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Do the Crime, Do the Time, but the Time Should Fit the Crime: Does Mississippi Need Sentencing Guidelines - White v. State

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DO THE CRIME, DO THE TIME, BUT THE TIME SHOULD FIT THE CRIME: DOES MISSISSIPPI NEED SENTENCING GUIDELINES?

White v. State, 742 So. 2d 1126 (Miss. 1999)

Renee C. Harrison

I. INTRODUCTION

Until recently, the Supreme Court of Mississippi virtually refused to review a trial court's discretionary sentence as long as the sentence complied with the prescribed statutory limits.[1] In 1998, however, the supreme court remanded a non-death penalty case for resentencing when the defendant, after conviction by a jury on a first offense, was sentenced to the maximum sentence allowed by the statute.[2] Subsequently, in 1999, the supreme court and the Mississippi Court of Appeals issued opinions in three more cases—all from the same circuit court district—in which first-time offenders, convicted by a jury, were sentenced to the maximum sentence allowed by law.[3] Each case was remanded for resentencing because of the lack of findings on the record that would show why the defendants merited the maximum sentence on their conviction.

This Note will examine the supreme court's abrupt change of tone in the holding in *White v. State.*[4] The Mississippi Supreme Court warned trial court judges to exercise more discretion in sentencing first time offenders or face the possibility of sentencing guidelines to ensure proportionate sentences.[5]

II. FACTS AND PROCEDURAL HISTORY OF THE INSTANT CASE

Earnest White was indicted for the unlawful sale of cocaine within 1500 feet of a church, in violation of Mississippi Code section 41-29-139, after selling forty dollars worth of crack cocaine to a confidential informant.[6] On December 21, 1996, narcotics officers wired a confidential informant and supplied him with

1. *See* Davis v. State, 724 So. 2d 342 (Miss. 1998); Wallace v. State, 607 So. 2d 1184, 1188 (Miss. 1992); Fleming v. State, 604 So. 2d 280, 302 (Miss. 1992); Corley v. State, 536 So. 2d 1314, 1319 (Miss. 1988); Reed v. State, 536 So. 2d 1336, 1339 (Miss. 1988).

2. *Davis*, 724 So. 2d at 346. Melissa Davis was convicted by a jury for selling forty dollars of crack cocaine within 1500 feet of a church pursuant to MISS. CODE ANN. § 41-29-139 (1993). She was sentenced to thirty years, which was enhanced to sixty years pursuant to MISS. CODE ANN. § 41-29-142 (1993) for sale within 1500 feet of a church. The supreme court found the sentence violated the Eighth Amendment and was excessive in view of the fact that the trial judge made no findings in the record that would warrant the maximum sentence.

3. These cases were tried in Copiah County, Mississippi, by the same trial judge. *See* White v. State, 742 So. 2d 1126 (Miss. 1999); Lewis v. State, No. 97-KA-00460-COA (Miss. Ct. App. 1998); White v. State, No. 98-KP-00084-COA (Miss. Ct. App. Aug. 17, 1999), *withdrawn and superceded by*, No. 98-KP-00084-COA, 2000 WL 251741 (Miss. Ct. App. Mar. 7, 2000). Each defendant was convicted by a jury on a first offense under MISS. CODE ANN. § 41-29-139.

4. 742 So. 2d 1126 (Miss. 1999).

5. *Id.* at 1137.

6. *Id.* at 1129. *See* MISS. CODE ANN. § 41-29-139.

forty dollars to purchase crack cocaine from White.[7] The sale was videotaped and audiotaped by the narcotics officers.[8] After his meeting with White, the confidential informant returned to the police with crack cocaine in his possession.[9] The jury convicted White for the sale of cocaine, but White waived the jury trial on the enhancement provision of selling a controlled substance within 1500 feet of a church.[10] The trial judge found that the sale occurred within 1500 feet of a church and sentenced White to the maximum of sixty years in the custody of the Mississippi Department of Corrections.[11]

White's motion for judgment notwithstanding the verdict, challenging the sufficiency of the evidence supporting the jury verdict, was denied by the trial court.[12] Subsequently, White perfected his appeal to the supreme court, assigning five points in error. However, the only point in error that will be discussed in this Note is the fifth, entitled, "The Lower Court Acted Improperly by Sentencing Appellant to 60 Years in the Mississippi Department of Corrections."[13] In this assignment of error, White argued that the evidence was insufficient to support the charge that he sold a controlled substance within 1500 feet of a church.[14] Since he had waived the trial by jury on this issue, the supreme court relied upon the testimony of the narcotics officers that the farthest away the sale could have taken place was 1015 feet away from a church and found this assignment of error without merit.[15]

Most importantly, White asserted that his sentence of sixty years was extremely disproportionate to the crime committed and, in effect, amounted to a life sentence.[16] White was convicted under Mississippi Code section 41-29-139(b)(1), which provides that "a person may be sentenced to 'not more than 30 years . . . .'"[17] His sentence was "enhanced" to sixty years for sale of a controlled substance within 1500 feet of a church under the provisions of Mississippi Code section 41-29-142.[18]

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7. *White*, 742 So. 2d at 1130.
8. *Id.*
9. *Id.*
10. *Id.* at 1129.
11. *Id.* His thirty-year sentence was doubled pursuant to MISS. CODE ANN. § 41-29-142 (1993).
12. *Id.*
13. *Id.* White's other assigned errors included, "The Lower Court Erred in Not Granting a Judgment Notwithstanding the Verdict," "The Lower Court Erred in Not Granting a New Trial Based on Jury Misconduct and Failure to Release the Jury at a Reasonable Time," "The trial Court Erred by Allowing the Audio Tape and Illegal Substance into Evidence," and "The Trial Court Erred in its Ruling that an Opinion as to the Truth and Veracity of the Confidential Informant is not Admissible." The Mississippi Supreme Court found all of these errors meritless. *Id.*
14. *Id.* at 1134.
15. *Id.*
16. *Id.* at 1135. At the time of his conviction, White was thirty-four years old. If White serves the required eighty-five percent of his sentence under the "Truth in Sentencing Act," he will be eighty-five years old before he is eligible for release. *See* MISS. CODE ANN. § 47-5-138(5) (1993). Prior to the enactment of this provision, a prisoner sentenced to terms of thirty years or more was eligible for release after serving ten years. *See* MISS. CODE ANN. § 47-7-3 (1972). According to the Mississippi Department of Health, a 34-year-old black male living in Mississippi has a remaining life expectancy of 34.2 years. Mississippi State Dep't of Health, *Abridged Life Tables for Mississippi, 1989-1991, Table 3. Life Expectancy (in years), by Age and Race and Sex, 1989-91,* (visited Oct. 2, 1999) <http://www.msdh.state.ms.us/phs/lifetbl/ lifetbl.html>.
17. *White*, 742 So. 2d at 1135 (citing MISS. CODE ANN. § 41-29-139(b)(1) (1993)).
18. *Id. See* MISS. CODE ANN. § 41-29-142 (1993).

The State argued that White's case was similar to that of *Stromas v. State*.[19] Stromas was convicted of a single sale of seventy dollars of cocaine and convicted under Mississippi Code section 41-29-139(b)(1).[20] Since Stromas had been previously convicted of another drug offense, he received an enhanced sentence under Mississippi Code section 41-29-147.[21] The Mississippi Supreme Court rejected both the State's assertion that the case was similar to *Stromas* and White's argument that his sentence was "grossly disproportionate" to the crime charged.[22] However, finding at least some merit in his claim for relief from an excessive sentence, the supreme court remanded White's case for resentencing, based upon its holding in *Davis*,[23] and warned that

> [t]he Legislature wisely provided . . . a broad range of sentences to allow trial judges, *using their discretion*, to issue *appropriate sentences in each individual case*. It is incumbent upon those trial judges to use this power wisely . . . [or] los[e] this freedom through the adoption of sentencing guidelines as was done in the federal system.[24]

III. Background and History of the Law

A. Pre-Constitutional History of the Eighth Amendment

The United States Supreme Court's holding in *Solem v. Helm*[25] is the basis for many defendants' petitions for a proportionality review in state courts. In *Solem*, the Supreme Court examined at length the history of the concept of proportionality. The Court noted that the principle of proportionality of punishment to the crime is deeply rooted and frequently repeated in common-law jurisprudence.[26] The Court recalled that the Magna Carta devoted three chapters to the rule that fines may not be excessive and that this principle was repeated and extended in the First Statute of Westminster, 3 Edw. I, ch. 6 (1275).[27] In addition, the "English Bill of Rights repeated the principle of proportionality in language that was later adopted in . . . [our] Eighth Amendment: 'excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.'"[28] The Court found that "[a]lthough the precise scope of this provision is uncertain, it at least incorporated 'the longstanding principle of English law

19. 618 So. 2d 116 (1993).
20. *Id.* at 118. *See* Miss. Code Ann. § 41-29-139(b)(1) (1972).
21. *Stromas*, 618 So. 2d at 118. Stromas had a prior conviction for possession of marijuana. White had no prior convictions for drug or felony offenses. *White*, 742 So. 2d at 1136. *See* Miss. Code Ann. § 41-29-147 (1972).
22. *White*, 742 So. 2d at 1136.
23. *Id.* at 1137-38.
24. *Id.* (emphasis added).
25. 463 U.S. 277 (1983).
26. *Id.* at 284.
27. *Id.* at 284-85. "These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments. (citations omitted). When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional." (citations omitted). *Id.* at 285.
28. *Id.* at 285 (quoting 1 W. & M., sess. 2, ch. 2 (1689)).

that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged.'"[29]

The Court continued to trace the history of proportionate punishments by noting that the framers of our Constitution adopted the language of the English Bill of Rights and the principle of proportionality.[30] The Court found the fact that the framers modeled our Bill of Rights after the English version was proof that Americans intended to retain for themselves every protection afforded to the English, including freedom from excessive punishments.[31]

B. Early Eighth Amendment Proportionality Reviews

The Supreme Court then reviewed its own lengthy history with respect to the proportionality principle. Citing *Weems v. United States*,[32] the Court noted that '"it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'"[33] The *Weems* court endorsed the principle of proportionality as a constitutional standard and determined the sentence to be "cruel in its excess of imprisonment."[34]

Prior to the *Weems* decision, the Supreme Court had dismissed an appeal for lack of federal question—the Eighth Amendment did not apply to the States in 1892—in which the defendant was convicted of 307 counts of selling liquor without a license and sentenced to fifty-four years.[35] However, the dissent argued that this sentence was an Eighth Amendment violation and disproportionate to the offense for which the defendant was convicted.[36]

In 1962, the Court found a ninety-day sentence was excessive for a defendant convicted of being addicted to narcotics.[37] The Court explained that "imprisonment for ninety days is not, in the abstract, a punishment which is neither cruel or unusual . . . . But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold."[38] Furthermore, between 1958 and 1983, the Court continued to recognize the principle of proportionality in its holdings.[39]

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29. *Id.* (quoting R. PERRY, SOURCES OF OUR LIBERTIES 236 (1959); 4 W. BLACKSTONE, COMMENTARIES *16-19 (1769) (which, in condemning "punishments of unreasonable severity," uses "cruel" to mean severe or excessive)).

30. *Solem*, 463 U.S. at 285-86.

