SUPREME COURT OF THE UNITED STATES

No. 01–1127

BILL LOCKYER, ATTORNEY GENERAL OF CALIFORNIA, PETITIONER *v.* LEANDRO ANDRADE

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

[March 5, 2003]

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The application of the Eighth Amendment prohibition against cruel and unusual punishment to terms of years is articulated in the "clearly established" principle acknowledged by the Court: a sentence grossly disproportionate to the offense for which it is imposed is unconstitutional. See *ante*, at 4; *Harmelin* v. *Michigan*, 501 U. S. 957 (1991); *Solem* v. *Helm,* 463 U. S. 277 (1983); *Rummel* v. *Estelle,* 445 U. S. 263 (1980). For the reasons set forth in JUSTICE BREYER's dissent in *Ewing* v. *California*, *ante,* at ___, which I joined, Andrade's sentence cannot survive Eighth Amendment review. His criminal history is less grave than Ewing's, and yet he received a prison term twice as long for a less serious triggering offense. To be sure, this is a habeas case and a prohibition couched in terms as general as gross disproportion necessarily leaves state courts with much leeway under the statutory criterion that conditions federal relief upon finding that a state court unreasonably applied clear law, see 28 U. S. C. §2254(d). This case nonetheless presents two independent reasons for holding that the disproportionality review by the state court was not only erroneous but unreasonable, entitling Andrade to relief. I respectfully dissent accordingly.

The first reason is the holding in *Solem*, which happens

to be our most recent effort at proportionality review of recidivist sentencing, the authority of which was not left in doubt by *Harmelin*, see 501 U. S., at 998. Although *Solem* is important for its instructions about applying objective proportionality analysis, see 463 U. S., at 290–292, the case is controlling here because it established a benchmark in applying the general principle. We specifically held that a sentence of life imprisonment without parole for uttering a $100 "no account" check was disproportionate to the crime, even though the defendant had committed six prior nonviolent felonies. In explaining our proportionality review, we contrasted the result with *Rummel*'s on the ground that the life sentence there had included parole eligibility after 12 years, *Solem*, 463 U. S., at 297.

The facts here are on all fours with those of *Solem* and point to the same result. *Id.,* at 279–281. Andrade, like the defendant in *Solem*, was a repeat offender who committed theft of fairly trifling value, some $150, and their criminal records are comparable, including burglary (though Andrade's were residential), with no violent crimes or crimes against the person. The respective sentences, too, are strikingly alike. Although Andrade's petty thefts occurred on two separate occasions, his sentence can only be understood as punishment for the total amount he stole. The two thefts were separated by only two weeks; they involved the same victim; they apparently constituted parts of a single, continuing effort to finance drug sales; their seriousness is measured by the dollar value of the things taken; and the government charged both thefts in a single indictment. Cf. United States Sentencing Commission, Guidelines Manual §3D1.2 (Nov. 2002) (grouping temporally separated counts as one offense for sentencing purposes). The state court accordingly spoke of his punishment collectively as well, carrying a 50-year minimum before parole eligibility, see App. to Pet. for Cert. 77 ("[W]e

cannot say the sentence of 50 years to life at issue in this case is disproportionate"), and because Andrade was 37 years old when sentenced, the substantial 50-year period amounts to life without parole. *Solem*, *supra,* at 287 (quoting *Robinson* v. *California,* 370 U. S. 660, 667 (1962) (when considering whether a punishment is cruel or unusual "'the questions cannot be considered in the abstract'")); cf. *Rummel*, *supra,* at 280–281 (defendant's eligibility for parole in 12 years informs a proper assessment of his cruel and unusual punishment claim). The results under the Eighth Amendment should therefore be the same in each case. The only ways to reach a different conclusion are to reject the practical equivalence of a life sentence without parole and one with parole eligibility at 87, see *ante,* at 9, ("Andrade retains the possibility of parole"), or to discount the continuing authority of *Solem*'s example, as the California court did, see App. to Pet. for Cert. 76 ("[T]he current validity of the Solem proportionality analysis is questionable.") The former is unrealistic; an 87-year-old man released after 50 years behind bars will have no real life left, if he survives to be released at all. And the latter, disparaging *Solem* as a point of reference on Eighth Amendment analysis, is wrong as a matter of law.

The second reason that relief is required even under the §2254(d) unreasonable application standard rests on the alternative way of looking at Andrade's 50-year sentence as two separate 25-year applications of the three-strikes law, and construing the challenge here as going to the second, consecutive 25-year minimum term triggered by a petty theft.[1] To understand why it is revealing to look at

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[1]This point is independent of the fact, recognized by the Court, *ante,* at ___, that it remains open to Andrade to appeal his sentence under *People* v. *Garcia*, 20 Cal. 4th 490, 976 P. 2d 831 (1999) (holding trial court may dismiss strikes on a count-by-count basis; such discretion is

the sentence this way, it helps to recall the basic difficulty inherent in proportionality review. We require the comparison of offense and penalty to disclose a truly gross disproportionality before the constitutional limit is passed, in large part because we believe that legislatures are institutionally equipped with better judgment than courts in deciding what penalty is merited by particular behavior. *Solem*, 463 U. S., at 290. In this case, however, a court is substantially aided in its reviewing function by two determinations made by the State itself.

