Touro Law Review

Volume 11 | Number 3 Article 12

1995

Cruel & Unusual Punishment

CRUEL & UNUSUAL PUNISHMENT

N.Y. CONST. art. I, § 5:

Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained.

U.S. CONST. amend. VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

COURT OF APPEALS

People v. Thompson[1]
(decided March 30, 1994)

The State appealed the appellate division's affirmation of the trial court's holding that for a conviction of selling cocaine, the imposition of the minimum mandatory indeterminate sentence of fifteen years to life imprisonment on a seventeen year-old defendant with no prior criminal record would constitute cruel and unusual punishment.[2] The New York Court of Appeals reversed both lower courts and held that the defendant's youth and other mitigating factors were insufficient to establish the gross disproportionality of the sentence for imprisonment in light of the epidemic proportions of drug dealing in our present society.[3] The court further found that mandatory sentencing provisions for drug-related offenses enacted by the State

1. 83 N.Y.2d 477, 633 N.E.2d 1074, 611 N.Y.S.2d 470 (1994).
2. *Id.* at 479, 633 N.E.2d at 1075, 611 N.Y.S.2d at 471.
3. *Id.* at 482-85, 633 N.E.2d at 1077-79, 611 N.Y.S.2d at 473-75.

Legislature, although relatively severe, were constitutional under both State[4] and Federal[5] Constitutions.[6]

On August 31, 1988, the defendant sold 214 vials of cocaine for $2,000 to an undercover police officer and further "promised to 'take care of' him 'the next time' he came."[7] On December 11, 1989, the defendant, who was then seventeen years old, was convicted of criminal sale of a controlled substance in the first degree[8] for the sale of two ounces, or thirty-three grams of cocaine, a class A-I felony that carries a mandatory indeterminate sentence imposed by Penal Law section 70.00 (2)(a), (3)(a)(i), of which the minimum is between fifteen to twenty-five years and the maximum is life imprisonment.[9] Although the defendant's uncle, a co-defendant, was the prime mover of the drug operation and indicted for five criminal counts of selling a controlled substance in the first degree, he pleaded guilty to one such count in a plea bargain and was sentenced to fifteen years to life imprisonment.[10] The trial court found that because the defendant had no prior criminal record, was enrolled in college prior to incarceration, was a product of a broken family (orphaned at an early age), was the mother of a young son, had already served three years of her sentence, appeared to have sold the cocaine at the behest of her uncle, and especially, because of the defendant's youth,[11] even the imposition of the minimum indeterminate mandatory sentence of fifteen years to life would

4. N.Y. CONST. art. I, § 5. This provision states that: "Excessive bail shall not be required nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained." *Id.*

5. U.S. CONST. amend. VIII. This provision states that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

6. *Thompson*, 83 N.Y.2d at 485, 633 N.E.2d at 1079, 611 N.Y.S.2d at 475.

7. *Id.* at 479, 633 N.E.2d at 1075, 611 N.Y.S.2d at 471.

8. People v. Thompson, 190 A.D.2d 162, 596 N.Y.S.2d 421 (1st Dep't 1993).

9. *Thompson*, 83 N.Y.2d at 479, 633 N.E.2d at 1075, 611 N.Y.S.2d at 471.

10. *Id.* at 484, 633 N.E.2d at 1078, 611 N.Y.S.2d at 474.

11. *Thompson*, 190 A.D.2d at 165-66, 596 N.Y.S.2d at 422-23.

constitute cruel and unusual punishment as prohibited by the New York State Constitution, article I, section five and the Eighth Amendment of the United States Constitution.[12] Invoking the "rare" exceptional case referred to in the seminal case of *People v. Broadie*,[13] the trial court imposed a lower imprisonment term of eight years to life imprisonment.[14] The appellate division affirmed the trial court's judgment and stated that "[c]ertainly, the imposition of such a harsh punishment on a teenager violates the constitution."[15]