31. *Id.* at 286. Indeed, the Eighth Amendment was based directly on Art. I, § 9 of the Virginia Declaration of Rights (1776), which had adopted verbatim the language of the English Bill of Rights. George Mason, author of the Virginia Declaration of Rights wrote, "There can be no doubt that the Declaration of Rights guaranteed at least the liberties and privileges of Englishmen." *Id.* at n.10. "As Mason himself had explained: 'We claim Nothing but the Liberties & Privileges of Englishmen, in the same Degree, as if we had still continued among our Brethren in Great Britain . . . . We have received [these rights] from our Ancestors, and . . . we will transmit them, unimpaired to our Posterity.'" *Id.*

32. 217 U.S. 349 (1910). Weems had been convicted of falsifying a public document and sentenced to fifteen years of hard labor in chains and permanent civil disabilities. *Solem,* 463 U.S. at 287.

33. *Solem*, 463 U.S. at 287 (quoting *Weems*, 217 U.S. at 367).

34. *Solem*, 463 U.S. at 287 (quoting *Weems*, 217 U.S. at 372-73, 377).

35. *Solem*, 463 U.S. at 286 n.11. The case was O'Neil v. Vermont, 144 U.S. 323 (1892).

36. *Solem*, 463 U.S. at 287 n.11 (citing *O'Neil*, 144 U.S. at 339-40 (Field, J., dissenting)).

37. *Solem*, 463 U.S. at 287. The case was Robinson v. California, 370 U.S. 660 (1962).

38. *Solem*, 463 U.S. at 287 (quoting *Robinson*, 370 US. at 667).

39. *Id.* at 287 n.12. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 274, n.11 (1980); Hutto v. Finney, 437 U.S. 678, 685 (1978); Ingraham v. Wright, 430 U.S. 651, 667 (1977); Gregg v. Georgia, 428 U.S. 153, 171-72 (1976); Trop v. Dulles, 356 U.S. 86, 100 (1958).

C. Modern Era Proportionality Review

1. The *Solem* Majority Opinion.

Throughout the recent past, the Court has continued to apply the principle of proportionality not only in death penalty cases, but also in felonies and misdemeanors.[40] In *Solem*, the State of South Dakota argued that the Eighth Amendment did not expressly apply to felony prison sentences. The Court would not accept this view because "[t]he constitutional language itself suggests no exception for imprisonment."[41] The Court further stated,

> We have recognized that the Eighth Amendment imposes "parallel limitations" on bail, fines, and other punishments (citation omitted) . . . . It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is . . . no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms (citation omitted). And our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis.[42]

The Court found that a criminal sentence must be proportionate to the crime for which the defendant has been convicted,[43] but also reaffirmed its earlier holding in *Rummel v. Estelle*,[44] that outside the context of capital punishment, successful challenges to the proportionality of particular sentences will be exceedingly rare, and that proportionality analysis is sometimes applicable in noncapital cases.[45]

Focusing on the facts in *Solem v. Helm*, the Court noted that in 1979, Helm was convicted in a South Dakota state court of uttering a "no account" check for $100.[46] Ordinarily, the maximum punishment for the crime was five years' imprisonment and a $5000 fine; however, Helm was sentenced to life imprisonment without possibility of parole under South Dakota's recidivist statute because of his six prior felony convictions, and the South Dakota Supreme Court affirmed the sentence.[47] After Helm's request for commutation was denied, he sought habeas relief in Federal District Court, contending that his sentence constituted cruel and unusual punishment under the Eighth and Fourteenth

40. *See generally* Enmund v. Florida, 458 U.S. 782 (1982) (death penalty excessive for felony murder where defendant did not take life, attempt to take life, or intend that a life be taken or that lethal force be used); Coker v. Georgia, 433 U.S. 484 (1977) (a death sentence for rape is grossly disproportionate and excessive). "[T]he Court has continued to recognize that the Eighth Amendment proscribes grossly disproportionate punishments, even when it has not been necessary to rely on the proscription." *Solem*, 463 U.S. at 288. *See also* Hutto v. Finney, 437 U.S. 678, 685 (1978); Ingraham v. Wright, 430 U.S. 651, 667 (1977); Gregg v. Georgia, 428 U.S. 153, 171-72 (1976).

41. *Solem*, 463 U.S. at 288-89.

42. *Id.* at 289.

43. *Id.* at 290.

44. 445 U.S. 263 (1980).

45. *Solem*, 463 U.S. at 289-90 (citations omitted).

46. *Id.* at 281.

47. *Id.*

Amendments.[48] The District Court denied relief, but the Eighth Circuit Court of Appeals reversed.[49]

The Court recognized that its decisions in capital cases yielded little assistance to deciding the constitutionality of a punishment in a noncapital case.[50] The Court held that a criminal sentence must be proportionate to the crime for which the defendant has been convicted.[51] The Court, however, limited this decision by stating that "[r]eviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that the trial courts possess in sentencing convicted criminals."[52]

2. Application of the *Solem* Factors for Proportionality Review

A proportionality review in any court is guided by the factors in *Solem*, namely, a comparison of the gravity of the offense and the harshness of the penalty; a comparison of the sentences imposed on other criminals in the same jurisdiction; and a comparison of the sentences imposed for commission of the same crime in other jurisdictions.[53] In Helm's case, in comparing the gravity of the offense and the harshness of the penalty, the Court looked to the fact that he was charged with uttering a "no account" check as an habitual offender, but also recognized that the State was entitled to punish a recidivist more severely than a first offender.[54] Still, the Court also considered the fact that Helm's prior offenses were nonviolent, minor in nature and not committed as a crime against a person.[55] Helm was given a life sentence without the possibility of parole, barring clemency, which was highly unlikely in South Dakota.[56] Comparing this sentence to Rummel's sentence, the Court found it far more severe than Rummel's life sentence because Helm had no possibility of parole, suspension or probation—all of which were available to Rummel.[57]

For the second prong of the proportionality review, the Court considered the sentences that could be imposed on other criminals in South Dakota, and found that when Helm was sentenced, South Dakota was required to impose a life sentence for murder.[58] South Dakota was also authorized to impose a life sentence for treason, first-degree manslaughter, first-degree arson, and kidnapping.[59] In

48. *Id.* at 283.
49. *Id.*
50. *Id.* at 289. *See also Rummel*, 455 U.S. at 272.
51. *Solem*, 463 U.S. at 290.
52. *Id.*
53. *Id.* at 291-92.
54. *Id.* at 296.
55. *Id.* at 296-97.
56. *Id.* at 297.
57. *Id.* The *Solem* Court noted that Rummel, who was eligible for parole within twelve years of his original confinement, was released within eight months of the Court's decision. *Id.* and n.25.
58. *Id.* at 298.
59. *Id.* (citations omitted).

fact, no other crime was so severely punishable on a first offense, including attempted murder, placing an explosive device on an airplane, first degree rape, aggravated riot, distribution of heroin or aggravated assault.[60] Further analysis revealed that "[c]riminals committing any of these offenses ordinarily would be thought more deserving of [a life sentence] than one uttering a 'no account' check—even when the bad-check writer had already committed six minor felonies."[61] Based on the fact that Helm committed only non-violent crimes, the Court ultimately found him to have been treated at least as severely or more severely than criminals who had committed far more serious crimes.[62]

Comparing sentences for the same crime imposed in other states, the Court found that Helm would have received a life sentence without parole in only one other state—Nevada.[63] However, the Court could find no cases in Nevada in which any defendant had been treated as severely as Helm for his exact crime, and concluded that Helm was treated more harshly than he would have been in any other state.[64]

Finally, the Court examined South Dakota's argument that Helm could possibly receive executive clemency or commutation of his sentence from the governor of South Dakota.[65] However, the Court found these were faint possibilities that were more difficult to obtain than parole was in Texas for Rummel.[66] Clemency and commutation were subject to the whim of the governor with no reference to any time reduction rules.[67] Additionally, even if his sentence were commuted, Helm would still only be eligible to be considered for parole. The Court found the South Dakota system of parole to be more stringent than the Texas system in *Rummel*.[68] Finding these arguments unconvincing, the Court held that "[r]ecognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless."[69] The majority held that

> [t]he Constitution requires us to examine Helm's sentence to determine if it is proportionate to his crime. Applying objective criteria, we find that Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in [South Dakota] who have committed more serious crimes. He has been treated more harshly than he would have been in any other jurisdiction . . . . We conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.[70]

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60. *Id.* (citations omitted).
61. *Id.* at 299.
62. *Id.*
63. *Id.* The Court noted, however, that Nevada "merely authorized" a life sentence without parole—it did not require it as did South Dakota. *Id.* at 299-300.
64. *Id.* at 300.
65. *Id.*
66. *Id.* at 302. In Texas, a prisoner becomes eligible for parole when his "calendar time served plus 'good conduct' time equals one-third of the maximum sentence imposed or 20 years, whichever is less." *Id.* at 301-302 (citing TEX. CODE CRIM. PROC. ANN., Art. 42.12, § 15(b) (Vernon 1979)).
67. *Solem*, 463 U.S. at 301.
68. *Id.* at 302-03.
69. *Id.* at 303.
70. *Id.* Responding to the dissent's arguments, the majority recognized that "*Rummel* did reject a proportionality challenge to a particular sentence. But since the *Rummel* Court—like the dissent today—offered no standards for determining when an Eighth Amendment violation has occurred, it is controlling only in a similar factual situation." *Id.* at 303-04 n.32.

3. The *Solem* Dissent

Chief Justice Burger, joined by Justices White, Rehnquist, and O'Connor, dissented. These justices felt that the majority clearly disregarded the concept of stare decisis in its opinion and ignored the precedent of *Rummel*, which had been decided only three years earlier in 1980.[71] The Chief Justice chastised the majority's view that "all sentences of imprisonment are subject to appellate scrutiny to ensure that they are 'proportional' to the crime committed."[72]

The dissent argued that Rummel had advanced the same arguments as Helm, and that those arguments were also rejected in spite of the fact that Rummel's case was stronger.[73] The dissent admitted that the Court had on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime, and reminded that this type of proportionality review had been carried out only in a very limited category of cases, and never before in a case involving solely a sentence of imprisonment.[74] Drawing on the Court's holdings in *Rummel* and *Weems*, the dissent argued that the Eighth Amendment does not authorize courts to review sentences of imprisonment, since the length of the sentence actually imposed is purely a matter of legislative prerogative.[75] The dissent emphasized that sentences, such as those in *Weems* and other capital cases, are easier to review because a man's life lay in the balance. However, the Court considered that reviewing sentences was quite another situation, requiring the Court to draw lines between different sentences of imprisonment and "produce judgments that were no more than the visceral reactions of individual Justices."[76]

The dissent then flatly rejected the three "objective criteria" and the majority's analysis of Helm's case, stating, "[S]uch comparisons trample on fundamental concepts of federalism. Different states surely may view particular crimes as more or less severe than other states."[77] Chief Justice Burger pointed out that the Court has consistently avoided invading the province of the legislature and the discretion of trial judges unless the sentence was clearly not authorized by the statute under which a defendant had been convicted. Chief Justice Burger stated, "[I]t is error for appellate courts to second-guess legislatures as to whether a given sentence of imprisonment is excessive in relation to the crime."[78]

Next, Burger challenged the majority's recitation of the history of the Eighth Amendment in the United States, stating,

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71. *Id.* at 304.
72. *Id.* at 305.
73. *Id.* at 306. Rummel was previously convicted of fraudulent use of a credit card, passing a forged check, and obtaining money by false pretenses (a felony in Texas). *Id.* at 305. The dissent pointed out that all of these were nonviolent offenses, but under Texas's recidivist statute, the court was required to impose a mandatory life sentence after the jury returned a guilty verdict on felony theft. *Id.* at 305-06.
74. *Id.* at 306.
75. *Id.* at 307 (quoting *Rummel*, 445 U.S. at 274).
76. *Solem*, 463 U.S. at 308 (quoting *Rummel*, 445 U.S. at 275).
77. *Solem*, 463 U.S at 309.
78. *Id.* at 311.

