

# The Burger Court Opinion Writing Database

## *Solem v. Helm*

463 U.S. 277 (1983)

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

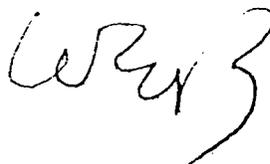
June 21, 1983

Re: 82-492 - Solem v. Helm

MEMORANDUM TO THE CONFERENCE:

Enclosed is a typescript early draft of my dissent in this case. Given the date, I send what is essentially a "work draft" so you can see the "direction."

Regards,

A handwritten signature in cursive script, appearing to read "WRB", followed by a large closing flourish.

To: Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: The Chief Justice

Circulated: JUN 21 1983

Recirculated: \_\_\_\_\_

1st Draft

No. 82-492, Solem v. Helm

CHIEF JUSTICE BURGER, dissenting.

The controlling law governing this case is crystal clear, but today the Court ~~blithely~~ blithely discards any concept of stare decisis, trespasses gravely on the authority of the States, and distorts the concept of proportionality of punishment by tearing it from its moorings in capital cases. Only two Terms ago, we held in Rummel v. Estelle, 445 U.S. 263 (1980), that a life sentence imposed after a third nonviolent felony conviction did not constitute cruel and unusual punishment under the Eighth Amendment. Today, the Court ignores its recent precedent and holds that a life sentence imposed after a seventh felony conviction does constitute cruel and unusual punishment under the Eighth Amendment. Moreover, I reject the fiction that all Helm's crimes were innocuous or nonviolent. Among his felonies were three burglaries and a third conviction for drunk driving. By comparison Rummel was a relatively

Printed copy - no changes

To: Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **The Chief Justice**

Circulated: 6/21/83

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-492

HERMAN SOLEM, WARDEN, PETITIONER *v.*  
JERRY BUCKLEY HELM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE EIGHTH CIRCUIT

[June —, 1983]

CHIEF JUSTICE BURGER, dissenting.

The controlling law governing this case is crystal clear, but today the Court blithely discards any concept of *stare decisis*, trespasses gravely on the authority of the States, and distorts the concept of proportionality of punishment by tearing it from its moorings in capital cases. Only two Terms ago, we held in *Rummel v. Estelle*, 445 U. S. 263 (1980), that a life sentence imposed after a third nonviolent felony conviction did not constitute cruel and unusual punishment under the Eighth Amendment. Today, the Court ignores its recent precedent and holds that a life sentence imposed after a *seventh* felony conviction does constitute cruel and unusual punishment under the Eighth Amendment. Moreover, I reject the fiction that all Helm's crimes were innocuous or non-violent. Among his felonies were three burglaries and a third conviction for drunk driving. By comparison Rummel was a relatively "model citizen." Although today's holding cannot rationally be reconciled with *Rummel*, the Court does not purport to overrule *Rummel*. I dissent.

I

A

The Court's starting premise is that the Eighth Amendment's Cruel and Unusual Punishments Clause "prohibits not

Justice Marshall  
 Justice Blackmun  
 Justice Powell  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

pp. 1-4, 6-14

From: **The Chief Justice**

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2d  
 1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-492

HERMAN SOLEM, WARDEN, PETITIONER *v.*  
 JERRY BUCKLEY HELM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE EIGHTH CIRCUIT

[June —, 1983]

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The controlling law governing this case is crystal clear, but today the Court blithely discards any concept of *stare decisis*, trespasses gravely on the authority of the States, and distorts the concept of proportionality of punishment by tearing it from its moorings in capital cases. Only two Terms ago, we held in *Rummel v. Estelle*, 445 U. S. 263 (1980), that a life sentence imposed after only a *third* nonviolent felony conviction did not constitute cruel and unusual punishment under the Eighth Amendment. Today, the Court ignores its recent precedent and holds that a life sentence imposed after a *seventh* felony conviction constitutes cruel and unusual punishment under the Eighth Amendment. Moreover, I reject the fiction that all Helm's crimes were innocuous or nonviolent. Among his felonies were three burglaries and a third conviction for drunk driving. By comparison Rummel was a relatively "model citizen." Although today's holding cannot rationally be reconciled with *Rummel*, the Court does not purport to overrule *Rummel*. I therefore dissent.