In strict adherence to *Broadie*, however, the New York Court of Appeals reversed both the trial court's and appellate division's judgment, and re-sentenced the defendant to fifteen years to life imprisonment as mandated by statute.[16] In *Broadie*, although the court noted that no punishment had ever been found to be unconstitutionally disproportionate in New York, it adopted the principle that an imprisonment sentence may constitute cruel and unusual punishment if it is "grossly disproportionate to the crime."[17] To assess whether a punishment is grossly disproportionate, the *Broadie* court established a three-prong analysis: 1) "the gravity of the offense;" 2) a comparison between "the challenged punishments with those prescribed in the same jurisdiction for other offenses, and also with punishments for the same or similar offenses prescribed in other

12. *Thompson*, 83 N.Y.2d at 479, 633 N.E.2d at 1075, 611 N.Y.S.2d at 471.

13. 37 N.Y.2d 100, 332 N.E.2d 338, 371 N.Y.S.2d 471 (1975). Eight defendants were convicted of selling heroin and cocaine. *Id.* at 110, 332 N.E.2d at 341, 371 N.Y.S.2d at 474. Defendants challenged the constitutionality of the "drug" laws, statutes classifying the crimes of the sale of controlled substances as class A felonies, the highest rank of crime in New York State, that imposed a mandatory minimum sentence from one or six years to eight and one-third years, and a maximum sentence of life imprisonment. *Id.*

14. *Thompson*, 190 A.D.2d at 163, 596 N.Y.S.2d at 421.

15. *Id.* at 167, 596 N.Y.S.2d at 424.

16. *Thompson*, 83 N.Y.2d at 479, 633 N.E.2d at 1075, 611 N.Y.S.2d at 471.

17. *Broadie*, 37 N.Y.2d at 111, 332 N.E.2d at 341, 371 N.Y.S.2d at 475.

jurisdictions;" and, 3) "the character of the offender and gravity of the threat he poses to society."[18]

In assessing the first prong, the gravity of the offense element, the court in *Thompson* held that "time has not eroded this Court's conclusion in *Broadie* that the selling of narcotic drugs represents a grave offense of the first magnitude."[19] As adopted by the *Broadie* court, the primary focus in determining the gravity of the offense was "the harm it causes to society."[20] In regard to drug trafficking crimes, the *Broadie* court reasoned that the legislature may "properly view criminal narcotics sales not as a series of isolated transactions, but as symptoms of widespread and pernicious phenomenon of drug distribution. . . . [t]he drug seller, at every level of distribution, is at the root of the pervasive cycle of destructive drug abuse."[21] Within this cycle, the *Broadie* court emphasized that drug trafficking, because of its high stakes and illegal nature, generates "collateral" crimes that often result in violence against law enforcement officers and violence even among drug dealers themselves, while simultaneously furthering the generation of new drug addicts whose addiction "degrades and impoverishes those whom it enslaves."[22] Thus, the *Broadie* court concluded that "[m]easured thus by the harm it inflicts upon the addict, and, through him, upon the society as a whole, drug dealing in its present epidemic proportions is a grave offense of high rank."[23]

In assessing the second prong, the court in *Thompson* held that the nineteen years spanning between *Broadie* and the case at bar have not changed the conclusion that "mandatory sentences for drug offenses are 'relatively severe, but not irrationally so, given

18. *Id.* at 112-13, 332 N.E.2d at 342-43, 371 N.Y.S.2d at 476-77. *See* Allyn G. Heald, *Criminal Law:* United States v. Gonzalez*: In Search of a Meaningful Proportionality Principle*, 58 BROOK. L. REV. 455 (1992) (advocating the test espoused in Solem v. Helm, 463 U.S. 277 (1983)).

19. *Thompson*, 83 N.Y.2d at 482, 633 N.E.2d at 1077, 611 N.Y.S.2d at 473.

20. *Broadie*, 37 N.Y.2d at 112, 332 N.E.2d at 342, 371 N.Y.S.2d at 476.

21. *Id.* at 112, 332 N.E.2d at 342, 371 N.Y.S.2d at 476-77.

22. *Id.* at 113, 332 N.E.2d at 343, 371 N.Y.S.2d at 477.

