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Eighth Amendment - Andrade v. Attorney General

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EIGHTH AMENDMENT

ANDRADE V. ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

270 F.3D 743 (9TH CIR. 2001)

I. INTRODUCTION

A large majority of states have enacted recidivist statutes requiring increased punishment for repeat offenders. California's controversial recidivist statute, the Three Strikes and You're Out Law (the Three Strikes Law), was approved by ballot initiative and enacted by the state legislature in 1994. Defendants have challenged the constitutionality of sentences under habitual offender statutes for at least twenty years. In Harmelin v. Helm, the United States Supreme Court addressed the constitutionality of a life sentence without the possibility of parole for a first time drug offender convicted of possession of 650 grams of cocaine. Justice Kennedy's concurrence in Harmelin set forth a three-part gross proportionality analysis to be applied to sentences imposed...
upon non-violent recidivists challenged under the Eighth Amendment's clause prohibiting cruel and unusual punishment.\textsuperscript{7} In \textit{Andrade v. Attorney General},\textsuperscript{8} the United States Court of Appeals for the Ninth Circuit applied Justice Kennedy's \textit{Harmelin} analysis to a life sentence without the possibility of parole for fifty years, imposed under the Three Strikes Law on a non-violent recidivist who stole nine videotapes worth under $200 on two separate occasions.\textsuperscript{9}

\section*{II. FACTS AND PROCEDURAL HISTORY}

\subsection*{A. FACTS AND HISTORY OF THE CASE}

Appellant Leandro Andrade's criminal history, prior to his convictions appealed from in this case, included a series of convictions for non-violent crimes, totaling five felonies and two misdemeanors,\textsuperscript{10} beginning in 1982 with a conviction for misdemeanor theft.\textsuperscript{11} One year later, Andrade was convicted for three counts of first degree residential burglary,\textsuperscript{12} a serious or violent felony under the Three Strikes Law. In 1988 and 1990, Andrade was convicted in federal court on two separate felony charges for transportation of marijuana.\textsuperscript{13} In 1990, prior to the marijuana conviction, Andrade was convicted for petty theft.\textsuperscript{14} In 1991, Andrade received a parole violation for escaping from federal prison.\textsuperscript{15}

\begin{itemize}
\item \textsuperscript{7} \textit{Andrade}, 270 F.3d at 756. Justice Kennedy's analysis requires examination of: "(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 the same crime in other jurisdictions." \textit{Id.}; Solem, 463 U.S. at 292.
\item \textsuperscript{8} 270 F.3d 743 (9th Cir. 2001).
\item \textsuperscript{9} \textit{Id.} at 746, 749.
\item \textsuperscript{10} \textit{Id.} at 749.
\item \textsuperscript{11} \textit{Id.} at 748. While the State excluded this conviction from it's summary of Andrade's criminal history, the conviction was in the preliminary report relied on by the sentencing court during the sentencing phase of Andrade's trial. \textit{Id.} at 748 n. 3.
\item \textsuperscript{12} \textit{Id.} at 749.
\item \textsuperscript{13} \textit{Andrade}, 270 F.3d at 748 - 49.
\item \textsuperscript{14} \textit{Id.} at 749. Petty theft is classified as a misdemeanor under the California Penal Code. \textit{CAL. PENAL CODE} \textsection{490} (West 2002).
\item \textsuperscript{15} \textit{Andrade}, 270 F.3d at 749. Under the California Penal Code, escape from prison is punishable by up to six years in prison. \textit{CAL. PENAL CODE} \textsections{4530, 4532}. Escape from federal prison where the underlying confinement is for a felony conviction is punishable by a maximum of five years in prison plus a fine. \textit{18 U.S.C.} \textsection{751(a)} (2002).
\end{itemize}
In 1996, Andrade was sentenced to life in prison, with the possibility of parole after serving a minimum of 50 years, for shoplifting nine videotapes worth a total of $153.54 from two different K-mart stores on two different occasions.16 The first incident, on November 4, 1995, involved Andrade stuffing five videotapes, worth $84.70, into his pants.17 Two weeks later, Andrade shoplifted four videotapes valued at $68.84.18

Generally, such offenses are treated as petty theft, a misdemeanor, which carries a maximum penalty of six months in county jail and a $1,000 fine.19 However, based on Andrade's status as a non-violent recidivist, the prosecutor chose20 to charge Andrade's petty thefts with priors21 as felonies triggering California's Three Strikes Law.22 The elevated misdemeanors constituted Andrade's third and fourth strikes,23 while his 1983 burglary convictions served as his first and second strikes.24

In a bifurcated trial, the jury convicted Andrade on both counts of petty theft with a prior.25 In the second phase of the trial, the court sentenced Andrade to two consecutive terms of twenty-five years to life.26 Andrade appealed his sentence to the California Court of Appeal.27 The California Court of Appeal affirmed, rejecting Andrade's Eighth Amendment argument.28 The California Supreme Court denied review.29

