Federal Review of a State Court Habeas Corpus Decision is Prohibited by Provisions of the Antiterrorism and Effective Death Penalty Act When a Petitioner is Convicted Under California Three Strikes Law and Sentenced to Two Terms of Twenty-Five Years to Life for Committing Petty Thefts: *Lockyer v. Andrade*

CONSTITUTIONAL LAW – EIGHTH AMENDMENT – HABEAS CORPUS – ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT – The Supreme Court of the United States held that a California state court did not act in a manner which was contrary to or an unreasonable application of an established federal law when it sentenced a recidivist offender to two consecutive terms of twenty-five years to life for committing two petty thefts.

Lockyer v. Andrade, 123 S. Ct. 1166 (2003)

In November 1995, Leandro Andrade committed a petty theft in which he stole five video tapes from a K-mart store.[1] Two weeks later, he committed a similar theft in which he stole four additional video tapes from a separate K-mart store.[2] The videotapes were worth a combined total of $153.54.[3] On each occasion Andrade was stopped by security personnel as he attempted to exit the store premises, but he was not immediately arrested.[4] Andrade was later arrested for both crimes and convicted under California's

1. Lockyer v. Andrade, 123 S. Ct. 1166, 1169-70 (2003).
2. *Id.*
3. *Id.*
4. *Id*. at 1169-70.

Three Strikes law.[5] He was subsequently sentenced to two consecutive terms of 25 years to life in a state prison.[6]

California's Three Strikes law requires that offenders who are convicted of *any* felony, and who have two or more prior convictions for serious or violent crimes, must be sentenced to 25 years to life in a state prison.[7] Petty thefts such as those committed by Andrade are customarily charged as misdemeanors in California and are punishable by up to six months in a county jail and a fine of up to $1000.00.[8] However, under the California Penal Code, the prosecutor has the option to charge the defendant with a felony for such crimes when the defendant has a record of prior convictions.[9] Where the prosecution seeks a felony charge under these circumstances, the sentencing court has discretion to later reduce the charge to a misdemeanor.[10] Andrade's petty thefts were

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5. *Id*. at 1170-71. A presentence reported filed by a probation officer who interviewed Andrade following his arrest stated:

> The defendant admitted committing the offense. The defendant further stated he went into the K-Mart Store to steal videos. He took four of them to sell so he could buy heroin. He has been a heroin addict since 1977. He says when he gets out of jail or prison he always does something stupid. He admits his addiction controls his life and he steals for his habit.

Id. at 1170.

6. *Andrade*, 123 S. Ct. at 1168. This sentence will prevent Andrade from seeking parole for 50 years, after which time he will be 87 years old. *See Id.* at 1176 (Souter, J., dissenting).

7. CAL. PENAL CODE § 667(e)(2) (West 2003). The relevant portion of the statute reads:

> (2)(A) If a defendant has two or more prior felony convictions as defined in subdivision (d) that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:
> (i) Three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions.
> (ii) Imprisonment in the state prison for 25 years.

Id.

8. Andrade v. Attorney General of State of California, 270 F.3d 743, 746 (2001).

9. CAL. PENAL CODE § 666. The relevant text of this section states:

> Every person who, having been convicted of petty theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, carjacking, robbery, or a felony violation of Section 496 and having served a term therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, is subsequently convicted of petty theft, then the person convicted of that subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

Id.

10. *Andrade*, 123 S. Ct. at 1170.

charged as felonies, and the court declined to reduce the charges to misdemeanors at sentencing.[11]

At the time of his arrest for the petty thefts, Andrade's history of prior convictions was substantial.[12] The state trial court made a special finding that several residential burglaries which he committed in 1982 qualified as previous strikes under the Three Strikes law, and subsequently each of his two thefts at the K-mart stores were treated as additional strikes.[13] These simultaneous convictions resulted in two consecutive sentences of 25 years to life.[14]

Following his conviction, Andrade filed an appeal in the California Court of Appeal, arguing that his sentence constituted an Eighth Amendment violation.[15] The appellate court, in an unpublished opinion, disagreed with Andrade and affirmed the trial court's decision.[16] In doing so, the court declined to rely on the proportionality analysis established by the United States Supreme Court in *Solem v. Helm*, which had previously been used as a test for Eighth Amendment violations.[17] The court of appeal reasoned that the analysis developed in *Solem* was questionable in view of the more recent Supreme

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11. *Id.* at 1170-71.

12. *Id.* at 1170. Andrade's prior convictions occurred between 1982 and 1995 and included two counts of misdemeanor theft, multiple counts of first-degree residential burglary, two federal convictions for transportation of marijuana, and escape from a federal prison. *Id.*

13. *Id.* at 1170-71.

14. *Id.* at 1170-71.

15. *Andrade*, 123 S. Ct. at 1171. The Eighth Amendment to the U.S. Constitution, which in part provides protection from cruel and unusual punishment, states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

16. *Andrade*, 270 F.3d 743, 750 (2001).

17. *Andrade*, 123 S. Ct. at 1171. The proportionality analysis states:

> [a] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (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.

Solem v. Helm, 463 U.S. 277, 292 (1983).

