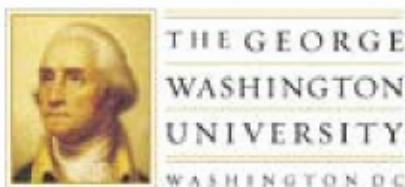


The Burger Court Opinion Writing Database

Rummel v. Estelle

445 U.S. 263 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



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

CHAMBERS OF
THE CHIEF JUSTICE

March 11, 1980

RE: 78-6386 - Rummel v. Estelle

Dear Bill:

I join.

Regards,



Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 22, 1980

MEMORANDUM TO: Mr. Justice Marshall
Mr. Justice Stevens

Re: No. 78-6386 - Rummel v. Estelle

Lewis has agreed to undertake the dissent in this case.

Sincerely,

Bill

cc: Mr. Justice Powell

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

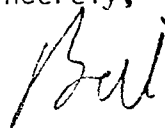
February 22, 1980

RE: No. 78-6386 Rummel v. Estelle

Dear Lewis:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill", written in dark ink.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington 25. D. C.

CHAMBERS OF
JUSTICE POTTER STEWART

February 25, 1980

Re: No. 78-6386, Rummel v. Estelle

Dear Bill,

I am glad to join your opinion for
the Court. I may or may not file the
enclosed "snapper."

Sincerely yours,

Mr. Justice Rehnquist

Copies to the Conference

P.S.
✓

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-6386

<p>William James Rummel, Petitioner, v. W. J. Estelle, Jr., Director, Texas Department of Corrections.</p>	}	<p>On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.</p>
--	---	---

[February —, 1980]

MR. JUSTICE STEWART, concurring.

I am moved to repeat the substance of what I had to say on another occasion about the recidivist legislation of Texas:

"If the Constitution gave me a roving commission to impose upon the criminal courts of Texas my own notions of enlightened policy, I would not join the Court's opinion. For it is clear to me that the recidivist procedures adopted in recent years by many other States . . . are far superior to those utilized [here]. But the question for decision is not whether we applaud or even whether we personally approve the procedures followed in [this case]. The question is whether those procedures fall below the minimum level the [Constitution] will tolerate. Upon that question I am constrained to join the opinion and judgment of the Court." *Spencer v. Texas*, 385 U. S. 554, 569 (concurring opinion).

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Stevens
Mr. Justice O'Connor
Mr. Justice Souter
Mr. Justice Ginsburg

From: Mr. Justice Stewart

Circulated: 14 MAR 1980

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-6386

William James Rummel, Petitioner, v. W. J. Estelle, Jr., Director, Texas Department of Corrections.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
---	---	---

[March —, 1980]

MR. JUSTICE STEWART, concurring.

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"If the Constitution gave me a roving commission to impose upon the criminal courts of Texas my own notions of enlightened policy, I would not join the Court's opinion. For it is clear to me that the recidivist procedures adopted in recent years by many other States . . . are far superior to those utilized [here]. But the question for decision is not whether we applaud or even whether we personally approve the procedures followed in [this case]. The question is whether those procedures fall below the minimum level the [Constitution] will tolerate. Upon that question I am constrained to join the opinion and judgment of the Court." *Spencer v. Texas*, 385 U. S. 554, 569 (concurring opinion).

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

CHAMBERS OF
JUSTICE BYRON R. WHITE


February 19, 1980

Re: No. 78-6386 - Rummel v. Estelle

Dear Bill,

Please join me.

Sincerely yours,



Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 21, 1980

Re: No. 78-6386 - Rummel v. Estelle

Dear Lewis:

Please join me in your dissent.

Sincerely,

Jm.
T.M.

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 10, 1980

Re: No. 78-6386 - Rummel v. Estelle

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

January 18, 1980

78-6386 Rummel v. Estelle

Dear Bill:

As you are the senior in dissent in this case, I write to say that I will be happy to draft a dissent for the four of us if you wish.

In view of the interest in the case, it may be that several of us will wish to write. I merely want you to know of my availability.

Sincerely,

Mr. Justice Brennan

lfp/ss

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: FEB 20 1980

Recirculated: _____

2-20-80

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-6386

William James Rummel,
Petitioner,
v.
W. J. Estelle, Jr., Director, Texas
Department of Corrections.

On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

[February —, 1980]

MR. JUSTICE POWELL, dissenting.