> The more common view seems to be that the Framers viewed the Cruel and Unusual Punishments Clause as prohibiting the kind of torture meted out during the reign of the Stuarts. Moreover, it is clear that until 1892 . . . not a single Justice of this Court even asserted the doctrine adopted for the first time by the Court today. The prevailing view . . . has been that the Eighth Amendment reaches only the *mode* of punishment and not the length of a sentence of imprisonment.[79]

Moreover, the dissent, perhaps sensing an opening of the "floodgates," warned that legislatures are "far better equipped than we are to balance the competing penal and public interests and to draw the essentially arbitrary lines between appropriate sentences for different crimes."[80]

Justice Burger further advised that the majority would do well to heed Justice Black's comments about judges overruling the considered actions of the legislatures under the guise of constitutional interpretation:

> Such unbounded authority . . . would unquestionably be sufficient to classify our Nation as a government of men, not the government of laws of which we boast. With a "shock the conscience" test of constitutionality, citizens must guess what is the law, guess what a majority of nine judges will believe fair and reasonable. Such a test wilfully throws away the certainty and security that lies in a written constitution, one that does not alter with a judge's health, belief or his politics.[81]

Since federal court judges now have sentencing guidelines,[82] the Supreme Court rarely reviews federal sentences. In fact, most of the requests for review by the United States Supreme Court of a particular sentence given in a particular state almost always involve habitual offender cases.

In Mississippi, which does not presently have sentencing guidelines, proportionality review is a fact of life. Since 1983, *Solem v. Helm* has become the oft-cited authority in Mississippi proportionality review cases. The Mississippi Supreme Court has used the dissent's arguments as often as the majority's to refuse to review a sentence or to affirm a sentence, especially for habitual offenders. Perhaps at least partially in response to the appellate reviews of so many criminal sentences, states have gradually adopted sentencing guidelines. Does Mississippi need to adopt sentencing guidelines in view of recent developments? This issue will be examined in later portions of this Note.

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79. *Id.* at 312-13 (emphasis in original).
80. *Id.* at 314.
81. *Id.* at 317-18 (quoting Boddie v. Connecticut, 401 US. 371, 393 (1971)).
82. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 1B1.1 to 8E1.3 (1996 & Supp. 1999).

D. History of Proportionality Review in Mississippi

1. Unique Non-Habitual Offender Cases

Prior to the *White* holding, the Mississippi Supreme Court had routinely denied challenges to all non-death penalty sentences, if the sentences were within statutory limits.[83] The common situation in which the court would review disparity in sentencing was a life sentence without parole given to a defendant convicted as an habitual offender for a minor offense, such as shoplifting or writing worthless checks. Whenever this was done, however, the court carefully worded its holding so as not to criticize the trial judge about the sentence length. However, prior to *White*, the court had never so directly warned trial judges to use discretion in sentencing.

In the case of *Presley v. State*,[84] the defendant was convicted of armed robbery, which began as a mere shoplifting incident, and was sentenced to forty years.[85] Presley appealed his sentence on the grounds that a sentence of forty years, which could not be reduced or suspended and for which he would not be eligible for probation or parole, violated the Eighth Amendment's prohibition against cruel and unusual punishment.[86] He argued that the factors in *Solem* were applicable to his case, since Helm was sentenced to life imprisonment without parole after having been convicted as a recidivist.[87] In its opinion, the Mississippi Supreme Court cited the case of *Whitmore v. Maggio*,[88] which involved a state prisoner convicted of two counts of armed robbery and sentenced to 125 years in prison without parole.[89] The Fifth Circuit remanded to the district court with instructions "to conduct a proportionality review of petitioner's claim that his . . . sentences of seventy-five (75) and fifty (50) years without possibility of parole constituted cruel and unusual treatment" based on the holding in *Solem*.[90] The Mississippi Supreme Court, in a footnote in *Presley*, foreshadowed its admonition in *White*: "A thorough discussion of *Solem v. Helm* and *Whitmore v. Maggio* is not necessary to our decision in this case. *However, the Bench and the Bar should acquaint themselves with the principle involved in those cases.*"[91] The court found that the trial judge's duty was to consider all facts, background and the defendant's record in a sentencing hearing so that a just and proper sentence may be imposed.[92] The court found that the case "should be remanded in order

83. *See* Davis v. State, 724 So. 2d 342 (Miss. 1998); Wallace v. State, 607 So. 2d 1184, 1188 (Miss. 1992); Fleming v. State, 604 So. 2d 280, 302 (Miss. 1992); Corley v. State, 536 So. 2d 1314, 1319 (Miss. 1988); Reed v. State, 536 So. 2d 1336 (Miss. 1988).

84. 474 So. 2d 612 (Miss. 1985).

85. *Id.* at 618-19.

86. *Id.* at 617.

87. *Id.* at 618. Presley claimed that *Solem* stood for the proposition that his sentence was disproportionate to the crime, since there are a large number of serious crimes for which the sentence imposed here would not be as severe.

88. 742 F.2d 230 (5th Cir. 1984).

89. *Presley*, 474 So. 2d at 619.

90. *Id.*

91. *Id.* at 619 n.1 (emphasis added).

92. *Id.* at 620.

that the lower court may consider and pass upon, all matters relevant to the sentence of [Presley]. [The court] should require counsel for [Presley] to present any mitigating circumstances at the resentencing hearing (surely, there must be some)."[93] Clearly, the Mississippi Supreme Court was troubled by the severity of Presley's sentence considering the circumstances of the crime committed.

Another common situation in which the supreme court reviews a sentence occurs when a defendant pleads guilty and receives a lesser sentence than his co-defendant, who lost a jury trial and received a stiffer sentence for the same crime. This is exemplified in the case of *McGilvery v. State*.[94] McGilvery received a forty-five year sentence after a jury verdict for armed robbery, while Turner, his co-defendant and triggerman, pleaded guilty prior to trial and received a twenty-five year sentence.[95] The supreme court remanded the case to allow the trial court to justify the disparity. The court was particularly concerned that the forty-five-year sentence gave the impression McGilvery had been punished for exercising his right to a jury trial. The court instructed the trial court to justify the sentence, and stated that if the sentence could not be justified, it should be reduced.[96] The majority opinion emphasized that it was

> the absolute nature of the right of a person charged with a crime to a trial by jury. This right is secured to every citizen by the Sixth and Fourteenth Amendments to the Constitution of the United States . . . [and] to every Mississippian by Article 3, Section 26 of the Mississippi Constitution of 1890. As a right, it is an entitlement of every individual which he . . . may claim no matter how inconvenient society or its members or its courts may deem it.[97]

The court, however, was careful to state "that in making this demand we do not propose to instruct the circuit judge on a matter purely within his prerogative; it is just that the disparity of sentences in this case requires some justification."[98] Thus, the supreme court was aware of the importance trial judges place upon exercising their own discretion in sentencing.

2. Once and Again: Habitual Offenders and Proportionality Review

Generally speaking, the Mississippi Supreme Court will uphold an habitual offender's sentence without regard to the nature of the crime. In *Jones v. State*,[99] the court affirmed a sixty-year sentence without the possibility of parole for a defendant convicted of unlawful possession of cocaine and hydromorphine with intent to distribute.[100] After the trial, the judge sentenced Jones to sixty years without possibility of parole because he had nineteen prior convictions.[101] Jones

93. *Id.*
94. 497 So. 2d 67 (1986).
95. *Id.* at 69.
96. *Id.*
97. *Id.*
98. *Id.*
99. 523 So. 2d 957 (Miss. 1988).
100. *Id.* at 961.
101. *Id.* at 959.

appealed and asserted that his sentence constituted cruel and unusual punishment.[102] Dismissing the assignment of error as meritless with little discussion, the supreme court held that double enhancement is proper, provided it meets the test adopted in *Solem*, and that the question of sentencing was not an appropriate subject for the courts.[103] Once again, the court avoided treading on the province of the trial judge or the legislature, just as the United States Supreme Court had done in its cases.

In quite a singular example of discretionary sentencing, a trial judge refused to sentence an habitual worthless check forger to the mandatory maximum term of fifteen years under enhancement statutes.[104] In *Clowers v. State*, finding the mandatory sentence disproportionate and cruel and unusual punishment, Hinds County Circuit Court Judge William F. Coleman, Jr. sentenced Clowers to five years without possibility of parole, suspension or probation for uttering a forged $250 check.[105] The state appealed this decision on the basis that the trial court lacked authority to refuse to sentence Clowers because Mississippi law required a mandatory sentence for habitual offenders.[106] The state urged that "once habitual offender status is proved, the trial court is without discretion and must sentence according to the maximum."[107] The supreme court discussed the *Solem* factors and held that the trial court did not commit reversible error in reducing a sentence it found to be disproportionate under the facts of this case.[108] The court held that

> [t]he fact that the trial judge lacks sentencing discretion does not necessarily mean the prescribed sentence meets federal constitutional proportionality requirements. Notwithstanding § 99-19-81, the trial court has authority to review a particular sentence in light of constitutional principles of proportionality as expressed in *Solem v. Helm*. That authority is a function of the Supremacy Clause (citations omitted). Here, the trial court properly invoked and exercised that authority as it reduced Clowers' sentence.[109]

The supreme court then limited its holding because of the particular facts in this case, and warned that "*Solem v. Helm* does not represent a *de facto* grant of sentencing discretion . . . because . . . 'outside the context of capital punishment,

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102. *Id.* at 960.

103. *Id.* at 961.

104. Clowers v. State, 522 So. 2d 762 (Miss. 1988). The enhancement statutes were MISS CODE ANN. §§ 99-19-81 (1987) and 97-21-33 (1972). Working in conjunction, Clowers would have been sentenced to fifteen years without possibility of parole, suspension or probation. *Clowers*, 522 So. 2d at 763.

105. *Clowers*, 522 So. 2d at 763.

106. *Id.* See MISS. CODE ANN. § 99-18-91. Clowers had been convicted twice before on burglary and larceny charges and another count of forgery. He received a ten-year sentence with eight years suspended on the forgery conviction in 1982 and a five-year sentence on the burglary and larceny charge in 1975. *Clowers*, 522 So. 2d at 763.

107. *Clowers*, 522 So. 2d at 764. "The Court in *Burt* went on to find that any relationship between that particular case and *Solem v. Helm* (citation omitted), 'is that of distant cousins and is not persuasive.'" *Id.* (quoting *Burt*, 493 So. 2d at 1330).

108. *Clowers*, 522 So. 2d at 765.

