



University of Arkansas at Little Rock Law Review

Volume 24 | Issue 3

Article 5

2002

Constitutional and Criminal Law—Eighth Amendment—Now You Can't Do That: Disproportionate Prison Sentences as Cruel and Unusual Punishment. *Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001).

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Recommended Citation

Ray S. Pierce, *Constitutional and Criminal Law—Eighth Amendment—Now You Can't Do That: Disproportionate Prison Sentences as Cruel and Unusual Punishment. Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001), 24 U. ARK. LITTLE ROCK L. REV. 775 (2002).

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CONSTITUTIONAL AND CRIMINAL LAW—EIGHTH AMENDMENT—
NOW YOU *CAN'T* DO THAT: DISPROPORTIONATE PRISON SENTENCES AS
CRUEL AND UNUSUAL PUNISHMENT. *Henderson v. Norris*, 258 F.3d 706
(8th Cir. 2001).

I. INTRODUCTION

The Eighth Amendment to the United States Constitution forbids the government from imposing “cruel and unusual punishments” on people convicted of crimes.¹ What, though, does the prohibition on cruel and unusual punishments mean exactly? Is the phrase merely meant to bar such old-fashioned and outmoded punishments such as thumbscrews, burning at the stake, or the lopping off of the hands of thieves—in other words, truly barbaric or torturous physical punishments? Is it limited solely to capital punishment? Indeed, some would assert that even the State’s most benign and pain-free attempts at capital punishment via lethal injection violate that constitutional mandate. But can that dictate also apply to a typical prison sentence? One could argue that anything less than a bizarre and unheard of punishment would not meet the literal definition of “cruel and unusual.” But the opposite view would have it that even a prison sentence that by its duration seems way out of proportion to the crime committed falls under the Eighth Amendment’s purview.

This note examines one opinion addressing the Eighth Amendment issue by the United States Court of Appeals for the Eighth Circuit, *Henderson v. Norris*,² and how the court reasoned that the life sentence of an Arkansas man for selling less than one-quarter gram of crack cocaine violated the Eighth Amendment. The note begins by telling the story of Grover Henderson’s arrest and trial in Lafayette County, and his ill-fated appeal to the Arkansas Supreme Court.³ The note then explores some of the history of the Eighth Amendment, from its genesis in the seventeenth-century English Declaration of Rights to its adoption in America and its application by American courts.⁴ Next, the note explains the reasoning employed by the Eighth Circuit in finding Henderson’s sentence unconstitutional.⁵ Finally, the note addresses the importance of the Eighth Circuit’s decision, both in terms of keeping the Eighth Amendment vibrant in a modern age and within the overall scheme of America’s so-called “war on drugs.”⁶

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1. U.S. CONST. amend. VIII.
 2. 258 F.3d 706 (8th Cir. 2001).
 3. See *infra* Part II.
 4. See *infra* Part III.
 5. See *infra* Part IV.
 6. See *infra* Part V.

II. FACTS

On July 1, 1993,⁷ Grover "Knot" Henderson, a forty-six-year-old black man,⁸ was arrested in Lafayette County, Arkansas, on suspicion of delivery of a controlled substance, namely cocaine.⁹ Henderson's arrest stemmed from a drug sale Henderson made to a police informant, instigated by then-Stamps Police Chief Al Dyar.¹⁰ On April 23, 1993, Chief Dyar gave his informant, Jerry Revels of Stamps, twenty dollars to make a drug buy and a microcassette tape recorder to record the transaction.¹¹ Revels ultimately met with Henderson, while Chief Dyar positioned himself so that he could witness the events.¹² Dyar testified that he saw Henderson retrieve a pill bottle from his sock, from which he removed a "tin foil" package.¹³ Revels took the package and gave Henderson the twenty dollars.¹⁴ Revels then went back to the truck from which Dyar was watching the transaction and gave Dyar the package and the tape recorder.¹⁵

Dyar opened the package and found three rock-like objects.¹⁶ Chemical analysis at the Arkansas State Crime Laboratory later proved that the rocks were cocaine base weighing 0.238 grams.¹⁷ Dyar then gave the foil package and tape to Joe Thomas of the Eighth Judicial District Drug Task Force.¹⁸ Later that evening, Revels signed a hand-written statement describing how he had purchased "three rocks" from Henderson.¹⁹ On June 10, 1993, La-

7. Record at 11, *Henderson v. State*, 322 Ark. 402, 910 S.W.2d 656 (1995) (No. CR 95-326).

8. *Id.* at 77.

9. *Id.* at 11.

10. *Henderson v. State*, 322 Ark. 402, 405, 910 S.W.2d 656, 657 (1995).

11. *Id.*, 910 S.W.2d at 657. Dyar knew Revels was a drug user, and he paid him fifty dollars per buy to make drug cases against drug sellers. *Id.*, 910 S.W.2d at 657.

12. *Id.*, 910 S.W.2d at 657.

13. Record at 218, 237.

14. *Henderson*, 322 Ark. at 405, 910 S.W.2d at 657.

15. *Id.*, 910 S.W.2d at 657.

16. *Id.*, 910 S.W.2d at 657.

17. Record at 102, 104-05.

18. *Henderson*, 322 Ark. at 405, 910 S.W.2d at 657.

19. *Id.*, 910 S.W.2d at 657. On August 22, 1993, however, Revels signed an affidavit under oath at the request of Henderson's attorney, denying that Henderson had sold him any cocaine on that night in April. *Id.* at 405-06, 910 S.W.2d at 657. Revels stated that he merely talked to Henderson that night about buying crack but that no sale was made. *Id.* at 406, 910 S.W.2d at 657. Instead, he said that he bought the drugs from someone else coming out of Henderson's home and that Dyar had threatened him with prosecution on an older burglary charge unless he implicated Henderson. *Id.*, 910 S.W.2d at 657. Based on those conflicting statements, Revels was to take a polygraph test, but before its administration Revels again changed his story. *Id.*, 910 S.W.2d at 657. Revels reaffirmed his initial statement to Chief Dyar, and he said that he had given the second statement to Henderson's attorney because Henderson had threatened him. *Id.*, 910 S.W.2d at 657.

fayette County Circuit Judge Joe E. Griffin signed a warrant for Henderson's arrest.²⁰

Henderson's trial was originally scheduled for December 6, 1993, but Revels was not present to give his testimony.²¹ The trial ultimately began on August 29, 1994.²² Based on the testimony of Revels, Chief Dyar, and Lafayette County Deputy Sheriff David Briggs,²³ a jury convicted Henderson of delivery of cocaine.²⁴ It was his first drug conviction.²⁵ The jury later fined Henderson \$5000 and sentenced him to life in prison,²⁶ the most serious prison term allowed by the statute under which he was convicted.²⁷

20. Record at 11.

21. *Henderson*, 322 Ark. at 406, 910 S.W.2d at 657. Revels said that Henderson had heard that Revels had been subpoenaed to testify, but that the subpoena had not yet been served. *Id.*, 910 S.W.2d at 657. Revels also stated that Henderson drove Revels on the morning of the trial to a motel in Springhill, Louisiana, paid for the room, and gave Revels money for food. *Id.*, 910 S.W.2d at 657-58.

22. *Id.*, 910 S.W.2d at 658.

23. *Id.* at 406-07, 910 S.W.2d at 658.

24. Record at 75. The record reflected that Henderson was not in the courtroom at the time the guilty verdict was handed down. *Id.* at 415. Henderson argued on appeal to the Arkansas Supreme Court that he should have had a mistrial because of a statement made during the State's closing argument in the penalty phase of the trial, when prosecuting attorney Brent Haltom told the jury:

I want y'all to look around the courtroom, he's not even here to accept the sentence you're going to hand down on him. He's not even here for the guilty verdict. He tried to put this accountability off, he violated the law to do it. . . . Y'all do what's right.

Id. at 427. The trial judge cited Henderson for civil contempt of court, fined him \$100, and sentenced him to ten days in the Lafayette County jail, to run consecutively with his criminal sentence. *Id.* at 80. Henderson later returned to the courtroom after the jury retired to deliberate his sentence. *Id.* at 428-32 (offering an explanation for his absence).

25. *Henderson*, 322 Ark. at 411, 910 S.W.2d at 660. Despite this being Henderson's first conviction, deputy prosecuting attorney Danny Rodgers argued exclusively for a life sentence "so that we won't have to worry about 'Knot' Henderson anymore in this county." Record at 419, 422. Rodgers told the jury that the maximum term of years under the statute was forty years, which Rodgers said meant that Henderson could be out in ten years. *Id.* at 422. Rodgers told the jurors that this was "the drug war first hand," and implored them that, if they wanted to do something in the drug war, they should return with nothing less than a life sentence. *Id.*

26. Record at 76.

27. See ARK. CODE ANN. § 5-64-401(a)(1) (LEXIS Supp. 2001) (providing that anyone who manufactures, delivers, or possesses with the intent to manufacture or deliver, a Schedule I or Schedule II controlled substance weighing fewer than twenty-eight grams "shall be imprisoned for not less than ten (10) years nor more than forty (40) years, or life, and shall be fined an amount not exceeding twenty-five thousand dollars (\$25,000)"). The primary difference between Schedule I and II drugs is that Schedule I drugs have no accepted medical use in the United States while Schedule II drugs do have an accepted medical use, under severe restrictions, but they may lead to severe dependence if abused. See §§ 5-64-203, -205 (Michie Repl. 1997). Cocaine is a Schedule II controlled substance. See Ark. Dep't of Health, List of Controlled Substances art. II, 007-07-002 (Weil 2000).