Court decision *Harmelin v. Michigan*, which appeared to invalidate this analysis.[18] The appellate court also compared Andrade's case to *Rummel v. Estelle*, in which the United States Supreme Court rejected a defendant's Eighth Amendment claim under circumstances similar to Andrade's.[19] Relying substantially on this latter case, the court of appeal ruled that Andrade's Eighth Amendment rights had not been violated.[20]

Andrade then sought and was denied discretionary review by the Supreme Court of California.[21] Having exhausted his state court appeals, he petitioned the U.S. District Court for the Central District of California for a writ of habeas corpus, and this too was denied.[22] However, the United States Court of Appeals for the Ninth Circuit granted Andrade's petition and thereafter reversed the decision of the district court.[23]

In reaching the conclusion that habeas relief should have been granted to Andrade, the Ninth Circuit relied upon language in § 2254(d)(1) of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[24] This section of the Act authorizes federal courts to review state court habeas corpus decisions under very narrowly

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18. *Andrade*, 123 S. Ct. at 1171. Writing for the Court in *Harmelin*, Justice Scalia stated, "we have addressed anew, and in greater detail, the question whether the Eighth Amendment contains a proportionality guarantee--with particular attention to the background of the Eighth Amendment…[w]e conclude from this examination that Solem was simply wrong; the Eighth Amendment contains no proportionality guarantee." Harmelin v. Michigan, 501 U.S. 957, 965 (1991).

19. *Andrade*, 123 S. Ct. at 1171. In *Rummel*, a Texas recidivist statute required that the defendant be given a life sentence following his third felony, which consisted of acquiring $120.75 through false pretenses. The Court held that the mandatory life sentence was not violative of either the Eighth or the Fourteenth Amendments. Rummel v. Estelle, 445 U.S. 263, 264 (1980).

20. *Andrade*, 123 S. Ct. at 1171.

21. *Id.*

22. *Id.* Habeas corpus is defined as "[a] writ employed to bring a person before the court, most frequently to ensure that the party's imprisonment or detention is not illegal (*habeas corpus ad subjiciendum*)." BLACK'S LAW DICTIONARY 715 (7th ed. 1999).

23. *Andrade*, 123 S. Ct. at 1171.

24. *See Id.* at 1171-2. The section of the AEDPA upon which the Ninth Circuit relies provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim...resulted in a decision that was contrary to, or *involved an unreasonable application of, clearly established Federal law*, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1) (2003) (emphasis added).

proscribed circumstances.[25] Writing for the Ninth Circuit, Judge Paez concluded that those circumstances had been met; in denying Andrade habeas relief, the state court had acted in a manner prohibited by the "unreasonable application" clause of the AEDPA because it had declined to apply law which had been clearly established by the United States Supreme Court in *Solem*.[26]

Further, Judge Paez applied a variation of the *Solem* proportionality analysis and found that the severity of Andrade's sentence was not only disproportionate, but in fact *grossly* disproportionate to his crimes.[27] In light of these findings, the Ninth Circuit concluded that it was compelled to grant habeas relief to Andrade.[28]

Notably, the decision of the Ninth Circuit was not unanimous; Judge Sneed dissented in part, arguing that Andrade's conviction did not rise to the level required to satisfy the gross disproportionality test.[29]

In response to the Ninth Circuit's ruling, the Attorney General of California petitioned the United States Supreme Court for review, and certiorari was granted.[30] Andrade's case and its companion case *Ewing v. California* were argued on the same day, and both opinions were written by Justice O'Connor.[31]

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25. *Id*.
26. *Andrade*, 123 S. Ct. at 1171-72.
27. *Id.* Judge Paez relied on the gross disproportionality test asserted by Justice Kennedy in his concurring opinion in *Harmelin v. Michigan*. Kennedy's analysis states: "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." (quoting *Solem*, 463 U.S. at 288, 303). Under the Kennedy scheme proposed in *Harmelin*, a court is required to initially compare a defendant's sentence to his crimes to determine whether the two appear to be *grossly* disproportionate. If this is not the case, there is no need for further analysis. However, if such gross disproportionality does appear to exist, the court can then proceed to a comparative analysis similar to that proposed by the *Solem* court. See *Harmelin*, 501 U.S. at 1001-1005.
28. *Andrade*, 123 S. Ct. at 1171-72.
29. *Id.* at 1172.
30. *Id*. Joined by Rehnquist, C.J., Scalia, J., Kennedy, J., and Thomas, J.
31. Ewing v. California, 123 S. Ct. 1172 (2003). This case is discussed in greater detail below.

Writing for a 5-4 majority, Justice O'Connor began by noting Andrade's arguments, which were essentially in line with the Ninth Circuit's holding.[32] Andrade claimed that (1) the severity of his sentence was grossly disproportionate to his crimes, and (2) the state court's decision was either contrary to or constituted an unreasonable application of an established federal law under the AEDPA.[33] However, the Supreme Court chose to focus exclusively on this latter claim as the sole determinant of whether habeas relief should have been granted.[34]

Justice O'Connor first sought to identify whether a legal principle clearly established by federal law existed in the context of Andrade's Eighth Amendment argument.[35] Conceding that the opinions in *Solem*, *Harmelin*, and *Rummel* offered little help in light of their inconsistency, Justice O'Connor stated that the only legal principle that appeared to be clearly established throughout this thread of cases was the application of the gross disproportionality standard to test Eighth Amendment violations, particularly in cases involving sentences for terms of years.[36] Even here, the Court conceded that there was a lack of clarity as to what factors should actually be considered in making a determination of gross disproportionality.[37] Nevertheless, the question of whether the clearly established gross disproportionality standard had received improper treatment under § 2254 served as the basis for the issue addressed in the Court's opinion.[38]

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32. *Id.*
33. *Id.*
34. *Andrade*, 123 S. Ct. at 1172.
35. *Id.*
36. *Id.* at 1173. The Court stated "our precedents in this area have not been a model of clarity…[i]ndeed, in determining whether a particular sentence for a term of years can violate the Eighth Amendment, we have not established a clear or consistent path for courts to follow." *Id.*
37. *Id.* at 1173.
38. *Id.* O'Connor stated the issue of the case as "whether the California Court of Appeal's decision affirming Andrade's sentence is 'contrary to or involved an unreasonable application of,' this clearly established gross disproportionality principle." *Id.* (quoting 28 U.S.C. § 2254(d)(1)).

