

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: RONALD ALLEN HARMELIN, Petitioner  
v. MICHIGAN

CASE NO: 89-7272

PLACE: Washington, D.C.

DATE: November 5, 1990

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SUPREME COURT OF THE UNITED STATES  
WASHINGTON, D.C.

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   RONALD ALLEN HARMELIN,                   :

4                   Petitioner                   :

5                   v.                   :   No. 89-7272

6   MICHIGAN                   :

7   - - - - - X

8                                   Washington, D.C.

9                                   Monday, November 5, 1990

10                   The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States at  
12 12:59 p.m.

13 APPEARANCES:

14 CARLA J. JOHNSON, ESQ., Detroit, Michigan; on behalf of  
15 the Petitioner, appointed by this Court.

16 RICHARD THOMPSON, ESQ., Prosecuting Attorney, County of  
17 Oakland, Pontiac, Michigan; on behalf of the  
18 Respondent.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

CARLA J. JOHNSON, ESQ.

On behalf of the Petitioner

3

RICHARD THOMPSON, ESQ.

On behalf of the Respondent

27

P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 89-7272, Ronald Allen Harmelin v. Michigan.

Ms. Johnson.

ORAL ARGUMENT OF CARLA J. JOHNSON

ON BEHALF OF THE PETITIONER

MS. JOHNSON: Mr. Chief Justice, and may it please the Court:

This case is about the most severe penalty, short of death, coupled with a total lack of discretion at any critical stage in the sentencing process. The petitioner, Ronald Harmelin, was convicted of possession of over 650 grams of cocaine in Michigan. He was sentenced to mandatory life in prison with no chance of parole ever. The question is whether this is cruel and unusual under the Eighth Amendment.

Before we go any further let me make one thing perfectly clear. Mr. Harmelin is not eligible for parole ever. Under this statute he will not see the parole board. The notion that a well-behaved lifer, who is punished by life in prison, will not actually serve life is wrong. He will serve life in prison with no chance of parole.

QUESTION: Ms. Johnson, does the State allow



1 commutation of sentences by the Governor or something of  
2 that sort? Pardon or a commutation?

3 MS. JOHNSON: Every State in the Nation has  
4 commutation by the Governor for any crime, whether it be a  
5 mass murderer or a serial rapist. But --

6 QUESTION: Is that ever -- is that a provision  
7 that is used on occasion in Michigan?

8 MS. JOHNSON: It is -- it is -- it has never  
9 been used in a drug offender scenario by our Governor.

10 QUESTION: Is it used in some circumstances in  
11 Michigan?

12 MS. JOHNSON: It has been used very infrequently  
13 in Michigan. However, this Court in *Solem v. Helm* has  
14 said that the mere ad hoc chance of executive clemency is  
15 not enough to preclude Eighth Amendment review, because if  
16 it was the Eighth Amendment review would be meaningless.  
17 Our Governor does not have a history of pardoning people,  
18 however.

19 Seven years ago, this Court in *Solem v. Helm*  
20 fashioned a proportionality test to determine whether a  
21 sentence is proportional to the crime.

22 QUESTION: Well, Ms. Johnson, *Solem* against *Helm*  
23 was a 5 to 4 decision, and it cut back on *Rummel* against  
24 *Estelle*, which was also a 5 to 4 decision. Do you think  
25 the Court has reached equilibrium, or do you think that

1 more changes might take place?

2 (Laughter.)

3 MS. JOHNSON: I don't think that this Court  
4 should treat stare decisis too cavalierly.

5 QUESTION: Well, do you think they did treat it  
6 -- how do you think they treated stare decisis in Solem  
7 against Helm?

8 MS. JOHNSON: I don't think that Solem v. Helm  
9 reversed or even narrowed Rummel. I think the facts in  
10 Rummel, who was eligible for parole and was going to be  
11 paroled within 10 or 12 years, was the whole difference.  
12 We're talking about a case where a person is in mandatory  
13 -- with mandatory life with no parole ever. That is a  
14 whole different thing than somebody that serves a life  
15 sentence and is eligible after 10 years. I think --

16 QUESTION: You see no conflict in the reasoning  
17 of the cases? I must submit I think the cases are  
18 difficult to square, so far as their approach and their  
19 reasoning are concerned.

20 MS. JOHNSON: Well, the majority in Solem v.  
21 Helm said that there was no conflict. They said that the  
22 difference was that in Solem v. Helm the person was -- Mr.  
23 Helm was sentenced to mandatory life with no parole, which  
24 is different in kind than a sentence of life where you can  
25 be paroled. And in Rummel v. Estelle this Court, even the

1 minority in Rummel v. Helm -- or, no, the -- in Rummel v.  
2 Helm the majority of this Court said that a ticket, a  
3 parking ticket -- if someone was sentenced to life in  
4 prison for a parking ticket, that would be  
5 disproportionate. So I don't think that -- if you were to  
6 reverse Solem v. Helm, I don't think you would necessarily  
7 have to throw out the whole proportionality test.

8 But going back to the test, the three factors  
9 that were used are the harshness of the penalty, the  
10 gravity of the offense, what other States do with your  
11 crime and what your State does with other crimes. Taking  
12 those in reverse order, Michigan is way out of line with  
13 every other State in the union. It is way out of line  
14 with what the Federal statutes are. As far as the other  
15 States, the majority of the States have sentences for  
16 possession of 650 grams somewhere between 0 and 10 years,  
17 and all of the States have discretion somewhere to factor  
18 in the mitigating factors, whether the person is a first  
19 time offender, whether he is a minor participant, whether  
20 there is some sort of violence or not, whether the person  
21 is a drug addict.

22 QUESTION: Maybe --

23 MS. JOHNSON: There is some sort of discretion.

24 QUESTION: Maybe Michigan has a bigger problem  
25 with drugs than Oregon and most of the other States do.

1     Isn't, isn't a State entitled to feel more deeply about  
2     some crimes than other States do?

3             MS. JOHNSON: Yes. I think States certainly can  
4     create laws trying to solve problems, and Michigan does  
5     have a big drug problem, as do California and D.C., some  
6     other States who -- that don't have those --

7             QUESTION: And it's a problem that causes the  
8     loss of human life. Not just the people that use the  
9     drugs, but the people who buy and sell it kill one another  
10    and innocent by-standers. Why can't Michigan feel very  
11    strongly about that and say -- and say by George, we're  
12    going to put a stop to it? We don't care whether other  
13    States want to ride along with it. We're going to impose  
14    a severe penalty so that no one will use drugs. We can't  
15    impose capital punishment, but we'll put them to prison  
16    for life. Why is that wrong?