Henderson appealed both his conviction and his sentence to the Arkansas Supreme Court, raising several points of error, but the court rejected them all and affirmed the sentence.²⁸ Henderson's final argument was that the sentence of life imprisonment for a first offense of selling crack cocaine constituted cruel and unusual punishment under the Eighth Amendment, which the court also rejected.²⁹ The court stated that the sentence was within the limits set by the Arkansas General Assembly and that the court was not free to reduce a sentence imposed by a trial court within those legislative limits, even if the court believed the sentence to be too harsh.³⁰ The court noted three "extremely narrow exceptions" to that general rule: "(1) where the punishment resulted from passion or prejudice, (2) where it was a clear abuse of the jury's discretion, or (3) where it was so wholly disproportionate to the nature of the offense as to shock the moral sense of the community."³¹

The Arkansas Supreme Court did not apply those three exceptions point-by-point to Henderson's case.³² The court noted, however, with reference to the third exception, that while this was Henderson's first conviction for selling crack cocaine, the jury had heard stories of at least one other drug transaction in which Henderson had been involved.³³ The court said the jury was free to believe that Henderson "was no innocent bystander" when it came to selling drugs.³⁴ The court ended its analysis of this point by stating that Henderson was not able to give proof that the sentence shocked the

Prior to arguments in the penalty phase of Henderson's trial, Circuit Judge Jim Gunter instructed the jury as to the penalty options. Record at 417-18. Gunter also instructed the jury that it could consider the possibility of Henderson being released on parole if sentenced to a term of years, but not under a life sentence. *Id.* This ineligibility for parole under a life sentence would later influence the Eighth Circuit Court of Appeals's opinion that the sentence violated the Eighth Amendment. See *Henderson v. Norris*, 258 F.3d 706, 711 (8th Cir. 2001); *infra* notes 182-91 and accompanying text.

28. See *Henderson*, 322 Ark. at 405, 910 S.W.2d at 657. Henderson first asserted that there was insufficient evidence to support his conviction, challenging the credibility of Chief Dyar and the sufficiency of the tape-recorded transaction. *Id.* at 407, 910 S.W.2d at 658. Henderson next challenged that the State's evidence that Henderson tampered with a witness was impermissible under Arkansas Rule of Evidence 404(b) as evidence of a separate bad act. *Id.* at 408-10, 910 S.W.2d at 658-59. Henderson also asserted that Judge Gunter should have declared a mistrial based on the statements made during the prosecutor's closing argument. *Id.* at 410, 910 S.W.2d at 659-60; see *supra* note 24.

29. See *Henderson*, 322 Ark. at 411, 910 S.W.2d at 660.

30. *Id.*, 910 S.W.2d at 660.

31. *Id.* at 411-12, 910 S.W.2d at 660.

32. See *id.* at 412, 910 S.W.2d at 660-61.

33. *Id.*, 910 S.W.2d at 661. The court noted that evidence in the case showed that Henderson had five rocks of crack cocaine with him on that day and gave the five rocks to a girl to sell, two of which she sold. See *id.*, 910 S.W.2d at 661. The girl, however, had sweated on the other three rocks, making them soft and less easy to sell. See *id.*, 910 S.W.2d at 661. It was those three that Henderson sold to Revels. See *id.*, 910 S.W.2d at 661.

34. *Id.*, 910 S.W.2d at 661.

moral sense of the community.³⁵ The court ultimately affirmed Henderson's life sentence.³⁶

After his loss in the state courts, Henderson petitioned the federal courts for a writ of habeas corpus³⁷ to argue his Eighth Amendment issue.³⁸ The United States District Court for the Eastern District of Arkansas denied the petition but certified it for appeal to the United States Court of Appeals for the Eighth Circuit.³⁹ There, the court would overturn Henderson's sentence as being grossly disproportionate to his crime in violation of the Eighth Amendment.⁴⁰

III. BACKGROUND

Everyone is familiar with the old yarn about letting the punishment fit the crime. What exactly that means under the constitutional prohibition against "cruel and unusual punishment" and whether it is a fixed, historical standard or an evolving one is an idea with which the United States Supreme Court has wrestled over the years.⁴¹ There have been times when the Court has ruled that a sentence less than death can still be so excessive as to be unconstitutional.⁴²

The idea that there should be some proportionality between a person's crime and his sentence is a concept borne of ancient Hebrew law⁴³ and more

35. See *Henderson*, 322 Ark. at 412, 910 S.W.2d at 661.

36. *Id.* at 405, 910 S.W.2d at 657.

37. "Habeas corpus" means in Latin, "that you have the body." BLACK'S LAW DICTIONARY 715 (7th ed. 1999). A writ of habeas corpus is used to require a government official to bring a person before the court, usually a prisoner who is challenging the legal authority of the government to hold him. See *id.*; see also 28 U.S.C. § 2254(a) (1994) (stating that the United States Supreme Court, an individual justice, a circuit judge, or a district judge shall consider the case of a person who is in custody following a state court judgment on the ground that such custody violates the United States Constitution, laws, or treaties of the United States).

38. See *Henderson v. Norris*, 258 F.3d 706, 707 (8th Cir. 2001).

39. *Id.* In a habeas corpus petition under federal law, where the petitioner's detention arises out of a process in a state court, an appeal of a district court's denial of the writ may not be taken to the courts of appeal unless a district judge or a circuit judge issues a certificate of appealability. FED. R. APP. P. 22(b)(1).

40. See *Henderson*, 258 F.3d at 706.

41. See 1 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 2.9(b) (2d ed. 1999).

42. See *Solem v. Helm*, 463 U.S. 277 (1983); *Weems v. United States*, 217 U.S. 349 (1910); *infra* notes 84-94, 104-15 and accompanying text.

43. *Exodus* 21:22-25 (New King James Version).

If men fight, and hurt a woman with child, so that she gives birth prematurely, yet no lasting harm follows, he shall surely be punished accordingly as the woman's husband imposes on him; and he shall pay as the judges determine. But if any lasting harm follows, then you shall give life for life, eye for eye, tooth for

recently of the Enlightenment.⁴⁴ It is the idea that the state has a duty to “respect the human dignity of each person.”⁴⁵ The driving spirit behind a doctrine on proportionality is that the law should not punish someone more severely than he deserves “for the harm caused and the moral blameworthiness exhibited.”⁴⁶ But the United States’s thirty-year “war on drugs” has led some to believe that any sense of proportion in sentencing, particularly where drugs are involved, has been scattered to the four winds.⁴⁷ Some say the lack of proportionality in any criminal context, not just where drugs are involved, stems from separation of power concepts—judicial reticence to second-guess legislative decisions regarding crime and punishment.⁴⁸ Others say that the Eighth Amendment’s prohibition on cruel and unusual punishment is not cognizant of proportionality at all.⁴⁹ The purpose of this section is to provide a brief road map showing a history of proportionality in

tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe.

Id.; see also *Leviticus* 19:15 (New King James Version) (“You shall do no injustice in judgment.”).

44. Thomas E. Baker & Fletcher N. Baldwin, Jr., *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court “From Precedent to Precedent”*, 27 ARIZ. L. REV. 25, 27 n.9 (1985). In 1975, student authors suggested the idea that the prohibition on cruel and unusual punishments stems from the Enlightenment. See generally Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: A Historical Justification for Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783 (1975). There, the authors asserted that the framers had been influenced by such Enlightenment writers as eighteenth century philosopher Cesare Beccaria. *Id.* at 806-30; see also Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 381 (1980); see also Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 62-63 (2000) (setting out a general discussion of Beccaria and the utilitarian theory of punishment).

45. Baker & Baldwin, *supra* note 44, at 27.

46. *Id.* at 26; see also Francis A. Allen, *A Matter of Proportion*, 4 GREEN BAG 2D 343 (2001).

47. See generally Debate, *Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?*, 36 AM. CRIM. L. REV. 1279 (1999) (publishing a debate between federal Judge Stanley Sporokin and then-United States Representative Asa Hutchinson, a former United States Attorney and currently the director of the federal Drug Enforcement Administration). In the debate, Judge Sporokin criticized the effect that federal mandatory-minimum laws and the lack of proportionality between drug convictions and the subsequent sentences has had on “these little people, who have no voting constituency,” presaging an assertion by Congressman Hutchinson that if people do not approve of the harshness of mandatory minimums then they can take it up with their congressmen. *Id.* at 1294-95.

48. See Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303, 1358 (2000).

49. *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (plurality opinion). Only Justice Scalia and Chief Justice Rehnquist agreed on that point. *Id.* at 961, 965.

American law and how the courts, primarily the United States Supreme Court, have dealt with the issue.

