

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BILL LOCKYER, ATTORNEY GENERAL :

4 OF CALIFORNIA, :

5 Petitioner :

6 v. : No. 01-1127

7 LEANDRO ANDRADE :

8 - - - - -X

 Washington, D. C.

 Tuesday, November 5, 2002

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:10 a.m

14 APPEARANCES:

15 DOUGLAS P. DANZIG, ESQ., Deputy Attorney General, San
16 Diego, California; on behalf of the Petitioner.

17 ERWIN CHERMERSKY, ESQ., Los Angeles, California; on
18 behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 01-1127, Bill Lockyer v. Leandro Andrade.

5 Mr. Danzig.

6 ORAL ARGUMENT OF DOUGLAS P. DANZIG

7 ON BEHALF OF THE PETITIONER

8 MR. DANZIG: Mr. Chief Justice, and may it
9 please the Court:

10 The Ninth Circuit's grant of habeas relief in
11 this case should be reversed for two reasons. First, the
12 court erred in setting aside the State court judgment
13 because it did not properly apply the principles of habeas
14 corpus review to cases that are considered under the
15 AEDPA. As confirmed in two concurring opinions issued by
16 this Court yesterday, *Early v. Hill* and *Woodford v.*
17 *Visciotti*, this case is resolvable on AEDPA grounds and
18 therefore the Court need not address the constitutional
19 issues in this case.

20 In any event, independent of the habeas corpus
21 aspects of this case, the sentence in this case is not
22 grossly disproportionate and therefore does not violate
23 this -- the Eighth Amendment.

24 Pursuant to 28 U.S.C. 2254(d), a Federal court
25 may not grant habeas relief unless the State court

1 determination on the merits was either contrary to, or
2 involved an unreasonable application of this Court's clear
3 controlling precedent. In this case, the Ninth Circuit
4 held that the State court determination involved an
5 unreasonable application. Despite the Ninth --

6 QUESTION: Is this the case in which the Ninth
7 Circuit first decided for itself the constitutional
8 question, and then decided whether the State court had
9 reasonably applied it?

10 MR. DANZIG: Yes, that is correct, Your Honor.

11 Despite the Ninth Circuit's holding in this
12 case, a careful analysis of the Ninth Circuit's opinion on
13 here reveals that although they reversed, or granted
14 habeas relief, reversing the district court on
15 unreasonable application grounds, the fact of the matter
16 is this, all of the reasoning lends itself to a contrary-
17 to analysis rather than an unreasonable application, and
18 opposing, or the respondent has, in fact briefed the
19 contrary-to prong of the 2254 as well as the unreasonable
20 application prong.

21 For example, the -- and for the most part the
22 circuit court held that holding was based on the
23 conclusion that the State court merits determination erred
24 because it did not consider the three-case triumvirate of
25 *Rummel*, *Solem*, and *Harmelin*, and faulted the State court

1 for failing to apply, or essentially disregarding Solem,
2 but as Early v. Packer made clear yesterday, on -- when we
3 are talking about a contrary-to application, it's not
4 necessary for the State court to have cited this Court's
5 controlling authority, and it's not even necessary for the
6 Court to be aware of it, and in fact the State court in
7 this case cited, or provided what we call a Lynch analysis
8 under California law, which incorporated virtually every
9 aspect of the Solem analysis that the State court said --
10 pardon me, that the Ninth Circuit said the State court
11 disregarded.

12 So on that basis alone, and I think Early
13 makes -- the per curiam opinion in Early makes clear that
14 that's okay if you have an application of State law, or
15 you rely on State law that provides even greater depth of
16 analysis than the Federal rule would require, and that's
17 what happened here. The Lynch analysis requires what
18 would be comparable to the second and third prongs under
19 the Solem analysis, which, following Harmelin, are deemed
20 no longer required unless -- and serve only to validate an
21 initial inference on the first prong, so this was clearly
22 not a contrary-to case. The court -- the State court --

23 QUESTION: May I just ask on that point, do you
24 think there was not even the need to look at the second or
25 third elements of the test because there is not even a

1 basis for saying this sentence was grossly
2 disproportionate?

3 MR. DANZIG: Yes, Justice Stevens, I agree with
4 that. I think that there is no inference --

5 QUESTION: In other words, the case could be
6 decided on the ground that there's -- an inference of
7 gross disproportionality should not be drawn in this case?

