ORIGINAL

In the

Supreme Court of the United States

WILLIAM JAMES RUMMEL,

PETITIONER,

V.

W. J. ESTELLE, JR., DIRECTOR,"
TEXAS DEPARTMENT OF CORRECTION,

RESPONDENT.

No. 78-6386

Washington, D. C.
January 7, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM JAMES RUMMEL, Petitioner,	:	
v.	:	No. 78-6386
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, Respondent.	:	

Washington, D. C.,

Monday, January 7, 1980.

The above-entitled matter came on for oral argument at 10:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

SCOTT J. ATLAS, ESQ., Vinson & Elkins, 2100 First City National Bank Building, Houston, Texas 77002; on behalf of the Petitioner

DOUGLAS M. BECKER, ESQ., Assistant Attorney General of Texas, P. O. Box 78711, Austin, Texas 78711; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: WE will hear arguments first this morning in No. 78-6386, Rummel v. Estelle, the Director of Texas Department of Corrections.

Mr. Atlas, you may proceed whenever you are ready.

ORAL ARGUMENT OF SCOTT J. ATLAS, ESQ.,

ON BEHALF OF THE PETITIONER

MR. ATLAS: Mr. Chief Justice, and may it please the Court: My name is Scott Atlas, court appointed counsel for the petitioner, William James Rummel.

The only issue before this Court is whether the Texas habitual offender statute, which since 1856 has mandated an automatic life sentence upon third felony conviction, is cruel and unusual in violation of the Eighth Amendment to the United States Constitution as applied to the three offenses for which my client received his life sentence.

The facts are simply stated: In 1964, at the age of 21, Rummel pleaded guilty to buying four tires at a gas station, worth $80, with a credit card that wasn't his. In 1969, he pleaded guilty to forging a $28.36 check to pay rent at a hotel. And in 1972, he accepted a $120.75 check and promised to fix an air-conditioner, didn't do it and in 1973 a jury convicted him in essence of not intending to do it when he accepted the check.

In the state trial court, after the conviction, the jury found that he had committed the two prior felonies and the judge assessed him the automatic life sentence required under Texas law.

QUESTION: Is there any question, Mr. Atlas, about the validity of the any of the three convictions?

MR. ATLAS: No, Your Honor, there is no such question. There is a Sixth Amendment question on ineffective counsel that is not before this Court, but it has not been decided and is still languishing in the --

QUESTION: So for present purposes --

MR. ATLAS: For present purposes, this is the only issue before the Court, Mr. Justice Stewart.

QUESTION: If these were three bank robbery convictions, would you be here?

MR. ATLAS: No, Your Honor, I would not be here.

QUESTION: So you are casting your entire case on the nature of the offense which the State of Texas through its legislature has declared to be a felony?

MR. ATLAS: That's correct, Your Honor. Each of the three offenses were felonies at the time they were committed. The third felony, the $120 check offense became a misdemeanor eight months later, punishable by a maximum of only one year. But at the time it was committed -- in fact, I think that is also true with the first offense, the

credit card offense -- at the time each of the three offenses were committed, they were felonies under Texas law and there is no question whatsoever that the statute was properly applied according to the dictates of the statute.

QUESTION: I take it, too, that -- well, I will put it to you as a question. Suppose in each of these cases you had exactly the same amount involved, that it was the theft of a welfare check going to a welfare recipient, what would be your position?

MR. ATLAS: Your Honor, that is clearly the most difficult analytical problem in this case, and my answer is not a perfect one. I think I would still be here arguing in this Court that the harm to the victims, since it is normally irrelevant at the sentencing stage unless it forms part of the substantive offense, is also irrelevant at the conviction stage that it ought not to be a factor for this Court. Nonetheless, I realize that that created by far the most difficult analytical problem, but I think that since stealing the $200 or whatever the amount would be from a welfare victim presumably constitutes the same offense under Texas law, regardless of the identity of the victim, we would argue that the offenses would make no difference in this Court's analaysis.

QUESTION: And if these were street robberies, at the point of a gun, in exactly the same amounts, what would

be your position?

MR. ATLAS: Your Honor, my position would be very different and I would not be before this Court. We have argued in our briefs and we contend to this Court that if there was any element of violence or potential violence in any one of the three offenses, that this Court ought not to consider the issue because the State of Texas is entitled to pass judgment of a life sentence, even automatic, on anyone convicted of an offense that involves a violent offense such as the bank robberies or street robberies that you mentioned, regardless of whether any money was taken successfully or not.

QUESTION: Where in the Constitution or cases of this Court do you find the distinction between money taken by violence or crimes committed accompanied by violence and perhaps very significant white collar fraud that didn't involve a bit of violence?

MR. ATLAS: Your Honor, first let me clarify my point a bit. When I say that if the offenses, any one of them are violent, that that ought to mean the case should not be in this Court, I do not mean that those are the only circumstances under which the Court ought not to consider an Eighth Amendment claim given a mandatory life sentence. There are certain offenses I think in addition to violent offenses -- for example, drug crimes, and certain

other crimes where the state has a peculiarly strong interest -- nonetheless, in direct answer to your question, there is nothing specifically written in the Constitution. We would argue that the Eighth Amendment ought to apply to a lengthy sentence under certain circumstances and in attempting to develop some type of objective criteria we have relied on the Court's decisions and the rules prescribed in various death penalty and non-death penalty cases, in particular the Court's 1977 Coker decision which talked about the disproportionate nature of offenses to the punishment given, and we would argue that in looking at the nature of the offenses that any time an offense involves violence or some element of violence or threat of violence, that since those kinds of offenses are always punished much more seriously in every state in this country, then the kind of nonviolent petty property crimes with which this Court is dealing in this case, that that ought to be some indication, although not the final answer, in and of itself that the sentence is excessive.

QUESTION: How about embezzlement?

MR. ATLAS: Embezzlement again gives me somewhat more trouble than the normal petty check offense.

QUESTION: Why should it, you just drew the line, and embezzlement certainly falls on the nonviolent side.

MR. ATLAS: Yes, Your Honor, but, Mr. Justice White,

embezzlement cases we think generally probably have much more of an indication of professional criminality, and we would argue that if we are dealing with professional criminals, someone who forges three $100,000 checks --

QUESTION: How about tax evasion?

MR. ATLAS: Tax evasion, I think Al Capone is perhaps a perfect example. The first time Al Capone was caught, they threw away the key.

QUESTION: What about three times?

MR. ATLAS: Three times, absolutely if you could ever find someone.

QUESTION: Absolutely what?

MR. ATLAS: Absolutely the Court ought not to consider an Eighth Amendment claim under those circumstances.

QUESTION: Why, it is completely nonviolent?