In its analysis, the Court addressed the application of the "contrary to" and "unreasonable application of" prongs of § 2254(d)(1) sequentially.[39] First, Justice O'Connor referred to the Court's definition of the phrase "contrary to clearly established precedent" as it was set forth in her opinion in *Williams v. Taylor*, and concluded that Andrade's sentence did not satisfy this prong.[40] Justice O'Connor reasoned that this prong was not met because (1) in its gross disproportionality analysis, the state court had acted properly in applying rules that had been established in *Solem* and in *Rummel*, neither of which had been overruled by the Court, and (2) despite reaching a conclusion opposite that reached by the Court in *Solem*, the state court acted properly because the pertinent facts of Andrade's case were clearly distinguishable from the facts of *Solem*.[41]

Next, Justice O'Connor turned to the "unreasonable application" prong, which permits habeas relief when it can be demonstrated that a court recognized the appropriate Supreme Court legal principle, but failed to apply this principle to the facts in the case under scrutiny.[42] Again citing her own opinion in *Williams*, O'Connor narrowly focused on the specific requirement that the state court's actions must be *objectively unreasonable* in failing to apply such a principle, not merely incorrect or erroneous.[43] In light of the uncertainty and breadth of the proportionality principle, O'Connor concluded that the state appellate court's affirmance of Andrade's sentence was not objectively unreasonable, and for this reason the second prong failed as well.[44]

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39. *Andrade*, 123 S. Ct. at 1173-75.
40. *Id.* at 1173-74. The 'contrary to' rule in *Williams* states that "a federal habeas court may grant relief if the state court (1) arrives at a conclusion opposite to that reached by this Court on a question of law or (2) decides a case differently than this Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 364-65 (2000).
41. *Andrade*, 123 S. Ct. at 1174-75.
42. *Id.* at 1174.
43. *Id.* at 1174-75.
44. *Id.* at 1175.

Having deduced that neither prong of § 2254(d)(1) had been met, the Court concluded that the California Court of Appeal acted properly when it affirmed Andrade's lengthy sentence, and thus habeas relief was not warranted.[45]

Justice Souter wrote a dissenting opinion, which was joined by Justices Stevens, Ginsberg, and Breyer.[46] Justice Souter first compared Andrade's case to its companion case, *Ewing v. California*.[47] Justice Souter pointed out that Andrade's criminal history and ultimate Three Strikes-triggering offense were less serious than Ewing's, yet Andrade's prison term was twice that of Ewing's.[48] Continuing for the minority, Justice Souter suggested that the state court's disproportionality analysis of Andrade's sentence was both erroneous and unreasonable, and for this reason Andrade should have been granted habeas relief.[49] The minority rested this assertion on two grounds in their analysis.[50] First, they argued that the holding in *Solem* represented the Supreme Court's most recent analysis of proportionality review and was therefore controlling.[51] In contrast to Justice O'Connor's proposition that *Solem* and *Andrade* were factually distinguishable, the minority asserted that the facts in Solem were strikingly similar to those in Andrade's case, and therefore the two cases should have received similar treatment.[52]

45. *Id.* at 1175-76.
46. *Andrade*, 123 S. Ct. at 1176 (Souter, J., dissenting).
47. *Ewing*, 123 S.Ct. 1179.
48. *Andrade*, 123 S. Ct. at 1176 (Souter, J., dissenting).
49. *Id*. (Souter, J., dissenting).
50. *Andrade*, 123 S. Ct. at 1176 (Souter, J., dissenting).
51. *Id.* (Souter, J., dissenting).
52. *Id.* (Souter, J., dissenting). Justice Souter points out that in *Solem*, the defendant (Helm) had a similar criminal record to Andrade's, including a lack of violent crimes or crimes against the person. Also like Andrade, Helm was sentenced to a long prison term after committing a relatively minor triggering offense: the utterance of a no account check for $100. Despite these similarities, Helm was granted habeas relief because his sentence was considered grossly disproportionate to his crimes. *Id.* (Souter, J., dissenting).

Second, the minority argued that there was no rational basis for the state court to impose two consecutive sentences on Andrade.[53] This argument was based on what the minority considered a flaw in the application of the Three Strikes law in Andrade's case, wherein Andrade was given a second sentence of 25 years to life immediately following his first.[54] Justice Souter suggested that the state's Three Strikes law rested on the policy of protecting society from the more serious danger of recidivist offenders, yet application of this policy to Andrade's *second* offense made no sense because Andrade did not become any more dangerous to society in the brief interim between his video tape thefts.[55] For these reasons, the minority would have held that Andrade's sentence was grossly disproportionate.[56]

The idea that a sentence should be proportional to the crime committed by the defendant has its roots in English common law.[57] This principle was evident in both the Magna Carta and the First Statute of Westminster, which prohibited disproportionate fines.[58] Later, this view was extended under the common law to apply to prison sentences,[59] and it was plainly evident in the language of the English Bill of Rights.[60]