23. *Id.*

the epidemic dimensions of the problem.'"[24] Noting that a comparison with punishments for other crimes in New York and with punishments for the same or similar crimes in other jurisdictions would be helpful in assessing the gravity of the offense, the *Broadie* court found that the punishment in New York for drug trafficking was relatively severe.[25]

In comparison with other crimes in New York, the *Broadie* court conceded that drug offenses were "punished more severely and inflexibly than almost any other offense in the State."[26] However, because drug dealing itself is a "grave offense of high rank" that generates collateral crimes, often violent crimes, which "have a higher and rising incidence, than other crimes comparably punished or equally grave crimes not as severely punished," drug-related crimes require "greater isolation and deterrence."[27]

In comparison with punishment in other jurisdictions, the *Broadie* court also found that drug offenses were "punished more severely in [New York] State than in other jurisdictions."[28] The

24. *Thompson*, 83 N.Y.2d at 482, 633 N.E.2d at 1077, 611 N.Y.S.2d at 473 (quoting *Broadie*, 37 N.Y.2d at 117, 332 N.E.2d at 345, 371 N.Y.S.2d at 480-81).

25. *Broadie*, 37 N.Y.2d at 115-16, 332 N.E.2d at 344-45, 371 N.Y.S.2d at 479-80.

26. *Id.* at 115, 332 N.E.2d at 344, 371 N.Y.S.2d at 479.

27. *Id.* at 116, 332 N.E.2d at 345, 371 N.Y.S.2d at 480.

28. *Id. See* State v. Padilla, 817 P.2d 15 (Ariz. Ct. App. 1991) (affirming sentence of nine years imprisonment plus $205,000 fine for possession of cocaine valued at $280,000); State v. Wise, 795 P.2d 217 (Ariz. Ct. App. 1990) (sentence of nine years imprisonment for possession of eight kilograms of cocaine to be sold); State v. Somerville, 572 A.2d 944 (Conn. 1990) (affirming statutory imposed minimum sentence of not less than five years nor more than twenty years for possession of more than one ounce of cocaine with intent to sell); State v. Fairchild, 829 P.2d 550 (Idaho Ct. App. 1992) (affirming the sentencing of the defendant to an imprisonment term of five years for the possession of more than three ounces of marijuana with intent to deliver); People v. Schultz, 460 N.W.2d 505 (Mich. 1990) (remanding the case for re-sentencing of the defendant to a lower prison term than the imposed term of twenty to thirty years for the possession of ten ounces of cocaine); State v. Roberson, 588 A.2d 434 (N.J. Super. Ct. App. Div. 1991) (affirming the imposition of a three-year mandatory minimum prison sentence for possession of more than one-half ounce but less than five ounces of cocaine

Broadie court, however, reasoned that severe punishment for drug offenses was justified in New York because "drug trafficking is more extensive in New York" and recognized that "California, with a similar drug problem, punishes drug trafficking almost as severely as New York."[29]

In assessing the third prong, the court in *Thompson* held that the defendant's culpability in the drug transaction was sufficiently high and the threat which the defendant poses to society, as examined under the facts of this particular case, justified the punishment.[30] Although the defendant had no prior criminal record, the court reasoned that because the defendant had made $2,000 "wholesale" deal for 200 vials of cocaine, "knowledgeably haggled with [the undercover officer] over the amount of the customary bonus of additional vials," insisted on only giving the officer fourteen additional vials instead of twenty, and then "promis[ed] to 'take care of' him personally 'the next time' he came," the court concluded that the defendant was "motivated by a desire 'to obtain personal profit'"[31] and rejected the notion that the defendant was an "accidental" offender.[32]

The court in *Thompson* emphasized that whereas the defendant in *People v. Jones*[33] may be characterized as "'perhaps an accidental' offender," the trial judge in the case at bar was

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with intent to distribute); State v. Hermann, 474 N.W.2d 906 (Wis. Ct. App. 1991) (affirming the trial court's sentencing the defendant to the statutory minimum of five years imprisonment on each count of delivery of a controlled substance); Saldana v. State, 846 P.2d 604 (Wyo. 1993) (affirming the sentence of a statutorily imposed prison term of not less than two and one-half years but no more than seven years for possessing four and one-half ounces of uncut cocaine with intent to deliver).