MR. ATLAS: Yes, Your Honor, but it represents an interest in which the state has a peculiarly strong interest in preserving the integrity of the tax process and we feel it is probably entitled to receive special treatment by the court.

Judge Clark in the Fifth Circuit panel, and again in his dissenting opinion in the court in this case made it clear that not only when the offenses involved violence but also when there was a strong social interest

in --

QUESTION: Well, what about just a compulsive con man who just goes around conning people out of money, with false schemes, especially children and old ladies, there are a lot of those around, you know?

MR. ATLAS: Your Honor, if we were dealing with a statute that mandated a life sentence uon conviction of a sufficient number of offenses to entitle --

QUESTION: Let's just take three.

MR. ATLAS: Yes, Your Honor, I think the state under those circumstances would not be entitled to make the irrebuttable presumption that someone is a lifetime con man and deem him beyond redemption, justifying the mandatory life sentence subject only to the parole board's unfettered discretion.

QUESTION: Then it turns on the number in effect, if it were seven rather than three, the case should come out differently?

MR. ATLAS: Your Honor, I think if the statute mandated life after seven, I would have a very difficult problem arguing the state's conclusion --

QUESTION: What about four?

MR. ATLAS: By far the most difficult line drawing question here. I can't tell this Court where the line ought to be drawn.

QUESTION: Well, you are though.

MR. ATLAS: I can only tell this Court that wherever that line is drawn, it ought not to be at three.

QUESTION: But there is no question that the line is drawn in your case?

MR. ATLAS: Absolutely, Your Honor. In fact, there is no question that there is no statute in this country at this time in which someone receives an automatic life sentence upon conviction of any more than four felonies. There are 30 states only where one receives an automatic life sentence for four, and there is only one state now as a practical matter, as I have discussed in my brief, I have distinguished Washington and West Virginia, because of court decisions or court language in those states. Texas is the only state now as a practical matter where one would receive an automatic life sentence for these three felonies, and we would argue that since one of the criteria outlined by this Court in the 1977 Coker case and then mentioned at various times by other members of this Court in other decisions, is looking at not only the nature of the offenses but the trend in other states and the manner in which other states punish the same offenses, but since we have been able to trace out for this Court every habitual offender statute ever enacted in this country in the last 200 years, and since it is clear that a number of other states, perhaps

17 I believe have attempted to punish prisoners with an automatic life sentence upon a certain number of nonviolent felony convictions, and every one of those states, one after another over the course of the years has decided that either the statute didn't work or it was unfair and now Texas stands alone by itself.

QUESTION: Isn't that up to the state to do?

MR. ATLAS: Yes, Your Honor. In the --

QUESTION: Maybe Texas will come around to that point of view.

MR. ATLAS: Your Honor, 123 years is long enough for Texas to come around to that point of view.

QUESTION: But they have the examples in the other states. You've compared Texas now to the other states. How do you compare the good time provisions in Texas with those in other states?

MR. ATLAS: Your Honor, the Attorney General's office has provided us with charts that according to the Attorney General's office suggest that Texas is more liberal in its good time credit. That in and of itself first of all nought not to be considered by this Court since it is a matter of discretion, but even if the Court considers good time credit alone, that is not enough to affect Rummel's sentence one bit. All that does, for someone who is given a life sentence, is move up the time when parole becomes a

possibility. It does not affect at all the time at which my client would be entitled to release because in fact at no time during his life is he ever entitled as a matter of right, either statutory or constitutional, to any consideration whatsoever in terms of release. If he had a ten-year sentence, then good time credit could move up the time where he would have the absolute right to release. The maximum possible good time credit in Texas might allow him to be released in five years, rather than ten, because he could receive an extra day for every day he served under the most liberal of the good time credit provisions. But where someone receives a life sentence under Texas law, the time for release is never, and parole in Texas is something, as this Court has held in the Greenholtz case last term, is something completely within the discretion of the state. As I have indicated in the reply brief, the Governor of Texas recently has been taking a much more strict interpretation of the parole provisions and in fact in June of this year rejected 79 percent of the parole board's recommendations.

The state has argued that the life sentence here is not really a life sentence because the parole board -- because Mr. Rummel might get good time credit and move up the time when he is eligible for parole consideration, because then the parole board might then choose to recommend

parole to the Governor, and that the Governor might then decide to exercise his prerogative to grant the parole. These are conditions under which Mr. Rummel has absolutely no right and ought not to be considered by this Court because if Mr. Rummel does not receive his hearing here today he will never receive it, this Court will never review his parole determination, if it is denied forever.

QUESTION: Do you mean this Court or any other reviewing court should not take judicial notice of the tiny, tiny percentage of life sentences that are in fact served as life sentences?

MR. ATLAS: Your Honor, the Court is entitled to take judicial notice of that matter, but in terms of the weight that the Court ought to give that, we think the weight ought to be practically nil because there is no right to it. If the state would guarantee me today that Mr. Rummel would absolutely as a matter of right get out on a certain day, then I would not be in this Court, but the state won't do that, the statute doesn't provide it, the parole board won't promise it, and --

QUESTION: I take it then that you are just suggesting we disregard the Fifth Circuit's judgment as to what the likelihood is?

MR. ATLAS: Your Honor, I would not suggest that the Court --

QUESTION: Well, the Fifth Circuit knows more about local law and practice than we do and decided that the chances were so high that he would get out that we should take it into consideration, and you think if it were 100 percent chance we should.

MR. ATLAS: No, Your Honor. If it were 100 percent chance because it were a matter of right, absolutely, but --

QUESTION: Exactly, but now --

MR. ATLAS: -- and I have no difficulty with the Court --

QUESTION: -- you keep emphasizing the discretion. The Fifth Circuit says that whatever, however it reads on the books, the practice is that it isn't, whatever the discretion is, it is a very narrow realm of discretion.

MR. ATLAS: No, Your Honor, it is not true that it is a very narrow realm of discretion.

QUESTION: Well, the way it operates, it almost always operates in favor of the prisoner.

MR. ATLAS: Your Honor, if a governor comes into office who chooses to cut back drastically on the number of paroles granted among those recommended by the parole board, then even though the parole board is exercising what you have characterized, Mr. Justice White, as very narrow discretion, the governor and the parole board itself, if

it changes its mind or the members change composition is entitled to exercise complete unlimited discretion.

Moreover, if Mr. Rummel misbehaves in prison or demonstrates a surly attitude, the parole board will never parole. The factors upon which the parole board bases its decision are only remotely related to any Eighth Amendment considerations, and in many instances, as outlined in the state's brief and in its supplement, are factors totally outside the control of the prisoner himself.

QUESTION: Mr. Atlas, there are some states, if I am not mistaken, California is one, where the sentence after conviction for almost any felony is an indeterminate sentence, and how long the convict will actually serve is in the discretion of -- I think in California it is called the adult authority, but the parole board.