8 MR. DANZIG: That's correct, Your Honor, I do
9 agree with that, and on the Eighth Amendment, the pure
10 Eighth Amendment question, that there was no inference of
11 gross disproportionality here, and therefore the second
12 and third prongs were not required, but the State court
13 did, in fact, apply a second and third prong analysis, and
14 that leads into the only portion of the Ninth Circuit's
15 opinion that really addresses the reasonableness of the
16 State court's decision.

17 The Ninth Circuit disposed of the unreasonable
18 application analysis in a footnote, and it basically said
19 that the State court's reliance on State law is irrelevant
20 because it didn't cite Federal law, and I think that the
21 decision yesterday in *Early v. Hill* kind of renders that
22 particular portion of the analysis --

23 QUESTION: Would you just refresh my
24 recollection on the facts of this case, because the prior
25 argument, the argument was made that violence was the

1 critical matter in the prior conviction. Were there
2 violence in the earlier, in the priors in this case?

3 MR. DANZIG: The record does not indicate
4 whether there were or not, Your Honor. The priors that
5 were the predicate for the three strikes sentence were
6 both residential burglaries, and there -- we have no facts
7 concerning them in the record, but the gravamen, as we all
8 know, of a residential burglary is the potential for
9 danger and violence that comes from invading someone's
10 home, and also subsequent to this case being decided quite
11 recently, the California legislature amended its statute
12 and now includes a residential burglary where the house is
13 occupied in its articulation of violent felonies. It's no
14 longer just confined to the serious felony --

15 QUESTION: Do you agree with your colleague in
16 the prior case that violence is a critical element in the
17 priors or not?

18 MR. DANZIG: No, I do not, Your Honor.

19 QUESTION: Okay.

20 MR. DANZIG: Not to be overly inconsistent
21 between our mutual arguments, but I think this Court has
22 held that the presence or absence of violence does not
23 necessarily dictate the proportionality analysis. There
24 may be circumstances where a crime is of sufficient
25 gravity that doesn't involve violence, such that extremely

1 long sentences are appropriate.

2 QUESTION: I agree on the merits that we can't
3 convert this Court into a sentencing commission, but it's
4 also true, I guess, that there must be some way of
5 deciding when a State has gone too far, and I don't know
6 any way that's other than highly subjective, except to
7 look at data that would show what happened in the past,
8 but if you take that, how do you give the State the right
9 to become harsher in the future?

10 Now, you're going to say, well, it has that
11 right, and of course it does to a degree, but is there a
12 way to say that it has to meet some burden, or that it has
13 to show something if it's going to change dramatically
14 what was the consensus in the past --

15 MR. DANZIG: I don't think that --

16 QUESTION: -- in a harsh direction?

17 MR. DANZIG: I don't think that the fact that
18 it's going to change dramatically is determinative or
19 dispositive, but I do think, Justice Breyer, that there
20 are a couple of responses to that question.

21 First of all, turning back to one of the
22 questions Justice Souter asked in the prior argument, I
23 believe that when the State is going to define certain
24 felonies as being sufficiently serious to trigger the
25 imposition of the three strikes, or three strikes approach

1 or harsher sentencing, I think a rational basis -- the
2 courts may be required to engage in a heightened scrutiny
3 analysis to determine whether there's a rational basis for
4 that in the first place.

5 But I think that's distinct from any
6 proportionality analysis, and the problem with the
7 hypothetical that you pose is that, while you are correct
8 that there is a subjective prong to this, the question is,
9 where does that subjectivity belong? Is it within the
10 particular personal subjective views of the reviewing
11 court, or is it within the confines of the subjective
12 views as reflect -- that the legislature represents of the
13 subjective views of the citizenry?

14 QUESTION: It has to be the latter, but still
15 there has to be a way of deciding when they go too far.

16 MR. DANZIG: In other words --

17 QUESTION: And that's what I'm looking for, and
18 I look to -- you know, what I've said before as a way of
19 isolating the problem, and then -- and I think here you
20 might say that on the merits of your case, it'll -- you'd
21 be hard-pressed to find many examples outside of the three
22 strikes laws where there were such sentences given for
23 such things.