The question in this case is whether petitioner was subjected to cruel and unusual punishment in contravention of the Eighth Amendment, made applicable to the States by the Fourteenth Amendment, when he received a mandatory life sentence upon his conviction for a third property-related felony. Today, the Court holds that petitioner has not been punished unconstitutionally. I dissent.

I

The facts are simply stated. In 1964, petitioner was convicted for the felony of presenting a credit card with intent to defraud another of approximately \$80. In 1969, he was convicted for the felony of passing a forged check with a face value of \$28.36. In 1973, petitioner accepted payment in return for his promise to repair an air conditioner. The air conditioner was never repaired, and petitioner was indicated for the felony offense of obtaining \$120.75 under false pretenses. He was also charged with being an habitual offender. The Texas habitual offender statute provides a mandatory life sentence for any person convicted of three felonies. See Tex. Penal Code Ann. Art 63 (Vernon 1925), as amended, Tex. Penal Code § 12.42 (Vernon 1974). Petitioner was convicted of the third felony and, after the State proved the existence of the two earlier felony convictions, was sentenced to mandatory life imprisonment.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

2-25-80

Circulated: _____

2nd DRAFT

Recirculated: FEB 25 1980

SUPREME COURT OF THE UNITED STATES

No. 78-6386

William James Rummel,
Petitioner,
v.
W. J. Estelle, Jr., Director, Texas
Department of Corrections.

On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

[February —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN,
MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join,
dissenting.

The question in this case is whether petitioner was subjected to cruel and unusual punishment in contravention of the Eighth Amendment, made applicable to the States by the Fourteenth Amendment, when he received a mandatory life sentence upon his conviction for a third property-related felony. Today, the Court holds that petitioner has not been punished unconstitutionally. I dissent.

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FNs 7-24 Renumbered

5,622

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

2-29-80

Circulated: _____

3rd DRAFT

Recirculated: FEB 29 1980

SUPREME COURT OF THE UNITED STATES

No. 78-6386

William James Rummel,
Petitioner,

W. J. Estelle, Jr., Director, Texas
Department of Corrections.

On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

[February —, 1980]

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

The question in this case is whether petitioner was subjected to cruel and unusual punishment in contravention of the Eighth Amendment, made applicable to the States by the Fourteenth Amendment, when he received a mandatory life sentence upon his conviction for a third property-related felony. Today, the Court holds that petitioner has not been punished unconstitutionally. I dissent.

I

The facts are simply stated. In 1964, petitioner was convicted for the felony of presenting a credit card with intent to defraud another of approximately \$80. In 1969, he was convicted for the felony of passing a forged check with a face value of \$28.36. In 1973, petitioner accepted payment in return for his promise to repair an air conditioner. The air conditioner was never repaired, and petitioner was indicated for the felony offense of obtaining \$120.75 under false pretenses. He was also charged with being an habitual offender. The Texas habitual offender statute provides a mandatory life sentence for any person convicted of three felonies. See Tex. Penal Code Ann. Art 63 (Vernon 1925), as amended, Tex. Penal Code § 12.42 (Vernon 1974). Petitioner was convicted of the third felony and, after the State proved the existence of

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

March 14, 1980

78-6386 Rummel v. Estelle

MEMORANDUM TO THE CONFERENCE:

The attached copy of page 17 of my dissent in this case shows a change that I have requested the printer to make.

It does not change the sense of the paragraph, and Bill Rehnquist - who has seen the change - agrees.

I also am making two or three minor stylistic changes that also have been cleared with Bill.

L. F. P.
L.F.P., Jr.

SS

RUMMEL v. ESTELLE

twice. Compare §§ 12.42 (a), 31.07 with § 12.42 (b); § 21.02 (1979 Supp.). Such a statutory scheme demonstrates that the state legislature has attempted to choose a punishment in proportion to the nature and number of offenses committed.

If, as Texas recognizes when it sentences two-time offenders, ~~the justification for punishment rests upon the seriousness and the number of offenses~~, imposition of the same punishment upon persons who have committed completely different types of crimes raises serious doubts about the proportionality of the sentence ~~against~~ the least harmful offender. Of course, the Constitution does not bar mandatory sentences. I merely note that the operation of the Texas habitual offender system raises a further question about the extent to which a mandatory life sentence, no doubt a suitable sentence for a person who has committed three violent crimes, also is a proportionate punishment for a person who has committed the three crimes involved in this case.