17            MS. JOHNSON: There are a couple answers to  
18    that. One is that a State can propose legislation, but it  
19    still has to pass constitutional muster. In this war on  
20    drugs we have to fight it with constitutional weapons.  
21    And if a State is going to legislate against drugs, they  
22    should -- they should keep it within some sort of rational  
23    basis. This legislation has the ability to sentence to  
24    life people who are major traffickers, people who are  
25    mules, aiders, and abettors, minor participants, or there



1 is always the possibility of somebody who would merely  
2 possess the 650. That is not out of the question.  
3 Oakland County is the richest county. So what my --

4 QUESTION: Most unlikely. You're not willing to  
5 concede that having that much is very good indication that  
6 it's not being held for personal consumption but for  
7 distribution?

8 MS. JOHNSON: The State didn't prove anything,  
9 so my position is that my client has been convicted of  
10 mere possession.

11 QUESTION: Of an awfully large quantity of --

12 MS. JOHNSON: I don't know if it's an awfully  
13 large quantity. In the Federal system in order to be a  
14 kingpin under the criminal -- Continuing Criminal  
15 Enterprise statute a person has to have five people  
16 working under him, he has to distribute 150 kilos of  
17 cocaine in a year, or make \$10 million, and have a  
18 continuing criminal enterprise going. So --

19 QUESTION: Ms. Johnson --

20 MS. JOHNSON: -- that would be -- in the scheme  
21 of things, I am not sure -- I am sorry.

22 QUESTION: At page 6 of the joint appendix the  
23 presentence report is present. And the presentence report  
24 that the judge had before him, as I gather it, said that  
25 police investigators described the defendant as a large-

1 scale drug trafficker, delivering down to mid-level  
2 dealers. Now the judge, even in a different jurisdiction,  
3 would have taken, been able to take that fact into  
4 consideration, wouldn't he?

5 MS. JOHNSON: That is correct. The presentence  
6 report did say that, and the reason it said it is because  
7 Michigan defines a large-scale drug trafficker as someone  
8 who possesses over 650. So who is the Oakpark police or  
9 the Michigan State police to argue with that? This  
10 presentence --

11 QUESTION: It just -- this doesn't seem to me to  
12 rely on the statutory definition. It says police  
13 investigators described the defendant as a large-scale  
14 drug trafficker, delivering down to mid-level dealer. If  
15 the statute says that, you don't need this.

16 MS. JOHNSON: I would -- if -- if there were a  
17 sentencing hearing on this I would object to that  
18 language. Since there was --

19 QUESTION: We're not talking about a Sixth  
20 Amendment case here. You're challenging this on the basis  
21 of the Eighth Amendment. It's a cruel and unusual  
22 punishment. And I think we have to take as a fact what  
23 the judge had before him in the presentence report.  
24 Certainly he would have used that in sentencing had he had  
25 discretion, wouldn't he?

1 MS. JOHNSON: I think you have to take as a fact  
2 that that was in the presentence report, but I think you  
3 have to take it -- you have to realize also that because  
4 Michigan doesn't make any -- any difference between a  
5 major or a minor trafficker -- anybody with 650 gets life  
6 in prison -- it discourages advocacy at the sentencing  
7 proceeding. So something that would have been objected to  
8 by counsel was not. So --

9 QUESTION: How do we know that?

10 MS. JOHNSON: I guess we don't know that, and  
11 that's the whole point. You can -- you can infer that  
12 some things would not be objected to if it didn't make any  
13 reason to object to them. I don't think you can -- you  
14 don't have any facts in front of you on this case -- the  
15 facts are pretty bare. But the fact that Michigan defines  
16 a person who is possessing 650 as a major trafficker, then  
17 no one argues with that. There is no reason. It  
18 discourages advocacy at the sentencing level.

19 QUESTION: I'm a little puzzled. This is a  
20 mandatory sentence, isn't it?

21 MS. JOHNSON: That is correct.

22 QUESTION: I mean, why would you argue about it  
23 before the judge, then?

24 MS. JOHNSON: That's my point exactly. Since it  
25 is a mandatory sentence, nobody objected to the

1 presentence report. Nobody said whether he was a major  
2 trafficker or not, because it didn't matter. Whether he  
3 was a major trafficker, or whether he had it for his own  
4 possession, or whether he was a minor participant carrying  
5 the package across the street for somebody who owned the  
6 package, you still get the same sentence.

7 QUESTION: But you said a moment ago, Ms.  
8 Johnson, that you are taking the position your client had  
9 only be convicted of possession and that therefore it was  
10 at the very bottom end of the scale. I think the  
11 presentence report tends to cut against that.

12 MS. JOHNSON: And my position is that the  
13 presentence report is inaccurate. But, whether it is  
14 accurate or not, my position is that the very statute on  
15 its face, because it is so broad, because it is possible  
16 to sentence people who are traffickers, people who are  
17 mules, people who are minor participants, or possessors --

18 QUESTION: Well, wouldn't you, wouldn't you  
19 think that if there was clear proof that here was a real  
20 drug kingpin, that this mandatory sentence might be  
21 constitutional as applied to him, and yet be quite  
22 unconstitutional as applied to somebody else, some minor,  
23 some person walking across the street as the delivery boy?  
24 This isn't a First Amendment case that has over-breadth or  
25 anything.



1 MS. JOHNSON: Well, there are some, there are  
2 some problems with the over-breadth of the statute and  
3 some presumptions in this statute as well. But this --  
4 this definitely would be cruel --

5 QUESTION: Well, would you say, would you say  
6 that the statute is necessarily, would necessarily be  
7 unconstitutional on its face if this was really a drug  
8 kingpin and everybody admitted it?

9 MS. JOHNSON: That would be a closer question.  
10 However, I don't believe that mandatory life --

11 QUESTION: Well, how would you answer the close  
12 question?

13 MS. JOHNSON: I don't believe that in nondeath  
14 cases mandatory life in prison is a constitutional  
15 sentence. I think that --

16 QUESTION: For anything?

17 MS. JOHNSON: For anything. I think that --

18 QUESTION: You can imagine no crime -- how about  
19 first degree murder?

20 MS. JOHNSON: Well, that's a non -- that's a  
21 death case.

22 QUESTION: No, no. Suppose you have a, suppose  
23 you have a State which doesn't have a death penalty?

24 MS. JOHNSON: Well, I am sorry. My definition  
25 of a death -- of a nondeath case, I am talking about -- in

1 Michigan we have a first degree murder statute where we do  
2 get mandatory life in prison, and there is no groundswell  
3 of judges who are having a problem with that.

4 QUESTION: Well, do you have a problem with it?

5 MS. JOHNSON: No, I do not have a problem --

6 QUESTION: So that there are some statutes --  
7 some crimes that in your view can constitutionally be  
8 punished with a mandatory life sentence?