A. The Eighth Amendment and a Stroll Toward Proportionality

The framers of the Constitution did not leave us with a “definitions” section to let future generations know exactly what was meant in the words they chose. This has left the courts to grope, or sometimes flail, in search of more precise meanings to some terms that could be open to debate. For many years, the “cruel and unusual punishment” clause of the Eighth Amendment was not one of those.⁵⁰ California attorney Anthony Granucci, in a 1969 article, posits that for many years judges and scholars both had accepted the conclusion that the Eighth Amendment simply prohibited torture and barbaric punishments and did not address penalties excessive to the crimes committed.⁵¹

1. *A Brief History of the Eighth Amendment*

The text of the Eighth Amendment is almost a verbatim recitation of a similar provision of the Virginia Declaration of Rights, which was itself an exact copy of a provision of the English Bill of Rights of 1689.⁵² The English Parliament enacted a Bill of Rights after William of Orange took over the English throne in 1688.⁵³ There is a conflict, however, between traditional history and more modern scholarship as to the events that served as the launching point of the English prohibition of cruel and unusual punishments.⁵⁴

Traditional history has it that the prohibition on cruel and unusual punishments was the result of the “Bloody Assizes.”⁵⁵ The Bloody Assizes refers to a special commission established by King James II, and led by King’s Bench Chief Justice George Jeffreys,⁵⁶ to try captured rebels following the ill-fated revolt against the king by James’s nephew, the Duke of

50. See Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CAL. L. REV. 839 (1969).

51. *Id.*

52. *Id.* at 840. The only significant difference between the provision in the Eighth Amendment and the English Bill of Rights is the substitution of the word “shall” in the American version for the word “ought” in the English version. See *id.* at 853.

53. See Parr, *supra* note 44, at 43 (stating that the purpose of the bill was to remedy the abuses committed during James II’s reign).

54. See, e.g., Granucci, *supra* note 50, at 853; Parr, *supra* note 44, at 46; Schwartz, *supra* note 44, at 378.

55. See Schwartz, *supra* note 44, at 378.

56. See Granucci, *supra* note 50, at 853.

Monmouth.⁵⁷ During the trials, Sir Henry Pollfexen, the chief prosecutor for the special commission, let it be known that anyone accused of treason who pleaded guilty would not be put to death.⁵⁸ While the plea offer was honored for a time, the government later executed almost 200 prisoners who had accepted the plea bargain.⁵⁹ Puritan propaganda against Jeffreys—and by extension James II, who had appointed Jeffreys Lord Chancellor—and his “insane lust for cruelty” spread, leading traditional history to mark the Bloody Assizes as the spur for an English declaration against cruel and unusual punishments upon the abdication of James II.⁶⁰

A modern view insists that the prohibition stemmed from the “Titus Oates Affair.”⁶¹ Titus Oates was one of the Puritan pamphleteers.⁶² In September 1678, Oates told about a “Popish Plot” to assassinate the Protestant King Charles II.⁶³ Oates, however, had made up the story as a way of solidifying the opposition against a Catholic retaking the throne.⁶⁴ With political backing, Oates swore to his story, and as a result, a number of Catholics were executed.⁶⁵ Ultimately, Oates came before Chief Justice Jeffreys on a perjury charge.⁶⁶ The court convicted Oates and sentenced him to a high fine and life imprisonment.⁶⁷ The sentence also required Oates to be whipped, pilloried four times a year, and be stripped of his clerical position.⁶⁸ After James II was dethroned, the House of Commons, disagreeing with the House of Lords, denounced Oates’s punishment as being cruel and

57. *Id.*

58. *Id.* at 854. Execution for treason in England at that time consisted of hanging a person by the neck, cutting him down while still alive, disemboweling him and having his entrails burnt before him, and then beheading and quartering him. *Id.*

59. *Id.*

60. *Id.* at 854-55 (quoting 2 G.M. TREVELYAN, HISTORY OF ENGLAND 467 (illus. ed. 1956)). Granucci disputes the traditional notion that the methods of execution following the Bloody Assizes was the impetus behind the cruel and unusual language in the English Bill of Rights, noting that similar methods of execution continued after the enactment of the bill. *See id.* at 855-56. Granucci also notes that a member of the committee drafting the bill was Henry Pollfexen, and he says that it would be unlikely that Pollfexen would have helped draft a bill that rebuked his own past actions. *Id.* at 856.

61. *Id.* at 856-58.

62. *See* Granucci, *supra* note 50, at 854. Oates was also a Church of England clergyman and, as Granucci put it, “an inveterate perjurer.” *Id.* at 857.

63. *Id.* at 857.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 858.

68. Granucci, *supra* note 50, at 858. Pilloring was the act of placing an offender’s head and hands in a wooden framework. BLACK’S LAW DICTIONARY 1168 (7th ed. 1999). It is similar to the stocks, except that the offender had to stand instead of sit as in stocks. *Id.*

unusual.⁶⁹ Granucci states that this was the only recorded contemporary use of the term “cruel and unusual.”⁷⁰

Blackstone’s *Commentaries* was virtually the only legal treatise the Americans had at their disposal during the colonial period that discussed criminal punishments, and it directly referenced the English Bill of Rights.⁷¹ By the time of the drafting of the American Bill of Rights, several colonies already had laws that prohibited cruel and unusual punishments.⁷² By the time of the drafting of the Constitution, such founders as Patrick Henry and George Mason, whose provision against cruel and unusual punishments had been included in the Virginia Declaration of Rights, spoke of the necessity of barring the government from using torture as a means of punishment.⁷³ The records of the debates on the adoption of the Eighth Amendment led some scholars to believe that what the Amendment was designed to prohibit was not excessive punishment but only torture and other cruel methods of punishment.⁷⁴

2. *Leading Up to Weems v. United States: The Court Begins to Look at the Cruel and Unusual Clause*

It was almost eighty years after the adoption of the Eighth Amendment of the Constitution in 1791 that the Supreme Court first heard a proportionality-of-sentence challenge in the case of *Pervear v. Massachusetts*.⁷⁵ In that case, a man was convicted of operating a tenement for the sale of liquor without a license and was sentenced to pay a fifty-dollar fine and serve three months in jail.⁷⁶ The Court rejected the defendant’s proportionality argument, holding that the Eighth Amendment applied to only federal legislation

69. Granucci, *supra* note 50, at 858-59.

70. *Id.* at 859.

71. See Parr, *supra* note 44, at 45-46. It has been argued that the American founders had mistaken Blackstone’s account in his *Commentaries* regarding the Titus Oates affair and the disproportionate punishment he received for his perjury with that of the “Bloody Assizes” and the torturous executions meted out in those cases. See Granucci, *supra* note 50, at 865. *Author’s note:* It is interesting to note that Chief Justice Jeffreys was a key figure in both the “Bloody Assizes” and the Titus Oates affair, which could have led to the framers’ confusion.

72. See Granucci, *supra* note 50, at 860 (stating how the Massachusetts Code of 1648, which was written forty years before the English Bill of Rights, contained provisions prohibiting torture and like punishments, and how other colonies were influenced by the code in drafting their own laws).

73. Schwartz, *supra* note 44, at 382.

74. See Granucci, *supra* note 50, at 865; see also Schwartz, *supra* note 44, at 382.

75. 72 U.S. (5 Wall.) 475 (1866); see also Schwartz, *supra* note 44, at 382.

76. *Pervear*, 72 U.S. (5 Wall.) at 480.

and not to the states.⁷⁷ In any event, the Court said, in dicta, that it did not think the punishment was cruel, unusual, or excessive.⁷⁸

The next discussion of the Eighth Amendment's bar on cruel and unusual punishment was eleven years after *Pervear* in *Wilkerson v. Utah*.⁷⁹ Wilkerson was convicted of murder in the Territory of Utah and was condemned to die by firing squad.⁸⁰ The Supreme Court rebuffed his ultimate appeal, saying that shooting or hanging as methods of capital punishment were not inconsistent with the Constitution.⁸¹ A few more cases made their way to the Supreme Court, challenging punishments as cruel and unusual, and all were turned away.⁸² That was until a civil servant in the Philippines took issue with his sentence for falsifying a public record.⁸³

In *Weems v. United States*,⁸⁴ an officer for the Bureau of Coast Guard and Transportation for the United States Government in the Philippine Islands was convicted of falsifying a public record⁸⁵ and sentenced to fifteen years of *cadena temporal*.⁸⁶ Justice McKenna, writing for the Court, said that the judiciary had not exactly determined what constituted cruel and unusual punishment,⁸⁷ the Court's writings in *In re Kemmler*⁸⁸ notwithstanding.⁸⁹ McKenna did say, however, that punishments like the *cadena*

77. See *id.* at 479-80.

78. *Id.* at 480.

79. 99 U.S. 130 (1878).

80. *Id.* at 130-31.

81. See *id.* at 134-35.

82. See, e.g., *O'Neil v. Vermont*, 144 U.S. 323 (1892) (dismissing appeal of a man who was convicted for numerous bootlegging violations, assessed a \$9500 fine and costs, and sentenced to one month at hard labor, plus an additional fifty-four years if he did not pay the fines within that month). The Court's decision was based on its holding that there was no federal question at hand. *Id.* at 334-35. In dissent, Justice Harlan argued that there was a federal question involved, that the sentence was excessive and that the Eighth Amendment was binding on the states by the application of the Fourteenth Amendment. *Id.* at 370-71 (Harlan, J., dissenting); see also *In re Kemmler*, 136 U.S. 436, 446 (1890) (holding that electrocution was not cruel and unusual and that the Eighth Amendment was designed to prohibit punishments such as "burning at the stake, crucifixion, breaking on the wheel, or the like").