MR. ATLAS: Yes, Your Honor, but there is an absolute --

QUESTION: There are maxima, I suppose.

MR. ATLAS: Yes, Your Honor, there are maximum, and at some point the prisoner is entitled to absolute release.

QUESTION: Well, is that true in every state?

MR. ATLAS: Yes, Your Honor, we have demonstrated in charts, the 204 pages -- my apologies for the length -- that we submitted to this Court, that in every state except

the three I mentioned, plus Texas, the discretion, either the judge or jury has discretion in sentencing with an absolute boundary behond which they cannot go.

QUESTION: No, no, I'm not talking about the judge or jury. I'm talking about the mandatory sentence after he is in custody, after he is incarcerated, the --

MR. ATLAS: After he is incarcertated --

QUESTION: -- the administration of the parole board or, as is called in California, the adult authority is very great, is it not?

MR. ATLAS: Yes, Mr. Justice Stewart, in every state there is a certain amount of discretion for a certain amount of time, but at some point the prisoner is entitled to absolute release when the offenses are the same type of offenses with which we are dealing in this case. When they are dealing with violent offenses, there may not be an absolute maximum at all, and the prisoner may have no rights to release at any time before the end of his term.

QUESTION: Will serve the life term.

MR. ATLAS: But in cases in every other state --

QUESTION: Even after a single conviction --

MR. ATLAS: Even after a single conviction --

QUESTION: -- a felony involving violence he may serve --

MR. ATLAS: That's correct, Your Honor, absolutely.

But when we are dealing with only these type of petty offenses, California and every other state --

QUESTION: Well, these are based in the eyes of Texas, were at the time of conviction felonies.

MR. ATLAS: Yes, Your Honor, no question.

QUESTION: They were not petty offenses.

MR. ATLAS: Your Honor, they are petty offenses we feel in a constitutional sense. We are not arguing that Mr. Rummel does not deserve somehow to avoid punishment for these offenses --

QUESTION: But didn't you say, I thought you said that if they had been offenses committed at gunpoint they would not be petty even though the amounts were precisely the same as involved here.

MR. ATLAS: That's right, Your Honor. We are dealing --

QUESTION: How much does the amount have to do with it?

MR. ATLAS: The amount has to do with it only to the extent that it demonstrates that we are dealing with the pettiest type of offender, not an organized criminal, not a member of any organized gang. These are three petty, small, double-digit check offenses, suggesting bad judgment and --

QUESTION: Well, Mr. Atlas, isn't the state

entitled to impose a much severer penalty even though the facts are exactly as you state, because its judgment is that after three of these type of offenses the person is one who is simply unable to conform his conduct to social norms in a way -- the basic rationale for a recidivist statute.

MR. ATLAS: Mr. Justice Rehnquist, that is absolutely right. On the one hand, we do not argue that the state is not entitled to increase the punishment based on the existence of prior offenses. We are simply saying this is too much for too little. On the other hand, if the statute mandated a life sentence upon third or fourth or fifth parking ticket, we have no doubt that the Court would find that statute grossly excessive, that punishment grossly excessive considering the nature of the offenses.

Well, having established the principle at some point, we are now really attempting to determine where the line ought to be drawn, not whether, because under some circumstances if the state legislature is entitled to characterize something as criminal and entitled to punish the third offense, the third commission of that offense with a life sentence, then a parking offense which states typically characterize as criminal, whether felony or misdemeanor, would justify a life sentence under that rationale upon the third commission of it, and there is no

question that someone who committed a third parking ticket or a third speeding ticket or in Texas the third time you steal a goat, with an automatic life sentence, at some point this Court will be called in to say that the legislature has exceeded constitutional bounds. And we would argue that in attempting to provide some type of objective criteria for this Court to decide the case and attempting to suggest some ways to limit the inherent subjectivity that is involved in most constitutional decisions and even most peculiarly in an Eighth Amendment decision, that the criteria that have been outlined by the Court and that we have attempted to demonstrate we fulfill, and frankly whatever test this Court chooses to adopt for evaluating sentence length, we think Mr. Rummel's case makes it.

QUESTION: Now, you have referred in the brief and to some extent in your argument to the death penalty cases, where the proportionality concept was introduced. Is it not true that in all the discussion of proportionality in the death case opinions, this is linked with the irreversibility of the punishment, and is it not true that the whole concept of parole and probation is to make adjustments after the judgment and after the sentence?

MR. ATLAS: Mr. Chief Justice Burger, you are absolutely right. But if the state should mandate a life sentence for one parking ticket and yet held out the

possibility of parole in 15 minutes, we have no doubt that the Court would find that sentence excessive. no question of --

QUESTION: You are dealing with one parking ticket or three parking tickets here, are we?

MR. ATLAS: Even three parking tickets, Your Honor.

QUESTION: We are not dealing with them in this case.

MR. ATLAS: No, Your Honor, absolutely not.

QUESTION: So we haven't taken that step.

MR. ATLAS: No, but theoretically they could under the rationale that the state has suggested. No question, death is different, although in the Hutto case last term this Court mentioned the proportionality analysis in the context of a non-death case and it has in a number of instances.

QUESTION: The Williams case had to do with proportionality, didn't it?

MR. ATLAS: Yes, Your Honor, it did and that was a non-death case, a falsification of government documents, although there was no proof of -- and the statute did not require proof of any fraud. And we concede for purposes of argument that Williams is different. But there is no question but that death is different and we don't question

that. And perhaps the test ought to be imposed with greater exactitude in the instance of the death penalty, but that is a different question. The test itself ought to be the same.

I will reserve time.

MR. CHIEF JUSTICE BURGER: Mr. Becker.

ORAL ARGUMENT OF DOUGLAS M. BECKER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BECKER: Mr. Chief Justice, and may it please the Court: I am Douglas Becker, Assistant Attorney General of the State of Texas, attorney for the State of Texas in this habeas corpus matter.

Your Honors, the State of Texas is of the opinion that the fundamental issue in this case is one of federalism, a question of -- questions of federalism have often appeared before the Court in years past, but we feel that rarely has a case ever cried out for judicial restraint and the application of a doctrine that is attractive at first glance to some because of the seeming oppressive nature of Mr. Rummel's sentence in light of his convictions, but which would have effects upon the administration of justice in Texas and indeed throughout the nation, that would make the costs of such a system far outweigh any supposed benefits.