9 MS. JOHNSON: Yes. The intentional taking of a  
10 human life.

11 QUESTION: All right, so -- That's all?

12 MS. JOHNSON: In my view. In Michigan's view as  
13 well, other than this 650 statute, first degree murder and  
14 felony murder are punished with mandatory life in prison  
15 with no parole. But those statutes by their very nature,  
16 the very elements of the crime narrow the class of people  
17 who can be punished by the elements of the crime. You  
18 have to have premeditation, deliberation, you have to  
19 actually take a life and -- or in felony murder you have  
20 to have, you have to take a life or you have to intend to  
21 kill, intend to do great bodily harm, or act with reckless  
22 disregard. So you have that mental culpability in those  
23 areas, proof of intent, proof of moral depravity that man  
24 -- or that would, that would make the sentence of  
25 mandatory life with no parole more proportional.

1                   QUESTION: It's only about a decade or so ago  
2                   that we found in the Constitution a prohibition on  
3                   imposing capital punishment for anything except the  
4                   killing of a human being, and now you say that we also  
5                   can't impose life -- it is also unconstitutional to impose  
6                   life imprisonment for anything except the taking of a  
7                   human life. I sense a certain ratchet effect here.

8                   MS. JOHNSON: Well, you're -- this Court has  
9                   said that the --

10                  QUESTION: What, what about 30 years to a 50  
11                  year old, or to a 60 year old? Does that amount to life  
12                  imprisonment?

13                  MS. JOHNSON: I think the Court needs to have  
14                  some sort of discretion to decide whether the person under  
15                  this statute, whether they are a major or a minor  
16                  participant, whether they are a first time offender or  
17                  just a mule of transport. But my main problem is with the  
18                  nonparolability.

19                  QUESTION: Well, what do you, what do you do  
20                  about someone who is not likely to live 35 years, and he  
21                  gets a mandatory 35 years under a statute? He's a -- he  
22                  is 60 years old when he is convicted. Is -- does that  
23                  come within your prohibition? You can only give that  
24                  sentence to someone who has taken a human life?

25                  MS. JOHNSON: That would be a close question,

1 but outside the realm of these facts.

2 QUESTION: Well, I am just, you know, testing  
3 what you're -- you're asking us to create a new  
4 constitutional rule that I have not heard of before. What  
5 is -- what's the criterion for it?

6 MS. JOHNSON: I think there needs to be some  
7 sort of discretion to decide -- this statute where there  
8 is no discretion to decide the culpability of the person,  
9 coupled with the mandatory life with no chance of parole  
10 ever, is cruel and unusual. As to numbers of sentences  
11 where the person probably won't live, I am not sure. But  
12 the fact -- they would still serve --

13 QUESTION: Well, I thought this Court had made  
14 reasonably clear that outside the capital murder context  
15 that mandatory sentencing was all right. You seem to be  
16 arguing that no mandatory sentencing scheme can remain in  
17 effect.

18 MS. JOHNSON: Well, --

19 QUESTION: That the Constitution requires  
20 judicial discretion. And yet I had thought in Sumner and  
21 Woodson, and perhaps Rummel, that the Court had made clear  
22 that's not the position this Court has taken.

23 MS. JOHNSON: This Court has said that the  
24 sentence of death is different in kind, qualitatively  
25 different than any other sentence with a length of years.



1 But my position is that mandatory life in prison with no  
2 chance of parole ever is death in prison. There is no way  
3 out. He will die in prison. So for that reason it is  
4 qualitatively different. And I feel that a statute that  
5 has no discretion to decide who is going to be punished by  
6 that statute, and coupled with the fact that he will die  
7 in prison, makes it more like a death penalty case than  
8 any other number of years. And this Court has developed a  
9 doctrine of constitutionality in the death penalty cases  
10 for individualized sentencing.

11 As far as mandatory minimum sentencings, if they  
12 are small, like 5 or 10 years, I don't have a position on  
13 that because I haven't really studied that issue.

14 QUESTION: Well, and yet you, I thought you said  
15 a while ago that, but there are some crimes that, for  
16 which a mandatory life sentence without parole is okay?

17 MS. JOHNSON: Yes. I think the intentional  
18 taking of a human life is a crime that is universally held  
19 to be that -- to show that sort of depravity.

20 QUESTION: Well, what about some very aggravated  
21 recidivist situation, someone who four successive times  
22 has committed aggravated rape, or has committed mayhem?  
23 Do you think it would be a violation of the Eighth  
24 Amendment to sentence them on the conviction for the  
25 fourth time to life imprisonment without possibility of

1 parole?

2 MS. JOHNSON: I don't know if that would be a  
3 violation. A State has a different interest in trying to  
4 stop recidivist behavior. And a person who has shown by  
5 their behavior that they can't conform their behavior to  
6 societal norms, there's a whole different interest there  
7 than in this drug scenario where we have a first time  
8 offender, where we have possibly just a minor participant,  
9 and where we have no indication that if he were paroled  
10 that he would be any danger of recidivism. So there is a  
11 different interest there.

12 QUESTION: I am not sure that I understand the  
13 principle on which you are distinguishing mandatory life  
14 in a homicide case from mandatory life in a nonhomicide  
15 case. What is the principle?

16 MS. JOHNSON: The principle -- I believe that  
17 society agrees that the intentional taking of human life  
18 is the worst possible crime there is. This Court said in  
19 Coker v. Georgia that it was all right to -- it was not  
20 all right to give the death penalty to a person who raped  
21 an adult woman. This Court drew quite a line there at the  
22 intentional taking of human life, and I think that that  
23 line still holds.

24 QUESTION: Yes, but we are dealing here with  
25 mandatory life imprisonment. Why -- why do you draw the

1 line where you do on this penalty?

2 MS. JOHNSON: Because mandatory life in prison  
3 is death in prison. The person has no hope to get out  
4 ever.

5 QUESTION: What about --

6 QUESTION: So in effect you are saying we must  
7 regard it as the equivalent of a death sentence? Is that  
8 what your argument hinges on?

9 MS. JOHNSON: Well, that is one of the things my  
10 argument hinges on.

11 QUESTION: Well, what if -- what if we don't  
12 accept that? What do you have left?

13 MS. JOHNSON: A couple of things. You have the  
14 Solem v. Helm test, where you have to measure the gravity  
15 of the offense with the severity of the crime -- I mean  
16 the gravity of the punishment with the gravity of the  
17 crime. You have to look at what is done with other  
18 States. This Court in Stanford v. Kentucky developed an  
19 evolving standard of decency test, where you looked at  
20 what the other 50 States did. And as far as this crime,  
21 Michigan has the only statute where there is no discretion  
22 and there is no parole. Michigan has perhaps a big drug  
23 problem, but so do other States. And our drug problem  
24 doesn't seem to be getting any better with -- because of  
25 this law.