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53. *Id*. at 1178 (Souter, J., dissenting).
54. *Id*. at 1177-78 (Souter, J., dissenting).
55. *Andrade*, 123 S. Ct. at 1177-78 (Souter, J., dissenting).
56. *Andrade*, 123 S. Ct. at 1177-78 (Souter, J., dissenting).
57. *Solem*, 463 U.S. at 284-85.
58. *Id.* at 284. Chapter 20 of Magna Carta 1215 reads in part, "Liber homo non amercietur pro parvo delicto nisi secundum modum ipsius delicti, et pro magno delicto, secundum magnitudinem delicti, salvo contenemento suo." This translates "A free man shall not be amerced for a trivial offense; and for a serious offense he shall be amerced according to its gravity, saving his livelihood." HOLT, J.C., MAGNA CARTA 456-7 (2d ed. 1992). To *amerce* means to "impose a fine or penalty that is not fixed but is left to the court's discretion; to punish by amercement." BLACK'S LAW DICTIONARY 81 (7th ed. 1999).
59. *Solem*, 463 U.S. at 285.
60. *Id.* at 285. The relevant portion of the English Bill of Rights states "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." (quoting 1 W. & M., sess. 2, ch. 2 (1689)).

This same language was then incorporated into the Eighth Amendment of the American Bill of Rights, and with it the principle of proportionality in sentencing.[61]

The provision of the Eighth Amendment which prohibits the federal government from imposing cruel and unusual punishment for federal crimes is echoed in the constitutions of nearly all of the states.[62] Further, the guarantees of the Eighth Amendment were made applicable to the states in *Robinson v. California*, where the United States Supreme Court decided that a California statute which made it a crime to be addicted to narcotics was offensive to both the Eighth and the Fourteenth Amendments.[63] *Robinson* was decided during the Supreme Court's most active period of selective incorporation of provisions of the Bill of Rights during the 1960's and 1970's.[64]

The substantive limits on cruel and unusual punishment imposed by the Eighth Amendment can be separated into three categories.[65] First, the Eighth Amendment imposes limits on the specific *methods* which may be used to administer punishment.[66] Examples of methods of punishment considered to be cruel include pillorying, disemboweling, decapitation, and drawing and quartering.[67] Second, it bans the imposition of punishment under certain circumstances, such as the imposition of capital

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

62. LAFAVE, WAYNE R., CRIMINAL LAW §2.14(f) at 186 (3d ed. 2000).

63. 370 U.S. 660 (1962). A concurrence by Justice Douglas in the case was particularly pertinent: "The command of the Eighth Amendment, banning 'cruel and unusual punishments,' stems from the Bill of Rights of 1688... [a]nd it is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment." *Id.* at 675 (Douglas, J., concurring).

64. STONE, GEOFFREY R., ET AL., CONSTITUTIONAL LAW 708-09 (4th ed. 2001). During this period the Supreme Court decided that the due process clause of the 14th Amendment incorporates numerous provisions of the Bill of Rights, and therefore these provisions are binding on the states. The Fourteenth Amendment in relevant part states: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

65. LAFAVE, CRIMINAL LAW, *supra* note 62, at 187.

66. *Id.*

67. Note, *Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 637 (1966).

punishment for any crime other than murder.[68] Third, the Eighth Amendment limits the *amount* of punishment which may be imposed for a given offense.[69]

The United States Supreme Court gave much attention to the principle embodied in this latter category in *Weems v. United States* in 1910.[70] In *Weems*, a public official in the Philippine Islands was convicted of falsifying a public document, and under the applicable law of the former American territory, he was sentenced to fifteen years of an extremely harsh penalty known as *cadena temporal*.[71] The Court reasoned that because the cruel and unusual punishment provision of the Philippine Bill of Rights was derived directly from the Eighth Amendment, it should be given the same interpretation.[72] Looking to the facts of the case and comparing the result to sentences for similar crimes in other jurisdictions, the Court focused on the harshness of the sentence and objected to it, endorsing the principle of proportionality.[73]

Following *Weems*, the Court essentially withdrew from the proportionality principle for more than sixty years and gave great deference to the state legislatures, typically relying on this principle only in cases where the decision of the lower court had in fact been founded on the state's own constitutional ban on disproportionate

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68. *Id.* at 641.

69. *Id.* at 639-41. The United States Supreme Court's reaction to cruelly excessive punishments is particularly evident in the decisions of the Court in the late 19th and early 20th century. These decisions culminated in Weems v. United States., 217 U.S. 349 (1910). *Id.*

70. *Weems*, 217 U.S. 349 (1910).

71. *Id.* at 357-58. The punishment of *cadena temporal* is described as, at a minimum, "…confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council." *Id.* at 366.

72. *Id.* at 367 (citing Kepner v. United States, 195 U.S. 100, 122 (1904) and Serra v. Mortiga, 204 U.S. 470 (1907)).

73. *Id.* at 366-67. The Court stated:

> Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.