109. *Id.*

successful challenges to the proportionality of a particular sentence [will be] exceedingly rare . . . .'"[110] The majority then reminded that it would give substantial deference to the Legislature, and thus, extended analysis will rarely be necessary.[111]

A vigorous dissent is featured in the case of *Barnwell v. State*,[112] in which the supreme court held that a fifteen-year sentence without the possibility of parole was not cruel and unusual punishment for an habitual offender convicted on charges of uttering a forged instrument.[113] Barnwell was convicted and sentenced as an habitual offender since he had two prior felony convictions.[114] Barnwell appealed on the basis that his sentence constituted cruel and unusual punishment, citing *Clowers* as his authority.[115]

The supreme court conducted its analysis under *Rummel* and *Solem* and noted that this was not the first time the court had addressed this issue.[116] The court considered both *Solem* and *Rummel* and unanimously held that Barnwell's sentence did not violate the Eighth Amendment.[117] Finding Barnwell's case very similar to Rummel's, the supreme court noted that even though Rummel was eligible for parole in twelve years, he was not guaranteed to receive parole, and that under these circumstances, the United State Supreme Court held this type of sentence constitutional.[118] Comparing Barnwell's case to *Solem*, the Mississippi Supreme Court quoted the passage that the "*Solem* Court recognized that legislatures and sentencing courts should be given 'substantial deference' and, combining this with the need for individualized sentencing results in a 'wide range of constitutional sentences.' Even under *Solem* then, what remains to be determined would be whether the sentence is 'grossly disproportionate.'"[119]

The Mississippi Supreme Court rejected the Eighth Amendment violation argument on the basis that *Solem* was simply a distant cousin and not persuasive.[120] The court then compared Barnwell's argument to *Clowers*, but the court noted that the *Clowers* holding was limited to the distinctive facts and procedural posture in that case.[121]

The court adopted the rulings in *Rummel* and *Solem*[122] and concluded that *Rummel*, not *Solem*, provides the rule in factually similar cases. The court stated, "[A]part from the factual context of *Solem*—a sentence of life in prison without the possibility of parole—or a sentence which is manifestly disproportionate to

110. *Clowers*, 522 So. 2d at 765 (emphasis added) (quoting *Solem*, 463 U.S. at 289-90).
111. *Clowers*, 522 So. 2d at 765 (citing *Solem*, 463 U.S. at 290, n.16).
112. 567 So. 2d 215 (Miss. 1990).
113. *Id.* Barnwell lived with his victim, Mrs. Almedia Cooley, for about six months prior to his offense, which she discovered when she sent her son to cash a $100 check. The bank called to tell her that her account had insufficient funds and that Barnwell had cashed a $500 check earlier that week. *Id.* 216-17.
114. *Id.* at 219. Barnwell was sentenced under MISS. CODE ANN. § 99-19-81 (1990).
115. *Barnwell*, 567 So. 2d at 219.
116. *Id.* at 220.
117. *Id.* (citing *Seely*, 451 So. 2d at 215-16).
118. *Barnwell*, 567 So. 2d at 220-21 (quoting *Seely*, 451 So. 2d at 215-16).
119. *Barnwell*, 567 So. 2d at 221 (quoting *Seely*, 451 So. 2d at 215-16).
120. *Id.*
121. 522 So. 2d 762 (Miss. 1988). *See supra* notes 109-115 and text accompanying.
122. *Barnwell*, 567 So. 2d at 221.

the crime committed . . . extended proportionality analysis is not required by the Eighth Amendment."[123] The court reiterated that it would continue to "recognize[] the broad authority of the legislature and the trial court in this area and . . . h[o]ld that where a sentence is within prescribed statutory limits, it will generally be upheld and not regarded as cruel and unusual."[124]

What makes *Barnwell* important is the vigorous dissent by former Chief Justice Lenore Prather. She wrote that "this Court should address the propriety of a statutory sentence of an habitual offender for non-violent crimes in balance with constitutional mandates against cruel and unusual punishment."[125] The dissent examined whether the sentence Barnwell received was proper in this case, noting that the supreme court would defer to the trial judge's discretion, if the correct criteria were applied, and affirm if the sentence is within statutory limits.[126]

The dissent's analysis continued with a review of the factors in *Solem*, noting that a "proportionality analysis is necessary because '[n]o penalty is per se constitutional.'"[127] Barnwell's crimes were considered non-violent by the dissent, and as such, the dissent found that he was entitled to a proportionality review.[128]

Next, Barnwell's crimes were compared with sentences imposed for other crimes in the same jurisdiction.[129] The dissent recalled that Judge William Coleman, Jr., the trial court judge in *Clowers*, had refused to sentence the defendant to the statutory mandatory maximum for an habitual offender.[130] The court compared Barnwell's crime as an habitual offender to the sentences for other more serious crimes committed by habitual offenders.[131] For example, an offender convicted of attempted murder under Mississippi Code section 97-1-7, whose sentence is enhanced because of his habitual offender status under Mississippi Code section 99-19-81, would receive a ten-year term in prison.[132] The dissenters were clearly impressed by the fact that these violent offenders would be out of prison long before Barnwell, who had merely uttered forged checks.

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123. *Id.* (citations omitted).

124. *Id.* at 222 (citations omitted).

125. *Id.* (Prather, J. dissenting).

126. *Id.* at 223 (citing McClendon v. State, 539 So. 2d 1375, 1377 (Miss. 1989); Gibson v. Manuel, 534 So. 2d 199, 204 (Miss. 1988); Detroit Marine Engineering v. McRee, 510 So. 2d 462, 467 (Miss. 1987)).

127. *Barnwell*, 567 So. 2d at 223 (quoting *Solem*, 463 U.S. at 290).

128. *Barnwell*, 567 So. 2d at 224. "[T]he two foremost reasons for upholding a conviction under . . . *Solem*, i.e. crimes of violence and the possibility of parole are [not] present here. None of the crimes Barnwell committed involved the use of violence, or the threat of violence against a person or his property." *Id.*

129. *Id.* "'If other criminals who are convicted of more serious crimes receive the same or less severe sentences, then it may be an indication of disproportionality.'" *Id.* (quoting Cocio v. Bramlett, 872 F.2d 889, 894 (9th Cir. 1989)).

130. *Barnwell*, 567 So. 2d at 224-25.

> In my opinion, [Clowers's sentence] is disproportionate to the maximum sentence for a more serious crime in the State of Mississippi . . . . [I]f the maximum sentence is applied, it requires that a defendant serve a longer sentence than an individual who's convicted [on a first offense] . . . and receives a life sentence, that is, they're eligible for parole consideration after ten years . . . . I find as a fact that the maximum sentence for forgery, as applied under the circumstances of this case would be disproportionate to sentences in other crimes set out in this jurisdiction . . . .

Id. (quoting *Clowers*, 522 So. 2d at 764).

131. *Barnwell*, 567 So. 2d at 225.

132. *Id.* "It should also be remembered that many first time offenders who receive a life sentence would be eligible for parole before Barnwell who received fifteen (15) years without parole." *Id.* at 225 n.3. *See* MISS. CODE ANN. §§ 97-1-7 (1972), 99-19-81 (1989).

For the third prong of the *Solem* analysis, the dissent focused on a comparison of Barnwell's sentence with sentences imposed in other jurisdictions for the same crime. The justices found that Mississippi's maximum sentence exceeded the maximum possible sentence in Alaska, Arkansas, Florida, Georgia, Kentucky, Louisiana, North Carolina, Oklahoma, South Carolina, and Tennessee.[133] Even when read together with each state's habitual offender enhancement, only a sentence in Oklahoma would be stiffer than the sentence Barnwell received.[134] Based on all of these comparisons, the dissent submitted that *Presley* and *Clowers* all legally supported Barnwell's assignment of error regarding sentence and remanded for the circuit court's reconsideration of sentence consistent with the holding in *Solem*, *Presley* and *Clowers*.[135]

In narcotics cases, defendants may be sentenced as habitual offenders with their second conviction[136] as in the case of *Stromas v. State*.[137] Stromas was convicted of selling a controlled substance under Mississippi Code section 41-29-139(a)(1)[138] and sentenced to serve sixty years in prison as a subsequent offender.[139] Stromas appealed his conviction and sentence, claiming that the sixty-year sentence violated the Eighth Amendment's prohibition of cruel and unusual punishment.[140]

Stromas asserted that the *Solem* analysis was invoked because "a sentence of [sixty] years confinement for a single sale of a small amount of cocaine is inconsistent with other sentences in this jurisdiction and in other jurisdictions."[141] He also argued that since he was a drug addict, using his prior marijuana conviction to double his sentence was "cruel in its failure to consider the extent to which the addict's repetition of prescribed behavior is attributable to his addiction."[142] The state argued that Stromas's case was not ripe for a *Solem* analysis; furthermore, he was not entitled to the review because he did not cite any authority to support his claim for a reduction in sentence.[143]

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133. *Barnwell*, 567 So. 2d at 226 (citing ALASKA STAT. ANN. § 11.46.510(a)(3) (1989); ARK. CODE. ANN. §§ 5-37-201(c)(1), 5-4-401(a)(4) (Michie 1987); FLA. STAT. ANN. §§ 831.02, 775.082(3)(d) (West 1976); GA. CODE ANN. § 16-9-1 (1988); KY. REV. STAT. §§ 516.060, 532.020 (1985); LA. REV. STAT. ANN. § 14:72 (West 1981); N.C. GEN. STAT. §§ 14-1.1, 14-120 (1989); OKLA. STAT. ANN. tit. 21 § 1592 (West 1983); S.C. CODE ANN. § 16-13-10 (Law. Co-op. 1976); TENN. CODE ANN. § 39-14-114 (1989)).

134. *Barnwell*, 567 So. 2d at 227. The sentence for an habitual offender in Oklahoma on the same charge as Barnwell's would not be less than twenty years. OKLA. STAT. ANN. tit. 21 § 51 (West 1983). However, the previous convictions for forming the basis of the habitual offender status must be less than ten years old. *Barnwell*, 567 So. 2d at 227, n.7. Barnwell's convictions were committed in 1971, 1972 and 1986, so he would not have been subjected to the enhancement in Oklahoma. *Id.* at 227 n.6.

135. *Barnwell*, 567 So. 2d at 227.

136. MISS. CODE ANN. § 41-29-127 (1993). This statute appears in the Uniform Controlled Substances Act in MISS. CODE ANN. § 41-29-101 et seq. (1993). The difference between this statute and the enhancement provisions under MISS. CODE ANN. § 99-19-91 is that § 41-29-147 requires only prior conviction to be invoked. Enhancement under § 99-19-91 requires at least two prior felony convictions.

137. 618 So. 2d 116 (Miss. 1993).

138. The thirty year sentence for this offense is found in MISS. CODE ANN. § 41-29-139(b)(1) (1993).

139. *Stromas*, 618 So. 2d at 117.

140. *Id.* at 118. His other assignments of error include that the trial court erred in allowing a tape recording of the drug transaction into evidence without first requiring the State to properly authenticate it; and that his federal and state constitutional right to confront the witnesses against him was violated. *Id.* at 117-18. The supreme court held that the trial court did not abuse its discretion in these decisions. *Id.* at 120, 122.

141. *Id.* at 123.

142. *Id.*

143. *Id.*

The supreme court summarily reviewed his sentence, noting that the statutes for selling and the sentence enhancement were very broad, and that they applied to any amount of controlled substance sold.[144] However, showing how far the court will stretch to avoid a proportionality reversal, the court also pointed out that Stromas really did not receive the maximum sentence under Mississippi Code section 41-29-139 because he did not also receive the maximum fine of one million dollars.[145]

Finding the sentence "quite severe," but the crime "serious," the court fell back on its usual holding that the public, through the legislature, considered drug crimes to be very serious, and the legislature is better equipped to deal with the length of sentences for these crimes.[146] The court found the sentence was within the statutory guidelines, and a *Solem* analysis was not implicated.[147] Consequently, under Mississippi law, habitual offenders generally are not eligible for a proportionality review because of the fact that they are repeat offenders. Society and the law are far more generous to first-time offenders, especially in the area of non-violent crimes.

3. True Crime: Violent Offenders and Proportionality Review

Non-habitual, non-violent offenders can sometimes convince the Mississippi Supreme Court to remand their cases for resentencing. However, a defendant convicted of an egregious crime, even when it is his first offense, can expect an unsympathetic supreme court. In *Johnson v. State*,[148] the supreme court upheld the life sentence of Bill Johnson, Jr., who had been convicted of the capital rape of a six-year-old child.[149] Examination and laboratory tests revealed that the child had had sexual intercourse, that she had a purulent vaginal infection, and that the infection was caused by neisseria gonorrhea, which Johnson also suffered.[150] After conviction and sentencing, Johnson appealed, assigning as one error that the trial court abused its discretion in sentencing him.[151]

Johnson complained that his life sentence was more severe than the five-year plea bargain he had been offered by the State prior to trial, and that this was evidence that he had been punished for exercising his right to a trial by jury.[152] The supreme court addressed this error by first stating that a trial court is prohibited from imposing a heavier sentence simply because a defendant exercised his right

144. *Id.* (citing MISS. CODE ANN. §§ 41-29-139(b)(1), 41-29-147 (1993)).