29. *Broadie*, 37 N.Y.2d at 116, 332 N.E.2d at 345, 371 N.Y.S.2d at 480.

30. *Thompson*, 83 N.Y.2d at 482-84, 633 N.E.2d at 1077-79, 611 N.Y.S.2d at 473-75.

31. *Id.* at 484, 633 N.E.2d at 1075-78, 611 N.Y.S.2d at 471-74.

32. *Id.* at 483, 633 N.E.2d at 1078, 611 N.Y.S.2d at 474.

33. 39 N.Y.2d 694, 350 N.E.2d 913, 385 N.Y.S.2d 525 (1976). In *Jones*, the defendant was a "millhand," a drug packager who was at the lowest level among the hierarchy of a large-scale heroin distribution operation and had no control over the amount of drugs present on the premises. *Id.* at 696, 350 N.E.2d at 914, 385 N.Y.S.2d at 526.

convinced that the defendant was in fact guilty as charged.[34] Even for a possible accidental offender, however, the *Jones* court held that the wide disparity between the defendant's sentence of fifteen years to life imprisonment, and twelve other persons' sentences ranging from three years to twenty-five years arising from the same police raid, did not amount to grossly disproportionate punishment.[35] Similarly, in *People v. Donovan*,[36] the court held that there was no gross disproportionate punishment where the defendant had procured the drugs without the motive for personal profit and at the behest of her boyfriend, a drug dealer, who was only sentenced to lifetime probation for cooperating with the authorities.[37] The court further reasoned that although the defendant's uncle's "far greater culpability merited substantially more punishment than

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34. *Thompson*, 83 N.Y.2d at 483, 633 N.E.2d at 1078, 611 N.Y.S.2d at 474 (quoting *Jones*, 39 N.Y.2d at 701, 350 N.E.2d at 918, 385 N.Y.S.2d at 529 (Breitel, C.J., dissenting)).

35. *Jones*, 39 N.Y.2d at 696, 350 N.E.2d at 914-15, 385 N.Y.S.2d at 526. In *Jones*, the court was called to determine whether the marked discrepancy between the sentence imposed upon the defendant, a "millhand" in a large-scale heroin distribution operation, and the sentences imposed upon twelve other persons arrested in the same police raid, constituted cruel and unusual punishment. *Id.* at 696, 350 N.E.2d at 914, 385 N.Y.S.2d at 526. The defendant was convicted of criminal joint possession of a dangerous drug in the first degree for joint possession of over four pounds of heroin and sentenced to an indeterminate term from 15 years to life imprisonment. *Id.* Although the defendant was given the opportunity to plead to a lesser offense similar to the twelve others arrested in the same raid, she had declined to do so. *Id.* Depending on the crime to which each of the twelve persons pleaded guilty, they received imprisonment sentences ranging from 3 years to 25 years. *Id.*

36. 89 A.D.2d 968, 454 N.Y.S.2d 118 (2d Dep't 1982), *aff'd*, 59 N.Y.2d 834, 451 N.E.2d 492, 464 N.Y.S.2d 745 (1983). In *Donovan*, the defendant was convicted of first degree criminal sale and first degree possession of a controlled substance, approximately four ounces of cocaine, and was sentenced to 15 years to life imprisonment. *Id.* at 968, 454 N.Y.S.2d at 119. Although the defendant was given the opportunity to plead guilty to a lesser offense that carried one to three years imprisonment, the defendant rejected that plea proposal. *Thompson*, 83 N.Y.2d at 481, 633 N.E.2d at 1077, 611 N.Y.S.2d at 473.

37. *Donovan*, 89 A.D.2d at 968, 454 N.Y.S.2d at 118.