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16 Id. at 746, 749.
17 Id. at 749.
18 Id.
19 Id. at 748. "Petty theft is punishable by fine not exceeding one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding six months, or both." CAL. PENAL CODE § 490 (West 2002).
20 Andrade, 270 F.3d at 748. The decision to charge petty theft with a prior or as a misdemeanor rests in the discretion of the prosecutor. People v. Superior Court (Alvarez) 14 Cal.4th 968, 976 (1997). The trial court has reviewable discretion to reduce the wobbler offense to a misdemeanor at sentencing. Andrade, 270 F.3d at 749. The trial court's discretion to reduce the charge to a misdemeanor at sentencing was not eliminated by the Three Strikes Law. Id.; Alvarez, 14 Cal.4th at 979.
21 Andrade, 270 F.3d at 749. CAL. PENAL CODE § 666 authorized elevation of Andrade's current convictions to petty theft with a prior, a "wobbler" offense, because of Andrade's 1990 misdemeanor theft conviction. Id.
22 Id. at 749.
23 Id.
24 Id.
25 Id.
26 Andrade, 270 F.3d at 749.
27 Id. at 750.
28 Id. The court rejected Andrade's argument that his sentence constituted cruel and unusual punishment in violation of the Eighth Amendment. Id.
Subsequently, Andrade filed a habeas corpus petition in federal district court pursuant to 28 U.S.C. § 2254. The district court denied Andrade's petition on February 19, 1999. Twenty-five days later, Andrade placed a Motion for Order Extending Time for Appeal in the prison mail system seeking a sixty-day extension to file his notice of appeal. The district court denied Andrade's motion. Fifty days after the entry of the district court judgment, Andrade placed a Notice of Appeal in the prison mail system. The district court denied Andrade a certificate of appealability. The United States Court of Appeals for the Ninth Circuit granted Andrade a certificate of appealability as to his Eighth Amendment claim.

B. BACKGROUND: CALIFORNIA'S THREE STRIKES LAW

In 1994, the legislature and the voting public enacted California's "Three Strikes and You're Out Law" (the Three Strikes Law). The law's purpose is to impose harsher sentences on repeat offenders with prior qualifying felony convictions or "strikes." "Serious" or "violent" felony convictions qualify as prior strikes, whereas the "triggering" felony conviction, or the principal offense, need not be violent. Punishment increases with the number of strikes. A second

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29 Id. The California Supreme Court denied Andrade's petition without comment. Id. Andrade raised several constitutional claims, including a violation of his Eighth Amendment rights, which had previously been rejected by the California Court of Appeal. Andrade, 270 F.3d at 750.
30 Id.; Career Criminal Punishment Act, CAL. PENAL CODE §§ 667(b) - (i), 1170.12 (West 2002).
31 Id. § 2254(a) permits persons "in custody in violation of the Constitution or laws or treaties of the United States" to file a writ of habeas corpus. 28 U.S.C. § 2254(a) (2002).
32 Id. The district court's order consisted of only two sentences and simply adopted the Magistrate's findings. Andrade, 270 F.3d at 750.
33 Id.
34 Id.
35 Id.
36 Id.
37 Id. Andrade initially filed his appeal pro se, but the Ninth circuit appointed him counsel and ordered supplemental briefing. Andrade, 270 F.3d at 750.
38 Id.; Career Criminal Punishment Act, CAL. PENAL CODE §§ 667(b) - (i), 1170.12 (West 2002).
39 Andrade, 270 F.3d at 747.
40 Id.
41 Id. "Wobbler" offenses, those capable of being charged as either felonies or misdemeanors constitute a felony for the purposes of the Three Strikes Law when charged and sentenced as a felony. Id.
strike requires the sentencing court to double the sentence the defendant would have received and a third strike mandates a minimum sentence of 25 years to life.\[42\]

III. NINTH CIRCUIT'S ANALYSIS

A. JURISDICTION

The first issue addressed by the Ninth Circuit was whether the court had jurisdiction over Andrade's appeal.\[43\] A timely notice of appeal warrants jurisdiction.\[44\] A notice of appeal must be filed within thirty days after entry of the district court judgment.\[45\] The district court may grant a time extension if the moving party files the notice within the thirty day time limit and shows excusable neglect or good cause.\[46\] Essentially, the Ninth circuit distinguished, re-examined and overruled precedent which held that a motion for extension of time may not serve as a notice of appeal.\[47\] Although Andrade filed his notice of appeal fifty days after entry of the district court judgment, the court found that Andrade's motion for order extending time to appeal, filed within thirty days of entry of the district court judgment, served as "the functional equivalent" of a notice of appeal.\[48\] Accordingly, the court concluded that Andrade's appeal fell within their jurisdiction.\[49\]