1           The other States have some kind of discretion so  
2   that you can decide whether a person is a minor or a major  
3   participant. There has to be some discretion somewhere.

4           QUESTION: Ms. Johnson, let me just see if I  
5   don't understand what you are trying to say but you  
6   haven't quite said it. Has -- the Court has drawn a line  
7   between some crimes for which death is a constitutionally  
8   permissible punishment and some for which it is not. And  
9   you are saying this is on the side of the line that would  
10  not permit death to be imposed.

11          MS. JOHNSON: Yes.

12          QUESTION: And therefore it -- but the  
13  punishment nevertheless is different from all -- therefore  
14  there may well be a different rule for this category of  
15  punishment than there would be for crimes for which death  
16  would be a permissible punishment. And that line has  
17  already been drawn by the Court.

18          MS. JOHNSON: Yes. And that would fall in with  
19  the Solem v. Helm analysis as well. In Helm, the seven-  
20  time recidivist, this Court found that his sentence was  
21  cruel and unusual as to him because the sentence of  
22  mandatory life in prison with no chance of parole was so  
23  harsh compared to even his seven-time recidivist behavior.

24          QUESTION: But we could say in the death penalty  
25  cases, as we have many times, that death is different.



1 You really can't say that life imprisonment is different.  
2 Life imprisonment for a 20 year old is no different from a  
3 20 year sentence for a 70 year old.

4 MS. JOHNSON: Life imprisonment --

5 QUESTION: How can we say that -- I mean, if the  
6 criterion is whether you will die in prison, a mandatory  
7 life sentence is no different from a mandatory term of  
8 years, depending upon the age of the person convicted.

9 MS. JOHNSON: Well, under a mandatory term of  
10 years there is parolability. There is good time, special  
11 good time, all kinds of --

12 QUESTION: No, I'm positing a mandatory term of  
13 years without any good time, without anything else. Just  
14 20 years. You do 20.

15 MS. JOHNSON: Michigan has recently --

16 QUESTION: That's -- is that different too?  
17 Does that come within your prescription, depending upon  
18 how old the person condemned is?

19 MS. JOHNSON: Michigan has recently struck down  
20 cases with what they call basketball scores, where people  
21 were given 100 to 200 years. And they did it with  
22 actuarial tables where the sentences had to come into what  
23 the life realm, the life span of the defendant would be.  
24 So in Michigan, no matter what kind of years you are  
25 given, you still have some hope that some day you will be

1     able to get out. Whereas in this mandatory life --

2             QUESTION: Well, that may be the case in  
3     Michigan. It's not the case in my hypothetical. And how  
4     do you answer my hypothetical? Why is -- you know, we say  
5     death is different, and you tell us that life imprisonment  
6     is different. But life imprisonment isn't different from  
7     a flat term of years for an elderly person, is it?

8             QUESTION: It's not different from a very rare  
9     occasional hypothetical, no.

10            (Laughter.)

11            MS. JOHNSON: Thank you, Justice Stevens.

12            QUESTION: That's your answer?

13            (Laughter.)

14            MS. JOHNSON: And an excellent one.

15            (Laughter.)

16            QUESTION: You want us to say that the taking of  
17     a human life is constitutionally different, and that  
18     society could not agree on any other crime that was so  
19     close to that that mandatory life in prison is correct,  
20     and I, as with some of my colleagues, don't understand the  
21     principle for that. Is it -- you say it's because it's  
22     universal acceptance, or universal condemnation? I am not  
23     sure that all of society doesn't take some crimes and  
24     elevate them to the status of intentional killing: child  
25     molestation of a young child, kidnapping. We have to

1 write the opinion, so we need to know what standard it is  
2 that we are supposed to use in order to adopt your view.

3 MS. JOHNSON: Well, the standard I would  
4 propose, of course, is the standard that this Court  
5 fashioned in *Solem v. Helm*, where you would take --

6 QUESTION: Well, we write -- it's just the  
7 difference between -- I've just pointed out that if you,  
8 if you say that this is based on some societal consensus,  
9 I have no evidence that that consensus exists.

10 MS. JOHNSON: I was taking that from the *Coker*  
11 case, where the -- this Court said that rape was different  
12 than intentional taking of human life, and so the sentence  
13 of death was unconstitutional for a person who was  
14 convicted of rape. That's where I was drawing that line.  
15 In Michigan it is clear that serious criminal acts, such  
16 as rape, second degree murder, and armed robbery, are  
17 punished with less severity than possession of cocaine.  
18 So you have vicious people, dangerous criminals who are  
19 convicted who can only in Michigan get up to life in  
20 prison, but it is not mandatory life, it is life with  
21 parole, and it is life with some discretion. The judge  
22 has a chance to look at the mitigating factors and decide  
23 what kind of sentence to give a person. There is  
24 discretion somewhere, and there is also parole.

25 In this case, however, we've got no discretion

1 anywhere, we have got people who can be kingpins, people  
2 who can be mules, people who can be possessors, and they  
3 are all getting mandatory life in prison with no  
4 discretion at all.

5 QUESTION: Ms. Johnson, is it true that this  
6 hasn't had any effect in cutting down the number of dope  
7 cases?

8 MS. JOHNSON: I think the prosecutor in his  
9 brief has admitted that the drug problem is getting worse  
10 and worse in Michigan. Every time you put --

11 QUESTION: So it hasn't had an effect on cutting  
12 it down?

13 MS. JOHNSON: No, it hasn't. Every time you  
14 catch a mule --

15 QUESTION: Well, it might be even worse if it  
16 weren't for this statute.

17 QUESTION: It looks to me like it's worse from  
18 the --

19 MS. JOHNSON: Every time you put a mule in  
20 prison there is someone else to take his place. So as far  
21 as deterrence, this isn't working. If that is going to be  
22 a -- any reason for it. But --

23 QUESTION: So deterrence is not a reason for  
24 sentencing?

25 MS. JOHNSON: Deterrence is a reason for



1 sentencing. What I am saying is that this --

2 QUESTION: Well, if there is, if there is a mule  
3 ready to take their place every time someone is put in  
4 prison, then isn't it a plausible answer that more  
5 deterrence is needed? If the price -- if the profits from  
6 doing business in cocaine are so tremendously high that  
7 people would take these risks, doesn't it follow from that  
8 that a severe sentence must be required?