I

A

The Court's starting premise is that the Eighth Amend-

Stylistic Changes

Pp. 2, 4, 7-8, 10-15

Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

The Chief Justice

SUPREME COURT OF THE UNITED STATES 6/27/83

No. 82-492

HERMAN SOLEM, WARDEN, PETITIONER *v.*  
JERRY BUCKLEY HELM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 28, 1983]

CHIEF JUSTICE BURGER, with whom JUSTICE WHITE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The controlling law governing this case is crystal clear, but today the Court blithely discards any concept of *stare decisis*, trespasses gravely on the authority of the States, and distorts the concept of proportionality of punishment by tearing it from its moorings in capital cases. Only two Terms ago, we held in *Rummel v. Estelle*, 445 U. S. 263 (1980), that a life sentence imposed after only a *third* nonviolent felony conviction did not constitute cruel and unusual punishment under the Eighth Amendment. Today, the Court ignores its recent precedent and holds that a life sentence imposed after a *seventh* felony conviction constitutes cruel and unusual punishment under the Eighth Amendment. Moreover, I reject the fiction that all Helm's crimes were innocuous or non-violent. Among his felonies were three burglaries and a third conviction for drunk driving. By comparison Rummel was a relatively "model citizen." Although today's holding cannot rationally be reconciled with *Rummel*, the Court does not purport to overrule *Rummel*. I therefore dissent.

I

A

The Court's starting premise is that the Eighth Amend-

M

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

April 1, 1983

Re: No. 82-492 -- Solem v. Helm

Dear Chief,

Lewis has agreed to write the  
opinion for the Court in the above.

Sincerely,

*Bill*

The Chief Justice

Copies to the Conference

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

June 1, 1983

No. 82-492

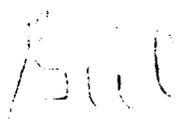
Solem v. Helm

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Dear Lewis,

I agree.

Sincerely,



Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 1, 1983

Re: 82-492 - Solem v. Helm

Dear Lewis,

I await the dissent.

Sincerely,



Justice Powell

Copies to the Conference

cpm

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

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 22, 1983

Re: 82-492 - Solem v. Helm

---

Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice

cc: The Conference

cpm

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

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 1, 1983

Re: No. 82-492-Solem v. Helm

Dear Lewis:

Please join me.

Sincerely,

*J.M.*

T.M.

Justice Powell

cc: The Conference

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

Make your  
changes meet  
HAB's request.

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

Go ahead & June 6, 1983  
print a 3rd Draft.

For call to HAB

Re: No. 82-492 - Solem v. Helm

& tell him

Dear Lewis:

I am certainly with you in the judgment in this case and may well be able to join your opinion.

→ I write to inquire whether you could see your way clear to omit the material concerning Ballew v. Georgia appearing on page 15. In fact, if you could omit the paragraph that begins on page 15 and concludes after the first five lines on page 16, and then mend the first sentence of the following paragraph on page 16, I think I could join your opinion in full. I may write a few words in separate concurrence, but this may depend on what the forthcoming dissent has to say.

Sincerely,

*Larry*

Justice Powell

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 8, 1983

Re: No. 82-492 - Solem v. Helm

Dear Lewis:

Please join me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath.

Justice Powell

cc: The Conference

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Powell**

Circulated: MAY 27 1983

Recirculated: \_\_\_\_\_

1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-492

**HERMAN SOLEM, WARDEN, PETITIONER v. JERRY  
 BUCKLEY HELM**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE EIGHTH CIRCUIT

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

I

By 1975 the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.<sup>1</sup> In 1972

<sup>1</sup>In 1969 third-degree burglary was defined in at least two sections of the South Dakota criminal code:

"A person breaking into any dwelling house in the nighttime with intent to commit a crime but under such circumstances as do not constitute burglary in the first degree, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. § 22-32-8 (1967) (repealed 1976).

"A person breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof, or any building or part of any building, booth, tent, railroad car, vessel, vehicle as defined in § 32-14-1, or any structure or erection in which any property is kept, with intent to commit larceny or any felony, is guilty of burglary in the third degree." S.D. Comp. Laws Ann. § 22-32-9 (1967) (repealed 1976).

In 1964 and 1966 the third-degree burglary definition was essentially the same. See S.D. Code § 13.3703 (1939 ed., supp. 1960); 1965 S.D. Laws, ch. 32. Third-degree burglary was punishable by "imprisonment in the state penitentiary for any term not exceeding fifteen years." S.D. Comp. Laws Ann. § 22-32-10 (1967) (previously codified at S.D. Code § 13.3705(3)).