Now, we feel that in the first place the holding contended for by Mr. Rummel in this case would be a

usurpation of traditional prosecutorial discretion in authority that has prevailed in this country and indeed in England and which prevails today in virtually all the states. The prosecutors in Texas who are locally elected, as is often the case across this nation, it had always been thought had the right to rely upon the judgment of their own state legislature insofar as a societal judgment in that particular society in Texas as opposed to any other state as to which crimes were more serious than other crimes, as to which crimes should be punished more severely than other crimes, as to whether certain offenses which were also offenses in Pennsylvania and Rhode Island should be pubished more or less severely in Texas in light of unique Texas experience, and that in the context of this case insofar as habitual offenders are concerned, those who are unable to conform their conduct to the norms of civilized society, as Mr. Justice Rehnquist phrased it a moment ago, the manner in which those persons should be punished and as to what attempts at rehabilitation should be made for those persons.

We thought that the District Attorney should rely upon the judgment of the legislature, that he would in exercising his discretion when he felt the statute should be invoked, that he might do so, subject to the review of the grand jury in Texas, and that such a sentence might be

imposed on someone.

Now, seen in this light, the application of the statute is not automatic, as Mr. Rummel says it is. Instead, the legislature gives the local prosecutor the discretion whether or not to apply or to seek the invocation of that statute on a particular offender. He commonly and frequently for many reasons elects not to apply it even thought he might. This is well known. And in such a case, even then he must persuade the grand jury that this is a proper case for the application of the baitual offender statute. Now --

QUESTION: Mr. Becker, you could make exactly the same argument about the Coker case, couldn't you?

MR. BECKER: Yes, Your Honor. Of course, the Coker case, the key difference between the Coker case and this one is the irrevocable nature of the punishment. The key difference is that in this case we have a concept of rehabilitation that is possible. We have an idea of rehabilitation that cannot enter into the equation in Coker. There is no rehabilitation possible at all. We feel that makes a very large difference.

QUESTION: General Becker, the Court of Appeals, as I remember the opinion, started with the assumption that the length of sentence could be sufficient to violate the Eighth Amendment even in a non-death case. Do you accept

that premise?

MR. BECKER: Your Honor --

QUESTION: So your distinction, of course, doesn't stand up.

MR. BECKER: Well, of course, that is the most difficult question I think that can be asked and I --

QUESTION: I would be interested in your answer.

MR. BECKER: The concept of proportionality even in death penalty cases, although it has never been applied in a case, in a criminal case to invalidate a sentence solely because of its length, I can envision in my mind a state legislature so recklessly bent on some course of misconduct and so totally unaware of principles established in modern day civilized society that it might enact some statute so utterly devoid of any rational justification that the sentence upon that statute could be excessive solely for length alone and proportionality for that reason applied.

QUESTION: On the other side of the coin, in death cases is it appropriate for this Court to consider the probability that the sentence will actually be inflicted? As I think we probably all know, it is very rare for the death penalty actually to be carried out. Is that a factor we should think about in death cases?

MR. BECKER: Your Honor, I think not or certainly it would bother me to think about that because once again

of the irrevocable nature.

QUESTION: Even if we assume that in 90 percent of the death cases either the governor will commute the sentence or it will be set aside for one reason or another, we should not take that into account in that context?

MR. BECKER: Yes, sir, the problem is what happens with the other 10 percent. Now --

QUESTION: What if this man is one of the 10 percent who doesn't get an early parole?

MR. BECKER: All right. Now, in the first place, it is not a matter of being 10 percent, it is a much lower percentage. Now, what we have shown in the brief and what the charts show is from the average length that a person in his situation will serve, being approximately 12 years, and furthermore we have shown in another chart that of those eligible for parole by the third year of eligibility the figure approaches 100 percent of those who were eligible for parole. By reference to other charts, it may be seen that of that tiny percentage that is left, which may possibly be as high as one or two percent, I believe, that those persons are not persons such as Mr. Rummel, convicted of less serious offenses than robbers, murderers and others who become eligible for parole in certain circumstances in Texas, and that that percentage must be reserved for those persons so depraved that parole is not considered proper.

The statistics are so overwhelming in this case. We believe that our proof is so convincing, the mathematical proof, that it would be ignoring a very obvious reality to say that Mr. Rummel indeed, although he has no legal expectation and no legal right, that the odds are so overwhelming in his case that it is virtually impossible.

QUESTION: General Becker, help me a little. You say practically none of the people ever serve their time. Well, what is the sense of giving it?

MR. BECKER: The sentence that we have given is life, Your Honor.

QUESTION: Well, what is the sense of sentencing them to life if he is not going to serve life?

MR. BECKER: Your Honor, the Texas approach to this problem has been very different from that of some other states and we thought that we were taking a more modern approach. Now, we could have a system of highly determined sentencing in Texas, as some states do in some circumstances. In other words, we could have a system where a man sentenced to ten years would serve ten years or perhaps nine years with good behavior. We haven't chosen to do that system in Texas, particularly with one like Mr. Rummel. The system that Texas has chosen to act --

QUESTION: What is so bad about Mr. Rummel?

MR. BECKER: What is bad about him is that he is

a habitual offender, none of his offenses singly have been so serious, but a look at his criminal record, as the prosecutor saw it, saw virtually that he is a career criminal, that he committed one crime after the other, that there was a succession of --

QUESTION: There is a total of four.

MR. BECKER: No, Your Honor, it is not a total of four. It is a significantly higher number than four.

QUESTION: Well, are you going to give him time for the crimes he wasn't convicted of?

MR.BECKER: Your Honor, we are giving him time because of what he has shown himself to be. He has shown himself to be unable to exist outside of prison for any significant period of time without violating the law.

QUESTION: Why not sentence him to death while you are at it?

MR. BECKER: Well, Your Honor --

QUESTION: That would remove him.

MR. BECKER: Your Honor, it must be said that the State of Texas is faced with a very difficult problem here. I wish we knew what to do with Mr. Rummel. I wish the State of Texas -- I wish that a Justice of this Court or a penologist or sociologist or someone knew what to do with someone like Mr. Rummel who is a petty criminal -- we admit it --

QUESTION: But one way would be to give him some training in jail. That would be one way, which Texas does?

MR. BECKER: Which Texas does, yes, sir.

QUESTION: To a great extent?

MR. BECKER: To an extent which Texas does.

QUESTION: Do you want to use the word "great"?

MR. BECKER: As far as the rehabilitation and the programs of the Texas Department of Corrections --

QUESTION: Yes, sir.

MR. BECKER: -- from my own knowledge, they are at least as good as those elsewhere, we think they are.

QUESTION: Can you get anybody else to join you in that?

MR. BECKER: I don't know, Your Honor, but there is a case in Houston, the Rouise case, which is litigating that very matter. It is not directly involved in this case. Mr. Rummel -- we have tried short of prison term with Mr. Rummel -- he is now serving his fourth term in the penitentiary. His first sentence, as the record reflects, were for three years. He was paroled on that sentence, his parole was revoked and he was sent back for a second time. His sentence on his '69 prior conviction was four years. He did a portion of that time, he was released. He violated the law again promptly and is now in for his fourth time.