24 MR. DANZIG: I --

25 QUESTION: I think so. I mean, there are a

1 handful in the SG's brief, that's true.

2 MR. DANZIG: I understand your question, Justice
3 Breyer, to basically go to what is grossly
4 disproportionate.

5 QUESTION: That's right.

6 MR. DANZIG: And the Court, this Court has not
7 defined that term, or given us any clear guidelines, but
8 we do know that by the very nature, grossly
9 disproportionate implies an extreme situation, and --

10 QUESTION: Suppose we were to find -- and
11 there's argument in this about the briefs both ways, but
12 suppose we were to conclude that this has likely been a
13 most effective scheme, that it's reduced the crime rate in
14 the State of California. The prisoners talk about it all
15 the time. They know what three strikes means. It's a
16 simple thing that they can understand, and that it works.

17 If we made that finding, and there -- your
18 adversaries will disagree that that's true, but if we made
19 that finding, does that bear on whether the sentence is
20 disproportionate?

21 MR. DANZIG: Not really, because I suppose -- I
22 mean, in an extreme example, Justice Kennedy, we could
23 lock up everybody for extremely long periods of time, and
24 it could still go past that point of proportion, of gross
25 disproportionality. I think there has to be a more clear

1 definition than simply the impact of the sentencing
2 statute, and --

3 QUESTION: Well, what's your limiting principle
4 here?

5 MR. DANZIG: The limiting --

6 QUESTION: Is there one?

7 MR. DANZIG: The limiting principle we offer is,
8 or we urge upon the Court is the one that's been mentioned
9 in a -- or has been used as related to an example
10 mentioned in a couple of the Court's opinions, when they
11 refer to lifetime for parking, and the reasonable mean --
12 understanding of that example is often cited as a life
13 sentence for a first-time parking --

14 QUESTION: But that --

15 QUESTION: Excuse me, what is your limiting
16 principle? I haven't heard it.

17 MR. DANZIG: The limiting principle would be
18 that those are, that sentences are grossly
19 disproportionate when they are not reasonably susceptible
20 to debate amongst reasonable minds.

21 QUESTION: But --

22 QUESTION: You seem to be --

23 QUESTION: -- in this particular case it's 50
24 years for stealing some tapes, right?

25 MR. DANZIG: No, Your Honor, I -- Justice

1 Stevens, I disagree with that. It is not a 50-year
2 sentence for stealing tapes, it is two 25-years-to-life
3 sentences.

4 QUESTION: But they're consecutive.

5 MR. DANZIG: They are consecutive.

6 QUESTION: Well, why isn't that 50?

7 (Laughter.)

8 MR. DANZIG: Because I think it's important to
9 bear in mind two things in reaching that conclusion.
10 First of all, they represent independent episodes of
11 criminal behavior. They are not connected. They may have
12 the impact of resulting in a 50-year sentence, but it --
13 but they do reflect the fact that the -- Mr. Andrade in
14 this case demonstrated beyond any question that he is a
15 habitual offender. He was arrested and either cited and
16 released, or booked and released and 2 weeks later he went
17 right back out and did the same thing.

18 Not only that, he told the probation officer
19 that he stole the tapes in order to sell them to buy
20 heroin, not as gifts for his children, but to buy heroin
21 with. He also indicated he was a hopeless heroin addict,
22 and that he always does something stupid when released
23 from prison, and I think the reasonable inference of what
24 he meant was, he always goes out and recommit crimes, so
25 I think that's part of why it's not a 50-year --

1 QUESTION: Well, is he being punished because
2 he's a heroin addict or because he stole these tapes?

3 MR. DANZIG: He's being punished because of his,
4 of a combination of his record of recidivism and his -- or
5 his habitual criminal behavior.

6 The other reason I think it's important to make
7 the distinction between the two 25-to-life sentences
8 versus characterizing it as 50-to-life for receiving, or
9 for stealing some tapes is because of the ameliorative
10 effects of the California sentencing structure.

11 QUESTION: But in light of the answer that you
12 gave to my question, and then to Justice O'Connor's about
13 what is the standard, I'm now at somewhat a loss as to how
14 to defend your statute under the incapacitation and
15 deterrence theory. That doesn't bear on proportionality?
16 That's quite a surprising answer to me. I thought the
17 whole point of this statute was that we wanted something
18 that works.