83. See *infra* notes 84-95 and accompanying text.

84. 217 U.S. 349 (1910).

85. The document was a "cash book of the captain," which Weems kept in his job as the bureau's disbursing officer. *Id.* at 357.

86. See *Baker & Baldwin*, *supra* note 44, at 29. "Cadena temporal" means "temporary chain." *Id.* It was a holdover punishment from the Spanish colonists and consisted of imprisonment and hard labor while being shackled about the wrist and ankle. *Id.* A permanent loss of civil liberties was also a part of the punishment. *Id.*

87. See *Weems*, 217 U.S. at 368 (citing *McDonald v. Massachusetts*, 53 N.E. 874 (Mass. 1899)).

88. 136 U.S. 436 (1890); see also *supra* note 82.

89. See *Weems*, 217 U.S. at 370. Justice McKenna noted that the Court's ruling in *In re Kemmler* was not on the cruel and usual punishment aspect, adding that what the Court did

“amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.”⁹⁰ Stating a principle that still is debated to the present day, Justice McKenna asserted that the Constitution must be a living document subject to differing interpretations upon the passage of time.⁹¹ Ultimately, the Court held that the punishment of *cadena temporal* for falsifying a public record was prohibited by the Eighth Amendment, and it ordered the case against *Weems* dismissed.⁹² Despite the significance of *Weems*,⁹³ the holding was fact-specific, and as such, it did not serve as the key to opening a floodgate of sentence appeals.⁹⁴ In 1958, forty-eight years after *Weems*, a plurality of the Court held that the revocation of citizenship of a soldier who had deserted violated the Eighth Amendment.⁹⁵

The next step in what Professor Grossman called the Court’s “tortured approach”⁹⁶ to the Eighth Amendment’s meaning is the 1980 case of *Rummel v. Estelle*.⁹⁷ Rummel, convicted in 1973 of obtaining \$120.75 by false pretenses—a felony—was sentenced under Texas’s recidivist statute to life imprisonment.⁹⁸ Justice Rehnquist, writing for the Court, initially noted the

say about it was not meant to be a comprehensive definition of the phrase. *Id.*

90. *Id.* at 366-67.

91. *See id.* at 373. Justice McKenna said, “Time works changes Therefore, a principle to be vital, must be capable of wider application than the mischief which gave it birth.” *Id.*

92. *See id.* at 382. In dissent, Justice White criticized the Court’s new doctrine. *See id.* at 409 (White, J. dissenting). He relied upon the traditional reading of the cruel and unusual clause as meaning a prohibition on torture and barbarous punishments or a bar on judges sentencing outside statutory limits. *See Parr, supra* note 44, at 51-52.

93. Professors Baker and Baldwin state how surprised and shocked some legal commentators were over the *Weems* decision when it came down. *See Baker & Baldwin, supra* note 44, at 30 n.32 (quoting L. BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* 67 (1975)).

94. *See Parr, supra* note 44, at 52. In addition, Schwartz asserts that it was the very nature of *cadena temporal*, plus the post-prison accessory punishments, that added up, in the Court’s mind, to a cruel and unusual punishment. Schwartz, *supra* note 44, at 385.

95. *See Trop v. Dulles*, 356 U.S. 86, 87, 103 (1958). In the plurality opinion, Chief Justice Warren harkened back to Justice McKenna’s opinion in *Weems*, stating that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Id.* at 101.

96. Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court’s Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107 (1995).

97. 445 U.S. 263 (1980).

98. *Id.* at 266. Rummel’s prior two felonies were fraudulent use of a credit card to obtain \$80 worth of goods or services and passing a forged check in the amount of \$28.36. *Id.* at 265. Professor Joshua Dressler sarcastically noted in his article on the case that Rummel’s total take in his “crime spree” was \$229.11. *See Joshua Dressler, Substantive Criminal Law Through the Looking Glass of Rummel v. Estelle: Proportionality and Justice as Endan-*

Court's past pronouncements regarding sentences deemed grossly disproportionate to the crime, most recently those having to do with capital punishment.⁹⁹ Justice Rehnquist, however, drew a line, although a not very bright one,¹⁰⁰ between death penalty cases and non-capital cases, saying that one could argue that a term of years in prison as punishment is within the legislative prerogative.¹⁰¹ The Court's reason for affirming *Rummel's* sentence was fourfold: (1) the Court hesitates to review prison sentences set by a state legislature; (2) it will not conduct such reviews absent some objective factors to guide it in determining what is grossly disproportionate; (3) *Rummel's* case lacked a bright-line objectivity; and (4) Texas's recidivist statute was constitutional.¹⁰² In dissent, Justice Powell relied on *Weems*, *Trop*, and other cases, arguing that proportionality in sentencing is part-and-parcel of the Eighth Amendment.¹⁰³ It was a clarion call that would be heard three years later in *Solem v. Helm*.¹⁰⁴

B. The Court Continues to Draw Lines in the Sand on Proportionality, Then Erases Them

While the holdings in *Weems* and *Trop* seemed to move the Court in the direction of finding the idea of proportionality within the Eighth Amendment, the ruling in *Rummel* seemed to reverse the Court's course. From that case, it appeared that no lengthy prison sentence might be held to violate the Constitution. Then, in 1983, came *Solem v. Helm*.¹⁰⁵

1. *Solem v. Helm* and a Test for Proportionality

A bright-line test for proportionality, which Justice Rehnquist said was necessary in *Rummel*, began to shine with the Court's ruling in *Solem v. Helm*.¹⁰⁶ Jerry Helm was a six-time non-violent felon when he received a sentence of life imprisonment in South Dakota in 1979, under that state's recidivist statute for passing a "no-account" check for one hundred dol-

gered Doctrines, 34 Sw. L.J. 1063, 1064 (1981).

99. *Rummel*, 445 U.S. at 271-72 (citing *Weems* and *Trop*, as well as some death penalty cases that had touched upon the proportionality question).

100. See Dressler, *supra* note 98, at 1067; see also Baker & Baldwin, *supra* note 44, at 36.

101. *Rummel*, 445 U.S. at 274.

102. Dressler, *supra* note 98, at 1067-68.

103. See *Rummel*, 445 U.S. at 288-95 (Powell, J., dissenting); see also Baker & Baldwin, *supra* note 44, at 34-35.

104. 463 U.S. 277 (1983).

105. *Id.*

106. See *id.*

lars.¹⁰⁷ Helm appealed to the South Dakota Supreme Court, arguing that the sentence violated the Eighth Amendment, but the court affirmed the sentence.¹⁰⁸ Helm filed a habeas corpus petition in federal court, which the lower court denied.¹⁰⁹ The Eighth Circuit Court of Appeals, however, granted the writ, distinguishing between Helm's case and *Rummel*.¹¹⁰ To the Eighth Circuit, *Rummel*'s case was different because he would have had a chance at parole, whereas Helm would not have; thus, Helm's sentence was grossly disproportionate to his crime.¹¹¹

The State appealed, and the United States Supreme Court affirmed the Eighth Circuit's ruling.¹¹² Justice Powell, writing for the Court, cited *Weems* and concluded that there was no hedging in that decision regarding the constitutional necessity for proportionality in sentencing.¹¹³ Justice Powell then outlined the following three-point test that might give courts some objective bright line to determine if sentences were disproportional: (1) the seriousness of the offense and the severity of the punishment; (2) the sentences imposed on other criminals for other offenses within the same jurisdiction; and (3) the sentences imposed for the same offense elsewhere.¹¹⁴ For the next eight years, *Solem* would become the closest thing to a guiding principle the courts had in determining whether a sentence was disproportionate.¹¹⁵

107. *Id.* at 279, 281.

108. *Id.* at 283. Following the state supreme court's ruling, Helm asked the governor to commute his sentence to a term of years that would make him eligible for parole, but the governor declined to do so. *Id.*

109. *Id.* The district court acknowledged that the punishment was harsh, but it decided that *Rummel* was binding and thus denied the writ. *Id.*

110. *Solem*, 463 U.S. at 283.

111. *Id.* at 283-84.

112. *Id.* at 284.

113. *See id.* at 286-87. The State argued that there is no basis for proportionality when it comes to prison sentences because of *Rummel* and the language Justice Rehnquist used in that case that "one could argue without fear of contradiction by any decision of this Court that for crimes . . . classified . . . as felonies, . . . the length of sentence actually imposed is purely a matter of legislative prerogative." *Id.* at 288 n.14 (emphasis in original). Justice Powell dismissed that language as merely stating that one could make such an argument, a line of reasoning that Professor Grossman called "at best unpersuasive and perhaps somewhat disingenuous." Grossman, *supra* note 96, at 129-30.

114. *Solem*, 463 U.S. at 292. In dissent, Chief Justice Burger criticized the majority for breaking with *Rummel*, yet without expressly overturning it, and for trampling over the rights of the states. *Id.* at 304 (Burger, C.J., dissenting).