Now, we have tried terms of imprisonment for two

and three and four years several times. It hasn't worked. The scheme that Texas has chosen to enact now is one that we think is not particularly oppressive. What we have said to him is, Mr. Rummel, all right, we have in shorter terms of imprisonment have utterly failed to convince you that following the law is the wiser course. We have tried three times, we have failed three times. Now you are threatened with something that must give you pause to reflect. Now you are threatened with the possibility that you will never be released for the rest of your natural life. Now, you know as well as we know that virtually no one is kept in for the rest of his natural life, but think about that possibility, think about it happening, and then when you are paroled in approximately ten to twelve years from now, then perhaps that thought of losing the rest of your life in prison will cause your conduct to change in a manner that shorter terms of imprisonment have failed to do.

Now, perhaps that is not the wisest course of conduct for Mr. Rummel. Perhaps there is a wiser course. Perhaps there is some course that would cause him to be a model citizen without the agony to him of ten to twelve years of imprisonment, without the expense to the State of Texas, without all the things that are bade about the whole situation. But the State of Texas doesn't know what it is. And even if there is such a wiser course, the petitioner's

position here is not that what the State of Texas has done is unwise, but that it is forbidden under the Constitution, that it is so --

QUESTION: Mr. Becker, I got the impression from reading both the dissenting opinion and the prevailing opinion of the Court of Appeals en banc and from both you and your opponent's brief that you chose to make "real world" arguments when it suited your purpose and kind of abandon them when they didn't.

Mr. Rummel has been sentenced to a term of life, has he not?

MR. BECKER: Yes.

QUESTION: And your argument is in effect a real world one that he doesn't really stand to serve that if you take the percentages into account.

MR. BECKER: Yes, Your Honor. I should emphasize very briefly that with respect to the parole, in addition to the twelve-year average for all persons doing life, a good number actually are paroled at the absolute minimum which is ten. I talked to the Texas Department of Corrections on Friday and learned that on December 12th of this year Mr. Rummel had already maintained trustee status which meant that he was getting two for one time credit upon his sentence. As the Court knows, in Texas twenty years of credit is necessary for parole, you can get up to -- you

can serve that in half the time or ten calendar years to be eligible for parole. He had already made trustee. But on December 12th his trustee status was made retroactive to the very day he entered, meaning that he will be considered for parole after nine and one-half years of time behind bars --

QUESTION: And couldn't all of that have been revoked by now?

MR. BECKER: Yes, sir, and it may all be revoked tomorrow, yes. The system in Texas is one that has a free giving and taking of the good time. That is the system. Now, after he --

QUESTION: Is it possible that the decision was influenced by the pendency of this case?

MR. BECKER: No, Your Honor, it is not.

Now, after he is paroled also, Petitioner Rummel characterizes his situation as that of a perpetual prisoner. Once again, viewing the case in reality, he is no such thing. What we have shown from the rules and regulations of the Board of Pardons and Paroles and from the statistics in our charts is that after three years of proper conduct upon parole, he is placed on annual reporting status in which he need only mail in once a year a statement which gives his location and his job and -- his residence and his job essentially, and then after three years of successful

service upon that annual reporting status, he is shifted to non-reporting status, which means that the only requirement upon him is that he must not violate the law. No longer must he ask permission to marry, to change county residence or anything of the sort, or even to stay in Texas. He simply vows that he will not violate the law and that if he does he can be sent back to prison again, once again for the rest of his natural life, but he is eligible for parole in that situation from the first day that he returns to prison.

QUESTION: Can the resentencing in that situation be for a misdemeanor?

MR. BECKER: Yes, sir, it can. It can be --

QUESTION: How about a traffic violation?

MR. BECKER: Yes, sir, it can be for any violation of the law, no matter how trivial. Once again, the revocation is not automatic, it is discretionary, and if he is sent back then he is eligible for parole immediately.

The system that Texas has adopted is one that when we adopted it we had thought was for the protection of the individual offender in the sense that he gained the benefits of what we had thought was the modern train of thought that the punishment should fit the offender. We don't want to give every bank robber 25 years or 50 years or any particular sentence because bank robbers differ in their experience and

in their motives and in their circumstances. Mr. Rummel, too, has been thrown into a very large pot with a very disparate number and types of persons in it, those doing life sentences.

We have shown in our brief and in the supplement to our brief that his reasonable expectations of treatment are far different from those of more serious offenders who have received life sentences.

We would also point out that his situation is very different in serving a life sentence than that of a person in many other states serving life sentences or even long ones. We have shown that because of the overwhelming statistical proof as to how long he will actually serve that his sentence is not significantly longer than that he might have received in a number of other jurisdictions. The differences at least are not so great in our view that it can reasonably be held that the Eighth Amendment of the Constitution of the United States forbids it.

Again, Texas believes that no matter what criticisms can be made of our scheme, that it is not the proper function of the federal courts to be in the sentencing review business. The result contended for by the petitioner would accomplish exactly that result. Every prisoner in state prison --

QUESTION: Mr. Becker, on the question of getting

into the sentence review business at all -- of course, I agree with you, if you view the case as one of a ten or twelve year sentence, it is quite different than if you just view it in terms of the legal rights and the life-time -- what would your view be if you did not have this kind of parole provision or if as a matter of law we decided we would just have to look at the sentence cold and not in the real world, as Justice Rehnquist puts it, would you say it would be up to us to review a life sentence without the possibility of parole for this kind of group of offenses?

MR. BECKER: Well, Your Honor, in our --

QUESTION: And get the federal court to --

MR. BECKER: In our particular case, we don't feel that that would come up because the status as an habitual offender we think is a different one. But I think in answer to your earlier question, I have stated I can conceive some circumstances where proportionality would be applied for --

QUESTION: If you did apply proportionality, if the sentence here were properly viewed as a life sentence rather than one of ten or twleve years, would you agree that that would be excessive?

MR. BECKER: In this particular case, Your Honor?

QUESTION: Yes.

MR. BECKER: Absolutely not. I would not, because the --

QUESTION: You don't really rely then on the -- you don't have to rely in your view on the probability of parole as part of your defense statutory scheme?

MR. BECKER: No, Your Honor. I believe that we should prevail upon the case regardless.

QUESTION: There are basically two different theories.

MR. BECKER: Well, if -- absolutely -- if the man had been sentenced for stealing $230 worth of merchandise on three different occasions, viewed in that way, that would be one case. That might even be close to the one that you have been talking about, but that is not what he was sentenced for. He was sentenced because under Texas law he is an habitual offender. That's different and --

QUESTION: Nonetheless, I take it you don't equate the term "punishment" as used in the Eighth Amendment with the normal context of the word "sentence" independent of parole possibilities?