9 MS. JOHNSON: Well, most of the people that are  
10 taking this, these risks don't even know what the law is.  
11 This encourages the recruitment of juveniles and young  
12 people from the inner city that are the ones that are  
13 carrying these packages for the major dealers. So it  
14 isn't deterring any crime at all. The drug problem is not  
15 such an easy problem. It's a problem of unemployment and  
16 poverty, and just putting more and more young people in  
17 jail is not going to solve anything. What are you going  
18 to do next? Cut their arms off or put -- just sentence  
19 them all to death? There is -- you are not solving the  
20 problem by doing that.

21 QUESTION: Apparently the Michigan legislature  
22 thought differently. I mean, that's a good argument. It  
23 may well be correct, but I assume it was made to the  
24 Michigan legislature when they passed this law.

25 MS. JOHNSON: At the time they passed this law,

1 the -- some of the opponents of the law realized that what  
2 is in reality happening might happen, that the mules of  
3 transport would be hired by the kingpins to carry the  
4 drugs, and that perhaps those people who are often drug  
5 addicts would end up doing this mandatory life in prison.  
6 The proponent of the law now has come out in opposition of  
7 it and has said that that is what is happening.

8 Of the 123 people in Michigan prisons, that's --  
9 and there's one other point that I would like to make.  
10 When a major trafficker is caught in a State court, the  
11 Feds come in, take him over to the Federal courthouse, and  
12 give him a chance to cooperate, or a chance to make some  
13 sort of a deal to get a lesser sentence. So the people  
14 that we have in our State court are the smaller guys, the  
15 ones that don't know enough to cooperate, don't have any  
16 information to trade. And they are the ones that are  
17 doing this mandatory life. And that is one --

18 QUESTION: Ms. Johnson, is there any  
19 prosecutorial discretion still in Michigan for whether to  
20 prosecute someone for this particular offense, more than  
21 650 grams? Could a prosecutor decide the facts warranted  
22 prosecution for a smaller amount?

23 MS. JOHNSON: I think they have a -- they have  
24 the ability to cut deals with people who cooperate.

25 QUESTION: Or just not to charge the full

1 potential offense. Is that right?

2 MS. JOHNSON: Yes, I think that's true.

3 QUESTION: So, while there may not be judicial  
4 discretion, there still is some built in at the charging  
5 stage, in effect.

6 MS. JOHNSON: Yes, there is prosecutorial  
7 discretion. That is all there is, and that is one of the  
8 problems with the law. Because if, if the person has  
9 information they will take him to the Federal courthouse  
10 where he can make a deal and get 3 or 4 years, instead of  
11 mandatory life. So the people who have no information,  
12 the very, very small people, the mules of transport, are  
13 the ones that are getting this mandatory life in prison.  
14 And that is what is wrong with this law.

15 QUESTION: Ms. Johnson, may I ask you, at the  
16 back of your brief you have a discussion of the pros and  
17 cons of the legislation. What is the official status of  
18 that? It's called the law librarian. Do you know what  
19 I'm talking about?

20 MS. JOHNSON: Yes.

21 QUESTION: What -- tell me a little bit about  
22 that, if you would.

23 MS. JOHNSON: The people who were proposing this  
24 law thought it would deter crime by putting major  
25 traffickers in prison for the rest of their life.

1 QUESTION: No, I know what it says, but I mean  
2 what is the -- is this an official legislative history in  
3 Michigan?

4 MS. JOHNSON: Yes, yes. That's the House  
5 legislative history, the proposed bills that were -- that  
6 were circulated at the time, in committee and at the time  
7 that they were making the laws.

8 QUESTION: So that when it recites that the  
9 Office of the Attorney General opposed the legislation, we  
10 can count on that as being an official statement?

11 MS. JOHNSON: Yes. Yes, that is official from  
12 the legislative journals in Michigan.

13 I would like to reserve the rest of my time for  
14 rebuttal.

15 QUESTION: Very well, Ms. Johnson.  
16 Mr. Thompson.

17 ORAL ARGUMENT OF RICHARD THOMPSON  
18 ON BEHALF OF THE RESPONDENT

19 MR. THOMPSON: Mr. Chief Justice, and may it  
20 please the Court:

21 As you consider the petitioner's case, I think  
22 it is important to keep in mind the potential harm to  
23 society of the 672 grams of cocaine that the petitioner  
24 possessed at the time he arrest -- he was arrested. That  
25 amount is equivalent to 12,000 hits on the street. That



1 amount makes more than 5,400 rocks of crack, the most  
2 addictive and dangerous form of cocaine in use today.

3 QUESTION: But Mr. Thompson, it would be the  
4 same even if it were diluted, wouldn't it?

5 MR. THOMPSON: Yes. Yes, Your Honor --

6 QUESTION: And so the number of hits that are  
7 possible has nothing to do with the sentence, does it?

8 MR. THOMPSON: Well, it has something to do --

9 QUESTION: I mean, if there is 672 grams, 1  
10 percent cocaine, it would be the same sentence.

11 MR. THOMPSON: Yes, if that -- that is  
12 theoretically possible, but it has something to do about  
13 why the State legislature used the 650 gram as the mark  
14 off for mandatory life in prison. This was a lot of  
15 cocaine, and the State legislature recognized the  
16 devastating effect of that much cocaine when it introduced  
17 this law and made this part of the law. The individual  
18 culpability of this --

19 QUESTION: But you said it, you said it was  
20 addictive, that is why they did it. That is not what the  
21 report says. It says it's a nonaddictive drug.

22 MR. THOMPSON: It is an addictive drug as far as  
23 its psychological and physiological effects has on the  
24 person that takes crack cocaine.

25 QUESTION: Is that in the legislative history?

1 MR. THOMPSON: No, Your Honor, it's not.

2 QUESTION: It's just the opposite in the  
3 legislative history. It is described as a nonaddictive  
4 drug.

5 MR. THOMPSON: The law enforcement lab people  
6 who are experienced in this, the professionals that handle  
7 this, indicate it is a highly addictive drug. A  
8 significant number of people who use crack for the first  
9 time become addicts. That is common knowledge in the law  
10 enforcement area. The other thing I would like to  
11 indicate, Justice Stevens, is that the legislative history  
12 is not really an official part of the legislature. That  
13 is merely a document that was prepared by the staff of the  
14 Senate and the House. So it is not really something that  
15 is in the official records of the legislature.

16 QUESTION: It is no more official than your  
17 reference to this general understanding about --

18 MR. THOMPSON: That is correct, Your Honor.

19 (Laughter.)