D

Examination of the objective factors traditionally employed by the Court to assess the proportionality of a sentence demonstrates that petitioner suffers a cruel and unusual punishment. Petitioner has been sentenced to the penultimate criminal penalty because he committed three offenses defrauding others of about \$230. The nature of the crimes does not suggest that petitioner ever engaged in conduct that threatened another's person, involved a trespass or endangered in any way the peace of society. A comparison of the sentence petitioner received with the sentences provided by habitual offender statutes of other American jurisdictions demonstrates that only two other States authorize the same punishment. A comparison of petitioner to other criminals sentenced in Texas shows that he has been punished for three property-related offenses with a harsher sentence than that given first-time offenders or two-time offenders convicted of far more serious offenses. The Texas system assumes that all three-time of-

applied to

the amount of punishment
should be
with the
severity of
the offense
committed
a three-
times rec-
the same
sentence.
In my
view,

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

14 FEB 1980

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-6386

William James Rummel, Petitioner, v. W. J. Estelle, Jr., Director, Texas Department of Corrections.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
---	---	---

[February —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Williams James Rummel is presently serving a life sentence imposed by the State of Texas in 1973 under its "recidivist statute," formerly Art. 63 of its Penal Code, which provided that "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."¹ On January 19, 1976, Rummel sought a writ of habeas corpus in the United States District Court for the Western District of Texas, arguing that life imprisonment was "grossly disproportionate" to the three felonies that formed the predicate for his sentence and that therefore the sentence violated the ban on cruel and unusual punishments of the Eighth and Fourteenth Amendments. The District Court and the United States Court of Appeals for the Fifth Circuit rejected Rummel's claim, finding no unconstitutional disproportionality. We granted certiorari and now affirm.

I

In 1964 the State of Texas charged Rummel with fraudulent use of a credit card to obtain \$80 worth of goods or

¹ With minor revisions, this article has since been recodified as Texas Penal Code § 12.42 (d) (1974).

Changes throughout

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 20 FEB 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-6386

William James Rummel, Petitioner, v. W. J. Estelle, Jr., Director, Texas Department of Corrections.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
---	---	---

[February —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner William James Rummel is presently serving a life sentence imposed by the State of Texas in 1973 under its "recidivist statute," formerly Art. 63 of its Penal Code, which provided that "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."¹ On January 19, 1976, Rummel sought a writ of habeas corpus in the United States District Court for the Western District of Texas, arguing that life imprisonment was "grossly disproportionate" to the three felonies that formed the predicate for his sentence and that therefore the sentence violated the ban on cruel and unusual punishments of the Eighth and Fourteenth Amendments. The District Court and the United States Court of Appeals for the Fifth Circuit rejected Rummel's claim, finding no unconstitutional disproportionality. We granted certiorari and now affirm.

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In 1964 the State of Texas charged Rummel with fraudulent use of a credit card to obtain \$80 worth of goods or

¹ With minor revisions, this article has since been recodified as Texas Penal Code § 12.42 (d) (1974).

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 21, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 78-6386 Rummell v. Estelle

Since my second draft and Lewis's dissent circulated only yesterday, I am taking the liberty of circulating my only proposed response to Lewis in draft form without a full recirculation at this time. I propose to delete what is now footnote 27 and to add a new footnote to go at the end of the paragraph ending on page 18 of my presently circulated second draft reading as follows:

The dissent draws some support for its belief that Rummel's sentence is unconstitutional by comparing it with punishments imposed by Texas for crimes other than those committed by Rummel. Other crimes, of course, implicate other societal interests, making any such comparison inherently speculative. Embezzlement, dealing in "hard" drugs, and forgery, to name only three offenses, could be denominated "property related" offenses, and yet each can be viewed as an assault on unique societal values as defined by the political process. The notions embodied in the dissent that if the crime involved "violence", see post, page 11, fn. 11, a more severe penalty is warranted under objective standards simply will not wash, whether it be taken as a matter of morals, history, or law. Caesar's death at the hands of Brutus and his fellow conspirators was undoubtedly violent; the death of Hamlet's father at the hands of his brother, Claudius, by poison, was not. Yet there are few, if any states which do not punish just as severely murder by poison (or attempted murder by poison) as they do murder or attempted murder by stabbing. The highly placed executive who embezzles huge sums from a state saving and loan association, causing many shareholders of limited means to lose substantial parts of their savings, has committed a crime very different from a man who takes a smaller amount of money from the same savings and loan at the point of a gun. Yet rational people could disagree as to which

criminal merits harsher punishment. By the same token, a state cannot be required to treat persons who have committed three "minor" offenses less severely than persons who have committed one or two "more serious" offenses. If nothing else, the three-time offender's conduct supports inferences about his ability to conform with social norms that are quite different from possible inferences about first- or second-time offenders.