145. *Stromas*, 618 So. 2d at 123. *See* MISS. CODE ANN. § 41-29-139 (1993).

146. *Stromas*, 618 So. 2d at 123.

147. *Id.* The court stated that "[d]eclaring a sentence violative of the Eighth Amendment . . . carries a heavy burden and only in rare cases should this Court make such a finding . . . . *Id.*

148. 666 So. 2d 784 (Miss. 1995), *abrogated on other grounds by* Hennington v. State, 702 So. 2d 403 (Miss. 1997).

149. *Johnson*, 666 So. 2d at 798. Johnson, the sexual partner of the child's mother, Draylene Leggett, was diagnosed with neisseria gonorrhea. *Id.* at 789. He had been staying in the home with Draylene for several days before he was diagnosed, and during the time of his stay, he had the opportunity to be alone with Draylene's four children *Id.* at 789-90. When Draylene returned from work that day, the six-year-old girl had been crying, and about a week later, the child began to complain of pain in her pubic area. *Id.* at 790.

150. *Id.* The incubation period for neisseria gonorrhea is a few days up to two weeks. *Id.*

151. *Id.* at 797. The other assignments of error, all of which were found meritless, included a speedy trial issue, a denial of a mistrial issue, and an overruled objection to hearsay testimony issue. *Id.* at 784.

152. *Id.* at 797.

to a jury trial.[153] The supreme court examined the record in Johnson's case and found no instance in which the trial judge had been involved in the plea bargaining process nor that he had been punished for choosing a jury trial.[154] In affirming, the court noted that the statute for capital rape[155] provided for a life sentence, which Johnson could have received, since he was over the age of eighteen and he had had carnal knowledge of a child under the age of fourteen years.[156]

In the case of *Hoops v. State*,[157] a seventeen-year-old was convicted on two counts of aggravated assault for shooting rival gang members and sentenced to thirty years under Mississippi Code section 97-3-7.[158] Hoops appealed, citing *inter alia*, that his sentence was "disproportionate to all other[s] sentenced for aggravated assault imposed in Jackson County at the time."[159] Hoops argued that the maximum sentence was imposed because he exercised his right to a jury trial, which is evidenced by the fact that all other sentences for aggravated assault in Jackson County at the time were less in comparison to his.[160] The State argued that since he did not cite any cases to support this theory, he was procedurally barred.[161]

The court noted that *Solem*, in light of the Supreme Court's subsequent ruling in *Harmelin v. Michigan*,[162] would only apply "when a threshold comparison of the crime committed to the sentence imposed leads to an inference of 'gross disproportionality.'"[163] The Mississippi Supreme Court found that this threshold was determined by comparing a particular crime to that in *Rummel*,[164] and that Hoops's aggravated assault convictions were not grossly disproportionate to the violent nature of his crime.[165] The supreme court found that the trial judge could have sentenced him to a total of forty years, and therefore, his thirty-year sentence for shooting two people was not cruel and unusual.[166]

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153. *Id.* (citing Temple v. State, 498 So. 2d 379, 381 (Miss. 1986)).

154. *Johnson*, 666 So. 2d at 797.

155. MISS. CODE ANN. § 97-3-65(1) (1972). The statute reads in part, "Every person eighteen (18) years or older who shall be convicted of rape by carnally and unlawfully knowing a child under the age of fourteen (14) years, upon conviction, shall be sentenced to death or imprisonment for life." *Id.*

156. *Johnson*, 666 So. 2d at 797. Johnson could have received the death penalty under this statute. *See supra* note 155.

157. 681 So. 2d 521 (Miss. 1996).

158. *Id.* at 539. The punishment for each count of aggravated assault is "imprisonment in the county jail for not more than one (1) year or in the penitentiary for not more than twenty (20) years." *See* MISS. CODE ANN. § 97-3-7(2) (1972).

159. *Hoops*, 681 So. 2d at 537. His other assignments of error were that the grand jury charge by the judge unfairly targeted him as a gang member; that the court erred in not granting his motion for change of venue; that the court erred in admitting testimony regarding other aggravated assaults he had committed; that the court erred in admitting testimony about his possible gang involvement; that the court erred in not granting a jury instruction on aiding and abetting; that the court erred in not granting a jury instruction on lesser included offenses; and that he was denied alternate sentencing as a juvenile, all of which the supreme court found meritless. *Id.* at 538-39.

160. *Id.* at 537.

161. *Id.*

162. 501 U.S. 957 (1991).

163. *Hoops*, 681 So. 2d at 538 (quoting Smallwood v. Johnson, 73 F.3d 1343, 1347 (5th Cir. 1996) (citing *Harmelin*, 501 U.S. at 1005)).

164. 445 U.S. 263 (1980). Rummel was sentenced to life with the possibility of parole under a recidivist statute for a third non-violent felony conviction. The United State Supreme Court found his sentence to be proportionate and did not violate the Eighth Amendment. *Hoops*, 681 So. 2d at 538.

165. *Hoops*, 681 So. 2d at 538. "The jury found Hoops guilty in shooting two people, apparently for no other reason than they were in a rival street gang. To be sure, this is a serious act of violence." *Id.*

166. *Id.*

4. Winds of Change?

In 1998, the Mississippi Supreme Court remanded *Davis v. State*[167] for resentencing to determine if a sixty-year sentence for a first-time offender convicted of selling 0.2 grams (0.0071 ounces) of crack cocaine was violative of the Eighth Amendment.[168] The defendant, a twenty-five-year-old female was charged with selling the controlled substance within 1500 feet of a church, for which a thirty-year sentence could be doubled to sixty years at the discretion of the trial judge.[169] The court was especially troubled by her sentence, since there was nothing in the trial record that explained why the judge sentenced her so severely, when the judge was authorized to use discretion to sentence up to double the penalty allowed.[170] The court commented,

> Legislative judgment of recent years to provide serious penalties for the sale of cocaine is easy to understand when we observe the effect that its wide-spread distribution has had on Mississippi as well as the nation. Occasionally, however, cases come before us in which sentences may be so severe as to appear on the record inexplicable and justify remanding the matter to the trial court for further consideration.[171]

Was the supreme court, as suggested by the dissent, merely sympathetic with a young mother who would be seventy-six years old before she could be eligible for parole?[172]

Davis listed in her brief comparable cases in which far lesser sentences were imposed both in Copiah County and Pike County.[173] Perhaps the court was concerned, as it was in *McGilvery*, that Davis might have been punished for exercising her right to a jury trial.[174]

> [We] [r]ecogniz[e] that the circuit judge may have had an excellent reason for McGilvery's sentence which had not been articulated . . . [and] emphasiz[e] the absolute right of one accused of a crime to a jury trial and remind[] the bench and bar that the sentence must not include a penalty for exercising that right.[175]

The majority of the court decided that remand was necessary in this case, even though the sentence was within the limits set by the legislature because the sentence "is in fact the maximum sentence allowable for a sale of cocaine."[176]

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167. 724 So. 2d 342 (Miss. 1998). *See also supra* note 2. The penalty for selling a controlled substance is "not more than thirty (30) years." *See* MISS. CODE ANN. § 41-29-139(b)(1) (1993).

168. *Davis*, 724 So. 2d at 346.

169. *Id.* at 344. *See also supra* note 2.

170. *Davis*, 724 So. 2d at 344. *See* MISS. CODE ANN. § 41-29-142 (1993) (providing discretionary sentencing of up to twice that authorized for sale of controlled substances within certain distances of schools, churches and other public buildings and locations).

171. *Davis*, 724 So. 2d at 344-45.

172. *Id.* at 344. It is interesting to note that, according to the Mississippi State Department of Health, 30-year-old white females have a remaining life expectancy of 50.2 years. Mississippi State Dep't of Health, *supra* note 16.

173. *Id.* at 345.

174. 497 So. 2d 67(Miss. 1986). *See supra* notes 94-98 and text accompanying.

175. *Davis*, 724 So. 2d at 345.

176. *Id.* at 346. Notably, the court did not mention the fines listed in the statute as it had in *Stromas*. *See supra* note 145 and text accompanying.

The three dissenters, led by Justice Mills, vigorously objected to the remand of this sentence since it was within the statutory limits and because of the precedents in prior Mississippi cases.[177] The dissent found Davis's case was controlled by *Stromas*, in which the court held that the sixty-year sentence for selling a small amount of cocaine, although quite severe, was not grossly disproportionate to his crime.[178] In his separate dissenting opinion, Justice Mills pointed out that "Cruel and Unusual Punishments"[179] applied to form of punishment, not length of sentence. Further, he wrote, "[I]n light of the complete discretion allowed the trial judge, an Eighth Amendment evaluation by an appellate court should only take place if it is the mode of punishment, rather than the length of sentence, which is being challenged."[180] Nevertheless, the holdings of this case and the instant case have led to a new era of proportionality review in the appellate courts of Mississippi.

III. INSTANT CASE

A. Majority Opinion

Writing for the court in *White*, Justice Waller stated that the "Legislature has provided a wide range of possible sentences for those convicted of sale of cocaine. We are duty bound to insure this broad discretionary authority is properly put to use."[181] Furthermore, he warned that the "failure of our trial courts to use discretion in sentencing may result in the loss of this freedom through the adoption of sentencing guidelines as was done in the federal system."[182]

The majority examined the Uniform Controlled Substances Act,[183] which was applicable in the case,[184] and found that the statute allowed a sentence of up to thirty years and an enhancement of up to double for selling controlled substances near a church or school.[185] The court reminded the parties that a sentence should not be disturbed if it did not exceed the statutory limits, but that if the sentence seemed grossly disproportionate, it is subject to an Eighth Amendment attack.[186] The court then recalled the *Solem* factors, which are applied in a proportionality review.[187]

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177. *Davis*, 724 So. 2d at 346 (Mills, Smith, Roberts, JJ. dissenting). *See generally* Presley v. State, 474 So. 2d 612 (Miss. 1985); Clowers v. State, 522 So. 2d 762 (Miss. 1988); Barnwell v. State, 567 So. 2d 215 (Miss. 1990); Stromas v. State, 618 So. 2d 116 (Miss. 1993).

178. *Davis*, 724 So. 2d at 348 (Mills, Smith, Robert, JJ. dissenting) (citing *Stromas*, 618 So. 2d at 123). *See supra* notes 141-51 and text accompanying. *But see* Associated Press Newswires, *Brooksville Woman Gets Suspended Sentence in Death of Newborn*, THE ASSOCIATED PRESS, Mar. 22, 1999, *available in* Westlaw, MSNEWS, State & Regional Category (reporting that Shantela Smith received a 20-year suspended sentence in the strangulation death of her newborn infant after pleading guilty to manslaughter); Associated Press Newswires, *Mississippi Editorial Roundup*, THE ASSOCIATED PRESS, Apr. 28, 1999, *available in* Westlaw, MSNEWS, State & Regional Category (reporting that Shantela Smith will serve 800 hours of community service and five years probation). "Noxubee County . . . has set a dangerous precedent . . . [in view of the] discovery of another murdered infant in Starkville . . . [whose mother] has been charged with capital murder." *Id.*

179. *Davis*, 724 So. 2d at 348 (Mills, Smith, Roberts, JJ. dissenting) (citing *Harmelin*, 501 U.S. at 967).