20 QUESTION: Given the fact that the 650 grams  
21 could be diluted down, as Justice Stevens said, isn't the  
22 real point of the 650-point cut off not so much to  
23 identify the seriousness of the specific offense, because  
24 he could be selling the -- the person possessing could be  
25 possessing something greatly diluted. Isn't the point of

1 it really to, as kind of a surrogate way of identifying a  
2 distributor? In other words, isn't the statute really  
3 saying regardless of what the dilution may be, anybody who  
4 possesses this quantity of a substance must be possessing  
5 it for something other than personal consumption? Isn't  
6 that the real point?

7 MR. THOMPSON: Yes, Your Honor, that was a  
8 legislative inference I think they made when they decided  
9 that cut off, that 650 grams. Someone does not possess  
10 that for personal use. Someone possesses that with the  
11 intent to deliver. In fact, petitioner admits in his own  
12 brief that I am a mule of transport, in an attempt to  
13 minimize his culpability. However --

14 QUESTION: Is there a separate State offense for  
15 possession with intent to distribute?

16 MR. THOMPSON: There -- it is a separate State  
17 offense, Your Honor, but the penalties are the same.

18 QUESTION: And here the offense charged and for  
19 which the conviction was obtained was mere possession, not  
20 possession with intent to distribute?

21 MR. THOMPSON: Yes, Your Honor. And the  
22 prosecutor's office, with the facts that we had, could  
23 easily have charged possession with intent to deliver.

24 QUESTION: Which would -- which would import the  
25 same penalty, life.

1 MR. THOMPSON: Which would import the same  
2 penalty, life, but there we would have a different  
3 element, an additional element that we would have to  
4 prove, which we could have in this case, but which we felt  
5 not necessary and not prudent to make it more difficult  
6 for us to win a prosecution.

7 QUESTION: Could you have proved it with a  
8 lesser quantity? Let's say for example you had 500 with  
9 intent to distribute. What would the penalty have been  
10 there?

11 MR. THOMPSON: That would be a lesser penalty on  
12 that, Your Honor. It would be mandatory 20 years to a  
13 maximum of 30 years.

14 QUESTION: But if we're dealing with 650 the  
15 penalty is the same whether it is mere possession or  
16 possession with intent to distribute?

17 MR. THOMPSON: Yes, Your Honor. Again, going  
18 back to the inference --

19 QUESTION: What's the basis for the distinction  
20 then?

21 MR. THOMPSON: The legislature just developed  
22 two laws. The inference is the same. If you have 650  
23 grams of cocaine, then that is not for your personal  
24 consumption. That is an indication to the legislature  
25 that this was going to be for transport, for delivery.



1 And in fact in this case the defendant admits in the  
2 petition that I was merely a mule. Now --

3 QUESTION: But let, let me go back to my  
4 example. Does the Michigan law read that if he possesses  
5 650 with intent to distribute, it is life without parole,  
6 and if he possesses 650, period, it is life without  
7 parole?

8 MR. THOMPSON: Yes, Your Honor.

9 QUESTION: Well, that pretty much destroys the  
10 suggestion I made a moment ago, doesn't it, that the real  
11 point of the law was to identify these people? Because  
12 the, the law seems to be drawing a distinction that does  
13 not, that is not consistent with the distinction that I  
14 was making.

15 MR. THOMPSON: I think that, not trying to read  
16 what the legislature was thinking when they did that,  
17 there is no difference as far as the penalty goes. But I  
18 do believe that the legislature was identifying, as you  
19 indicated, people who have that much cocaine on their  
20 possession do -- are going to be involved in the trade.  
21 It is not for personal consumption.

22 QUESTION: How did these two statutes come to  
23 be? Was the old -- is the intent to distribute statute an  
24 older one and this possession statute was simply added to  
25 it?

1 MR. THOMPSON: No, Your Honor. They have had  
2 these, those kinds of crimes for a long time. However,  
3 back in 1977 the legislature started to hold hearings,  
4 public hearings across the State trying to address the  
5 problem of drugs. And they listened to the community.

6 QUESTION: And you say that they enacted  
7 simultaneously two statutes, one of which says you get  
8 life for possessing 650 grams with intent to distribute,  
9 and in addition, at the same time, the same legislature  
10 drafted another statute that said you get 650 for  
11 possessing 650 -- or you get --

12 MR. THOMPSON: It was a part of the same act.  
13 However, as you go down further, when you get below 50  
14 grams, then the penalties do change. Where if you have  
15 possession of less than 50, 50 grams, you have a 4-year  
16 possibility of sentence, but if you possess with intent to  
17 deliver, then the penalty is more. But at the top level  
18 --

19 QUESTION: Mr. Thompson, now suppose there is a  
20 grandmother that is keeping a suitcase for her grandson,  
21 who is the mule, and it contains cocaine. He's gone for  
22 the weekend, she keeps it for him. Life without parole,  
23 right? Mere possession.

24 MR. THOMPSON: No, Your Honor. No, Your Honor.  
25 Merely having that suitcase in your closet does not

1 fulfill the requirements of possession. The person must  
2 know the nature of the contents, must have that knowledge  
3 plus the intent to establish some control, whether it be  
4 constructive or -- true control over the --

5 QUESTION: The grandson says I hate to tell you  
6 this, grandmother, it's cocaine, keep it for me for the  
7 weekend.

8 (Laughter.)

9 MR. THOMPSON: Your Honor, if we had -- if the  
10 prosecutor had that kind of information, there is that  
11 prosecutorial discretion that could be exercised in  
12 deciding whether you are going to charge the grandmother  
13 or whether you are going to use the grandmother to testify  
14 against the --

15 QUESTION: And would that be -- would that be  
16 exercising the interest of justice?

17 MR. THOMPSON: I can't give a definite yes or no  
18 on that, Your Honor, because I can see circumstances where  
19 --

20 QUESTION: Discretion by the prosecutor would be  
21 exercised in some cases in the interest of justice.

22 MR. THOMPSON: Yes. Yes, Your Honor.

23 QUESTION: So that this statutory scheme does  
24 permit an exception in the occasional case in the interest  
25 of justice by the prosecutor, but not by the judge?

1 MR. THOMPSON: There are checks and balances.  
2 Even -- once that, once the warrant is issued, Your Honor,  
3 if the prosecutor wants to make an agreement of some kind  
4 with the defendant in this level of drug dealing, the  
5 prosecutor must get permission from the court. Because  
6 what the legislature --

7 MR. THOMPSON: So, the point is you think this  
8 is an element in defending the statute, that there is a  
9 grounds in some cases not to impose the full sentence.  
10 But that's exactly what the petitioner is saying ought to  
11 be the case and that you are resisting.