115. Professor Grossman characterized the Court's result in *Solem* as "an unsatisfying mixture of confusion and division." Grossman, *supra* note 96, at 142. That academic slight notwithstanding, *Solem*'s influence has extended beyond the criminal courts into civil cases. *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432-35 (2001) (citing *Solem* in the overall context of a challenge to a punitive damages award complained of as unconstitutionally excessive).

2. Harmelin v. Michigan: *The Court Smudges Powell's Bright Line*

In 1990 the Supreme Court again heard an Eighth Amendment challenge to a prison sentence, but this time the result was very different.¹¹⁶ A Michigan court convicted Ronald Harmelin of possessing 672 grams of cocaine and sentenced him to a mandatory life sentence without the possibility of parole.¹¹⁷ In a fractured plurality opinion, the Court affirmed the sentence.¹¹⁸ In its holding, the Court rebuffed Harmelin's assertion that a mandatory life sentence without any consideration of mitigating factors was cruel and unusual.¹¹⁹ The Court said that while severe, mandatory penalties may well be cruel, they are not unusual in the constitutional sense when one looks at the country's history of sentencing.¹²⁰ The Court refused to require a mitigation hearing—which is required in death penalty cases—for cases involving only a prison term, even if the term is life without the possibility of parole.¹²¹ Rather, the Court focused on the irrevocability of death with the possibility, however slight, of a future reduction in a prison sentence as justifying different treatment.¹²²

Writing only for himself and Chief Justice Rehnquist, Justice Scalia took an even harder line.¹²³ In Part I-A of his opinion, Scalia examined the previous proportionality cases to come before the Court, but saved his harsh words for the Court's decision in *Solem v. Helm*.¹²⁴ Scalia wrote that the 5-4 decision in *Solem* was hardly a clear expression of constitutional doctrine.¹²⁵ After Scalia discussed the cases that had gone before, he bluntly said that the ruling in *Solem* was "simply wrong" and that "the Eighth Amendment contains no proportionality guarantee."¹²⁶

In a separate opinion, Justice Kennedy, joined by Justices O'Connor and Souter, said he agreed with the judgment but was not willing to go as

116. See Harmelin v. Michigan, 501 U.S. 957 (1991) (plurality opinion).

117. *Id.* at 961.

118. See *id.* at 961, 996. Justice Scalia announced the judgment of the Court, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Souter, as to the judgment and as to Part IV. *Id.* at 960. Only Rehnquist joined Scalia in Parts I, II, and III. *Id.* at 961.

119. See *id.* at 994-95. Harmelin said that the fact that this was his first felony conviction should have been taken into account at sentencing. See *id.* at 994.

120. *Id.* at 994-95.

121. *Id.* at 995-96.

122. See Harmelin, 501 U.S. at 995-96.

123. See *infra* notes 124-26 and accompanying text.

124. See Harmelin, 50 U.S. at 965.

125. *Id.*

126. *Id.* Scalia then went on to discuss the history of the cruel and unusual punishment concept and concluded that the similar prohibition in the English Bill of Rights was not at all addressing disproportionate sentences. He stated that the framers understood proportionality and excessiveness and if that is what they meant, they would have said so. See *id.* at 967-85; see also Grossman, *supra* note 96, at 143.

far one way or the other with Justice Scalia on one end or Justice White on the other.¹²⁷ Kennedy said that the Court's past decisions recognized the concept of proportionality within the Eighth Amendment, even in noncapital cases.¹²⁸ Kennedy looked to *Weems*, *Rummel*, and *Solem*, as affirming the existence of the proportionality principle.¹²⁹ Kennedy cited four guiding principles—"the primacy of the legislature" and judicial deference, the various legitimate punishment systems, federalism, and the need for objective factors to guide courts in proportionality reviews—and concluded that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence," but it does prohibit extreme sentences that are "grossly disproportionate."¹³⁰

Justice Kennedy began by comparing Harmelin's crime and punishment with that of Jerry Helm¹³¹ and concluded that Harmelin's crime was more serious than Helm's.¹³² Thus, Kennedy concluded, Helm's sentence was within constitutional limits.¹³³ Kennedy did not compare Harmelin's sentence with that which he might have received in other states, because Kennedy did not believe that the holding in *Solem* was a "rigid three-point" test.¹³⁴ Because Kennedy concluded that the first part of the *Solem* analysis showed that the sentence Harmelin received was not grossly disproportionate, there was no need to address the other two parts of the test.¹³⁵

Following the *Harmelin* decision, a number of courts began to look to Justice Kennedy's concurring opinion acknowledging the existence of proportionality when considering proportionality cases.¹³⁶ The narrowness of Kennedy's concurrence, however, has made successful challenges to prison

127. See *Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring). Justice White, in a dissenting opinion, argued that while drug crimes are serious, Harmelin had only been convicted of possession, not the more serious crime of possession with intent to distribute. *Id.* at 1025 (White, J., dissenting). As such, his punishment for the lesser crime should not have been the same as for the greater one. *Id.* at 1024 (White, J., dissenting). White also applied the three-pronged *Solem* test and found Harmelin's sentence constitutionally excessive. *Id.* at 1027 (White, J., dissenting).

128. *Id.* at 997 (Kennedy, J., concurring).

129. See *id.* at 997-98 (Kennedy, J., concurring) (citing *Solem*, 463 U.S. at 288, 303).

130. *Id.* at 1001 (Kennedy, J., concurring).

131. *Id.* (Kennedy, J., concurring).

132. *Id.* at 1002 (Kennedy, J., concurring).

133. *Harmelin*, 501 U.S. at 1004 (Kennedy, J., concurring).

134. *Id.* (Kennedy, J., concurring).

135. *Id.* at 1004-05 (Kennedy, J., concurring). Professor Grossman summarized Justice Kennedy's point here as Kennedy's not reading *Solem* "as requiring use of the comparative factors in every challenge to a sentence based on disproportionality." Grossman, *supra* note 96, at 153 (emphasis added).

136. See Grossman, *supra* note 96, at 156 n.325 (citations omitted).

terms in noncapital cases still hard to come by,¹³⁷ particularly in drug cases.¹³⁸

C. Proportionality in Arkansas

The idea of proportionality in sentencing was not new to the Arkansas Supreme Court when it reviewed Grover Henderson's case.¹³⁹ Indeed, as Justice Brown noted in his dissent in *Henderson*, the court had "contemplated" the concept of proportionality at least as far back as 1941.¹⁴⁰ In fact, the Arkansas Supreme Court has overturned and reduced a sentence as being too harsh, although not specifically under the rubric of the Eighth Amendment.¹⁴¹ In *Carle v. Burnett*,¹⁴² the Arkansas Supreme Court overturned the ninety-day jail sentence of a lawyer found in contempt of court for failing to proceed in a case.¹⁴³ Without addressing the cruel and unusual clause or any of the leading United States Supreme Court cases on the sub-

137. See Parr, *supra* note 44, at 58.

138. See, e.g., *United States v. Hill*, 30 F.3d 48 (6th Cir. 1994) (holding that mandatory life imprisonment for third felony drug conviction did not violate the Eighth Amendment); *United States v. D'Anjou*, 16 F.3d 604 (4th Cir. 1994) (affirming a life sentence for distributing more than fifty grams of cocaine base); *United States v. Easter*, 981 F.2d 1549 (10th Cir. 1992) (holding that a nineteen-year prison sentence for distributing cocaine base did not violate the Eighth Amendment); *United States v. Lowden*, 955 F.2d 128 (1st Cir. 1992) (holding that a seven-year prison sentence for distributing 7.7 grams of LSD did not violate the Eighth Amendment); *United States v. Gordon*, 953 F.2d 1106 (8th Cir. 1992) (holding that a twenty-one-year prison sentence for aiding and abetting the manufacture of drugs was not disproportionate); *United States v. Salmon*, 944 F.2d 1106 (3d Cir. 1991) (rejecting a disproportionality challenge to a seventeen-year sentence for possession with intent to distribute less than 500 grams of cocaine); *United States ex rel. Foules v. Roth*, 2001 WL 1134853 (N.D. Ill. Sept. 25, 2001) (holding that a fifteen-year sentence for possession of cocaine with intent to deliver was not disproportionate and noting that it was below the maximum allowed by state law); *State v. Smith*, 48 S.W.3d 159 (Tenn. Crim. App. 2000) (holding that a sixty-year prison sentence for possession with intent to deliver 0.5 grams of cocaine within drug-free school zone was not grossly disproportionate).