180. *Davis*, 724 So. 2d at 349.

181. White v. State, 742 So. 2d 1126, 1137 (Miss. 1999).

182. *Id.* at 1137-38.

183. MISS. CODE ANN. § 41-29-101 et seq. (1993).

184. *White*, 742 So. 2d at 1135. *See supra* text accompanying note 6.

185. *White*, 742 So. 2d at 1135.

186. *Id.* (citing Wallace v. State 607 So. 2d 1184, 1188 (Miss. 1992).

187. *Id. See supra* note 53 and text accompanying.

The State argued, just as it did in *Davis*,[188] that *Stromas*[189] was analogous to White's case.[190] White, like Stromas, was convicted of a single count of selling a small amount of cocaine and was sentenced to thirty years.[191] Stromas, unlike White, however, was a repeat-offender and his sentence was doubled under Mississippi Code section 41-29-147.[192] White was a first-offender whose sentence was doubled under Mississippi Code section 41-29-142.[193]

The supreme court distinguished *Stromas* from White's situation because Stromas had not received the maximum fine allowed by the statute.[194] As in *Stromas*, the court noted that the statute was "very broad in its application . . . appl[ying] to the sale of *any* amount of cocaine, no matter how small."[195] However, the court also recognized that "it was the Legislature's prerogative, and not that of this Court, to set the length of sentences."[196]

The court then found that *Davis* was more like White's case than Stromas's.[197] Both Davis and White were first offenders sentenced to sixty years, and Davis's sentence was remanded for resentencing, based upon the fact that the trial court did not justify the extreme sentence on the record.[198] In fact, the majority did not even mention a *Solem* analysis any further in its opinion.

While clear to the majority that White's sentence was within the statutory guidelines, the court recognized that the practical effect of this position made every sentence practically "unreviewable."[199] Thus, the court found that lack of discretion by the trial judge was the key factor in this case. Justice Waller defined discretion as "'sound judgment which is not exercised arbitrarily, but with regard to what is right and equitable in circumstances and law, and which is directed by the reasoning conscience of the trial judge to just result.'"[200] The abuse of discretion is "'clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing.'"[201] The court recognized the "awesome responsibility" and the "great deal of power" our Constitution and laws place in the hands of our trial judges and that the "power and responsibility should not be taken lightly in any case."[202]

The court reminded that "'[j]udicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.'"[203] The

188. 724 So. 2d 342 (Miss. 1998).
189. 618 So. 2d at 123.
190. *White*, 742 So. 2d at 1136.
191. *Id.*
192. *Id.* (citing *Stromas*, 618 So. 2d at 123). *See* MISS. CODE ANN. § 41-29-147 (1993).
193. *White*, 742 So. 2d at 1135. *See* MISS. CODE ANN. § 41-29-142 (1993).
194. *White*, 742 So. 2d at 1136.
195. *Id.*
196. *Id.* (citing *Stromas*, 618 So. 2d at 123).
197. *White*, 742 So. 2d at 1136 (citing Davis v. State, 724 So. 2d 342 (Miss. 1998)).
198. *White*, 742 So. 2d at 1136.
199. *Id.*
200. *Id.* (quoting BLACK'S LAW DICTIONARY 848 (6th ed. 1990) (citation omitted)).
201. *White*, 742 So. 2d at 1136 (quoting BLACK'S LAW DICTIONARY at 10).
202. *White*, 742 So. 2d at 1136-37.
203. *Id.* at 1137 (quoting Osborn v. Bank of United States, 22 U.S. 738 866 (1824)).

court noted that the statutes under which White was sentenced did not require specific terms, but provided a range of possible sentences of zero to thirty years for sale of cocaine, or zero years to life imprisonment without parole or probation when enhancement was involved.[204] There is no mandated maximum sentence in Mississippi except for defendants previously convicted of two felonies or federal crimes.[205] Therefore, the court opined that trial judges should use their discretion to "issue appropriate sentences in each individual case."[206] The court had never before explicitly defined discretion nor addressed a possible abuse of discretion in this manner. However, the court's most stringent analysis was yet to come.

The court compared *Davis* to White's case and found it "clear from the record . . . [that] the trial judge did not exercise any discretion in sentencing White to sixty years—the maximum allowed by statute."[207] The court then reported that the Mississippi Supreme Court and Mississippi Court of Appeals reviewed a total of sixteen appeals involving the sale of cocaine and sentence enhancement in 1998.[208] Of these sixteen, ten cases involved a mandatory maximum sentence correctly given because the offenders were habitual offenders convicted of their third offenses.[209] In the other six cases, all but three defendants correctly received discretionary sentences ranging from fifteen years to thirty years plus fines for repeat offenses or multiple counts.[210] However, the other three defendants, all first offenders, received sixty-year sentences for selling near a church or school, and all from the *same* trial judge.[211]

The supreme court, finding this information distinctly disquieting, vacated the sentence and remanded for resentencing consistent with its opinion. The court, however, went a step further and warned that "failure of our trial courts to use discretion in sentencing may result in the loss of freedom through the adoption of sentencing guidelines as was done in the federal system."[212]

B. Dissenting Opinion

The dissenters, led by Justice Smith, maintained, as they did in *Davis*, that since White's sentence was within the statutory limits, there was no abuse of discretion by the trial judge,[213] and then accused the majority of invading the province of the jury, the trial judge and the Legislature.[214] The dissent tersely reminded the majority that "[t]his Court is not a law-making body . . . . Apparently, the majority simply does not approve of the severe sentence given to

204. *White*, 742 So. 2d at 1137.
205. *Id.* (citing MISS. CODE ANN. §§ 99-19-81 to 99-19ñ83 (1994)).
206. *White*, 742 So. 2d at 1137.
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* (emphasis added). *See supra* note 3.
212. *White*, 742 So. 2d at 1137-38.
213. *Id.* at 1139.
214. *Id.* at 1138.

White and remands for resentencing without instruction to the trial judge."[215] Continuing its admonishment of the majority, the dissent accused the majority of lacking "self-restraint and [overstepp[ing] the boundaries of the judicial branch of government."[216] The dissent concluded its vigorous opinion by stating that the "majority is merely second guessing the sound discretion of the learned trial judge . . . [and] extending the already overreaching *Davis* precedent."[217]

C. Subsequent History and Information

The *White* opinion was released on June 24, 1999. On August 17, 1999, the Court of Appeals issued its opinion in another case styled *White v. State*.[218] Michael White, brother of Earnest White in the instant case, was also sentenced to sixty years, after selling cocaine to the same confidential informant in his brother's case at the same location just four days earlier.[219] The Court of Appeals, relying on *Davis*, also reversed and remanded this sentence, issued by the same trial judge as his brother's sentence, for resentencing.

On June 4, 1999, just twenty days before the Mississippi Supreme Court released its opinion in the instant case, Liliana Maldonado of Houston, Texas, was convicted of transporting 716 *pounds* of cocaine from Texas to Mississippi, and sentenced to thirty years in prison in Rankin County Circuit Court.[220] On October 14, 1999, a Texas man received a six-and-one-half year sentence in federal court for pleading guilty to transporting *twenty bricks* of cocaine worth one million dollars into Madison County.[221]

Another problem that has concerned the supreme court is the appearance of a defendant being punished for electing a jury trial and causing a "chilling effect" on the exercise of this fundamental right.[222] Have these sixty-year sentences produced a chilling effect on other defendants exercising their right to a jury trial in neighboring counties served by the same trial judge?[223] Perhaps so, as evidenced in an October 6, 1999, news article proclaiming that "[seventy-six] drug dealers have been taken off the streets of Claiborne and Jefferson counties."[224] Interestingly, however, none of the seventy-six defendants chose a jury trial—each pleaded guilty and received a sentence of three to fifteen years from the same judge who sentenced White.[225]

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215. *Id.* at 1138-39.
216. *Id.* at 1139.
217. *Id.* at 1140.
218. No. 98-KP-00084-COA, 1999 WL 619567 (Miss. Ct. App. Aug. 17, 1999), *withdrawn and superceded by*, No. 98-KP-00084-COA, 2000 WL 251741 (Miss. Ct. App. Mar. 7, 2000).
219. *White*, 2000 WL 251741 at ¶ 4. *Cf. White*, 742 So. 2d at 1126.
220. Clay Harden, *Texas Grandmother Gets 30 Years for Transporting Drugs*, CLARION-LEDGER, June 4, 1999, at 6B (emphasis added). At twenty-eight grams per ounce and sixteen ounces per pound, Maldonado transported 320,768 ounces of cocaine, compared to less than one ounce sold by White.
221. *Madison Drug Case Appealed*, CLARION-LEDGER, Oct. 14, 1999, at 1B (emphasis added). Of course, this defendant was subject to federal sentencing guidelines, not the state statutes under which White was sentenced.
222. *See supra* notes 182-83 and text accompanying.
223. The trial judge in *Davis* and *White* serves as the trial judge in Jefferson and Claiborne counties. Collectively, Jefferson, Claiborne and Copiah Counties comprise the 22nd Circuit Court District. MISS. CODE ANN. § 9-7-57 (1994).
224. Thyrie Bland, *Jefferson, Claiborne Jailing Drug Dealers Fast*, CLARION-LEDGER, Oct. 6, 1999, at 1A.
225. *Id.*

On January 26, 1999, Melissa Davis was resentenced to sixty years by the same judge, based on the reasoning that she had a prior conviction for possession of crack cocaine; that she had a prior conviction for uttering a forgery; that she failed to pay her fines from the previous convictions; that, in the court's opinion, crack cocaine can ruin the lives of innocent people; and that the judge "fe[lt] the crime . . . [of] . . . unlawful sale of crack cocaine is one of the most devastating crimes that can be committed on earth by a human being."[226] Did the judge exercise the proper discretion suggested by the Supreme Court? What will be the result when Earnest White is resentenced—or any of the other defendants whose sentences were remanded for resentencing?[227] Can Mississippi afford to continue down this same path without more specific guidance either from the appellate courts or the legislature? Certainly the criminal justice system and all Mississippians are the ultimate losers in this "battle of wills" between state trial court judges and the Mississippi appellate courts. Does Mississippi need sentencing guidelines?

IV. ANALYSIS

A. Mississippi's Current Situation

Drug offenses, especially possession with intent to distribute a Schedule I or II controlled substance, have drawn some of the stiffest sentences in Mississippi in the past fifteen years. Beginning in 1972, under Mississippi law, a defendant convicted of this charge faces a term of up to thirty years in prison.[228] Additionally, if a defendant sells this controlled substance within 1500 feet of a church or school, he is subject to, at the discretion of the trial judge, an enhancement of his sentence of up to double the time.[229] Mississippi also has a repeat-offender enhancement statute, which will effectively give a multiple-offense drug-case defendant a life sentence without possibility of parole,[230] no matter what amount of the controlled substance he sells or possesses with intent to sell.[231] What defendant would chose a jury trial, even if he were confident the evidence against him could be rebutted, when faced with the odds of going to prison for a substantial portion of his life if the jury still convicted him?

Can Mississippi afford to continue to sentence more and more first offenders to these lengthy sentences of which eighty-five percent must be served before

226. Transcript of Resentencing Hearing at 5, 7-8, 9, 11, State v. Davis, 724 So. 2d 342 (Miss. 1998) (Copiah County Cir. Ct., No. 15,105). Davis offered testimony in mitigation that she has a four-year-old daughter; that she has completed an Adult Survivors of Abuse program; that she has learned the importance of work; that she has learned to control herself; that she has worked in the kitchen; that she has learned to live independently; but that she is ineligible to attend school while in prison because her sentence exceeds the maximum allowed for that program. *Id.* at 1-3.