12 MR. THOMPSON: There -- we'll always have -- if  
13 I understand your question or your statement, we always  
14 have discretion in the system someplace. Sometimes it's  
15 with the prosecutor and sometimes it's with the court. In  
16 this particular case the legislature said --

17 QUESTION: But then --

18 MR. THOMPSON: -- we are going to eliminate that  
19 discretion from the court.

20 QUESTION: Mr. Thompson, supposing the statute  
21 -- the legislature passed a statute and said it shall be  
22 mandatory duty of the prosecutor to prosecute to the full  
23 extent of the law because this problem is so serious,  
24 we've got to get these people off the street. You  
25 eliminated discretion from the prosecutor for this



1 particular area. Would that be constitutional? That  
2 doesn't trouble you, does it?

3 MR. THOMPSON: Well, the prosecutor has, the  
4 prosecutor must enforce the law.

5 QUESTION: Right.

6 MR. THOMPSON: And in Michigan if there is --

7 QUESTION: I find it surprising that you defend  
8 the law on the ground that the prosecutor might ignore it,  
9 which is what you are saying.

10 MR. THOMPSON: The prosecutor does not ignore  
11 it, Your Honor. The prosecutor has discretion, as it has  
12 in any law that it, the prosecutor is going to enforce.

13 QUESTION: Do you think that is essential to  
14 sustain the constitutionality of this law?

15 MR. THOMPSON: No, Your Honor.

16 QUESTION: Do you think the law would be equally  
17 constitutional if instead of 650 grams it was 50 grams?

18 MR. THOMPSON: Yes, Your Honor.

19 QUESTION: So -- it's a very simple case, then.

20 MR. THOMPSON: In my view it is, Your Honor.

21 What we have here is the democratically elected  
22 representatives of the people saying -- expressing a  
23 societal interest in deterring this crime and permanently  
24 removing people from society who participate in this  
25 crime. And if we have a --

1 QUESTION: Is it correct that for this kind of  
2 sentence, unlike most others, the -- there is no interest  
3 in rehabilitation to justify the punishment? The sole  
4 interest is deterrence?

5 MR. THOMPSON: Yes, Your Honor. Deterrence,  
6 both general and individual. Deterrence to prevent other  
7 people from getting involved, and deterrence to keep this  
8 person from getting back out on the street to purvey his  
9 drugs again.

10 QUESTION: Well, on the deterrence point, what  
11 about those 1,200 that are in prison now?

12 MR. THOMPSON: The -- we have in prison right  
13 now 123 individuals charged and convicted under this act,  
14 Your Honor. Those people will never deal their drugs  
15 again. And contrary --

16 QUESTION: Is there any evidence that all of  
17 them knew of this sentence, of this law?

18 MR. THOMPSON: Your Honor, it would be merely  
19 speculation on my part. I know that the law --

20 QUESTION: And in this case, any evidence that  
21 this petitioner knew of the law?

22 MR. THOMPSON: I don't know, Your Honor. Again,  
23 it would be speculation on my part. The defendant did not  
24 take the stand. The defendant, by the way, was given an  
25 opportunity to address the court at the time of

1 sentencing, and did not address the court. The defense  
2 counsel was given an opportunity to address the court at  
3 time of sentencing, and the defense counsel said I have  
4 read the presentence report and it is accurate. He didn't  
5 deny --

6 QUESTION: Mr. Thompson, I just don't understand  
7 this. What good would it do to address the court under  
8 this statute?

9 (Laughter.)

10 QUESTION: I mean, what are you going to say to  
11 him, I don't like the statute?

12 (Laughter.)

13 MR. THOMPSON: Well, I was responding to the  
14 question of what is in --

15 QUESTION: I know, I'm not criticizing your  
16 response. But really, are we talking about anything that  
17 has to do with the decision of the issue before us?

18 MR. THOMPSON: No, Your Honor.

19 QUESTION: Was it at the sentencing hearing that  
20 the Eighth Amendment issue was raised?

21 MR. THOMPSON: No, Your Honor.

22 QUESTION: When was that raised?

23 MR. THOMPSON: It was at the appeals level, the  
24 first appeal -- the court of appeals. At the point, at  
25 the trial --

1 QUESTION: Okay.

2 MR. THOMPSON: -- it was a trial by a judge, and  
3 the only questions there were search-and-seizure  
4 questions. Those were resolved in the prosecutor's favor,  
5 and we had a 1-day trial.

6 QUESTION: At any point was a request made to  
7 supplement the record with evidence that might be relevant  
8 to the Eighth Amendment issue beyond what was already in  
9 the record?

10 MR. THOMPSON: I don't believe so, Your Honor.

11 Getting to the petitioner's culpability in this  
12 case, which I think is important, not only did he have a  
13 pound and a half of cocaine on his person, pure cocaine,  
14 by the way, not mixed, he had on his person also \$3,500 in  
15 cash, a sifter, which is commonly used to crush cocaine to  
16 dilute it with other material, other narcotics. He has on  
17 his person a beeper, a pager. He had on his person a  
18 coded address book. He had on his person a .38 caliber  
19 pistol strapped to his ankle. This was a person that just  
20 did not happen to come upon a pound and a half of cocaine.  
21 This was an individual that was deeply involved in the  
22 drug trade.

23 At the time of his arrest he was, it was at 5:10  
24 a.m. at the time of his arrest, but even before then  
25 police observed him going in and out of the motel area



1 between 2:45 a.m. and 5:00 a.m. in a highly -- in a high  
2 drug trafficking area.

3 QUESTION: Mr. Thompson, in addition to the fact  
4 that the Governor can grant clemency to this -- I gather  
5 you agree that the Governor could --

6 MR. THOMPSON: Yes, Your Honor.

7 QUESTION: -- grant clemency if he wishes. I  
8 assume the Michigan legislature, if it, if it came to the  
9 conclusion that this is a stupid law and is in fact not  
10 deterring, as counsel asserts it is not, I assume they  
11 could repeal the law and could retroactively reduce the  
12 sentence? Could the Michigan legislature do that, or is  
13 it writ in stone?

14 MR. THOMPSON: The Michigan legislature could do  
15 that. The Michigan Supreme Court can do that. They have  
16 done it before when a law has become more lenient from the  
17 time that the person was convicted of the crime. But,  
18 Your Honor, I think that's an important point --

19 QUESTION: So, so we, we could wait several  
20 years to see if the Michigan legislature really believes  
21 this things works, and if it doesn't they might well  
22 repeal it and reduce the sentences meted out under it?

23 MR. THOMPSON: Your Honor, the Michigan  
24 legislature has twice visited this law since it was  
25 adopted in 1978. Back in 1987 they amended some of the

1 penalties below the 650 level and reduced them by half. A  
2 year later they revisited again and raised those penalties  
3 back up, because they said that the law stopped to have  
4 the deterrent effect. And that is what is important about  
5 this.