Id.

sentences.[74] However, a reemergence of the principle occurred in the 1976 death penalty case of *Gregg v. Georgia*, where the Supreme Court considered the question of whether a sentence of death might ever be constitutionally imposed.[75] Although the *Gregg* court was fragmented in its decision, a plurality of the Court agreed that the death penalty was not per se invalid, and they stated clearly that a proportionality analysis must be a part of the determination of whether a sentence is violative of the Eighth Amendment.[76]

Gregg was closely followed in 1977 by *Coker v. Georgia*,[77] which has been described as "…the first modern decision in which the Supreme Court has relied on disproportionality to invalidate a punishment under the cruel and unusual punishments clause."[78] In *Coker*, the Court granted certiorari in order to decide whether a sentence of death prescribed for a defendant who had committed rape was offensive to the Eighth Amendment.[79] To answer this question, the Supreme Court conducted an analysis of societal opinion regarding whether such a sentence was appropriate, relying on legislative and judicial trends in other jurisdictions to reach this determination.[80] The Court noted that Georgia was the only state at the time which permitted the death penalty for the crime of raping an adult woman, and because of this concluded that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."[81]

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74. LAFAVE, CRIMINAL LAW, *supra* note 62, at 190.
75. 428 U.S. 153 (1976).
76. *Gregg*, 428 U.S. at 173. The plurality stated: "First, the punishment must not involve the unnecessary and wanton infliction of pain....[s]econd, the punishment must not be grossly out of proportion to the severity of the crime." (citations omitted) *Id.*
77. 433 U.S. 584 (1977).
78. Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U.PA. L.REV. 989, 990 (1978).
79. *Coker*, 433 U.S. at 586.
80. *Id.* at 593-97.
81. *Id.* at 592.

For several years following the decision in *Coker*, the Court declined to rely on disproportionality as a justification for invalidating any sentence carrying a penalty other than death.[82] Two representative cases decided during this period were *Rummel v. Estelle*, decided in 1980,[83] and *Hutto v. Davis,* decided in 1982.[84]

In *Rummel*, the Court was asked to decide whether a sentence of life in a state penitentiary was violative of the Eighth Amendment in light of the crimes committed by the defendant.[85] Rummel had been convicted under a Texas three strikes regime and given a life sentence for having committed three felonies, namely: (1) the fraudulent use of a credit card amounting to $80.00 worth of goods or services; (2) passing a bad check worth $28.36; and (3) obtaining $120.75 through false pretenses.[86] Rummel argued that his sentence was unwarranted because his crimes were non-violent, involved very little money, and were punished in a manner which was excessive compared to the sentence he would have obtained in the majority of other jurisdictions.[87] The Court disagreed with all three of Rummel's arguments, striking them down in turn. First, the Court argued, the lack of violence was irrelevant because a perpetrator such as a high official in a large corporation could bring about great and serious harm without causing any violence.[88] Second, the amount of money for which Rummel was responsible was also irrelevant, as the Court considered it the place of the legislature, not the judiciary, to draw lines when

82. LAFAVE, CRIMINAL LAW, *supra* note 62, at 192.
83. 445 U.S. 263 (1980).
84. 454 U.S. 370 (1982).
85. *Rummel*, 445 U.S. at 293.
86. *Id.* at 265-66. The former Texas statute required "[w]hoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." *Id.* at 264.
87. *Id.* at 276-77.
88. *Id.* at 275.

determining the amount of money that will trigger a given sentence.[89] Third, although only two other states might have punished Rummel as Texas did, the differences between Texas's recidivist statute and the statutes of other states were very subtle in the eyes of the Court.[90]

In light of this reasoning, the Court held that there was no unconstitutional disproportionality, and the life sentence imposed did not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments.[91]

Less than two years after *Rummel*, the Supreme Court again declined to apply the proportionality analysis to a non-death sentence Eighth Amendment claim in *Hutto v. Davis.*[92] In *Davis*, the defendant asserted that his forty year prison sentence constituted cruel and unusual punishment because it was grossly disproportionate to his crime of possessing less than nine ounces of marijuana.[93] Davis had been successful in his petition for habeas relief on his Eighth Amendment claim in the district court, but this decision was initially reversed by the Fourth Circuit, which stated that the United States Supreme Court had never decided that a sentence for a term of years constituted cruel and unusual punishment in cases where the sentence had properly fallen within the range authorized by the corresponding state statute.[94] However, the Fourth Circuit's decision was ephemeral, and on re-hearing it affirmed the grant of Davis' petition for habeas relief.[95]

89. *Id.* at 275-76.
90. *Rummel*, 445 U.S. at 279-80. For example, several states required similar penalties after only the fourth, rather than the third, offense. *Id.*
91. *Id.* at 285.
92. *Davis*, 454 U.S. at 371-72.
93. *Id.* at 371.
94. *Id.* at 371-72.
95. *Id.* at 372.

The Supreme Court agreed with the Fourth Circuit's earlier decision and reversed.[96] Again deferring to the legislature as it had done in *Rummel*, the Court stated "In short, Rummel stands for the proposition that federal courts should be '[reluctant] to review legislatively mandated terms of imprisonment,' and that 'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare'"[97]

Just over a year after its decision in *Davis*, the Supreme Court decided *Solem v. Helm*. In this case the Court *did* apply a proportionality analysis in making a determination that a defendant's term of years sentence was violative of the Eighth Amendment's prohibition against cruel and unusual punishment.[98] The issue before the Court was "whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh non-violent felony."[99] Helm's prior history of non-violent felonies included burglary, obtaining money by false pretenses, grand larceny, and repeated driving-while-intoxicated violations.[100] His seventh offense involved "[U]ttering a no account check for $100."[101] For this he was sentenced to life in prison under the applicable South Dakota recidivist statute.[102]

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96. *Id.*
97. *Davis*, 454 U.S. at 374 (quoting *Rummel*, 445 U.S. at 272, 275-76)(citations omitted).
98. *Solem*, 463 U.S. at 303.
99. *Id.* at 279.
100. *Id.* at 279-80.
101. *Id.* at 282. Uttering is defined as "[t]he crime of presenting a false or worthless instrument with the intent to harm or defraud. – Also termed *uttering a forged instrument*." BLACK'S LAW DICTIONARY 1545 (7th ed. 1999).
102. *Id.* At Helm's sentencing hearing, the state court remarked:

> It will be up to you and the parole board to work out when you finally get out, but I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before Courts. You'll have plenty of time to think this one over.