B. DE NOVO REVIEW

In reviewing de novo the district court's decision to deny Andrade's petition for habeas corpus under 28 U.S.C. §2254, the Ninth Circuit addressed whether the state court's decision was contrary to or involved an unreasonable application of, clearly established federal law.\[50\] The Ninth Circuit is required

\[42\] Id.
\[43\] Id. at 750.
\[47\] Id. at 751 - 52.
\[48\] Id. at 751.
\[49\] Id.
\[50\] Id. at 753 (citing 28 U.S.C. § 2254 (d)(1) and Van Tran v. Lindsey 212 F.3d 1143, 1148 (9th Cir. 2000).). Based on the date Andrade filed his petition, the court reviewed his petition under the Antiterrorism and Effective Death Penalty Act,
to make a de novo determination of what is clearly established federal law. The court explained that under the 'unreasonable application' standard, the court must also determine whether the state court erred, and if so, whether any error by the state court involved an unreasonable application of clearly established law. The court reviewed and applied controlling Eighth Amendment authority and held that Andrade's sentence was grossly disproportionate to his offense. Accordingly, the Ninth Circuit concluded that the California Court of Appeal decision, which reached the opposite result, was an unreasonable application of clearly established law. The court reversed the district court judgment and remanded with instructions to issue the writ of habeas corpus if the district court did not re-sentence Andrade within sixty days.

C. EIGHTH AMENDMENT ANALYSIS

The Eighth Amendment protects persons from cruel and unusual punishment. Numerous United States Supreme Court cases decided over the last two decades address the constitutionality of life sentences imposed on non-violent recidivists. The Ninth Circuit, in Andrade, followed the lead of other circuits and applied the Harmelin v. Michigan gross proportionality test announced in Justice Kennedy's plurality opinion.

Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), which requires application of the 'contrary to, or unreasonable application' standard. Id. at 753 (citing LaJoie v. Thompson, 217 F.3d 663, 668 (9th Cir. 2000)). Id. at 753 (citing Van Tran v. Lindsey 212 F.3d 1143, 1150 (9th Cir. 2000)). Id. at 767.

Id.

Andrade, 270 F.3d at 767.

Id. at 753 - 54. The Eight Amendment to the United States Constitution provides that there "shall not be . . . cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Eighth Amendment "applies against the States by virtue of the Fourteenth Amendment." Andrade, 270 F.3d at 754 (citing Harmelin, 501 U.S. at 962.).


59 Andrade, 270 F.3d at 753 - 754. The Ninth Circuit reasoned that the opinion written by Justice Kennedy, writing for himself and three other justices, constituted
1. Review of United States Supreme Court Law

The Ninth Circuit reviewed the previous United States Supreme Court decisions in *Rummel v. Estelle* and *Solem v. Helm* to give meaning to *Harmelin*’s gross proportionality test. In *Rummel*, the Supreme Court upheld a sentence of life in prison with the possibility of parole for a three-time non-violent recidivist convicted under Texas’ habitual offender statute. *Rummel*’s prior felony convictions included credit card fraud to obtain goods or services totaling approximately $80 and check forgery in the amount of $28.36. *Rummel*’s third triggering offense was a conviction for obtaining $120.75 by false pretenses. In *Solem*, the Supreme Court reversed a sentence of life in prison without the possibility of parole for a seven-time non-violent recidivist. The defendant’s criminal history consisted of three third degree burglary convictions, one conviction for obtaining money under false pretenses, one grand larceny conviction, and a conviction for driving while intoxicated. Defendant’s seventh felony was for writing a “no account” check for $100. The Ninth Circuit outlined the pertinent factors considered by the Supreme Court in *Rummel* and *Solem*. Both the Ninth Circuit and the Supreme Court emphasized the fact that Texas’ recidivist statute at issue in *Rummel* compelled separate convictions and sentences for each felony, and allowed the prosecution to retain discretion to not
invoke the recidivist statute\(^{70}\) in addition to the liberal nature of the Texas' parole policy, under which *Rummel* would have been eligible for parole in as few as twelve years.\(^{71}\) In *Solem*, the Supreme Court set forth three specific objective guidelines to determine gross proportionality under the Eighth Amendment: "(1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions."\(^{72}\) The Supreme Court distinguished the life sentences in *Rummel* and *Solem* by noting the more liberal parole policy at issue in *Rummel* and the lack of any possibility of parole for the defendant in *Solem* to invalidate Solem's sentence.\(^{73}\)

The Ninth Circuit next examined Justice Kennedy's concurrence in *Harmelin*.\(^{74}\) The concurring opinion in that case, which relied heavily on *Rummel* and *Solem*,\(^{75}\) held that the Eighth Amendment gross proportionality analysis could, but did not, prohibit Harmelin's non-capital sentence.\(^{76}\) The Ninth Circuit agreed with Justice Kennedy's conclusion that the second and third considerations of *Solem*, respectively, the intrajurisdictional and interjurisdictional factors, need not be addressed by courts unless an examination of the first factor leads to an "inference of gross proportionality."\(^{77}\)

\(^{70}\) See id.
\(^{71}\) See id. Texas' parole policy allowed Rummel to be eligible for parole in twelve years. *Rummel*, 445 U.S at 280 - 81.
\(^{72}\) Andrade, 270 F.3d at 756.
\(^{73}\) Id; *Solem*, 463 U.S. at 292.
\(^{74}\) Andrade, 270 F.3d at 757.
\(^{75}\) Id. Justice Kennedy's concurrence recognized several common principles from *Rummel* and *Solem* that helped illuminate the proportionality analysis, including:

- (1) . . . substantial deference to legislative determinations of appropriate punishments,
- (2) the Eighth Amendment does not require that legislatures adopt any particular penological theory, . . .
- (3) divergences in theories of sentencing and length of prison terms . . .
- (4) proportionality reviews should be informed by objective factors and
- (5) the Eighth Amendment does not require strict proportionality between crime and sentence but rather, it forbids only extreme sentences that are grossly disproportionate to the crime.