In short, the "seriousness" of an offense or a pattern of offenses in modern society is not a line, but a plane. Once the death penalty and other punishments different in kind from imprisonment have been put to one side, there remain no objective standards for judgment whether or not a life sentence imposed under a recidivist statute for several separate felony convictions not involving "violence" violates the cruel-and-unusual-punishment prohibition of the Eighth Amendment. As Mr. Justice Frankfurter noted for the Court in Gore v. United States, 357 U.S. 386, 393 (1958), "Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, . . . these are peculiarly questions of legislative policy."

Sincerely,



9-11-18-20
footnotes renumbered

✓
To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

3rd DRAFT

From: Mr. Justice Rehnquist

Circulated: _____
Filed: 22 FEB 1980

SUPREME COURT OF THE UNITED STATES

No. 78-6386

William James Rummel,
Petitioner,
v.
W. J. Estelle, Jr., Director, Texas
Department of Corrections.

On Writ of Certiorari to
the United States Court
of Appeals for the Fifth
Circuit.

[February —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner William James Rummel is presently serving a life sentence imposed by the State of Texas in 1973 under its "recidivist statute," formerly Art. 63 of its Penal Code, which provided that "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."¹ On January 19, 1976, Rummel sought a writ of habeas corpus in the United States District Court for the Western District of Texas, arguing that life imprisonment was "grossly disproportionate" to the three felonies that formed the predicate for his sentence and that therefore the sentence violated the ban on cruel and unusual punishments of the Eighth and Fourteenth Amendments. The District Court and the United States Court of Appeals for the Fifth Circuit rejected Rummel's claim, finding no unconstitutional disproportionality. We granted certiorari and now affirm.

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¹ With minor revisions, this article has since been recodified as Texas Penal Code § 12.42 (d) (1974).

P 9, 12, 15, 19
footnoted numbered

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 5 MAR 1980

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-6386

William James Rummel, Petitioner, v. W. J. Estelle, Jr., Director, Texas Department of Corrections.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
---	---	---

[February —, 1980]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner William James Rummel is presently serving a life sentence imposed by the State of Texas in 1973 under its "recidivist statute," formerly Art. 63 of its Penal Code, which provided that "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."¹ On January 19, 1976, Rummel sought a writ of habeas corpus in the United States District Court for the Western District of Texas, arguing that life imprisonment was "grossly disproportionate" to the three felonies that formed the predicate for his sentence and that therefore the sentence violated the ban on cruel and unusual punishments of the Eighth and Fourteenth Amendments. The District Court and the United States Court of Appeals for the Fifth Circuit rejected Rummel's claim, finding no unconstitutional disproportionality. We granted certiorari and now affirm.

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¹ With minor revisions, this article has since been recodified as Texas Penal Code § 12.42 (d) (1974).

HA

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 26, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 78-6386 Rummel v. Estelle

The only case being held for Rummel is Hutto v. Davis, No. 79-482.

This case arises out of the CA 4 and involves a sentence of 20 years imprisonment and a \$10,000 fine for selling three ounces of marijuana and a consecutive sentence of 20 years imprisonment and a \$10,000 fine for possessing six ounces of marijuana with intent to distribute.

The State of Virginia charged respondent with the above-mentioned offenses, each of which was punishable under then-extant Virginia law by a sentence of up to 40 years. The evidence at trial demonstrated that respondent had sold a government informant three ounces of marijuana and some other drugs knowing that these drugs were for use by inmates at a Virginia prison. A search of respondent's house conducted subsequent to the sale uncovered six ounces of marijuana and various drug paraphernalia. The jury convicted respondent on both counts and set his sentence at 20 years imprisonment and a \$10,000 fine for each offense. The trial judge, who knew from records not submitted to the jury that respondent had been convicted on a prior charge of drug distribution, entered judgment on that verdict and directed the sentences to be served consecutively.

After exhausting state remedies, respondent sought federal habeas. The DC found that the sentence imposed upon respondent was disproportionate to his offenses, relying heavily upon the analysis set forth in Hart v. Coiner, 483 F.2d 136 (CA 4 1973), cert denied, 415 U.S. 983 (1974). See 432 F.Supp. 444, 451-54 (W.D. Va. 1977).

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 21, 1980

Re: 78-6386 - Rummel v. Estelle

Dear Lewis:

Please add my name to your dissenting
opinion.

Respectfully,



Mr. Justice Powell

Copies to the Conference