6 QUESTION: I wonder if there was an intervening  
7 election.

8 (Laughter.)

9 MR. THOMPSON: I don't know. We're always  
10 having elections in Michigan, Your Honor.

11 But that is an important part. They are  
12 representing the will and the societal interest in this,  
13 in this area. And I think this Court, through its stated  
14 concerns about separation of powers and federalism and  
15 judicial restraint, ought to leave this case where it is,  
16 in the hands of the legislature, who are preeminently  
17 involved with the line drawing schemes when you are  
18 dealing with crimes and the punishments for those crimes.

19 Now, Petitioner says I am not a drug kingpin.  
20 Now, I don't know what a drug kingpin is, because it is  
21 not defined in the Michigan statute. But assuming it is  
22 someone that has a lot of drugs, what, what is the level  
23 that we have to decide that makes a drug kingpin? We do  
24 know he was involved in a lot of drugs. This statute, I  
25 submit respectfully to the Court, was anchored in the

1 practicalities of the drug distribution network.

2           We realize that when you are dealing with drugs  
3 you have got the street level dealer that has to depend on  
4 a large supplier to get the drugs, and you have the large  
5 supplier that needs to depend on the street level dealer  
6 to get the drugs. What we were focussing in on was the  
7 entire drug distribution network, not the man at the top,  
8 because we realize the man at the top doesn't even get  
9 close to the drugs. And if we had this statute focused in  
10 on the kingpin, it would have been doomed to failure from  
11 the start. But what we do have is a focus on the entire  
12 distribution network.

13           And contrary to petitioner's position, it has  
14 had a dramatic impact on the drug distribution problem  
15 that we have in Michigan. Before this act when someone  
16 got caught they had a very lenient sentence. They would  
17 serve their time, they would go right back out on the  
18 streets and commit their acts again. It was merely a cost  
19 of doing business. Now when we catch someone under this  
20 act, the first thing they do is talk to the prosecutor  
21 about making a deal, wanting to turn the bigger man in.  
22 Contrary to what the petitioner says, this has had an  
23 impact on us getting the drug kingpin, because this  
24 statute was anchored on the practicalities of the drug  
25 distribution network in the State of Michigan.

1 QUESTION: What -- do you have any figures to  
2 back you up?

3 MR. THOMPSON: I have --

4 QUESTION: You've said --

5 MR. THOMPSON: -- not a part of the record, Your  
6 Honor, but the Michigan State Police in their annual  
7 report indicated that it does have a deterrent --

8 QUESTION: I don't want -- I don't want anything  
9 outside the record. I didn't ask for it.

10 MR. THOMPSON: Okay. Well, I don't have  
11 anything in the record itself, Your Honor.

12 QUESTION: I assumed that what you tell me is in  
13 the record.

14 MR. THOMPSON: No, Your Honor.

15 QUESTION: And you haven't told me a crying  
16 thing about the fact that it -- the crime of selling drugs  
17 has dropped off since this statute was passed.

18 MR. THOMPSON: That is correct. But as it was  
19 observed before, we don't know how high it would have been  
20 without the statute. And that is where you get into those  
21 --

22 QUESTION: But you don't know anything about  
23 what's happened.

24 MR. THOMPSON: Not regarding the impact of a  
25 particular statute --



1 QUESTION: Right.

2 MR. THOMPSON: -- with the entire drug  
3 distribution sea out there. No, Your Honor.

4 QUESTION: You don't know anything about that  
5 part.

6 MR. THOMPSON: We don't, and it would be very  
7 difficult to develop a scientific study about that.

8 QUESTION: Well, what in the world are you  
9 arguing about?

10 MR. THOMPSON: Because the purpose -- the  
11 purpose of this statute was deterrence. And the State  
12 legislature has indicated that, and when they reduced the  
13 charge they brought it back up, the penalties, they  
14 brought it back up because the State legislature said that  
15 we weren't getting deterrence out of the more lenient  
16 sentences.

17 QUESTION: What standard do you think we apply  
18 to test proportionality under the Eighth Amendment? Or do  
19 we just not make an examination at all?

20 MR. THOMPSON: Your Honor, I think the test that  
21 this Court has enunciated in Solem is whether there is  
22 gross disproportionality involved. And a lot has been  
23 said about what other States do as far as the drug laws  
24 go.

25 QUESTION: And does any other State have a

1 similar penalty for mere possession?

2 MR. THOMPSON: Not as tough, Your Honor. Not -  
3 -we have, and I will admit we have the toughest penalties,  
4 but this Court has said that merely because a State has  
5 the toughest penalty in any area does not mean it is  
6 grossly disproportionate. Because under our Federal  
7 system there will always be a State that has the  
8 distinction of having the severest penalty in some  
9 offense. That's the beauty of the federal system. That  
10 people can look to the State of Michigan and see what  
11 Michigan's experience is with the drug laws. And as the  
12 Solicitor General has said in his brief, that States are  
13 starting to follow Michigan's lead, that they are making  
14 stricter penalties in the drug area. That in fact the  
15 Federal Government in the last 10 years has amended its  
16 controlled substance act 3 times, and each time it has  
17 made the penalties tougher.

18 Now, petitioner doesn't say it's  
19 unconstitutional to create a crime such as we have  
20 created, and petitioner admits that this crime is a grave  
21 one, admits it in the brief. The only question that  
22 petitioner has is has the State-mandated law gone so high  
23 as to make it constitutionally impermissible? Now, what  
24 that issue does is thrust this Court into the line-drawing  
25 process which this Court has said on many occasions is

1 preeminently -- belongs to the legislative branch of  
2 government.

3           There's no question about it, Your Honor, that  
4 the decision, Your Honors, that the decision in this case  
5 will affect the extent to which the State legislatures and  
6 the Federal Government can enact tough laws to deal with  
7 this grave crisis that our Nation is facing. And I  
8 respectfully request that this Court send a clear signal  
9 that under the war on drugs that tough penalties, such as  
10 Michigan's, are constitutionally permissible.

11           If you have no further questions, thank you,  
12 Your Honor.

13           CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
14 Thompson.

15           The case is submitted.

16           (Whereupon, at 1:51 p.m., the case in the above-  
17 entitled matter was submitted.)

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# CERTIFICATION

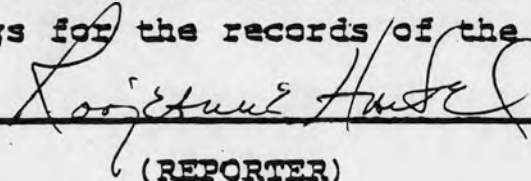
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#89-7272 - RONALD ALLEN HARMELIN, Petitioner v. MICHIGAN

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