*Id.* (internal citation and quotation marks omitted).

\(^{76}\) *Id.*
\(^{77}\) *Id.*
2. Application of United States Supreme Court Law

In reviewing the facts of the Andrade case, the Ninth Circuit applied Justice Kennedy's gross proportionality test\(^{78}\) and found that an inference of gross disproportionality arose when comparing the harshness of the punishment to the relative lack of gravity of the crime.\(^{79}\)

a. Comparison of Punishment and Crime

i. Harshness of the Penalty

The trial court sentenced Andrade to two consecutive twenty-five years to life sentences.\(^{80}\) The Ninth Circuit noted that the Three Strikes Law eliminates judicial discretion and requires the trial judge to impose consecutive rather than concurrent sentences.\(^{81}\) Additionally, the court noted that, unlike sentences imposed under other California laws, good behavior or working credit would not minimize Andrade's sentence.\(^{82}\) The Ninth Circuit likened Andrade's sentences to those in *Solem* and *Harmelin* and distinguished Andrade's sentence from the sentence in *Rummel*.\(^{83}\) The court distinguished the sentence imposed in *Rummel* primarily based on the fact that Rummel's first and second felonies were adjudicated in two separate proceedings, whereas Andrade's first and second strike were adjudicated in a single judicial proceeding more than ten years prior to the current offense.\(^{84}\) Andrade would not be eligible for parole until he is 87 years old, therefore, the court concluded it was more likely than not that he would spend the rest of his life in prison without ever becoming eligible for parole for the commission of two petty offenses with a prior.\(^{85}\)

\(^{78}\) Id. at 758.

\(^{79}\) Andrade, 270 F.3d at 757.

\(^{80}\) Id. at 758.

\(^{81}\) Id.

\(^{82}\) Id.

\(^{83}\) Id. at 759.

\(^{84}\) Id. at 760.

\(^{85}\) Andrade, 270 F.3d at 759. The court also noted that because Rummel was eligible for parole in twelve years, Andrade would serve more than four time the length of Rummel's sentence before he would become eligible for parole. Id. at 758.
ii. Gravity of the Offense

Before analyzing the gravity of the offense, the court recognized the policy rationale underlying harsher sentences for recidivists while emphasizing that the increased sentence is harsher punishment for the triggering felony. The Ninth Circuit found the facts of the present case to be most analogous to the facts in *Solem*. The court held that both Andrade's and Solem's triggering offenses were for petty theft, were non-violent, and involved relatively small amounts of money. In contrast, Harmelin's principal offense was of a more serious and violent nature. Additionally, the Ninth Circuit noted that defendants prosecuted for petty theft are usually charged with a misdemeanor rather than a felony. In the present case, had the petty theft offense been Andrade's first, the punishment for the conviction could not exceed six months of imprisonment and a $1,000 fine. Instead, the prosecutor opted to charge Andrade's petty theft offenses as felonies rather than misdemeanors, and also, utilized prosecutorial discretion to count the elevated felonies as Andrade's third and fourth strikes. Essentially, the court concluded that the Three Strikes Law allowed Andrade's offenses to be double counted, by first enhancing his misdemeanor offenses to felonies and then enhancing them again to third and fourth strikes. The Ninth Circuit explained that in considering the gravity of the offense, the nature of the principal offense is an important factor and that recidivism alone does not create a presumption of constitutionality for the enhanced sentence.

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86 Id. at 759. "A 'State is justified in punishing a recidivist more severely than it punishes a first offender.'" Id. (citing *Solem*, 463 U.S. at 296.).
87 Id. at 761.
88 Id. at 759.
89 *Andrade*, 270 F.3d at 759. The court adopted the reasoning of Justice Kennedy's concurrence in *Harmelin*, which emphasized the large quantity of drugs possessed by the defendant and the consequences of such possession on society. Id.
90 Id. at 760.
91 CAL. PENAL CODE § 490 (West 2002).
92 The California Penal Code authorizes prosecutorial discretion in charging defendants with felonies or misdemeanors if the current offense is petty theft offense with a prior petty offense conviction. CAL. PENAL CODE § 666 (West 2002).
93 *Andrade*, 270 F.3d at 761.
94 Id. at 760.
95 Id. The Ninth Circuit cited the holding in *Solem*, which invalidated a life sentence of a seven-time non-violent recidivist, as support for this proposition. Id.
iii. Inference of Gross Disproportionality