The first is the State's adoption of a particular penalogical theory as its principal reason for shutting a three-strikes defendant away for at least 25-years. Although the State alludes in passing to retribution or deterrence (see Brief for Petitioner 16, 24; Reply Brief for Petitioner 10), its only serious justification for the 25-year minimum treats the sentence as a way to incapacitate a given defendant from further crime; the underlying theory is the need to protect the public from a danger demonstrated by the prior record of violent and serious crime. See Brief for Petitioner 17 ("significant danger to society such that [defendant] must be imprisoned for no less than twenty-five years to life"); *id.,* at 21 ("statute carefully tailored to address . . . defendants that pose the greatest danger"); *id.,* at 23 ("isolating such a defendant for a substantial period of time"); Reply Brief for Petitioner 11 ("If Andrade's reasoning were accepted, however, California would be precluded from incapacitating him"). See also *Rummel*, 445 U. S., at 284 ("purpose of a recidivist statute . . . [is] to segregate").[2] The State, in other words has not

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consistent with mandatory consecutive sentencing provision).

[2]Implicit in the distinction between future dangerousness and repunishment for prior crimes is the notion that the triggering offense must, within some degree, be substantial enough to bear the weight of the sentence it elicits. As triggering offenses become increasingly

chosen 25 to life because of the inherent moral or social reprehensibility of the triggering offense in isolation; the triggering offense is treated so seriously, rather, because of its confirmation of the defendant's danger to society and the need to counter his threat with incapacitation. As to the length of incapacitation, the State has made a second helpful determination, that the public risk or danger posed by someone with the specified predicate record is generally addressed by incapacitation for 25 years before parole eligibility. Cal. Penal Code Ann. §667(e)(2)(A)(ii) (West 1999). The three-strikes law, in sum, responds to a condition of the defendant shown by his prior felony record, his danger to society, and it reflects a judgment that 25 years of incapacitation prior to parole eligibility is appropriate when a defendant exhibiting such a condition commits another felony.

Whether or not one accepts the State's choice of penalogical policy as constitutionally sound, that policy cannot reasonably justify the imposition of a consecutive 25-year minimum for a second minor felony committed soon after the first triggering offense. Andrade did not somehow

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minor and recidivist sentences grow, the sentences advance toward double jeopardy violations. When defendants are parking violators or slow readers of borrowed library books, there is not much room for belief, even in light of a past criminal record, that the State is permanently incapacitating the defendant because of future dangerousness rather than resentencing for past offenses.

That said, I do not question the legitimacy of repeatedly sentencing a defendant in light of his criminal record: the Federal Sentencing Guidelines provide a prime example of how a sentencing scheme may take into account a defendant's criminal history without resentencing a defendant for past convictions, *Witte* v. *United States*, 515 U. S. 389, 403 (1995) (the triggering offense determines the range of possible sentences, and the past criminal record affects an enhancement of that sentence). The point is merely that the triggering offense must reasonably support the weight of even the harshest possible sentences.

become twice as dangerous to society when he stole the second handful of videotapes; his dangerousness may justify treating one minor felony as serious and warranting long incapacitation, but a second such felony does not disclose greater danger warranting substantially longer incapacitation. Since the defendant's condition has not changed between the two closely related thefts, the incapacitation penalty is not open to the simple arithmetic of multiplying the punishment by two, without resulting in gross disproportion even under the State's chosen benchmark. Far from attempting a novel penal theory to justify doubling the sentence, the California Court of Appeal offered no comment at all as to the particular penal theory supporting such a punishment. App. to Pet. for Cert. 76–79. Perhaps even more tellingly, no one could seriously argue that the second theft of videotapes provided any basis to think that Andrade would be so dangerous after 25 years, the date on which the consecutive sentence would begin to run, as to require at least 25 years more. I know of no jurisdiction that would add 25 years of imprisonment simply to reflect the fact that the two temporally related thefts took place on two separate occasions, and I am not surprised that California has found no such case, not even under its three-strikes law. Tr. of Oral Arg. 52 (State's counsel acknowledging "I have no reference to any 50-year-to-life sentences based on two convictions"). In sum, the argument that repeating a trivial crime justifies doubling a 25-year minimum incapacitation sentence based on a threat to the public does not raise a seriously debatable point on which judgments might reasonably differ. The argument is irrational, and the state court's acceptance of it in response to a facially gross disproportion between triggering offense and penalty was unreasonable within the meaning of §2254(d).

This is the rare sentence of demonstrable gross disproportionality, as the California Legislature may well have

recognized when it specifically provided that a prosecutor may move to dismiss or strike a prior felony conviction "in the furtherance of justice." Cal. Penal Code Ann. §667(f)(2) (West 1999). In this case, the statutory safeguard failed, and the state court was left to ensure that the Eighth Amendment prohibition on grossly disproportionate sentences was met. If Andrade's sentence is not grossly disproportionate, the principle has no meaning. The California court's holding was an unreasonable application of clearly established precedent.