State v. Helm, 287 N.W.2d 497, 500 (1980).

After the Eighth Circuit granted Helm's petition for habeas relief, the Supreme Court granted certiorari.[103] The State challenged Helm's Eighth Amendment claim, arguing that the principle of proportionality did not apply to felony prison sentences.[104] Writing for the majority[105], Justice Powell disagreed, clarifying the Court's view in *Davis*: "'outside the context of capital punishment, successful challenges to the proportionality of particular sentences will be exceedingly rare,' [t]his does not mean, however, that proportionality analysis is entirely inapplicable in noncapital cases."[106]

At the same time, Justice Powell provided a test to serve as a framework for other courts in conducting proportionality analyses.[107] This three part test took into consideration the weight of the defendant's offense and the harshness of the corresponding sentence, as well as the sentences prescribed by other courts within and outside the jurisdiction where the defendant was sentenced.[108] Applying this test to the instant case, the Court concluded that Helm's sentence was disproportional to his crime and therefore offensive to the Eighth Amendment.[109] The Court reasoned: "Helm has received the penultimate sentence for relatively minor criminal conduct. He has been treated more harshly than other criminals in the State who have committed more serious crimes [and] more harshly than he would have been in any other jurisdiction, with the possible exception of a single State.[110]

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103. *Solem*, 463 U.S. at 283-84.
104. *Id.* at 288.
105. Powell, J., delivered the opinion of the Court, in which Brennan, Marshall, Blackmun, and Stevens JJ., joined.
106. *Id.* at 289-90 (quoting *Davis*, 454 U.S. at 374).
107. *Id.* at 292. See Justice Powell's proportionality analysis in note 17, *supra*.
108. *Id.*
109. *Solem*, 463 U.S. at 303.
110. *Id.*

Eight years after the Supreme Court had apparently concluded that a proportionality analysis should serve as a legitimate component in determining the validity of cruel and unusual punishment claims, the Court granted certiorari in *Harmelin v. Michigan* and changed course yet again by rejecting the *Solem* holding entirely.[111] Writing for a fragmented court, Justice Scalia stated:

> Accordingly, we have addressed anew, and in greater detail, the question whether the Eighth Amendment contains a proportionality guarantee -- with particular attention to the background of the Eighth Amendment…and to the understanding of the Eighth Amendment before the end of the 19th century…We conclude from this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.[112]

In a lengthy analysis, Justice Scalia argued that as early as the 17th century the phrase "cruel and unusual" was most likely misunderstood, focusing on the word "unusual" as the source of confusion.[113] He proposed that what was most likely meant by the drafters of the Constitution was not "unusual" but rather "illegal."[114] He added that under its literal meaning, the phrase could never have been incorporated into a newly-born system of government, because such a system lacked common law punishments and therefore a punishment could not be considered "unusual."[115]

Justice Scalia ultimately concluded that a proportionality analysis may be relevant in capital crimes, but while "[s]evere, mandatory penalties may be cruel…they are not

111. *Harmelin*, 501 U.S. 957.
112. *Id.* at 965. Justice Scalia was joined only by Chief Justice Rehnquist in his opinion.
113. *Id.* at 966-75.
114. See *Id.* at 969-74.
115. *Id.* at 975-76.

unusual in the constitutional sense, having been employed in various forms throughout our Nation's history."[116]

Following *Harmelin*, the Supreme Court did not address applicability of the proportionality analysis to non-capital sentences again until *Andrade*.[117] Here the Court sought once more to clarify its meaning, this time redefining the requirement in holding that a sentence must be found *grossly disproportional* to the crime committed in order to violate the Eighth Amendment.[118] However, the Court in Andrade declined to pass judgment on whether Andrade's sentence met this requirement, and instead chose to decide the issue of whether habeas relief could properly be granted in light of the proscriptions of the AEDPA on habeas relief.[119]

The concept of habeas relief derives from the common law writ of habeas corpus, which in Latin means "you have the body."[120] This writ, which was first used in England prior to the thirteenth century, became an essential tool in the sixteenth century to counter the power of the Crown by providing a means of release for those who had been unjustly imprisoned.[121] The writ later emerged in American jurisprudence, first under the Judiciary Act of 1789 and later as the Habeas Corpus Act of 1867.[122] The latter granted broad federal power to review judgments of the state courts.[123] For over a hundred years after its enactment as the Habeas Corpus Act of 1867, the writ was in large part unchanged.[124] It was not until the enactment of the

116. *Harmelin*, 501 U.S. at 994-96.
117. See *Andrade*, 123 S.Ct. 1171.
118. *Id.* at 1173.
119. *Id.* at 1172.
120. LAFAVE, WAYNE R., ET. AL., CRIMINAL PROCEDURE §28.1(b) at 1292 (3d ed. 2000).
121. *Id.* at 1292-93.
122. *Id.* at 1293.
123. *Id.*
124. LAFAVE, CRIMINAL PROCEDURE *supra* note 120 §28.2(b) at 1294-95.

