. Helm, on the  
17  other hand, has never in his life committed any offense  
18  involving violence or the threat of violence or any  
19  injury to the person of another.

20          QUESTION:  You don't think drunken driving  
21  involves any threat to the person of another?

22          MR. BURNETT:  Well, Your Honor, it would if  
23  there was an accident involved.  To that extent, any  
24  time you drive while intoxicated there would be a threat  
25  of injury to another person.  But to the extent that you

1 commit an offense where you, for instance, in robbery  
2 where you threaten violence in order to obtain money,  
3 that certainly doesn't apply to a third offense DWI.

4           So for that reason I do not count third  
5 offense DWI as an offense involving injury to the person  
6 of another or the threat of violence or a violent  
7 offense, for that matter. When an accident happened, I  
8 would certainly have to agree that there was violence  
9 involved.

10           So comparison of the laws of the state of  
11 South Dakota and how South Dakota treats other criminals  
12 also indicates that the punishment in this case is  
13 excessive compared to the offense.

14           Every one of these objective factors,  
15 considered separately -- the nature of the offense in  
16 terms of the harm involved and the mens rea with which  
17 it was committed, compared to the punishment, the first  
18 objective factor, to the interjurisdictional comparison,  
19 the fact that Nevada is the only state out of South  
20 Dakota -- outside of South Dakota in this whole country  
21 where Mr. Helm could have received a sentence of life  
22 without parole for the offenses he was convicted of, and  
23 thirdly, the fact that South Dakota punishes only  
24 people, outside of Mr. Helm, convicted of violent crimes  
25 or crimes involving violence, or injury to a person of

1 another -- all of these objective factors, considered  
2 separately, indicate that Mr. Helm's sentence in this  
3 case is grossly disproportionate to his punishment.

4 When all three objective factors are  
5 considered together, it should compel the conclusion, in  
6 this case, that his sentence is grossly disproportionate  
7 to his punishment. The Eighth Circuit in this --

8 CHIEF JUSTICE BURGER: We will resume at  
9 1:00.

10 MR. BURNETT: Excuse me, Your Honor. I  
11 believe I'm done. Thank you.

12 (Whereupon, at 12:01 o'clock p.m., the Court  
13 recessed, to reconvene at 1:00 o'clock p.m., the same  
14 day.)

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1 until 1979. It shows the type of man that the circuit  
2 court judge was faced with, one who was an absolutely  
3 unrepentant thief who will absolutely not follow the  
4 rules of society.

5 At some point society must preserve one thing,  
6 the right to protect itself, and that was done in this  
7 case and I believe nothing in the Eighth Amendment  
8 prohibits it, nor would the founders of our country ever  
9 believe that we could not protect ourselves from  
10 habitual offenders.

11 Thank you very much.

12 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
13 The case is submitted.

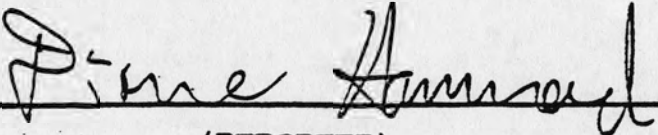
14 (Whereupon, at 1:02 o'clock p.m., the case in  
15 the above-entitled matter was submitted.)  
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:  
Herman Solem, Warden, Petitioner  
v. Jerry Buckley Helm

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

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