227. On November 4, 1999, White was resentenced by the trial court to a term of twenty years. *Another Circuit Court Session Underway,* THE COPIAH COUNTY COURIER, Nov. 10, 1999, at 1A, 8A. *See also* Resentencing Order, State v. White, 742 So. 2d 1126 (Miss. 1999) (Copiah County Cir. Ct., No. 15,112).

228. MISS. CODE ANN. § 41-29-139(b)(1) (1972).

229. *Id.* at § 41-29-142.

230. *Id.* at § 41-29-147.

231. *Id.* at § 41-29-139(a)(1). Earnest White, in the instant case, was sentenced to sixty years for selling seventy dollars worth of crack cocaine near a church, which is probably less than eight grams of pure cocaine. There are twenty-eight grams in one ounce.

eligibility for parole? On September 9, 1999, the Mississippi Department of Corrections (MDOC) reported that a total of 17,861 Mississippians were currently incarcerated in an MDOC facility.[232] Of these, at least 9,440 (54.2%) are first offenders.[233] When parolees and probationers are included, a total of 33,531 individuals are currently under the supervision of MDOC.[234] Mississippi's 1998 total estimated population was 2,752,000.[235] A quick calculation reveals that as of September 9, 1999, approximately 1.22% of the entire population of the State of Mississippi was incarcerated or under the direct supervision of the Department of Corrections.

By comparison, 457,070 Mississippians are classified as non-white males by the State Department of Health.[236] Of the 17,861 current inmate population, 13,513 (74.9%) are classified as non-white.[237] This is 2.95% of the total non-white males in Mississippi. The criminal justice system in Mississippi, as in most states and the federal system, has a disparate impact upon the non-white population. A 1999 study predicted that at the then-current incarceration rates, by the year 2000, one in ten black men were in prison—a statistic with major social implications because prisoners do not have jobs, pay taxes, or care for their children at home. Since most states bar felons from voting, in the next generation, thirty to forty percent of the black men will not be allowed to vote in more than a dozen states.[238]

Why do thirteen percent of the nation's population account for over one-half of the prison population? According to Laurie Levensen, a former federal prosecutor and associate dean of Loyola Law School in Los Angeles, one reason may be that "[i]t is much easier to go into a black community and pop someone selling drugs on the street corner than to go into a suburb where drug use happens behind closed doors."[239] Mississippi cannot afford to have this many of its citizens removed from participation in its society and their families dependent upon welfare programs if Mississippi is to continue to grow and prosper.

The reported *total capacity* of the MDOC system is 17,467 inmates, but there are currently 17,974 *active* inmates.[240] In 1998, MDOC reported that Mississippi spends an average of $45.28 per day to house one adult male inmate in the current system.[241] At this rate the cost to Mississippi will be $16,527.20 per year to

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232. Mississippi Dep't of Corrections, *Monthly Fact Sheet*, (visited Sept. 9, 1999) <http://www.mdoc.state.ms.us/information/fact%20sheet.html>. The facilities include the Mississippi State Penitentiary at Parchman, regional correctional facilities, county jails, satellite facilities, private prisons, and joint county facilities. *Id.*

233. *Id.*

234. *Id.*

235. U.S. Census Bureau, *USA Statistics in Brief—State Population Estimates*, (visited Oct. 18, 1999) <http://www.census.gov/statab/www/part6.html>.

236. MISSISSIPPI STATE UNIV., *Mississippi Statistical Abstract 1998*, 45 (1998).

237. Mississippi Dep't of Corrections, *supra* note 232.

238. *Increase in Black Inmates 'Staggering'*, STAR TRIB. (Minneapolis-St. Paul), March 2, 1999, at 3A.

239. *Id.*

240. Mississippi Dep't of Corrections, *supra* note 232. (emphasis added).

241. MISSISSIPPI LEGISLATURE JOINT COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW, MISSISSIPPI DEP'T OF CORRECTIONS' FY 1998 COST PER INMATE PER DAY, Dec. 30, 1998, at 4. This is the average of the costs of incarcerating inmates in the minimum, medium and maximum prison facilities in Mississippi. *Id.*

incarcerate Earnest White. If he is to serve 51 years—eighty-five percent of his sentence—before he is eligible for parole, Mississippi will spend the total sum of $842,887.20 to incarcerate him, assuming (incorrectly) that the costs do not rise in the future.

Still, these costs will far exceed the $3,946 spent per year in 1996 to educate one child in Mississippi's public school system.[242] At this rate, Mississippi spends only $47,352 to educate one child from first grade through high school graduation. Even including four years of college at $5,000 per year, the total cost to educate a child in Mississippi from first grade through college would still be under $70,000. In fact, for the cost to incarcerate White for fifty-one years, Mississippi could pay for the college education of forty-two children at the rate of $5000 per year. Of course, White's case is an exception, since most defendants plead guilty and receive sentences in the three- to fifteen-year range.[243] Even so, Mississippi spends between $40,000 and $215,000 to incarcerate these defendants for eighty-five percent of their sentences. How many more thirty- or sixty-year sentences can Mississippi afford?

In 1976, the MDOC supervised 2,509 offenders on a budget of nine million dollars.[244] The budget for fiscal year 1998-99 was $222.5 million, a budget increase of over 2,000 % for an inmate population that has increased by over 600% since 1976![245] Since the department is already at full capacity, only limited options exist to handle this increasing predicament: Mississippi must either build more prisons, or change the sentencing system. Common sense dictates the easier of these two options, and more cost-efficient plan in the long run, is to change the sentencing system rather than to build more and more prisons.[246] Surely, the taxpayers would rather see a balancing between these costs that would focus more on educating young people about the dangers of drug use and providing treatment programs than spending hundreds of millions of dollars to build more prisons and to incarcerate first-time offenders for fifty years for selling less than $100.00 worth of drugs.[247]

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242. U.S. Census Bureau, *Per Pupil Amounts for Current Spending of Public Elementary-Secondary School Systems by State: 1995-96*, (visited Oct. 18, 1999) <http://www.census.gov/govs/school/96tables.pdf>.

243. Bland, *supra* note 224.

244. Mississippi Dep't of Corrections, *Current News & Press Releases*, (visited Oct. 2, 1999) <http://www.mdoc.state.ms.us/mdoc/news.html>.

245. *Id.*

246. *But see* Butch John, *Poor Counties See Inmates as Ticket to Freedom*, CLARION-LEDGER, Dec. 20, 1999, at 9A. The Mississippi Delta has fifteen facilities that house state or federal prisoners, with that number growing every year. *Id.* Senate Corrections Chairman, Bunky Huggins, of Greenwood (in the Mississippi Delta) sees these prisons as a boon to the economy of the Delta: "It's helped the motel business, fast food and gas stations up here." *Id.* "A substantial inmate population is an advantage . . . [p]risons are helping the economy of the towns they're coming into, so what would you do? With the Crime rate growing as it is, you're never going to run out of customers." *Id. But cf.* Walter L. Gordon III, *California's Three Strikes Law: Tyranny of the Majority*, 20 WHITTIER L. REV. 577, 580-81 (1999) (reporting that by 1996 the FBI recorded the largest decline in violent crime since the government began keeping records in 1935 and that crime rates have declined every year since 1992).

247. *See* Joanne Jacobs, *N.M. Gov. Johnson Right on to Support Legalization, Treatment for Drug Abuse*, CLARION-LEDGER, Oct. 25, 1999, at 7A.

> When real political leadership is needed, [politicians] wimp out. Usually . . . . The war on drugs is a high-priced failure . . . . Treatment is the most effective way, by far, to limit drug abuse and crime. Yet access is limited, and waiting lists are long. [Only a] few courageous politicians, notably Baltimore Mayor Kurt Schmoke, have called for treating drug users instead of jailing them.

Id.

Another problem the state must consider is jury nullification in the counties in where these harsh sentences have been imposed.[248] When jurors begin to find defendants not guilty, in spite of solid evidence to the contrary, the situation will grow worse, not better. Individuals who should be locked up for at least some amount of time will walk free and could cause harm to the very citizens who set them free. The cycle will become vicious and law enforcement will be less enthusiastic about prosecuting these cases in the future. Then, the drug crimes could escalate, causing a greater burden on the justice system and the taxpayers of Mississippi.

In the 1980s, most states were facing a crisis in their criminal justice and correctional systems. The tough stance on the "war on drugs" has unwittingly combined with funding shortfalls in most states to produce the prison overcrowding and budgetary crises and little success in reducing the flow of drugs into America.[249] Prison overcrowding in most states, including Mississippi, has spawned federal lawsuits claiming civil rights violations. In 1987, North Carolina passed a prison population cap to avoid federal takeover of its prison system, which led to a dramatic increase in paroles of even violent criminals.[250]

Mississippi faces a difficult policy choice. Shall the state continue to build prisons by raising taxes, diverting funds from education and other plans, or shall it change the criminal justice system?[251] Legislators must understand that ideas of appropriate punishment for crime are not immutable; that appropriate punishments must change over time and vary among individuals; that the scarcity of resources and the need for a clear system of punishment suggest another approach to dealing with the correctional consequences of the law enforcement build up is needed.[252]

The Mississippi Legislature attempted to address the problem in 1998 when it realized that Mississippi's "85% Law" (Truth in Sentencing) was adding to the prison population crisis.[253] However, the parole bill[254] that would have allowed non-violent offenders to be eligible for parole after serving sixty percent of their sentence died in committee on a technicality.[255] Senator Bunky Huggins, Chairman of the Senate Corrections Committee, realizing the need for action,

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248. *See*, Christopher M. Alexander, *Indeterminate Sentencing: An Analysis of Sentencing in America*, 70 S. CAL. L. REV. 1717, 1725 & n.44. (1997) (suggesting that juries may engage in nullification in response to harsh sentences).

249. Thomas W. Ross & Susan Katzenelson, *Crime and Punishment in North Carolina: Severity and Costs Under Structured Sentencing*, 11 FED. SENT. R. 207 (1999). *See also*, Harry W. Fenton, *Drug War Battle Fatigue*, 85 A.B.A.J., Dec. 1999, at 112 (advocating alternatives to locking up more citizens in a war on drugs that cannot be won by conventional means).

250. *See* Ross & Katzenelson, *supra* note 249.

251. *Id.*

252. *Id.*

253. Mississippi Dep't of Corrections, *Reducing Sentences for Non-Violent Inmates . . . Died in Committee*, (visited Oct. 2, 1999) <http://www.mdoc.state.ms.us/press%20releases/ press1.html>.