MR. BECKER: I'm sorry, Your Honor, I don't --

QUESTION: Well, the Eighth Amendment forbids cruel and unusual punishment, as we all know. You are not saying I take it -- and I understood that Mr. Atlas was not saying either -- that that means you look only to the

sentence and not at all to the possibilities of parole, where you are dealing with a life or less sentence rather than death sentence with its irreversable aspect.

MR. BECKER: We think that long sentences, even very long sentences, if it is the expressed societal judgment of the state for various crimes, that that is entitled to the deference in federal court, and it might be that a sentence could be so unusual and so bizarre and so unsupported by logic that it could be possible that that would fall within the punishment of cruel and unusual punishment clause or the meaning of that word, but ordinarily that it would not, and clearly this is such a case where it does not. It is a case -- we feel that it is quite easy, as Judge Thornberry said in the court below, and quite openly I believe, that perhaps if he were the prosecutor he wouldn't have sought to obtain this indictment, if he were a grand juror he wouldn't have approved it, if he were a state legislator he would vote to repeal it, but he holds none of those offices.

QUESTION: He went on to say, as I remember it, that as long as there is a rational basis for the sentencing scheme, that passes the Eighth Amendment standard. Do you agree with that test?

MR. BECKER: Well, I do agree with that test, Your Honor. I don't think -- I think that the purpose, the

underlying purpose of the statute -- now, actually the -- you know, the petitioner makes the point that you can always make a rational basis explanation for any punishment, even death for a minor offense as a rational basis in the sense that it will prevent recurrence of that offense again. But we think it must have a rational basis supported by civilized thought that is thinkable in our system --

QUESTION: How do you measure civilized thought? He says you look at what 49 other states do and you say you don't have to do that, I gather.

MR. BECKER: I look at what the legislature has done and the apparent purposes for which they have done it. I attempt to view the reality of a situation. Now, if the State of Texas says -- has chosen to make these offenses felonies, there is a strong presumption upon the validity of that judgment, that presumption in connection with the realities of the punishment --

QUESTION: But if we are looking at the real world, General Becker, would it really matter if they said each of these are a misdemeanor but nevertheless we shall apply our habitual offender statute to three misdemeanor convictions of this kind?

MR. BECKER: Well --

QUESTION: Would that be equally valid?

MR. BECKER: Well, it is --

QUESTION: I don't think the label of felony can be determinative, can it?

MR. BECKER: No, Your Honor, I don't believe that the label felony is determinative, no. I think that what he has done is determinative, according to how that state has chosen, the consequences it has chosen to affix to what he has done. And I think it is patently obvious that a man that has a criminal record as Mr. Rummel has cannot be seriously contended that he is outside the constitutional ambit of what is permissible. I think the mere fact that even Texas may be more severe than other jurisdictions, there is no constitutional principle that I know of that federal courts should go around and look to the most severe statute in every jurisdiction has one -- he mentioned theft of goats in Texas -- we used to have a theft of edible meat statute back from the depression days with the ranchers, it was tied in, in other words, to a particular social situation in Texas, it was a very serious offense. And I think that the state is entitled to make those kinds of things offenses, and I didn't know -- and I am not aware and I don't believe that the Constitution says -- we look for the strongest statutes that there are, the most severe criminal ones, and we throw them all out because they are the most severe. I think that is the fallacy in his argument. He may show that we are more

severe in the punishment we inflict, but I don't believe that that is a basis for throwing out the punishment. It must be so much more severe, so much more severe that it appears to be without a sufficient rational basis that it shocks the conscience, if you will, language that has been frequently thrown around or expressed I should say in this context before, and that that is true here.

QUESTION: Mr. Becker, you spoke earlier and just repeated now that there is nothing automatic about this recidivist statute, that it depends first of all upon the discretion of the prosecuting attorney whether or not to ask for an indictment under it, and I suppose that is his absolute and uncontrolled discretion, principle discretion, that is there is no statutory criteria to guide him, right?

MR. BECKER: That is correct. It is --

QUESTION: Then you said that it also depends upon the discretion of the grand jury, that even if he asks for such an indictment, the grand jury must decide that this is a proper case in which to return one. Is the grand jury given any guidance?

MR. BECKER: No, Your Honor, not from the legislature.

QUESTION: From anybody?

MR. BECKER: Well --

QUESTION: How about the prosecutor?

MR. BECKER: From their own consciences is their guidance.

QUESTION: It is uncontrolled, uncontrollable and standardless discretion, is that it?

MR. BECKER: There are no formal guidelines.

QUESTION: And they are of course unappealable.

MR. BECKER: That is correct.

QUESTION: One would think the grand jury would be inclined to indict when they are shown all of the necessary elements of Texas recidivism statutes --

QUESTION: They have only the prosecutor and no defense counsel in front of them.

MR. BECKER: Yes, that's correct, Your Honor. I don't have any statistics on how often they agree with the prosecutor. I suggest that it is most of the time. I suggest that in smaller communities perhaps they may be more independent than in larger ones, perhaps the reverse is the case. I don't really know. I don't think that it is totally correct to say that the prosecutor's discretion is unfettered. We have existing protections for prosecutors who are seeking indictments, whether habitual or any other kind, for impermissible --

QUESTION: That is, the next time they run theu won't be elected.

MR. BECKER: No, Your Honor, that is ultimately but even judicially he cannot make a decision of that sort on an impermissible basis, a racial basis --

QUESTION: Well, what is an impermissible basis under the statute?

MR. BECKER: Well, under the statute -- I am talking about existing case law, prior case law of this Court, Your Honor, and Texas courts, not under the statute. I am talking about invidious or some other sort of discrimination. I am talking about a prosecutor who is persecuting a particular individual with the habitual offender statute and not in the sound exercise of his judgment. There are case law authority given in those kinds of protections. There is at the moment no other formal kind of protection that he has, as Your Honor has pointed out.

QUESTION: And the grand jury the same?

MR. BECKER: And the grand-jury the same, yes. That's right. Now, of course, we say that remedial measures are peculiarly province of the legislature. Now, in the Spencer case in 1967, when it was before this Court, as the Court knows, by the time that the case got to this Court the Texas legislature had already enacted a statute that had done away with the single proceeding that was a problem in the case and had instituted the bifurcated proceeding where the jury would not be told until the

sentencing phase of trial about any prior convictions that the defendant had, so remedial legislation had taken place. I am aware of remedial legislation in this case, but it is not relevant, of course, to the outcome here. It may exist. It is being undertaken by those persons that we feel are the proper ones to diagnose the problem and if there are some results that are impermissible or even if the results are generally all right but, as Mr. Justice Stewart has suggested, that better guidelines should be instituted. Perhaps the Texas Court of Criminal Appeals should review sentence length, as some courts do in some systems. There are a lot of systems that perhaps might be better, and we don't debate and don't feel that it is our burden to show that ours is the wisest system among all the states, but only that is permissible under the Constitution and that this Court is not the proper forum for correcting every apparent inequity in the sentencing process.