139. See *Henderson v. State*, 322 Ark. 402, 415-16, 910 S.W.2d 656, 662-63 (1995) (Brown, J., dissenting).

140. *Id.* at 415-16, 910 S.W.2d at 662-63 (Brown, J., dissenting) (citing *Williams v. State*, 320 Ark. 498, 898 S.W.2d 38 (1995); *Carle v. Burnett*, 311 Ark. 477, 845 S.W.2d 7 (1993); *Dunlap v. State*, 303 Ark. 222, 795 S.W.2d 920 (1990); *Parker v. State*, 302 Ark. 509, 790 S.W.2d 894 (1990); *Thompson v. State*, 280 Ark. 265, 658 S.W.2d 350 (1983); *Chaviers v. State*, 267 Ark. 6, 588 S.W.2d 434 (1979); *Pridgeon v. State*, 266 Ark. 651, 587 S.W.2d 225 (1979); *Stout v. State*, 263 Ark. 355, 565 S.W.2d 23 (1978); *Collins v. State*, 261 Ark. 195, 548 S.W.2d 106 (1977); *Hinton v. State*, 260 Ark. 42, 537 S.W.2d 800 (1976); *Carter v. State*, 255 Ark. 225, 500 S.W.2d 368 (1973); *Davis v. State*, 246 Ark. 838, 440 S.W.2d 244 (1969); *Geurin v. City of Little Rock*, 203 Ark. 103, 155 S.W.2d 719 (1941); *Scott v. State*, 27 Ark. App. 1, 764 S.W.2d 625 (1989)).

141. See generally *Carle*, 311 Ark. 477, 845 S.W.2d 7.

142. 311 Ark. 477, 845 S.W.2d 7 (1993).

143. *Id.* at 478, 484, 845 S.W.2d at 8, 11.

ject, the Arkansas Supreme Court held that Carle's punishment, in light of the "facts and circumstances" surrounding his case, was "unduly harsh."¹⁴⁴

In cases involving drugs, however, defendants have not been so fortunate.¹⁴⁵ In *Pridgeon v. State*,¹⁴⁶ the Arkansas Supreme Court rejected a cruel and unusual punishment argument against the doubling of a prison sentence for a defendant twice convicted of drug-related offenses.¹⁴⁷ Other Eighth Amendment challenges in drug cases received the same chilly reception.¹⁴⁸ Grover Henderson looked as if he were going to be just another Arkansas defendant whose drug conviction sentence would withstand an Eighth Amendment challenge—that is, until the Eighth Circuit took a look.

IV. REASONING

Before the Eighth Circuit Court of Appeals could discuss the merits of Henderson's constitutional claim, it had to address the standard of review under which it would hear Henderson's appeal.¹⁴⁹ The court addressed the standard because, between Henderson's 1995 loss in the Arkansas Supreme Court and the time the Eighth Circuit heard his appeal,¹⁵⁰ Congress had passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),¹⁵¹ which placed stricter limitations on state prisoners' appeals to the federal courts for relief of state court judgments.¹⁵² The court explained

144. *Id.* at 483-84, 845 S.W.2d at 11. The court ultimately reduced Carle's punishment to five days in jail and a \$500 fine. *Id.* at 484, 845 S.W.2d at 11.

145. *See Henderson*, 322 Ark. at 414-15, 910 S.W.2d at 662 (Brown, J., dissenting) (citing a list of drug case sentences the Arkansas Supreme Court affirmed).

146. 266 Ark. 651, 587 S.W.2d 225 (1979).

147. *Id.* at 653, 587 S.W.2d at 227. Pridgeon received a forty-five-year sentence under a statute that allowed for the doubling of the "normal penalty" for a drug offense for twice-convicted offenders. *Id.* at 652, 587 S.W.2d at 226.

148. *See, e.g., Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997) (rejecting an appeal based on the proportionality of a ninety-five-year prison sentence for multiple drug offenses); *Teas v. State*, 266 Ark. 572, 587 S.W.2d 28 (1979) (stating that the imposition of a statutory maximum prison term and fine for sale of morphine and marijuana was not cruel and unusual punishment); *Cardwell v. State*, 264 Ark. 862, 575 S.W.2d 682 (1979) (holding that an eight-year prison sentence for the sale of \$180 worth of cocaine was not cruel and unusual punishment); *Ryan v. State*, 260 Ark. 270, 538 S.W.2d 702 (1976) (rejecting a cruel and unusual punishment challenge to a four-year prison term and a \$7500 fine for possession of marijuana with the intent to deliver).

149. *See Henderson v. Norris*, 258 F.3d 706, 707-08 (8th Cir. 2001). A panel of the court of appeals decided the case 3-0, with the opinion written by Circuit Judge Morris Sheppard Arnold. *Id.* at 707.

150. *Id.*

151. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of the United States Code and the Federal Rules of Appellate Procedure).

152. *See id.* at 1217-21. The AEDPA imposed strict limitations on writs of habeas corpus by creating a one-year statute of limitations for petitions, requiring that state prisoners ex-

that Henderson filed his petition to the federal courts before the effective date of the AEDPA,¹⁵³ and as such, it would review the case under pre-AEDPA law.¹⁵⁴

The court next turned to Henderson's point of appeal, his Eighth Amendment argument.¹⁵⁵ After reciting the language of the Eighth Amendment, the court immediately turned its attention to *Solem v. Helm*¹⁵⁶ and *Harmelin v. Michigan*¹⁵⁷—the two significant recent cases in the area of disproportionality of sentences.¹⁵⁸ The court noted how the Supreme Court declared in *Solem* that a "punishment is cruel and unusual if it is 'grossly disproportionate' to the crime."¹⁵⁹ In a brief review of the facts and holding in *Harmelin*, the Eighth Circuit pointed to the sharp division among the Justices.¹⁶⁰ Although five Justices affirmed Harmelin's life sentence without parole for possession of 672 grams of cocaine, the Eighth Circuit looked to the fact that three affirming Justices refused to join the other two, Justice Scalia and Chief Justice Rehnquist,¹⁶¹ who would have overruled *Solem* and stated that the Eighth Amendment does not countenance proportionality.¹⁶² Rather, the Eighth Circuit made a point of noting that those three affirming Justices in *Harmelin* believed that the Eighth Amendment does allow for the concept of proportionality, despite the sentence in *Harmelin* not rising to that "grossly disproportionate" level.¹⁶³

The Eighth Circuit used Justice Kennedy's view of the majority opinion in *Solem*¹⁶⁴ and Justice Kennedy's concurring opinion in *Harmelin* as the basis for its analysis of Henderson's case.¹⁶⁵ In announcing how it would conduct its analysis, the court of appeals stated that first it would

haust all state remedies before applying for federal habeas corpus relief, and establishing a "gatekeeping" system for second or successive habeas petitions. *See id.*

153. *See Henderson*, 258 F.3d at 707.

154. *Id.* at 707-08 (discussing *Williams v. Taylor*, 529 U.S. 362 (2000)). In addition to arguing that the federal court must give deference to the state court's findings of fact, with which the court of appeals agreed, the State also argued that the federal court must give deference to the state court's resolution of federal law, which the court declined to do. *Id.* at 707.

155. *Id.* at 708.

156. 463 U.S. 277 (1983).

157. 501 U.S. 957 (1991) (plurality opinion).

158. *Henderson*, 258 F.3d at 708; *see also supra* notes 106-35 and accompanying text.

159. *Henderson*, 258 F.3d at 708.

160. *Id.*

161. *See supra* notes 123-26 and accompanying text.

162. *Henderson*, 258 F.3d at 708.

163. *Id.* (citing *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring)).

164. *See supra* text accompanying notes 130-33.

165. *Henderson*, 258 F.3d at 709; *see also supra* note 114 and accompanying text (outlining Justice Powell's three-point test laid out in *Solem v. Helm*, 463 U.S. 277, 292 (1983)).

compare the seriousness of the crime with the severity of punishment meted out,¹⁶⁶ the “grossly disproportionate” review Justice Kennedy conducted in *Harmelin*. Within that comparison, the court would assess the seriousness of the crime by measuring the harm caused to a particular victim or to society against the defendant’s blameworthiness and the level of his involvement.¹⁶⁷ Then the court would evaluate a defendant’s culpability by looking at his motive and intent.¹⁶⁸

In applying that part of the analysis to Henderson’s case, the court acknowledged that drug crimes usually can be considered serious.¹⁶⁹ The court explained, however, that “it denies reality and contradicts precedent to say that all drug crimes are of equal seriousness and pose the same threat to society.”¹⁷⁰ The court looked to *Solem* and how the Supreme Court had placed importance on how the “absolute magnitude” of the offense may be instructive in evaluating the harm or threat posed to society.¹⁷¹ The Eighth Circuit pointed out that Justice Kennedy’s concurring opinion in *Harmelin* stressed that the amount of cocaine involved in that case influenced the concurring Justices to uphold the life without parole sentence, determining that such a large amount posed a threat to society significant enough to warrant the sentence.¹⁷²

By contrast, the court held that the amount of drugs involved in Henderson’s case was “extraordinarily small,” less than one-quarter of a gram, compared to the 672 grams in *Harmelin*.¹⁷³ The absolute magnitude of the drugs in *Harmelin* was nearly 2825 times the weight of that for which Henderson was convicted.¹⁷⁴ Even taking into account two other rocks a girl had sold for Henderson, which the jury was not told it could take into account at sentencing, that only amounted to five rocks for a total value of \$33.33.¹⁷⁵

As to Henderson’s culpability, the court viewed the circumstances involving his ultimate arrest as illuminating.¹⁷⁶ The court noted that Henderson had not initiated the contact between himself and Revels, had not tried

166. *Henderson*, 258 F.3d at 709.

167. *Id.*

168. *Id.*

169. *Id.* (citing *Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring)).

170. *Id.*

171. *Id.* (quoting *Solem v. Helm*, 463 U.S. 277, 293 (1983)).