Antiterrorism and Effective Death Penalty Act in 1996 that substantial alteration of the framework took place.[125]

But for several factors which contributed to the political climate immediately prior to the enactment of the AEDPA, the writ of habeas corpus might be yet unchanged today.[126] These factors included the 1993 siege at Waco and the bombing of the World Trade Center that same year, as well as the 1995 bombing of the Alfred P. Murrah Federal building in Oklahoma City.[127] Additionally, the Republican movement for habeas reform was given forward motion in 1994 by the presence of a Republican majority in the Senate and the first Republican majority in the House of Representatives in over forty years.[128] The appeal of habeas reformers for a new system of justice without the delays of the old system, and the uniformity of the new Republican majority to buoy this reform combined to bring the AEDPA into effect.[129]

Some of the substantial changes that the AEDPA made to the habeas framework included (1) the addition of a one year limitations period during which a petitioner may apply for a writ, (2) new limitations on a petitioner's ability to make successive petitions, and (3) the added requirement that a petitioner exhaust all state remedies prior to being eligible for federal habeas relief.[130] Perhaps the most important change, however, was the addition of § 2254(d), which prescribed the circumstances through which a writ of habeas could be granted once a petitioner's

125. *Id.*
126. Benjamin R. Orye III, Note, *The Failure of Words: Habeas Corpus Reform, the Antiterrorism and Effective Death Penalty Act, and When a Judgment of Conviction Becomes Final for the Purposes of 28 U.S.C. 2255(1)*, 44 WM & MARY L. REV. 441, 451-52 (2002).
127. *Id.*
128. *Id.*
129. *Id.* at 453.
130. LAFAVE, CRIMINAL PROCEDURE *supra* note 120, §28.2(c) at 1295.

claim had already been decided on the merits in a state court.[131] This section was later addressed and qualified by the Supreme Court in *Williams v. Taylor*, where the Court clarified the independent meanings of the phrases "contrary to" and "unreasonable application of", and asserted that one of these two conditions must be met in order for a writ of habeas corpus to be issued by a federal court.[132]

These subtleties of the language of §2254(d) became the basis for Justice O'Connor's analysis and ultimately the Court's decision in Andrade's case, but *Andrade* did not arrive on the steps of the Supreme Court through this route initially. His Eighth Amendment challenge served as the substantive approach to a case which was ultimately decided by the Supreme Court on procedural grounds.

In the Supreme Court cases leading up to *Andrade*, the Court's treatment of Eighth Amendment challenges to sentences involving terms of years was, as Justice O'Connor stated, inconsistent.[133] It is no surprise that when petitions from Leandro Andrade and Gary Ewing came before the Supreme Court, certiorari was granted. Each case revealed a procedural history characterized by the lower courts wrestling with the proportionality principle and attempting to interpret the Supreme Court's previous decisions. In addition, California's highest court had consistently declined to address the constitutionality of California's Three Strikes law, leaving the question to the United States Supreme Court.[134]

In 1996, it appeared that the California Supreme Court, though declining to take a direct stand on the issue, would allow a "safety valve" to protect recidivist offenders such

131. *Id.*
132. *Williams*, 529 U.S. at 364-65.
133. *Andrade*, 123 S. Ct. at 1173.
134. Alex Ricciardulli, *The Broken Safety Valve: Judicial Discretion's Failure to Ameliorate Punishment Under California's Three Strikes Law*, 41 DUQ. L. REV. 1, 51 (2002).

as Andrade from unconscionable sentences.[135] *In People v. Superior Court (Romero)*, the California Supreme Court held that a judge had the discretion to dismiss prior strikes from a defendant's record in order to circumvent sentencing under the Three Strikes law, whenever such an action would promote the "furtherance of justice."[136] However, the state court also warned that abuse of this discretion would be subject to review, and this admonishment eventually became the centerpiece of that decision, as state appellate courts routinely reversed the decisions of trial judges who had utilized this discretion.[137]

No help was available from the California legislature, either. At the time of the enactment of the Three Strikes law, the political climate was such that politicians almost uniformly feared being labeled "soft on crime," and they allowed the legislation to pass easily.[138] By the time Andrade went before the state courts, this climate had relaxed somewhat, but the legislature still felt the reverberations of public opinion.[139] Adding to this challenge was the fact that part of the Three Strikes legislation required a supermajority for any amendment to pass, and this kind of support had not been mustered.[140]

Thus, when the United States Supreme Court was petitioned by Andrade and Ewing, the issue was more than ripe: the lower courts were conflicted, the legislature was intimidated, and the California Supreme Court had declined to take a firm stand on the issue. Both Ewing and Andrade had prior histories characterized by qualifying Three Strikes offenses, but each defendant had committed a relatively minor triggering offense.

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135. *Id.* at 1.
136. 13 Cal.4th 497, 504 (1996).
137. Ricciardulli, *supra* note 134, at 20-23.
138. Michael Vitiello, *Three Strikes Laws: A Real or Imagined Deterrent to Crime?*, 29-SPG Hum. Rts. 3, 4 (2002).
139. *Id.*
140. See *Id*.