In finding an inference of gross disproportionality between the harshness of the crime and the gravity of the offense, the court found Andrade's case most similar to Solem's for three primary reasons. The court stated that Andrade's and Solem's principal offenses were non-violent, Andrade's first and second strike were prosecuted in a single judicial proceeding, more than ten years prior to the current sentencing and Andrade's offense were double-counted based on an odd 'quirk' in California law allowing the prosecutor to charge Andrade's petty thefts with a prior as felonies and enabling those felonies to count as Andrade's third and fourth strikes. In light of the court's finding that an inference of gross disproportionality existed, the court went on to examine the remaining factors of Justice Kennedy's Harmelin test.

b. Intrajurisdictional Comparison

The Ninth Circuit explained that an intrajurisdictional comparison involves examining the suspect sentence in comparison to sentences imposed on other criminals in the same jurisdiction. The court restated that a first offense petty theft conviction in California is punishable by up to six months imprisonment and a $1,000 fine if prosecuted as a misdemeanor in California. The same offense, if charged as a felony, is punishable by up to three years in prison. The court concluded that under the California Penal Code, Andrade's maximum sentence would have been six years. The court further noted that the California Penal Code only punishes a limited number of crimes with sentences harsher than Andrade's, while the punishments for other

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96 Id. at 761.
97 Id. The Ninth Circuit found that the offenses were double-counted since that the prosecutor charged Andrade's petty theft offenses as felonies rather misdemeanors and in addition, the prosecutor used the elevated felony convictions as Andrade's third and fourth strikes. Andrade, 270 F.3d at 761.
98 Id.
100 Andrade, 270 F.3d at 761. Cal. Penal Code §§ 18, 666 (West 2002).
101 Andrade, 270 F.3d at 761.
102 Id. at 761 - 62. See e.g., Cal. Penal Code § 190 (first-degree murder punishable by death, life without parole, or 25 years to life); Cal. Penal Code § 209 (kidnapping
serious and violent crimes are much less severe. The State attempted to persuade the court to compare Andrade's sentence with the sentences of other non-violent recidivists convicted under the Three Strikes Law. However, the court summarily rejected this argument and stated that such an approach would require "justifying the constitutionally-suspect application of a statute by pointing to other applications of the same statute." The court further commented that even if such an approach were adopted, Andrade's sentence was twice as long as other non-violent recidivists sentenced under California's Three Strikes Law. Thus, the court determined that Andrade's sentence was grossly disproportionate when compared to sentences prescribed by California law for most violent crimes, as well as sentences imposed upon other defendants sentenced under the Three Strikes Law. Accordingly, the Ninth Circuit concluded that the intrajurisdictional comparison suggested that Andrade's sentence was grossly disproportionate to his crimes in violation of the Eighth Amendment.

c. Interjurisdictional Comparison

The Ninth Circuit observed that many states have statutes that authorize more severe sentences for repeat offenders. However, the court noted that Andrade's petty theft with a prior offense would trigger the recidivist statute in only four states: Rhode Island, West Virginia, Texas, and Louisiana.

under certain circumstances punishable by life without parole); CAL. PENAL CODE §§ 218 and 219 (train wrecking or derailing punishable by life without parole or death); CAL. PENAL CODE § 12310 (unlawful explosion causing death, mayhem, or great bodily injury punishable by life without parole).

Andrade, 270 F.3d at 762. See e.g., CAL. PENAL CODE § 190 (second-degree murder generally punishable by 15 years to life); id. § 193 (voluntary manslaughter punishable by up to eleven years); CAL. PENAL CODE § 264 (rape punishable by up to eight years); CAL. PENAL CODE § 288 (sexual assault punishable by up to 8 years).

Andrade, 270 F.3d at 762.

Id.

Id.

Id.

Id.

Id.

Id.


Id. at 763.
The Ninth Circuit concluded that based on the states' various statutory provisions, Andrade's sentence would not be as severe in those states as the sentence imposed under California law based on his two prior strikes for residential burglary.\textsuperscript{111} As the single exception, the court found that if Andrade's other prior offenses were considered, even though these offenses were not used to calculate his current sentence, Louisiana law could impose a comparable sentence.\textsuperscript{112} Notably, even such a hypothetical conviction would be subject to challenge under Louisiana's state constitution.\textsuperscript{113}

\textit{i. Rhode Island}

The court found that if Andrade had been sentenced in Rhode Island, he could not receive a similarly harsh sentence in Rhode Island for two reasons. First, Rhode Island law permits the imposition of an additional twenty-five years in prison for a three-time felon.\textsuperscript{114} However, Andrade's petty theft offense would be insufficient to trigger the statutory provision since theft of goods valued under $100 is not a felony in Rhode Island, even if the defendant has a prior petty theft conviction.\textsuperscript{115} Second, the habitual offender statute in Rhode Island requires two or more separate convictions to trigger the imposition of enhanced punishment for recidivists.\textsuperscript{116} Thus, the court concluded that Andrade's criminal history would not trigger harsher punishment in Rhode Island because the principal offenses were individually valued at less than $100 and Andrade's first and second strikes were adjudicated in a single proceeding.\textsuperscript{117} The court further noted that unlike California's Three Strikes Law, Rhode Island's habitual offender statute grants judicial discretion in setting the number of years that must be served before a defendant is eligible for parole, whereas California law requires mandatory minimum sentencing.\textsuperscript{118} Thus, the Ninth Circuit concluded