172. *Henderson*, 258 F.3d at 709.

173. *Id.* at 710.

174. *Id.* (noting that the price of the drugs for which Henderson was convicted was only twenty dollars).

175. *Id.* The State had argued that the amount of drugs was irrelevant, but the court rejected that argument based on the *Harmelin* plurality or the “absolute magnitude” language in *Solem*. *Id.*

176. *Id.*

to force or coerce Revels into making the buy, nor had he attempted to sell Revels any more than the three rocks for which he was convicted.¹⁷⁷ The court further stated that there was no evidence that Henderson had engaged in violence during the transaction, had any weapons, or as the defendant in *Harmelin*, possessed any “‘trappings’ of the drug trade.”¹⁷⁸ Additionally, the fact that Henderson had no prior convictions was significant for the Eighth Circuit.¹⁷⁹ In brushing back the State’s argument that it was free to impose a mandatory sentence despite no prior convictions, the court pointed to the Supreme Court’s reasoning in *Rummel* that recidivism is a factor to take into account when fixing a severe sentence.¹⁸⁰ Thus, the Eighth Circuit concluded, the facts sifted through this part of the analysis did not support Henderson’s strict sentence.¹⁸¹

The court next looked at the severity of Henderson’s sentence.¹⁸² The court pointed out that the life sentence Henderson received is surpassed in severity by only two other penalties: a sentence of death, reserved for only capital murder or treason, and a sentence of life without the possibility of parole.¹⁸³ The distinction between a life sentence and a sentence of life in prison without the possibility of parole is one without much difference in practice, the court reasoned.¹⁸⁴ The court pointed out that under a life sentence without the possibility of parole, a prisoner is precluded from ever being eligible for parole, even if the governor commutes the life sentence to a fixed term of years.¹⁸⁵ A sentence of life, on the other hand, precludes the possibility of parole unless the governor grants clemency and commutes the sentence to a term of years, at which point the prisoner becomes eligible for parole in the same way as all other prisoners.¹⁸⁶

177. *Id.*

178. *Henderson*, 258 F.3d at 710.

179. *Id.*

180. *Id.* (citing *Rummel v. Estelle*, 445 U.S. 263, 276 (1980)); see *supra* notes 97-103 and accompanying text.

181. *Henderson*, 258 F.3d at 710. The court added, in considering Henderson’s culpability, that the Arkansas Supreme Court, in rejecting Henderson’s Eighth Amendment argument, had not considered the evidence that Henderson had tried to prevent Revels from testifying at trial, and that the jury had not been instructed that it could consider that evidence when imposing sentence. *Id.* This seemed to be important to the Eighth Circuit in that it focused the sentence and, thus, the Eighth Amendment argument, solely on the drugs sold as the principal felony and not on the attendant circumstances. *Id.* at 710-11.

182. *Id.* at 711.

183. *Id.*

184. *Id.*

185. *Id.* (citing ARK. CODE ANN. §§ 5-4-104(b), -606, -607(b)-(c)).

186. *Id.* (citing ARK. CODE ANN. § 16-93-607(c)(1)). The court also noted that the jury at Henderson’s trial was specifically instructed that a person sentenced to life imprisonment is not eligible for parole. *Id.*

Bearing that distinction in mind, the court turned aside the State's contention that a life sentence is not as severe as life without the possibility of parole because some prisoners under a simple life sentence have received commutations from the governor.¹⁸⁷ The court said it could find nothing in the record before it that would show the number of prisoners who have asked for a commutation or the amount of time such prisoners under a life sentence have served before being granted a commutation.¹⁸⁸ In any event, the court said, past performance is not indicative of future results, particularly when the power to grant a commutation rests with the governor, who can change in person and temperament with each election, and who can wield that power with arbitrary sway.¹⁸⁹ The court quoted the Supreme Court in *Solem* regarding the difference between parole and commutation: "Parole is . . . part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases . . . [while] the possibility of commutation . . . is little different from the possibility of executive clemency" ¹⁹⁰ It is from that analysis of the severity of the crime and the harshness of punishment that the court concluded that Henderson's sentence was grossly disproportionate to his crime.¹⁹¹

That, however, was not the end of the court's analysis to establish whether or not Henderson's sentence violated the Eighth Amendment,¹⁹² as it had been for Justice Kennedy in Harmelin's case.¹⁹³ Continuing with the *Solem* analysis, the court also had to compare Henderson's sentence with those of offenders in similar circumstances in Arkansas and in other jurisdictions.¹⁹⁴ First, as to Arkansas, the court pointed to Justice Brown's dissent in the Arkansas Supreme Court opinion below, which stated that Henderson's case was the first in which the supreme court affirmed a life sentence "where the defendant's crime was one offense and a first offense and where the quantity of drugs sold was such a minor amount."¹⁹⁵ The court

187. *Henderson*, 258 F.3d at 711.

188. *Id.*

189. *Id.* (citing *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280-81 (1998); *Solem v. Helm*, 463 U.S. 277, 303 (1983); *Nelson v. Hall*, 171 Ark. 683, 687, 285 S.W. 386, 388 (1926)).

190. *Id.* at 711-12 (quoting *Solem*, 463 U.S. at 303) (fourth alteration in original).

191. *Id.* at 712.

192. *Id.*

193. *See supra* notes 131-35 and accompanying text.

194. *Henderson*, 258 F.3d at 712 (quoting Justice Kennedy's opinion in *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991)).

195. *Id.* (quoting *Henderson v. State*, 322 Ark. 402, 413, 910 S.W.2d 656, 661 (Brown, J., dissenting)). The State's lawyers gave the district court the names of two people sentenced to life in prison for a first offense involving a small amount of drugs, the court observed. *Id.* The court, however, pointed out that one prisoner had his sentence overturned on other grounds, and that the prison records of the second prisoner were so questionable in their completeness and accuracy that they tended to confuse the issue. *Id.*

also looked at Arkansas's own advisory sentencing guidelines and found that, under those guidelines, Henderson would have received only a three-and-one-half-year sentence.¹⁹⁶ That disparity between the guidelines's recommended sentence and the one actually imposed added to the court's contention that Henderson's sentence violated the Eighth Amendment.¹⁹⁷

The court then turned to comparing Henderson's case with similar ones in other jurisdictions.¹⁹⁸ In its brief, the State cited two cases where defendants had received long sentences for comparable offenses, but as the Eighth Circuit pointed out, one was a forty-year-old case out of Washington where the amount of drugs involved was not stated, decreasing the case's persuasive value.¹⁹⁹ In the other case, two defendants were sentenced to terms amounting to a term of years or life, and the court noted that the defendants were eligible for parole after serving their minimum terms.²⁰⁰ In its own research, the Eighth Circuit found three other states—Idaho, Montana, and Oklahoma—that allowed life sentences for first offenses for delivering small amounts of crack cocaine.²⁰¹ The court pointed out, though, that those states merely authorized such punishments for those crimes, and that there was no evidence that any defendant in those states has ever received that maximum penalty.²⁰² Finally, looking at the federal sentencing guidelines, the court said that Henderson's sentence in federal court would have been only ten to sixteen months.²⁰³

Looking at the whole of its *Solem* analysis only strengthened the court's initial determination that Henderson's sentence was grossly disproportionate to his crime and violated the Eighth Amendment.²⁰⁴ As a result, the court remanded the case to the district court to grant Henderson's writ of habeas corpus if the state had not resentenced him within ninety days.²⁰⁵

196. *Id.* at 713 (observing, however, that the statutory minimum of ten years in prison would have overridden the advisory guidelines).

197. *Id.*

198. *Id.*

199. *Id.* (citing *Washington v. Boggs*, 358 P.2d 124, 125 (Wash. 1961)).

200. *Henderson*, 258 F.3d at 713 (citing *Carmona v. Ward*, 576 F.2d 405, 407 (2d Cir. 1978)).

201. *Id.*

202. *Id.* The court also noted that, with the possible exception of Idaho, those three states appeared to allow for parole, even for a life sentence, without the need for commutation from the governor. *See id.* at 713-14.

203. *Id.* at 714. The court added that even if a sentencing enhancement for Henderson's alleged obstruction of justice had been imposed in a federal trial, such an enhancement would have raised the sentence under the federal guidelines to fifteen to twenty-one months. *Id.*

204. *Id.*

205. *Id.* The state attorney general decided not to petition the United States Supreme Court for review, and the local prosecutor reached an agreement with Henderson on October 15, 2001, whereby he would accept a nineteen-year prison term for his plea of guilty to the

V. SIGNIFICANCE

The Eighth Circuit Court of Appeals's decision in *Henderson* is important in two respects. First, it applies a common-sense meaning to the Eighth Amendment, helping to keep it from becoming a quaint, but largely irrelevant, historical relic as the Third Amendment²⁰⁶ has become. If the Amendment only applies to types of punishment and not to the proportionality of punishment to the crime,²⁰⁷ and prison is an acceptable mode of punishment (Justice Scalia's interpretation), then it is not inconceivable that a legislature could mandate long prison sentences for the most minor of offenses, say, a life term for unpaid traffic tickets. Under Justice Scalia's reasoning, that sentence would have to be constitutionally acceptable because the mode of punishment, prison, is acceptable.²⁰⁸ Of course, such a penalty for such minor offenses would be absurd.²⁰⁹ The fact that our soci-

drug charge, while making *Henderson* eligible for parole. Telephone Interview with J. Thomas Sullivan, Professor of Law, University of Arkansas at Little Rock William H. Bowen School of Law and Counsel for Appellant (Nov. 4, 2001); see also *supra* notes 184-86 and accompanying text (discussing the difference between sentences of life and life without the possibility of parole).