Now, there is one other -- the Court knows that there is an alternate prayer for relief at the conclusion of our brief, and just before I close I would like to emphasize it, and that is that if the Court is not convinced that there is a facial inequity in this case, if it appears under the Court's view that the sentence is grossly disproportionate for what has been shown -- we point out to

the Court that there never has been a hearing in this case in either state or federal court. Now, Judge Borman, dissenting in Hart v. Coiner, the famous Fourth Circuit case that preceded this one, stated that it should not be beyond the ordinary knowledge of judges who had been prosecutors and other kinds of attorneys before they were judges that the habitual offender statute is rarely enacted for a person who only has the offenses that is necessary to formally allege and prove.

Now, if there is any doubt at all about the existence of that fact in this case, we pray for a remand to the District Court where we are entitled we believe to show the full extent of Mr. Rummel's criminal history. We cannot believe that if it were shown that he had committed sufficient offenses to show to the agreement of everyone that he is a career criminal in an ordinary understanding of that word, that we would not be entitled to embark upon a course of conduct that we have undertaken.

There was in this case no objection at his trial to the punishment against him. If there had been, the record might well be different. If Mr. Rummel's attorney had stood up and said we think life for these crimes is too much, the prosecutor might well at that point have stood up and said, very well, Your Honor, we would like to hear the rest of it, we will be glad to proceed. We didn't have that

opportunity.

In the Federal District Court below, we made a motion to dismiss along with our answer. Under the case law that is all we needed to do, we felt. Ultimately we were proved correct. In essence, we think it is quite similar to a motion to dismiss for failure to state a claim.

If the case is going to go off on proportionality to the benefit of Mr. Rummel, the state would pray that it go off upon the full basis that we have a full opportunity to show exactly his history and his circumstances.

QUESTION: General Becker, just to refresh my recollection about the Texas procedure, doesn't the statute require that the prior offenses be identified in the indictment?

MR. BECKER: It does, Your Honor.

QUESTION: Then how would it have been proper during the trial itself to introduce evidence of offenses not described in the indictment?

MR. BECKER: There is no requirement --

QUESTION: If the judge doesn't have any discretion, once you proved what you did prove he has an automatic duty to impose the life sentence.

MR. BECKER: Quite so, but there is still nothing in Texas law to prevent the introduction of other offenses

and his other criminal record. The Texas law precludes the use of those other convictions not pleaded in the indictment for the procedural sequence which results in enhancement, but they can still be introduced. And I suppose that there are cases that where a defendant might take the stand and in effect might urge, in spite of the prior convictions, that the jury or the judge, the sentencing authority effect a nullification, as it is called, that is refuse to find that the prior felonies are true in order to avoid a life sentence.

QUESTION: The material that you are talking about, was that before the court?

MR. BECKER: It was --

QUESTION: It was not, was it?

MR. BECKER: No, Your Honor.

QUESTION: Well, what are you arguing it here for?

MR. BECKER: Well, it was --

QUESTION: What right do you have to argue it here?

MR. BECKER: Your Honor, all I argue here is that the court is entitled to presume or that there may well have been other circumstances that were never shown.

QUESTION: Where do you get that? Where can we presume that a man has committed offenses? I thought a

man was presumed to be innocent.

MR. BECKER: Yes, Your Honor. I am not asking that the Court presume that he has committed offenses. I am asking --

QUESTION: What do you want us to presume?

MR. BECKER: I am asking that the Court, as Judge Borman did in the Fourth Circuit in his dissent, note from their experience that it is possible that there were other things known to the prosecutor, that because a statute says A and B are all that is required, that there may be other things and that we would be able to show the other things. We are not asking for a presumption. We are asking to be able to meet our burden of proof.

QUESTION: General Becker, just to refresh my recollection, Judge Clark's initial panel opinion, wasn't the relief that he granted that you vacate the mandatory sentence and send it back for resentencing?

MR. BECKER: I believe so.

QUESTION: On resentencing hearing, would it not have been open to the state to put in whatever would be relevant for resentencing, including these additional convictions?

MR. BECKER: Well --

QUESTION: Aren't you already protected on this?

MR. BECKER: I don't know, Your Honor. I think

the matter is unclear as to what would happen on remand, and it would be up to the Texas courts. I don't know if there would be any case on the point that would explain it. You see, in the meantime --

QUESTION: Normally in a sentencing hearing in Texas you can put in all sorts of prior convictions.

MR. BECKER: Yes, that's right. That's true.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Atlas, do you have anything further?

ORAL ARGUMENT OF SCOTT J. ATLAS, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. ATLAS: Mr. Chief Justice, and may it please the Court --

QUESTION: Mr. Atlas, could I ask if we agree with you, what should be our disposition of this case?

MR. ATLAS: Your Honor, the proper disposition of the case we think is to order Rummel's immediate release. I have a section in my brief dealing with the very clear Texas law on the proper procedure in Texas, but we have no disagreement if it chooses to remand back --

QUESTION: Not to --

MR. ATLAS: -- to the District Court to find what Texas law properly would allow.

QUESTION: You mean the state shouldn't be ordered

just to resentence?

MR. ATLAS: Your Honor, under Texas law as it happens we think Rummel is entitled to a completely new trial and for various coincidences we think he is entitled to relief.

QUESTION: Let's assume that weren't true. Assume that all he was entitled to was resentencing.

MR. ATLAS: Yes, Your Honor, we would argue in that instance that the state would not --

QUESTION: What should we say -- should we just say resentence, this is too much? Should we say how much should -- should we give them any guidance as to how much enhancement, if any, is permissible, or do you think any enhancement is permissible in this case?

MR. ATLAS: Your Honor, it is possible that the state could enhance under the two-time offender statute of Texas and give Mr. Rummel an automatic ten-year sentence which he has already served.

QUESTION: Well, what about a three-timer?

MR. ATLAS: Your Honor, a three-time is only permitted under Texas to be given a life sentence. There is nothing else authorized by statute. Either they can give him the two-timer or sentence him for his last offense, nothing else. For the state to make these rather last-minute outside the record accusations is not only irrelevant

because they could not be admitted in a habitual offender trial because they are irrelevant, none are potentially useful for enhancement, none frankly have ever been proven and they are just accusations at this point. The state wants to have it both ways. The statute --

QUESTION: You suggest that even if the Court in its wisdom thought that 30 years would be a good sentence in this case --

MR. ATLAS: Your Honor --

QUESTION: -- that Texas couldn't under its law impose 30 years?