\textsuperscript{111} \textit{Id. at 762.}
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id. See also R.I. GEN. LAWS § 12-19-21 (2001).}
\textsuperscript{115} \textit{Andrade, 270 F.3d at 762. See also R.I. GEN. LAWS § 11-14-20(d) (2001).}
\textsuperscript{116} \textit{Andrade, 270 F.3d at 762.}
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.}
that sentencing under Rhode Island law would be less severe than under California law.\textsuperscript{119}

\textit{ii. West Virginia}

The Ninth Circuit found that while Andrade's principal offense would trigger the West Virginia recidivist statute, Andrade could not receive a life sentence based on a state supreme court holding that life sentences for non-violent recidivists violate the state constitution.\textsuperscript{120}

\textit{iii. Texas}

Under Texas law, all petty theft offenses are charged as misdemeanors unless the defendant has two prior theft convictions, then the subsequent petty theft offense may be charged as a felony.\textsuperscript{121} The Ninth Circuit reasoned that if only Andrade's 1990 petty theft conviction was considered, as the state courts did, then Andrade's current offenses, if committed in Texas, could only be prosecuted as a misdemeanor with a maximum punishment of six months in prison and a $2,000 fine.\textsuperscript{122} Texas' habitual offender law is not triggered by misdemeanor offenses, therefore, Andrade's current offenses would not trigger Texas' recidivist statute.\textsuperscript{123} However, the court noted that if both Andrade's 1982 and 1990 misdemeanor petty theft convictions were counted, then Andrade's offenses would be "state jail felonies"\textsuperscript{124} with a maximum penalty of forty years imprisonment\textsuperscript{125} if the court sentenced him to two consecutive terms. Furthermore, the court recognized the liberal nature of Texas' parole policy and found that Andrade could be eligible for parole in ten years or less.\textsuperscript{126} In any case,

\begin{footnotes}
\textsuperscript{119} Id.
\textsuperscript{121} \textit{Andrade}, 270 F.3d at 764; \textit{TEX. PENAL CODE ANN. §§ 31.03(e)(4)(D) and 12.42} (Vernon 2001).
\textsuperscript{122} \textit{Andrade}, 270 F.3d at 764.
\textsuperscript{123} \textit{Id.}
\textsuperscript{124} \textit{Id.; TEX. PENAL CODE ANN. § 31.03(e)(4)(D)} (Vernon 2001).
\textsuperscript{125} \textit{Andrade}, 270 F.3d at 764.
\textsuperscript{126} \textit{Id. Good-time credit may apply to Andrade's sentence, thus, making him eligible for parole in a shorter amount of time.  Id.}
\end{footnotes}
Andrade's sentence would be far less under Texas' recidivist statute.

iv. Louisiana

Louisiana law, at the time the California courts considered Andrade's appeal, would have permitted a sentence comparable to 50 years to life. This sentence could have been possible only if, in addition to the convictions considered by the California courts in sentencing Andrade, his 1982 petty theft conviction and his two federal felonies for marijuana transportation were considered during sentencing. Under Louisiana's recidivist statute, a fourth or subsequent felony conviction is punished with a minimum of twenty years in prison without the possibility of parole.

The Ninth Circuit analyzed Andrade's criminal history under Louisiana law. The court found that Louisiana law would treat Andrade's three counts of burglary as a single prior felony and count his federal marijuana convictions as his second and third strikes. The Ninth Circuit concluded that Andrade could receive two twenty year terms, or forty years if sentenced consecutively. However, the Ninth Circuit noted that in Louisiana, unlike California, a sentence similar to the

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127 Id.
128 Id. In 2001, Louisiana amended it's recidivist statute requiring, inter alia, that to count as a third or fourth strike the triggering offense be "a crime of violence, a sex offense, or ... a violation of the Uniform Controlled Dangerous Substances Law punishable by imprisonment for ten years or more or any other crimes punishable by imprisonment for twelve years or more." 2001 La. Sess. Law. Serv. 403 (West). Andrade's two counts of petty theft with priors are punishable each by a maximum of two years in prison. Thus, his current convictions could only count as second strikes and carry a maximum punishment of eight years, or twice the maximum sentence for each petty with a prior. Andrade, 270 F.3d at 764.
129 Id.
130 Id.
131 Id. at 765; LA. REV. STAT. ANN. § 15:529.1(A)(1)(c)(i), (G) (West 2002).
132 Andrade, 270 F.3d at 764.
133 Id. at 765. Louisiana consistently interpreted the recidivist statute as having a 'sequential requirement.' See State v. Corry, 601 So.2d 142, 147 (La. Ct. App. 1992) (applying the sequential requirement to three counts of burglary entered on the same day).
135 Andrade, 270 F.3d at 765. The court noted that Andrade could receive a life sentence without the possibility of parole if either of his federal marijuana felonies were punishable under the Louisiana Uniform Controlled Dangerous Substances Law by more than five years. Id; LA. REV. STAT. ANN. § 15:529.1 (A)(1)(c)(iii) (West 2002).
one imposed upon Andrade would be subject to the possibility of a successful constitutional challenge under the Louisiana state constitution.  