19 MR. DANZIG: And I agree, Your Honor, and if I
20 misstated that, I did not mean to. I think that the --

21 QUESTION: Then proportionality has to be judged
22 against the legislative objective, I should think.

23 MR. DANZIG: Absolutely, Justice Kennedy.

24 QUESTION: Well, then, then the question that I
25 put to you does bear on proportionality. The premise I

1 put to you does bear on proportionality, that we need a
2 system that's simple but works, that reduces crime in the
3 State, and you told me, oh, well, that means we could lock
4 up everything, everybody so you can't use that.

5 MR. DANZIG: No, I did not mean --

6 QUESTION: But we don't lock up everybody.
7 That's not the three strikes statute.

8 MR. DANZIG: I did not mean to imply that it
9 doesn't bear on proportionality, I certainly believe that
10 it does. I simply said that standing alone, without any
11 further consideration, that would also justify an extreme
12 example, but yes, I do believe that it does bear on
13 proportionality in light of the legislative purpose of the
14 statute, but in measuring that legislative purpose, I do
15 believe that what's reasonable -- sentences, evaluating
16 sentences on whether they are reasonably susceptible to
17 debate also provides a framework or a lens with which to
18 look, to apply that analysis.

19 QUESTION: Mr. Danzig --

20 QUESTION: Okay, but if we do that --

21 QUESTION: -- if we can just back up, I think
22 you started out by urging that we not do what the Ninth
23 Circuit did in terms of the order. It first made a ruling
24 that there was a violation of the Eighth Amendment, and
25 then it determined whether we had clearly established law.

1 MR. DANZIG: That's correct.

2 QUESTION: You are urging that we not reach any
3 ultimate decision on the Eighth Amendment question, but
4 simply decide that however you come out on that, the --
5 there was no violation of clearly established Federal law.

6 MR. DANZIG: Not exactly, Justice Ginsburg. We
7 are saying that the case is disposable on AEDPA grounds,
8 but if the Court found that the State court merits
9 determination was unreasonable, it necessarily would have
10 to turn to the Eighth Amendment issue.

11 QUESTION: Yes, but which -- the Ninth Circuit
12 said it's appropriate in these cases to decide the Eighth
13 Amendment question first. What is your view on that?
14 Should we follow in line with what the Ninth Circuit did,
15 or should we say the proper thing to do is to find out
16 whether it's an unreasonable interpretation of clearly
17 established Federal law, and if it isn't, that's the end
18 of it?

19 MR. DANZIG: The latter, Justice Ginsburg. The
20 methodology that the Ninth Circuit has developed as
21 articulated in Van Tran is inconsistent with the very
22 spirit of the AEDPA.

23 QUESTION: Well, it's also inconsistent with our
24 idea that we try to avoid constitutional questions if we
25 can, isn't it?

1 MR. DANZIG: Yes, it is, Your Honor.

2 QUESTION: But you said earlier that you thought
3 the proper analysis was contrary to, rather than
4 unreasonable application, and how can you decide whether
5 something's contrary to a rule unless you know what the
6 rule is?

7 MR. DANZIG: I would like to clarify that,
8 Justice Stevens. I didn't say that the proper analysis in
9 this case was contrary to. I said that the Ninth Circuit
10 purported to reach an unreasonable application prong, but
11 when you look at their reasoning, it actually is a
12 contrary-to argument that they made, and I meant to say
13 that when -- if -- to the extent that it is a contrary-to
14 decision that they made, no matter the fact that they
15 ultimately labeled it unreasonable application, this
16 Court's per curiam decision yesterday in *Early v. Packer*
17 has essentially resolved that question, because of what
18 they base their decision on.

19 QUESTION: I'm not sure you've answered my
20 question. It seems to me that we have to decide whether
21 or not -- regardless of what the Ninth Circuit did, I
22 think one of the things we have to decide is whether or
23 not the sentence in this case is contrary to a Federal
24 rule, and I don't know how we can decide that without
25 knowing what the Federal rule is, and I was asking for

1 your advice on that point.

2 MR. DANZIG: The Federal rule I think is
3 articulated in Harmelin, and that is that grossly
4 disproportionate sentences violate the Eighth Amendment.