[the sentence] defendant received," the fact that the defendant and her uncle received the same indeterminate sentence of fifteen years to life imprisonment was insufficient to establish grossly disproportionate punishment.[38]

Moreover, the court stressed that because the defendant had made a $2,000 "wholesale" deal for 214 vials of cocaine, her level of culpability and the threat to society was at least a step higher than defendants who had prior convictions of mere "street" sales or possessions as in *Broadie*.[39]

In *Broadie*, although the court stated that none of the eight defendants were "hardened" criminals, the court found that they were also not what are often called "accidental" offenders, because all eight defendants were convicted of at least "street" sales or possession of heroin or cocaine.[40] Thus, the *Broadie* court concluded that "[a]s sellers, they cannot disclaim their roles in the scourge of drug distribution," and that each of the defendants may reasonably be considered a serious threat to society meriting severe punishment.[41] Thus, the *Broadie* court found that the imposed mandatory sentences were not grossly disproportionate for the criminal sale of a controlled substance and held that the mandatory sentencing provisions were constitutional, both facially and as applied.[42]

In addressing the "rare" exception case as envisioned in *Broadie*,[43] the court briefly concluded that although the defendant's pre-sentence report did evince some mitigating factors, the defendant failed to "demonstrate such an exceptional level of childhood deprivation that would significantly excuse her behavior."[44] Referring to the defendant's probation officer's pre-

38. *Thompson*, 83 N.Y.2d at 484, 633 N.E.2d at 1078, 611 N.Y.S.2d at 474.

39. *Id.* at 483, 633 N.E.2d at 1077-78, 611 N.Y.S.2d at 473-74.

40. *Broadie*, 37 N.Y.2d at 113, 332 N.E.2d at 343, 371 N.Y.S.2d at 477.

41. *Id.* at 114, 332 N.E.2d at 343, 371 N.Y.S.2d at 478.

42. *Id.* at 117, 332 N.E.2d at 345, 371 N.Y.S.2d at 481. *See* People v. Johnson, 53 A.D.2d 777, 384 N.Y.S.2d 551 (2d Dep't 1976) (upholding mandatory maximum sentences of life imprisonment as constitutional).

43. *Id.* at 119, 332 N.E.2d at 347, 371 N.Y.S.2d at 482.

44. *Thompson*, 83 N.Y.2d at 484, 633 N.E.2d at 1078, 611 N.Y.S.2d at 474.

sentence investigation report as a "good 'vantage point'" since the defendant did not testify on her own behalf, the court summarily refused to acknowledge any possible domination or coercion by the defendant's uncle and rather stressed that the defendant's motive for committing the offense was "a desire 'to obtain personal profit'" and that the defendant "'received adequate supervision and that the quality of the home was decent' during most of her formative years when she was raised by a grandmother in Jamaica, British West Indies."[45]

In consideration of the defendant's youth, the court rejected the notion that adolescent offenders are constitutionally protected from mandatory imprisonment provisions.[46] The court noted that "the Legislature has consciously extended the A-I felony mandatory minimums to youths in [the] defendant's age category."[47] The court reasoned that because of the prevalent roles that adolescents play in marketing and trafficking illegal drugs today, the legislature may rationally conclude that they "pose a serious threat to society."[48] The court found that the defendant had failed to meet the burden of demonstrating "any objective basis" to support the assertion that "contemporary standards of decency prevent imposing a sentence of fifteen years to life imprisonment upon an older adolescent for a direct volitional sale of more than two ounces of cocaine for $2,000."[49]

Therefore, after reviewing the gravity of the defendant's crime, the general harm it causes to society, comparisons with other crimes in New York and with the same or similar crimes in other jurisdictions, the defendant's culpability and the harm that the defendant's specific conduct causes society, and finding "no strongly mitigating factors" except the defendant's youth, the court held that there was no gross disproportionate punishment.[50] The court thus concluded that the New York State Constitution, article I, section 5 and Eighth Amendment of the United States

45. *Id.* at 483-84, 633 N.E.2d at 1078, 611 N.Y.S.2d at 474.
46. *Id.* at 484, 633 N.E.2d at 1078, 611 N.Y.S.2d at 474.
47. *Id.* at 484, 633 N.E.2d at 1079, 611 N.Y.S.2d at 475.
48. *Id.* at 485, 633 N.E.2d at 1079, 611 N.Y.S.2d at 475.
49. *Id.*
50. *Id.*

Constitution proscribing cruel and unusual punishment were not violated.[51]