The court reasoned that the possibility that Andrade could receive a comparable sentence in only one other state, and even then only if convictions not considered in the California sentencing were considered, was not enough to overcome the conclusion that Andrade's sentence was grossly disproportional under the Eighth Amendment. Accordingly, the court held Andrade's sentence violated the Eighth Amendment since it met the Harmelin guidelines: (1) gross disproportionality when compared to his current convictions and his criminal history; (2) a sentence harsher than the punishment prescribed for most violent crimes in California and other sentences imposed under the Three Strikes Law; and (3) only one other state would have imposed a similarly harsh sentence.

3. Decision of the California Court of Appeal

The Ninth Circuit stated relief may only be granted if the state court's decision is "contrary to, or involves an unreasonable application of Federal law." The court held that Eighth Amendment case law, as applied to non-violent recidivists, was well-settled at the time of the California Court of Appeal's decision in 1997. Specifically, the court found Harmelin controlling, while Rummel and Solem were instructive as to Harmelin's application. The California Court of Appeal had relied on Rummel, and had questioned the validity of Solem in light of Harmelin, in deciding to uphold Andrade's sentence. The Ninth Circuit held that the state

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136 Andrade, 270 F.3d at 765. A Louisiana court found a life sentence under the recidivist statute excessive for a defendant convicted of "misappropriating or taking over $500" when his prior crimes included two counts of theft (one under and one over $100), several counts of issuing worthless checks, check forgery and simple robbery. Id.; State v. Hayes, 739 So. 2d 301 (La. Ct. App. 1999).
137 Andrade, 270 F.3d at 765.
138 Id. at 765 - 66.
139 Id. at 766. Under the Antiterrorism and Effective Death Penalty Act, the Ninth circuit's "mere disagreement" with the state court would not be enough to grant relief. Id.; 28 U.S.C. § 2254(d)(1) (2002).
140 Andrade, 270 F.3d at 766.
141 Id.
142 Id.
court's analysis, which ignored the holding in *Solem*, was an unreasonable application of United States Supreme Court precedent since only two justices in *Harmelin* agreed to overrule *Solem*.\textsuperscript{143} While the circumstances surrounding Andrade's sentence are comparable to the sentences in both *Rummel* and *Solem*, the Ninth Circuit found Andrade's sentence most analogous to *Solem*.\textsuperscript{144} Accordingly, because the state court did not address the importance of *Solem*’s impact on the present case, the California Court of Appeal's decision constituted clear error and was an unreasonable application of federal law.\textsuperscript{145}

D. CONCLUSION

The Ninth Circuit did not invalidate California's Three Strikes Law, but instead limited their holding to the unique facts of Andrade's case.\textsuperscript{146} Since Andrade's sentence was grossly disproportionate to his offenses, and the California Court of Appeal rendered a decision that involved an unreasonable application of federal law, the Ninth Circuit reversed the district court's judgment and remanded the case for the district court to re-sentence Andrade within sixty days or issue the writ of habeas corpus if it failed to do so.\textsuperscript{147}

E. JUSTICE SNEED'S CONCURRENCE AND DISSENT

Justice Sneed concurred with the majority's holding that Andrade's motion for extension of time served as the functional equivalent of a notice of appeal.\textsuperscript{148} However, the heart of Justice Sneed's dissent focused on his disagreement with the majority's conclusion that Andrade's sentence was invalid under the Eighth Amendment.\textsuperscript{149} Justice Sneed emphasized how infrequently sentences have historically been invalidated under the Eighth Amendment's cruel and unusual punishment

\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Andrade, 270 F.3d at 767.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
clause and stated that Ninth Circuit precedent supported invalidating a defendant's sentence under the Eighth Amendment only if the sentence exceeded statutory limits.\footnote{Id. at 767 - 68.}

Justice Sneed found that an analysis under *Harmelin* required an affirmation of Andrade's sentence based on the principles underlying that decision as enunciated by Justice Kennedy.\footnote{Id. at 768.} Justice Sneed emphasized Justice Kennedy's first and second principles, respectively, substantial deference to the legislature and the Eighth Amendment's lack of a requirement to adopt a specific penological theory.\footnote{Id.} Based on these principles, Justice Sneed believed the court should grant great deference to the voting public who, by a majority of over seventy-one percent, approved California's Three Strikes Law, as well as to the state legislature, which created the sentences under the Three Strikes Law.\footnote{Id. at 769.} Furthermore, based on the idea that states have varying theories of sentencing,\footnote{Id. at 769.} Justice Kennedy's third principle, Justice Sneed declared that each state is entitled to its own theories of sentencing.\footnote{Andrade, 270 F.3d at 770.} The fourth principle requires maximum use of objective factors, which may include distinguishing between capital sentences and sentences for terms of years.\footnote{Id. at 769.}