Both had been denied any judicial or prosecutorial discretion, and both were sentenced to long prison terms under the Three Strikes regime. Andrade's case was arguably more controversial than Ewing's because his criminal history was less serious, and his sentence was twice the length of Ewing's. Prior to the Supreme Court's decisions, it was argued that the outcome of the closely-watched *Andrade* case would likely fall somewhere between one of two extremes:

> The Supreme Court could hold that categorically, regardless of a defendant's past criminal record, it is cruel and unusual punishment to sentence a defendant to life in prison for a current non-serious, non-violent crime. At another extreme, the court could hold that a life sentence for a felony, even as minor as stealing golf clubs or videotapes, is never unconstitutional.[141]

In Andrade's case, the Court avoided reaching a decision on Andrade's constitutional claim altogether, choosing instead to decide the case entirely on procedural grounds.[142] A simplification of the Court's approach to Andrade's two claims might appear as follows:

ANDRADE:

1. My sentence is grossly disproportional to my crime, and therefore constitutes cruel and unusual punishment; consequently, my Eighth Amendment rights have been violated.
2. The state court's decision to sentence me to two consecutive terms of 50 years to life for my crimes was contrary to (or involved an unreasonable application of)

141. Ricciardulli, *supra* note 134, at 47. It bears mentioning that Ricciardulli wisely identified the prospect of a "wildcard" in the possible outcomes: the Court might decide the case on procedural rather than substantive grounds. *Id*. at 46, n. 258.

142. *Andrade*, 123 S. Ct. at 1172.

> the clearly established law which requires that where a sentence for a term of years is grossly disproportionate to the corresponding crime committed, it is violative of the Eighth Amendment. Because the state court did not adhere to this Supreme Court-made law when it reached its decision, I am entitled to habeas relief.

UNITED STATES SUPREME COURT, in response to Andrade's two claims:

1. We decline to decide whether the sentence was grossly disproportional to the crime committed.
2. We think that the state court acted properly. We have not clearly established a particular *method* which may be used to demonstrate that a sentence for a term of years is grossly disproportional to the corresponding crime. Because of this, the state could not have acted in a manner which was contrary to or an unreasonable application of an established law when made its decision.

The Supreme Court's holding was clearly focused on clarifying its past decisions regarding the issue of whether the proportionality principle may be applied to sentences involving prison terms. In contrast, this holding sheds little light on the constitutionality of a sentence like Andrade's.[143] More significantly, the decision suggests little about the Court's impression of the constitutionality of California's Three Strikes law in its present form.

In *Ewing*, however, the Supreme Court *was* willing to apply the gross disproportionality principle in reaching a more substantive decision.[144] The Court held that Ewing's Three Strikes sentence was not grossly disproportional to his crime, and

143. In fact, the decision provides only faint illumination of the proportionality issue, as the 5-4 decision suggests that the Court is still conflicted on this matter.

144. *Ewing*, 123 S.Ct. 1179, 1190.

therefore did not constitute cruel and unusual punishment.[145] Although this decision would appear to flatly uphold the Three Strikes regime, it still leaves the Supreme Court partially untested. A simultaneous examination of the Court's decisions in *Ewing* and *Andrade* reveals only that in less-extreme cases like Gary Ewing's, the Court will not trump California's Three Strikes law. If an *Andrade*-like case came on direct petition to the Supreme Court, i.e. a case characterized by a very mild triggering offense, a history of non-violent priors, and a severe sentence, would the Court strike it down as violative of the 8th Amendment? The question remains open.

Nevertheless, the implications of these decisions are broad. At least twenty-four states have three strikes-type laws,[146] and as many as forty states have some kind of recidivist statute on the books.[147] California's Three Strikes law is considered by some to be the most severe because it allows any felony to qualify as a triggering offense.[148] State courts and legislatures will likely interpret the *Andrade* and *Ewing* decisions as indications of deference by the Supreme Court, and this may well result in more liberal utilization of state recidivist statutes, resulting in longer sentences. Compounding this problem is the impact of the AEDPA on habeas petitions. The constraints imposed by the AEDPA on the federal courts' power to disturb state court convictions should result in substantially fewer successful habeas pleas, and by extension more prisoners will be retained in correctional facilities. The combination of longer sentences and fewer

145. *Id.*

146. Marguerite A. Driessen & W. Cole Durham, Jr., *Sentencing Dissonances in the United States: The Shrinking Distance Between Punishment Proposed and Sanction Served*, 50 Am. J. Comp. L. 623, 635 (2002).

147. 1997 WL 1168650, 4 (Cal.App. 4 Dist.).

148. Thomas B. Marvell & Carlisle E. Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. Legal Stud. 89, 101 (2001).

successful petitions for habeas relief could result in a considerable increase in the nation's inmate population.

Although Andrade's sentence qualifies as one of the more extreme applications of a recidivist law, it stands to reason that all jurisdictions with recidivist frameworks can periodically expect less-conscionable, Andrade-like sentences to emerge. If the number of defendants sentenced under recidivist statutes increases, so too will the quantity of sentences which a substantial proportion of the public finds objectionable, and perhaps public opinion will be swayed to change the law. California is a likely forum for this kind of change in light of the strictness of its law.

States, of course, have the right to offer more protection than federal law provides. Because California's Supreme Court has never ruled on the constitutionality of the Three Strikes law, the door remains open to the possibility that the court will find the statute violative of California's own constitution, which, perhaps significantly, prohibits "cruel *or* unusual punishment."[149] However, it would seem that there is nothing in the *Andrade* or *Ewing* decisions that would convince the court to do this. The legislature could also provide relief in the form of amending the Three Strikes law, but this seems unlikely in light of the supermajority of legislators required to amend the law. Andrade's best hope for relief may lie in the possibility that the sharply divided United States Supreme Court will eventually be persuaded by the harshness of another recidivist offender's sentence and a new decision will emerge.

- Jude A. Thomas, DMD

149. CAL. CONST. art. I, § 17