The dissenters, Judges Bellacosa and Ciparick, on the other hand, argued that imposing the mandatory sentence is a grossly disproportionate punishment for the defendant's crime because the case at bar fell within the "rare" case exception in *Broadie*.[52] The dissenters stressed that "*Broadie*'s 'rare case' exception, examined, understood and applied in the brighter light of contemporary standards, based on twenty years of experience and empirical data," applied in this case.[53] Focusing on the numerous mitigating factors including defendant's total lack of prior criminal record and no other criminal activity noted in the pre-sentence report or the testimony of the undercover officer,[54] the domination of her uncle,[55] the deprivation of her natural parents, and her youth, the dissenters firmly placed the case at bar within the *Broadie*'s rare case exception.[56] The dissenters reasoned that in assessing the mitigating factors, the trial court and the appellate court "had the best vantage point to draw inferences, characterizations and interpretations from the record" rather than pre-sentence reports by a probation officer, because the courts are ordinarily and traditionally given deference in sentencing matters.[57]

The dissenters noted that since *Broadie*, this is the first case where the court, rather than not disturbing the sentences below, "substitute[d] the more severe, legislatively mandated minimum sentence in lieu of the sentence imposed by the prior courts in their effort to arrive at a constitutional, proportioned and

51. *Id.*

52. *Id.* at 488-89, 633 N.E.2d at 1081, 611 N.Y.S.2d at 477 (Bellacosa, J., dissenting).

53. *Id.* at 488, 633 N.E.2d at 1081, 611 N.Y.S.2d at 477 (Bellacosa, J., dissenting).

54. *Id.* at 491-92, 633 N.E.2d at 1082-83, 611 N.Y.S.2d at 478-79.

55. *Id.*

56. *Id.* at 488-500, 633 N.E.2d at 1081-88, 611 N.Y.S.2d at 477-84 (Bellacosa, J., dissenting).

57. *Id.* at 491, 633 N.E.2d at 1082-83, 611 N.Y.S.2d at 478-79 (Bellacosa, J., dissenting).

appropriate sentence."[58] The dissenters concluded that "by overturning the opposite views of both prior courts, effectively renders a first instance judgment that an Eighth Amendment transgression and the rare case exception are not present."[59] That is, the dissenters reasoned that the court's judgment "allows, ironically, no judicial sentencing discretion or departure from absolute mandates [by the Legislature] in the particular framework of this case . . . ."[60] although no branch of the government have been "invested with unilateral power over the liberty of individuals,"[61] but rather "the unique responsibility of sentencing is traditionally reposed in neutral Magistrates, not in partisan prosecutors."[62] In conclusion, the dissenters urged that the original sentence "should be upheld by affirming the prior courts as heralds of the arrival of *Broadie*'s promise that a rare case exception does indeed exist."[63]

When faced with the correct set of facts, the courts in New York have found the "rare case exception" stated in *Broadie*. The Appellate Division, First Department in *People v. Robinson*[64] firmly stated that "the instant matter is embraceable within the guidelines of *Broadie*."[65] The *Robinson* court held that "the instant case does represent that rare case which on its particular facts impels the reasoned conclusion that the statutes have been unconstitutionally applied insofar as the sentencing of this defendant is concerned."[66] The defendant in *Robinson* was convicted for criminal sale of a controlled substance in the second degree and sentenced to an indeterminate term from six years to life imprisonment as mandated by statute. The court found that

58. *Id.* at 495, 633 N.E.2d at 1085, 611 N.Y.S.2d at 481 (Bellacosa, J., dissenting).

59. *Id.* (Bellacosa, J., dissenting).

60. *Id.* (Bellacosa, J., dissenting).

61. *Id.* at 499, 633 N.E.2d at 1087, 611 N.Y.S.2d at 483 (Bellacosa, J., dissenting).

62. *Id.* (Bellacosa, J., dissenting).

63. *Id.* at 500, 633 N.E.2d at 1088, 611 N.Y.S.2d at 484 (Bellacosa, J., dissenting).

64. 68 A.D.2d 413, 417 N.Y.S.2d 88 (1st Dep't 1979).