16: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall ✓  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

JUN 2 1983

changes on pp: 6-7, 10-11,  
 13-14, 17-20, 23

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: JUN 2 1983

2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-492

HERMAN SOLEM, WARDEN, PETITIONER v. JERRY  
 BUCKLEY HELM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE EIGHTH CIRCUIT

[June —, 1983]

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To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

JUN 7 1983

From: Justice Powell

Circulated: \_\_\_\_\_

Recirculated: JUN 7 1983

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-492

HERMAN SOLEM, WARDEN, PETITIONER *v.*  
 JERRY BUCKLEY HELM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE EIGHTH CIRCUIT

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

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By 1975 the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.<sup>1</sup> In 1972

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p. 15

To: The Chief Justice  
 Justice Brennan  
 Justice White  
 Justice Marshall ✓  
 Justice Blackmun  
 Justice Rehnquist  
 Justice Stevens  
 Justice O'Connor

From: **Justice Powell**

Circulated: \_\_\_\_\_

Recirculated: **JUN 27 1983**

pp. 1, 6-13, 16-26

4th DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 82-492

HERMAN SOLEM, WARDEN, PETITIONER *v.*  
 JERRY BUCKLEY HELM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
 APPEALS FOR THE EIGHTH CIRCUIT

[June —, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.

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By 1975 the State of South Dakota had convicted respondent Jerry Helm of six nonviolent felonies. In 1964, 1966, and 1969 Helm was convicted of third-degree burglary.<sup>1</sup> In 1972

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“A person breaking or entering at any time any building within the curtilage of a dwelling house but not forming a part thereof, or any building or part of any building, booth, tent, railroad car, vessel, vehicle as defined in § 32-14-1, or any structure or erection in which any property is kept, with intent to commit larceny or any felony, is guilty of burglary in the third degree.” S. D. Comp. Laws Ann. § 22-32-9 (1967) (repealed 1976).

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HAB

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

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

June 27, 1983

MEMORANDUM TO THE CONFERENCE

Case Held for No. 82-492, Solem v. Helm

No. 82-6370, Marrero v. Wainwright

This case raises two issues. Petitioner contends that his sentence was constitutionally disproportionate and that the District Court erred in denying habeas relief without holding an evidentiary hearing concerning the voluntariness of his confession. In my view, the latter contention is fact-bound and does not warrant review in this Court.

Petitioner was convicted of 12 counts of breaking and entering and 12 counts of grand larceny. The details of the crime are not entirely clear (there was no opinion in either the District Court or the Court of Appeals), but it appears that petitioner entered 12 rooms in a single motel and stole a television set from each room. Petitioner asserts--and the State does not dispute--that these "offenses involved no violence toward another person." He was sentenced to 240 years imprisonment: 15 years (the statutory maximum) on each count of breaking and entering and 5 years (the statutory maximum) on each count of grand larceny, the sentences to run consecutively. There is no indication of any prior criminal record.

The District Court (following a magistrate's report) denied habeas relief on the ground that Rummel v. Estelle, 445 U.S. 263 (1980), was dispositive. The magistrate read Rummel to hold "that the length of a sentence for a particular felony offense [is] a matter of legislative prerogative." As we indicate in our opinion in Helm, see n. 14, this was not the holding of the Rummel Court. Thus the District Court erred in applying the wrong legal standard.

There is not enough information before us to determine how this case should be decided under the correct legal standard. Whatever petitioner's age, 240 years is well beyond his life expectancy, so the sentence is effectively life imprisonment. There is no indication in the papers now before us whether he will be eligible for parole within a reasonable time. There is also no indication that petitioner is a recidivist; all 24 counts arose out of a single criminal transaction. These questions can be resolved on remand.

I will vote to GVR in light of Helm.

L.F.P., JR.

*L.F.P.*

LFP/vde

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

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

June 22, 1983

Re: No. 82-492 Solem v. Helm

Dear Chief:

Please join me in your dissent.

Sincerely,



The Chief Justice

cc: The Conference

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

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 31, 1983

Re: 82-492 - Solem v. Helm

Dear Lewis:

Please join me.

In the second sentence of footnote 14 on pages 10-11, I think you mean to refer only to a sentence of imprisonment; surely some forms of torture would be unconstitutional.

Respectfully,



Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

May 31, 1983

No. 82-492 Solem v. Helm

Dear Lewis,

I am sorry to part company on this,  
but I will await the dissent.

Sincerely,



Justice Powell

Copies to the Conference

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

May 31, 1983

No. 81-1985 DeBartolo Corp. v. NLRB

Dear John,

Please join me.

Sincerely,



Justice Stevens

Copies to the Conference

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

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

June 21, 1983

No. 82-492 Solem v. Helm

Dear Chief,

Please join me in your dissenting opinion.

Sincerely,

*Sandra*

The Chief Justice

Copies to the Conference