254. H.B. 320, 1998 Reg. Sess. (Miss. 1998).

255. *Id.* In January 2000, Rep. Roger Ishee of Gulfport filed H.B. 55, which would exempt nonviolent offenders from serving at least eighty-five percent of their sentences before becoming eligible for parole as is done in other states. Emily Wagster, *House Bill 108 Would "Stick It" to Residents*, CLARION LEDGER, Jan. 20, 2000, at 1A, 5A.

stated, "We'll have to look at it [in 1999] . . . . We need to do something."[256] On February 2, 1999, the Nonviolent Criminal Convictions Provision died in the House Committee on the Penitentiary, and when the Legislature adjourned on April 1, 1999, there was no carry-over provision for further action.[257] As of the writing of this article, Mississippi has done nothing to make any changes in these harsh laws or to address the crisis, other than building more prisons and extending the Prison Overcrowding Emergency Powers Act until July 1, 2001, a program which simply advances the parole dates of eligible inmates.[258]

Budget shortfalls and battle over pay increases for teachers brought to the forefront the problem of prison exponential growth again in the 2000 legislative session. A federal lawsuit brought against the state by prisoners' rights attorney Ron Welch threatened the state with $19,728,000 in fines for the housing of state inmates in federally unapproved county jails.[259] With more than 5,800 current prisoners incarcerated for drug convictions, even Mississippi Attorney General Mike Moore spoke out in favor of changing the 85% law because of the burden it places on the prison system population without adequate budgetary measures to address the overcrowding and rising populations.[260] One circuit judge, Keith Starrett of the 14th Circuit Court District, instituted a drug court in 1998, and runs it on a budget of only $25,000 per year.[261] Starrett estimated that his program saved the state over a million dollars and predicted that over $21 million could be saved state-wide if the program were available in every circuit court district.[262]

However, even the threat of $20 million dollars in fines did not prompt the legislature to change the 85% law or pass any other measures to relieve the burgeoning prison population.[263] The Senate let Senate Bill 2800 die, which would have exempted some future nonviolent offenders from the 85% requirement. Senate Judiciary Committee Chairman Bennie Turner decided not to bring the bill to the floor because he felt it did not have the votes to pass.[264] The state then faced a May 15, 2000, deadline to respond to Welch's lawsuit with a plan to ease over-

256. *See*, Mississippi Dep't of Corrections, *supra* note 253. *But see* John, supra note 246.

257. H.B. 797, 1999 Reg. Sess. (Miss. 1999). The bill provided that "persons convicted of nonviolent crimes shall not be subject to the mandatory eighty-five percent sentencing provisions; defines nonviolent crimes; provides for eligibility for parole and for periods of probation." *Id.*

258. MISS. CODE ANN. § 47-5-731 (1995 & Supp. 1999). The 1999 amendment extended the repeal date from July 1, 1999, to July 1, 2001. Ironically, the requirements for the declaration of a prison system overcrowding state of emergency is a system population in excess of ninety-five percent operating capacity for at least thirty consecutive days. MISS. CODE ANN. § 47-5-705 (1995 & Supp. 1999). The prison system is operating at over its capacity, according to MDOC's own statistics. *See* Mississippi Dep't of Corrections, *supra* note 253 and text accompanying. When the system is overcrowding, the Act provides for a report to the Governor and State Parole Board of, inter alia, a recommendation of the specific term of advancement of parole eligibility dates for qualified inmates. MISS. CODE ANN. § 47-5-707 (1993 & Supp. 1999). A qualified inmate is any inmate not incarcerated for murder, kidnapping, arson, armed robbery, rape, sexual offenses or any offense involving the use of a deadly weapon, but not an habitual offender. *Id.* at § 46-5-703(g). *See also* Wagster, *supra* note 255.

259. Beverly Pettigrew Kraft, *AG: Locking up, Throwing Away Key not Answer*, CLARION LEDGER, Mar. 24, 2000, at 1A, 7A.

260. *Id.* at 7A.

261. *Id.*

262. *Id.*

263. Mario Rossilli, *Prison Crowding Bill Dies in Senate*, CLARION LEDGER, May 5, 2000, at 1A.

264. *Id.* at 6A.

crowding and come into compliance with federal mandates.[265] On June 12, 2000, United States Magistrate Judge Jerry Davis fined the state $1.8 million dollars for violating the mandates in *Gates v. Collier*,[266] a federal suit brought against the state in 1974 to end violations of state prisoners' rights while housed in county jails. Judge Davis declined to suspend the 85% law as Welch had requested, but reserved the right to reconsider if the state continued to violate the federal mandates.[267] Welch estimated that to keep pace with current levels of incarceration, the state will need to add about 1,500 new prison beds each year at a cost of $55 million dollars.[268]

Robert Johnson, MDOC Commissioner, laid the blame for the current budget and overcrowding crisis on the lack of long-range planning.[269] The Joint Committee on Performance Evaluation and Expenditure Review (PEER) had recommended earlier the establishment of a long-range plan to handle the projected growth of the inmate population from the current 18,000 to 25,000 by 2006, which will cost an additional $142 million per year.[270] In addition to increased use of probation programs such as electronic monitoring and rehabilitation, Johnson suggested modifying or repealing the 85% law to exempt nonviolent offenders, thereby lessening the space crunch.[271]

One other program that may help alleviate prison overcrowding and budget shortfalls is the Second Chance at Life program advocated by Claiborne County Sheriff Frank Davis.[272] After seeing the same non-violent inmates coming back through the prison system time and time again, Davis hopes the state will adopt the program, which is designed to reduce recidivism by offering education, rehabilitation and discipline programs to the prisoners.[273] Additionally, those who complete the program have a chance to have their records cleared.[274] However, this program will undoubtedly be labeled by the legislature as being "soft on crime." But, Lieutenant Governor Amy Tuck believes this is a common-sense approach to decreasing the state's inmate population.[275]

The debate rages on in the Mississippi Legislature and among its citizens, but, as of January 2, 2001, nothing has been accomplished. The same bill that died in 2000 was reintroduced, but this time the atmosphere at the Capitol has changed since the Mississippi Department of Corrections also requested a $256 million dollar budget plus a $15 million deficit appropriation.[276] Legislators are poised for a fight between budget concerns and appearing soft on crime. In the mean-

265. *Id.*
266. Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd* 501 F.2d 1291 (5th Cir. 1974).
267. Mario Rossilli, *Judge Fines State $1.8M*, CLARION LEDGER, June 13, 2000, 1A, 3A.
268. *Id.* at 3A.
269. Beverly Pettigrew Kraft, *Johnson: Prisons Need a Plan*, CLARION LEDGER, Sep. 3, 2000, at 1A.
270. *Id.* at 15A.
271. *Id.*
272. Sherri Williams, *Sheriff Hopes New Program Will Deter Repeat Offenders*, THE CLARION LEDGER, Dec. 14, 2000, at 1A.
273. *Id.*
274. *Id.*
275. *Id.*
276. Beverly Pettigrew Kraft, *Sentence Mandates v. Costs Big Battle*, CLARION LEDGER, Jan. 2, 2001, 1A.

time, the taxpayers of Mississippi will eventually have to shoulder the additional budgetary shortfalls.

Mississippi is facing an ever-increasing crisis in its corrections and social services systems. When more and more individuals are incarcerated for these long sentences, the remaining members of society are forced to support many of the families of these defendants. Mississippi is one of the poorest states with average per capita income of $16,213.[277] Mississippians cannot continue to afford increased tax burdens and political invasion of a correctional system that is better administered by criminal justice professionals.

B. Will Sentencing Guidelines Help?

Across the nation, drug crimes peaked in the mid-1980s, but the harshest federal penalties were not enacted until 1986 and 1988.[278] A federal drug czar was not appointed until 1989, and many states did not enact their current strict drug laws until 1990 or later, when crimes rates were already falling.[279] The response to the problem has come too late, and now the punishments are too severe for current circumstances. According to Michael Tonry, Director of the Institute of Criminology, Cambridge University and Sonoksy Professor of Law and Public Policy, University of Minnesota, the majority of citizens nearly always reports that sentences are too lenient; yet when they are asked to propose sentences appropriate for certain cases, their proposals are generally much shorter than those actually imposed.[280] Moreover, when citizens express concern over drug use, most suggest that more money should be spent on programs educating youths about drugs—not building more prisons.[281] Generally speaking, legislatures, courts and citizens know why current policies are as they are, but acting on that knowledge will require political courage and public civility not generally found in politics today.[282]

Faced with a similar situation in 1994, North Carolina adopted a sentencing system, which classifies felonies into nine levels and provides presumptive sentences for each level based on the prior record level of the defendant.[283] This system also provides for specific aggravating factors and mitigating factors to raise or lower the presumptive sentence, provided the trial court puts in writing the reasons for departing from the presumptive range.[284] For example, among the twenty aggravating and twenty-one mitigating factors listed, the trial court must examine whether the defendant was employed at the time of his arrest; whether

277. U.S. Census Bureau, *Mississippi Statistics*, (visited Oct. 24, 1999) <www.census.gov/statab/www/states/ms.txt>.

278. Michael Tonry, *Why Are U.S. Incarceration Rates So High?* 45 CRIME & DELINQ. 419437, Oct. 1, 1999, *available in* Westlaw, CJNEWS, 1999 WL 23594635.

279. *Id.*

280. *Id. See also Texas Man Gets 4-Month Sentence in Shooting Death of Wife Having Affair*, CLARION-LEDGER, Oct. 23, 1999 at 5A. "A man who shot his wife to death after finding her with her lover got four months in prison [for murder] . . . [even though] the jury recommended only probation." *Id. Cf.* Jacobs, *supra* note 247.

281. *Poll: Drug Use Alarms Americans*, CLARION-LEDGER, Nov. 21, 1999, at 13A.

282. *Id.*

283. N.C. GEN. STAT. § 15A-1340.17 (1997 & Supp. 1998).

284. *Id.* at §§ 15A-1340.16, -17 (1997 & Supp. 1998).

he was supporting his children; whether the offense was gang-related; whether he has a good treatment prognosis; and whether a workable treatment plan is available.[285] The burden of proof for aggravation is on the prosecutor, while proving mitigation is the defendant's burden—both by preponderance of the evidence.[286]

In addition to incarceration, North Carolina's system offers special probation, residential programs, house arrest with electronic monitoring, intensive probation, day reporting center, supervised and unsupervised probation, outpatient drug/alcohol treatment, community service and restitution and fines.[287] These are all options that are currently available in Mississippi through programs such as Court Watch, Inc.[288] The North Carolina Court of Appeals does not review sentences falling outside the presumptive range, provided that judges have given written reasons for departing from them.[289] This system has worked to bring North Carolina's prison overpopulation crisis into control and has restored the public's trust in the fairness, rationality and predictability of their criminal justice system and measurably improved sentencing in North Carolina.[290]

V. CONCLUSION

Mississippi needs to seriously consider either a modification of its 85% law or a sentencing guidelines system that would create proportional sentencing that allocates punishment according to the gravity of the offense of conviction and the seriousness of the offender's prior record; to increase the use of prison for violent offenders and use less expensive punishments for non-violent offenders; to utilize the home-monitoring systems that some court districts now use; to provide resources to increase supervision, monitoring and control in the community; and to provide more treatment, education and work opportunities in the community.[291] As of 1995, thirteen states were considering guidelines and twenty-two states had already enacted sentences guidelines, most of which are linked to corrections resources and utilize presumptive sentencing from which judges, in their discretion, can depart upon finding aggravating and/or mitigating factors.[292] Mississippi should join the group and at least consider adopting some guidelines.

The time to act is now—the Mississippi Supreme Court issued the invitation in *White*—first offenders, indeed all offenders, should be sentenced proportionately to the crime committed. Mississippi needs a better system with more alternatives to incarceration and lengthy sentences. Mississippi's legislators would be well advised to investigate the North Carolina system and others or to develop its

285. *Id.*
286. *Id.*
287. See Ross & Katzenelson, *supra* note 249.
288. Court Watch, Inc. provides a variety of monitoring services and other alternatives to incarceration to courts around the state. The main office is located in Jackson, and other offices are located in Laurel and McComb.
289. *See* Ross & Katzenelson, *supra* note 249.
290. *Id.* North Carolina's Structured Sentencing reform won the Ford Foundation's 1997 Award for Innovations in American Government. *Id.* n.16.
291. Ross & Katzenelson, *supra* note 249.
292. Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 JUDICATURE 173, 174 (1995).

own system of proportional sentencing that takes into account the individual's case and the state resources available. It is a process in which politics must be put aside in the best interest of all Mississippians. The legislature should act to restore fairness in our criminal justice system as we begin a new millennium. Mississippi simply cannot afford to wait any longer.