206. U.S. CONST. amend. III. "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." *Id.* Of the few times the Third Amendment has been cited, most have involved the Amendment as one of the "penumbra" of constitutional provisions incorporating a right to privacy and not the literal quartering of soldiers. See, e.g., *Katz v. United States*, 389 U.S. 347, 350 (1967); *Engblom v. Carey*, 677 F.2d 957, 961-62 (2d Cir. 1982); *Commonwealth v. Leis*, 243 N.E.2d 898, 903-04 (Mass. 1969); *State v. Coburn*, 530 P.2d 442, 446 (Mont. 1974).

207. See *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (plurality opinion).

208. Justice Scalia did say, "This is not to say that there are no absolutes," and that "one can imagine extreme examples that no rational person, in no time and place, could accept. But for the same reason these examples are easy to decide, they are certain never to occur." *Id.* at 985-86. This sounds very much like a "grossly disproportionate" standard employed by Justice Kennedy, albeit a bar set much higher. Also, Justice Scalia does not attempt to set out such an example, leaving the question open as to what he might consider so extreme. It is also conceivable that a reasonable person might have considered a life sentence for a first-time offender on a small drug sale as one "certain never to occur," thus leaving the door open, even under Justice Scalia's rationale, for the Eighth Circuit to do exactly what it did.

209. Even Justice Scalia might agree. But seeing that prison is an acceptable *mode* of punishment, how could one justify holding such a punishment unconstitutional if it were one validly approved by the legislative branch and did not "shock the moral sense of the community," see *Henderson v. State*, 322 Ark. 402, 411-12, 910 S.W.2d 656, 660 (1995), unless one looked to the absolute magnitude of the harm done? This was one of the standards employed in *Solem v. Helm*, 463 U.S. 277 (1983), that Justice Scalia would have overruled in *Harmelin*, 501 U.S. at 965.

In April 2002 the Court granted certiorari, see *Lockyer v. Andrade*, 122 S. Ct. 1434 (2002) (mem.), to a case that will allow the Court to revisit the issue of disproportionate prison sentences and the Eighth Amendment. David G. Savage, *Supreme Court to Hear Three-Strikes Challenge*, L.A. TIMES, April 2, 2002 at A1. At issue will be whether Califor-

ety does not mete out such physically barbarous punishments as disemboweling or burning at the stake—in other words, because we have become more mature and humane in how we treat our convicted criminals—should be no reason why we should lose a key constitutional protection against a potentially unreasonably hard-line legislature. Yes, we have a republican form of government whereby we elect representatives to make governmental decisions for us, but that state of affairs must be restrained by our Constitution, which from time to time has to step in to tell our elected representatives that “you can’t do that.” This is not a matter of the Constitution being a “living” document, which can be invoked and misused by some to increase governmental power over the citizenry. Instead, it is one of maintaining the Constitution as a government-limiting document. Interpreting the Eighth Amendment as containing a proportionality guarantee does not betray, but rather reinforces, that principle.

The second area in which the Eighth Circuit’s opinion is significant is akin to the first. The opinion represents a dollop of common-sense medicine into a society that has sickened itself with its “War on Drugs.” The federal government spends roughly \$17 billion per year to wage the “War on Drugs,”²¹⁰ and America as a whole spends roughly \$110 million in taxpayer money per day incarcerating and arresting in connection with drugs, treating

nia’s “three strikes” law, in which an offender is subject to a long prison term upon conviction of a third felony offense, is constitutional as applied to offenders whose third strike is a minor, non-violent crime. *Id.*

The Court may well use the case of Leandro Andrade to take a fresh look at its decision in *Harmelin*, which the United States Court of Appeals for the Ninth Circuit used in holding Andrade’s sentence unconstitutional. *See Andrade v. Attorney Gen. of California*, 270 F.3d 743 (9th Cir. 2001). A California jury convicted Andrade of two petty thefts of video tapes, worth a total value of \$153. *Id.* Because of prior non-violent convictions, prosecutors used the three strikes law to enhance the usual misdemeanor petty theft charges into felonies. *Id.* at 746. As a result, Andrade was sentenced to life imprisonment without the possibility for parole for fifty years. *Id.*

The Ninth Circuit overturned Andrade’s sentence as being unconstitutional because it was “grossly disproportionate” to his crimes. *Id.* at 747. In its analysis, the Ninth Circuit court first reviewed the United States Supreme Court decisions in *Rummel v. Estelle*, 445 U.S. 263 (1980), *see notes 96-104 and accompanying text*, and *Solem v. Helm*, 463 U.S. 277 (1983), *see notes 106-15 and accompanying text*. Then the court turned to the *Harmelin* decision. *Andrade*, 270 F.3d at 756-57. The court of appeals stated that while there was no majority opinion in *Harmelin*, there were seven justices who favored some form of proportionality review. *Id.* at 757. At the end of its discussion of the cases, the court concluded that *Harmelin* did nothing to change the law established in *Solem*. *Id.* at 758. The court then proceeded to analyze Andrade’s sentence through the prism set forth by Justice Kennedy’s concurrence in *Harmelin*, *id.* at 758-66, following which it concluded that Andrade’s sentence was so grossly disproportionate to his crime that it violated the Eighth Amendment. *Id.* at 766. The court, however, limited its decision to Andrade’s case alone and did not invalidate California’s three strike law as facially unconstitutional. *Id.* at 767.

210. Jim Oliphant, *Heeding the Lessons of the War on Drugs*, RECORDER, Oct. 12, 2001, at 3, available at LEXIS, News Group File.

drug users, or trying to keep people from using drugs.²¹¹ Upwards of 460,000 of the roughly two million people in American prisons are there for drug offenses,²¹² a nine-fold increase since 1980.²¹³

When we set aside all of the chest-thumping rhetoric, which tends to come more out of the realm of emotion rather than reason, we have to ask ourselves whether it truly makes sense to subject someone for selling less than one gram of cocaine, particularly a first-time offender, to the same range of prison time that we reserve for first-degree murderers, kidnapers, or rapists.²¹⁴ The Eighth Circuit clearly thought it does not.

It should be noted that any widespread application of the Eighth Circuit's ruling in the case is not likely, given the specific facts in Henderson's case: a first-time offender selling such a small amount of drugs being given such a hefty punishment. Indeed, Arkansas Supreme Court Justice Robert Brown, who wrote the dissenting opinion in Henderson's Arkansas appeal, acknowledged that such cases calling for the application of a proportionality principle would be rare.²¹⁵ But the Eighth Circuit's opinion should serve to tell legislators that they cannot affix just any prison time they deem appropriate, irrespective of the offense.

The application of the federal Antiterrorism and Effective Death Penalty Act of 1996 may also mute the effect of the decision. That statute will make state prisoner appeals to the federal courts much more difficult by placing limits on habeas corpus petitions.²¹⁶

In any event, the Eighth Circuit's ruling in *Henderson v. Norris*²¹⁷ stands as a beacon that the Eighth Amendment is still alive as a hedge against governmental power. It also confirms that reason can still be found afloat in a swirling sea of irrationality when it comes to fighting drug abuse in this country.

*Ray S. Pierce**

211. Carl M. Cannon, *Tempering the War*, NAT'L J., Aug. 18, 2001, at 2, available at 2002 WL 7094642.

212. *Id.*

213. See Jane Blotzer, Editorial, *The Drug War is Insane*, PITTSBURGH POST-GAZETTE, May 20, 2001, at E-1, available at 2001 WL 3390548 (stating that in 1980 the number of people incarcerated for drug offenses was about 50,000).

214. Under Arkansas law, all of the above offenses are Class Y felonies. See ARK. CODE ANN. §§ 5-10-102(b)-(c), -103(b) (Michie Repl. 1997). The prison term set out for Class Y felonies is ten to forty years, or life. *Id.* § 5-4-401(a)(1) (Michie Repl. 1997). The selling of fewer than twenty-eight grams of a Schedule I or II controlled substance is also considered a Class Y felony. *Id.* § 5-64-401(a)(1) (LEXIS Supp. 2001); see also *supra* text accompanying notes 182-86.

215. *Henderson v. State*, 322 Ark. 402, 415, 910 S.W.2d 656, 662 (1995) (Brown, J., dissenting).

216. See *supra* notes 151-52 and accompanying text.

217. 258 F.3d 706 (8th Cir. 2001).

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Univ. of Ark. at Little Rock William H. Bowen School of Law, May 2003. The author would like to express his profound and sincere appreciation to Laurie Pierce for her Job-like patience and endurance while the author was away from home writing this note. The author also thanks Professor Kenneth S. Gallant for his assistance in this endeavor.

University of Arkansas at
LITTLE ROCK
Law Review

Volume 24

Summer 2002

Number 4

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