Justice Sneed distinguished Andrade's sentence from other constitutionally suspect sentences since it provides for a terms of years as opposed to death.\footnote{Id. at 769.} Justice Sneed argued that the *Harmelin* court concluded that a rational basis existed for Harmelin's sentence based on these four principles.\footnote{Id. at 769.} Accordingly, Justice Sneed concluded that an equally rational basis existed to uphold Andrade's sentence based on the purpose of recidivist statutes, namely to inflict harsher

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\begin{itemize}
  \item \footnote{Id. at 767 - 68.}
  \item \footnote{Id. at 768.}
  \item \footnote{Andrade, 270 F.3d at 768. The four principles are: "(1) ... substantial deference to legislative determinations of appropriate punishments, (2) the Eighth Amendment does not require that legislatures adopt any particular penological theory, ... (3) divergences in theories of sentencing and length of prison terms ..., (4) proportionality reviews should be informed by objective factors." (internal citation and quotation marks omitted).} \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{Id. at 769.}
  \item \footnote{Andrade, 270 F.3d. at 770.}
  \item \footnote{Id. at 769.}
  \item \footnote{Id.}
\end{itemize}
punishments on repeat offenders. Justice Sneed complained that the majority ignored Harmelin's underlying principles and emphasized that an Eighth Amendment analysis of a sentence imposed on non-violent recidivist should be guided by deference to the state’s electorate and the discretion of the fifty states.

Justice Sneed also commented that application of Justice Kennedy's principles, rather than his three-part test, will not lead to excessive judicial discretion. Upon examining the facts of Andrade's case, Justice Sneed determined that two terms of twenty-five years to life, given Andrade's entire criminal history, created a rational basis upon which to justify Andrade's sentence. Therefore, he concluded that Andrade's sentence was not grossly disproportionate, and thus was neither clearly erroneous nor an unreasonable application of clearly established United States Supreme Court law.

IV. IMPLICATIONS OF THE NINTH CIRCUIT'S DECISION

When a defendant seeks relief from a state court decision using a habeas corpus petition, the United States Court of Appeals may only grant relief if the state court decision was contrary to, or involved an unreasonable application of, clearly established United States Supreme Court law. The Court of Appeals will find an unreasonable application within the meaning of the habeas statute only if the state court clearly erred. Harmelin declared, and Andrade affirmed, that a challenge to a state court sentence brought under the cruel and unusual punishment clause of the Eighth Amendment requires an analysis of gross proportionality between the sentence and

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160 Id.
161 Id. at 770.
162 Id. Justice Sneed cited two Circuit Court of Appeals' cases as support for his position; Bocian v. Godinez (7th Cir. 1996) 101 F.3d 465, 472 (court upheld defendant's sentence and concluded sentence as consistent with federal law); McGruder v. Puckett (5th Cir. 1992) 954 F.2d 313 (court upheld defendant's life sentence without the possibility of parole where the triggering offense was auto burglary). Andrade, 270 F.3d at 770.
163 Andrade, 270 F.3d at 772.
164 Id.
165 Id. at 763; Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d)(1) (2002); Van Tran, 212 F.3d at 1149.
166 Andrade, 270 F.3d at 753; Van Tran, 212 F.3d at 1153 - 54.
the crime. A gross proportionality analysis must compare the harshness of the punishment to the gravity of the offense. If an inference of gross disproportionality is found, then the reviewing court must engage in both an intrajurisdictional analysis, comparing the sentence to other punishments imposed in the same jurisdiction as the sentencing court, and an interjurisdictional analysis, comparing it to sentences imposed in other jurisdictions.

The Andrade court's narrow decision is limited to the specific circumstances of Andrade's case and holds that a sentence of fifty years to life under California's Three Strikes Law, based on a triggering offense for petty theft of goods and services valued at $153.54 with two priors was so grossly disproportionate as to violate the Eighth Amendment's prohibition against cruel and unusual punishment. However, the Ninth Circuit sent a clear message to California's sentencing courts that excessive punishment of a non-violent recidivist sentenced under the Three Strikes Law is not immune from reversal. Nonetheless, several California courts of appeal have chosen not to follow the holding in Andrade claiming that either the Ninth circuit erred in its reasoning and analysis or the state is not bound by lower federal court decisions, while other California courts of appeal distinguished Andrade based on the facts. While some California courts have questioned the validity of the Andrade court's analysis, its implication on the future application of the Three Strikes Law to non-violent recidivists is still pending in

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167 Harmelin, 501 U.S. at 1001; Andrade, 270 F.3d 743.
168 Andrade, 270 F.3d 757.
169 Andrade, 270 F.3d 761; Harmelin, 501 U.S. at 1005.
170 Andrade, 270 F.3d 766.
light of the United States Supreme Court's decision to grant the State's writ of certiorari.¹⁷⁴

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