65. *Id.* at 415, 417 N.Y.S.2d at 90.

66. *Id.*

the defendant, who had no prior criminal record, was a mother of two small children, and who was below average intelligence, was merely a messenger to deliver the package containing a controlled substance at the bequest of her husband.[67] In light of the rare exception rule, the *Robinson* court modified the sentence, reducing the imprisonment term to a term of one year to life.[68]

The United States Supreme Court was faced with the constitutionality of mandatory sentencing provisions in the seminal cases of *Solem v. Helm*[69] and *Harmelin v. Michigan.*[70] Although both cases involved mandatory sentencing laws that imposed life imprisonment without the possibility of parole, the *Solem* Court struck down the mandatory sentencing law while *Harmelin*, the most recent case, upheld such mandatory sentencing provision.[71] In *Solem*, the Court established the proportionality analysis in assessing whether a sentence was grossly disproportionate that included the following objective criteria: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of

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67. *Id.* at 414, 417 N.Y.S.2d at 89.

68. *Id.* at 415, 417 N.Y.S.2d at 90. *Cf.* People v. Miranda, 155 A.D.2d 901, 547 N.Y.S.2d 491 (4th Dep't 1989) (dismissing the contention that the facts of the case constituted the "rare case" exception under *Broadie* where the defendant was a willing seller of 10 ounces of cocaine who had previously sold the same amount and negotiated with an undercover officer by lowering the price to close the drug transaction); People v. Miller, 126 A.D.2d 868, 511 N.Y.S.2d 160 (3d Dep't 1987) (rejecting the "rare case" exception argument).

69. 463 U.S. 277 (1983). In *Solem*, the defendant was convicted of uttering a "no account" check for $100 and under South Dakota recidivist law, sentenced to life imprisonment without the possibility of parole because the defendant had six prior felony convictions although the maximum sentence would have been only 5 years imprisonment and a $5,000 fine if the defendant had no prior criminal record. *Id.* at 281-84. The Supreme Court held that such mandatory sentencing scheme was significantly disproportionate to the crime committed and thus, violated the Eighth Amendment. *Id.* at 303.

70. 501 U.S. 957 (1991). In *Harmelin*, the defendant was convicted under Michigan law for the illegal possession of 672 grams of cocaine and was sentenced to mandatory life imprisonment without parole. *Id.* at 958.

71. *Thompson*, 83 N.Y.2d at 485-86, 633 N.E.2d at 1079, 611 N.Y.S.2d at 475-76.

the same crime in other jurisdictions."[72] Comparisons may be "made in the light of the harm caused or threatened to the victim or society, and the culpability of the offender."[73] These factors were essentially identical to those set forth by Chief Judge Breitel in *Broadie*. In *Harmelin*, although these same factors were applied by the dissenters in their proportionality analysis, the majority of the Supreme Court rejected the notion of a constitutional proportionality principle.[74] The majority reasoned that if proportionality principle exists, its real function is to "enable judges to evaluate a penalty that some assemblage of men and women has considered proportionate -- and to say that it is not."[75] In the real world, however, the Court noted that "the [*Solem*] standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values."[76] Thus, the *Harmelin* Court concluded that "*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee"[77] and upheld a mandatory sentencing provision imposing a mandatory life imprisonment without the possibility of parole.[78]

In contrast, New York law only requires that the minimum term of sentence be served before the possibility of parole.[79] Furthermore, similar to the dissenters in *Harmelin*, the New York Court of Appeals, in the case at bar, essentially applied the same factors of proportionality analysis laid-out by Chief Judge Breitel in *Broadie* and applied in *Solem*. Thus, New York law provides greater protection for its citizens from cruel and unusual punishment under the State Constitution than federal law provides under the Eighth Amendment.

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72. *Solem*, 463 U.S. at 292.
73. *Id.*
74. *Harmelin*, 501 U.S. at 963.
75. *Id.* at 977.
76. *Id.*
77. *Id.* at 963.
78. *Id.* at 982.
79. *Thompson*, 83 N.Y.2d at 482, 633 N.E.2d at 1077, 611 N.Y.S.2d at 473.