MR. ATLAS: Your Honor, under its current law it could not. It could pass a new law that mandated or allowed it, but it has not gotten. And the alternatives to the state are to give the automatic life sentence, if that is invalid then find another statute justifying the sentence. They can give as much as they are allowed to under the third offense, as much as they are allowed to for asecond felony, but not something not allowed by statute of Texas.

QUESTION: You don't think Texas could be ordered to treat him as though he had a 30-year sentence?

MR. ATLAS: No, Your Honor, we think not because that would be judicial legislation I think. The --

QUESTION: Well, what kind of a standard do you think we ought to have --

MR. ATLAS: Your Honor, the standard ought to be --

QUESTION: You suggest some kinds of nonviolent crimes would be quite all right, and yet --

MR. ATLAS: Your Honor, the standard ought to be -- and I think the Court could enact a fairly narrow standard if it chose --

QUESTION: Enact?

MR. ATLAS: Pardon me, I misspoke and as badly as I have ever done. The point is if the judge or jury had given the sentence based on some sentencing discretion, this Court need not review it. If the crimes involved some element of violence or some of these strong social interests that we have talked about not present here, then the Court need not review it.

QUESTION: So you say our standard should be violent crimes generally but there are some other strong social interests.

MR. ATLAS: Yes, Your Honor, I think --

QUESTION: And we should go on just on an ad hoc basis from then on to decide what is a strong social interest?

MR. ATLAS: Your Honor, fortunately from all the research we have done, we found almost no cases where the Court would ever have a case that --

QUESTION: Well, could you help us by suggesting

some -- how do we identify one of those when we run into one?

MR. ATLAS: Your Honor, fortunately this Court has never had one nor has any other court that has ever dealt with the problem. I think the drug offenses are probably a perfect example of that, because of the problems that legislature normally deal with and make fact-findings about in the legislative process explicitly or implicitly before passing those statutes.

The federalism problem that we are talking about in this case and the potential so-called floodgate problems that the state refers to in its brief are non-existent. The Fourth Circuit decided in '73 and it has not had a floodgate problem. Courts in states that have constitutional provisions allowing review of statutes have reviewed statutes and sentences for excessiveness and have not had this floodgate problem. As a practical matter, this Court will never have to face the problem again. It has been 200 years and they have only had one other case argued before.

As to the parole argument, the state has argued that the possibility of parole ought to be considered. Ironically enough, Mr. Rummel, if he maintains good time credit, will become eligible on January 1, 1984. The --

QUESTION: You do agree, Mr. Atlas, that the term "punishment" in the Eighth Amendment means more than just

sentence, that parole possibilities under certain circumstances can be taken into consideration?

MR. ATLAS: Your Honor, at this point I cannot conceive of a circumstance under which I would support the principle that parole consideration ought to be received unless there is some statutory entitlement, using this Court's language, that would give Mr. Rummel some constitutionally protected rights to be allowed to challenge the parole board's denial of parole on whatever basis if the actual sentence that he served exceeded whatever would be a reasonable one.

QUESTION: So you say cruel and unusual punishment means cruel and unusual sentence?

MR. ATLAS: Among other things, Your Honor. Sentence is one part of the mosaic of punishment, only one. There are obviously others.

QUESTION: Well, maybe a life sentence for somebody who behaved himself in the penitentiary and showed every sign of rehabilitation and adjustment as a good citizen for these offenses might be cruel and unusual punishment, whereas a sentence of ten to twelve years upon such a person might not be.

MR. ATLAS: Your Honor, if a life sentence is unconstitutional for three petty offenses, it is unconstitutional for three petty offenses and a surly attitude.

QUESTION: I understand that is your submission, but I would think that would be not an open and shut question.

MR. ATLAS: Your Honor, if the legislature had sentenced Mr. Rummel to the thumb screws but it provided that they bring him down if he behaved while on the rack, we think this Court would not approve the sentence.

The state argues we ought to view this case in reality. As Judge Clark said in the Fifth Circuit en banc dissent, Mr. Rummel's reality is that he has a life sentence with no guarantee or rights or expectations legitimately that he will ever get out.

One other criterion that the Court has discussed in its other cases, including Coker, is to examine the types of punishments that Texas provides for other offenses. There is only one other offense in the State of Texas for which one receives an automatic life sentence and that is capital murder. One can commit two murders in Texas and not receive an automatic life sentence although presumably one would receive the equivalent to one by a judge or jury. And if Rummel had received a life sentence by a judge or jury, I wouldn't be here, I would have a much more difficult case. But as we know as a practical matter, no judge or jury would have given Rummel a life sentence in this case anywhere in this country, and that is precisely one of the

factors and one of the criteria upon which this Court ought to base its Eighth Amendment decision.

QUESTION: Well, how do we know that as a factor? The state legislature did.

MR. ATLAS: Your Honor, the state legislature in 1856 did not say that three petty property offenses ought to bring a life sentence. Admittedly, it is covered by the statute, and I would not want to argue that the legislature did not intend it.

QUESTION: Right.

MR. ATLAS: But we think there is only so -- in any constitutional decision, this Court is being asked in some sense to pass on the constitutionality and indirectly on the wisdom of the state in passing such a statute. That is what the Supreme Court sits for.

QUESTION: Not to pass on the wisdom of any state statute --

MR. ATLAS: No, Your Honor, but only to the extent that a statute exceeds the constitutional limits, and when it does the statute cannot stand.

The jury in this case is in Texas under state law knows absolutely nothing about the life sentence that the result of its conviction will bring. It is not clear that the grand jury does.

QUESTION: Well, I suppose you would -- if the

prosecutor here had simply put in the indictment six or seven crimes, even though petty crimes, if there were that many, you wouldn't be here?

MR. ATLAS: Yes, Your Honor, because the statute says --

QUESTION: Yes, would you be here or not?

MR. ATLAS: Yes, sir, I would be here, Your Honor, because the statute says three felonies, automatic life. The state cannot have its cake and eat it, too. We had --

QUESTION: Seven are --

MR. ATLAS: Yes, Your Honor, but the state says three, any others are irrelevant. The statute says the jury and judge cannot consider extraneous circumstances when passing on the sentence because upon the proof of the third the sentence is automatic. If we can't bring in extraneous circumstances and all the criteria and all the other facts at the time of sentencing, then the state can't either.

QUESTION: I will put it to you this way: Suppose the judges in the Texas courts construed the law differently than you do, the Texas law, that you may put seven in the indictment.

MR. ATLAS: Yes, Your Honor?

QUESTION: Then if there is a conviction, would you be here then?

MR. ATLAS: Your Honor, if the statute mandated

life sentence upon seven, I would probably not be here because I would lose and we cannot forget that under these circumstances, after all of the criteria have been discussed, we are talking about a human being who was given a life sentence for three petty offenses.

Thank you.

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

(Whereupon, at 11:05 o'clock a.m., the case in the above-entitled matter was submitted.)

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