5 QUESTION: But we have to identify that as the
6 Federal rule before we go on to decide whether it's
7 contrary to, I think. Is that -- would you agree with
8 that?

9 MR. DANZIG: Yes. You're -- I would.

10 QUESTION: That seems just the opposite of what
11 you responded to me earlier, that we don't have to decide
12 the Eighth Amendment question, that we can just decide
13 whatever the answer to that is, this was not off the
14 chart.

15 MR. DANZIG: I don't think that we have to --
16 that it's necessary to resolve the Eighth Amendment
17 question, but it may be necessary to know what the rule is
18 before we know whether the State court selected
19 the right rule or not --

20 QUESTION: But if we know what the rule is --

21 QUESTION: Well, precisely we have to ask
22 whether there is a Federal rule. We don't have to know
23 what it is. The question is, is there a clearly
24 pronounced Federal rule.

25 MR. DANZIG: Correct.

1 QUESTION: And the answer to that may well be
2 no.

3 MR. DANZIG: In many circumstances it may be.

4 QUESTION: In which case we have no occasion to
5 pronounce on what the Federal rule is.

6 MR. DANZIG: Correct.

7 QUESTION: All we have to say is that there is
8 no clearly enunciated Federal rule here.

9 QUESTION: Can I go back for a second to the
10 merits of this?

11 MR. DANZIG: Yes.

12 QUESTION: Because I -- we all have -- my
13 problem that I'm struggling with is, is there an objective
14 standard. You're absolutely right about what the problem
15 is I'm having, and I tend to -- do look to this empirical
16 stuff as a way of finding an objective standard, and if
17 here the empirical part suggests this is way out of line,
18 I'm now faced with the question, well, can't the State
19 make a harsher system if it has a reason for doing it, and
20 I think the answer to that question must be yes.

21 But then -- then I'd ask, very well, doesn't the
22 State have to come up with some reason that's persuasive
23 in this case that it makes a difference to extend the
24 three-strike thing with this kind of thing in mind, this
25 kind of case in mind, to the wobblers?

1 I mean, is there some punitive purpose in terms
2 of incapacitation that's gained, of a significant kind, by
3 increasing the wobbler sentences by factors of, you know,
4 multiples of four or five or 10 or something, over what
5 they would have been before when committed by serious
6 criminals, and I guess the answer to that is, there's no
7 indication, or is there?

8 MR. DANZIG: The -- I think you can't -- that
9 begs the question. It cannot disassociate the wobbler
10 offense that's at issue in this particular case from the
11 recidivism

12 QUESTION: No, no, I'm not. I'm only
13 considering the class of recidivists, and I'm saying --
14 let's call them recidivist plus wobbler, all right. That
15 group of people, recidivist plus wobbler, is getting an
16 enormous increase in sentence over what was or is any
17 other place, on average, and therefore I think, gee, maybe
18 this is really grossly disproportionate.

19 MR. DANZIG: But it's a certain class of
20 recidivists. It's not just recidivists in general. It is
21 that class --

22 QUESTION: No, that's right.

23 MR. DANZIG: -- that's already demonstrated that
24 they are willing to commit the most serious and violent --

25 QUESTION: That's right.

1 MR. DANZIG: -- potentially violent types of
2 crimes, and has now indicated that they are also unwilling
3 to remain law-abiding, and there comes a point at which
4 the State has a right to say, enough is enough.

5 QUESTION: So jay-walking?

6 MR. DANZIG: Well, I think that would probably
7 return to the rational basis, the -- analysis.

8 QUESTION: Fine. If jay-walking's not there,
9 and this is, the wobblers, why can the wobblers be there,
10 but not the jay-walkers? That's what I'm -- that's what
11 I'm thinking about here.

12 MR. DANZIG: There is a distinction between the
13 wobblers and the jay-walking. There's the obvious
14 distinction that there's a longstanding historical
15 tradition between felonies and misdemeanors and
16 infractions. The infractions, the jay-walking doesn't
17 even present, for the most part, a property or personal
18 safety issue.

19 QUESTION: Well, does California fine people for
20 jay-walking?

21 MR. DANZIG: There is, I believe, a code on the
22 books that makes it an offense, or an infraction.

23 QUESTION: Is it enforced at all?

24 MR. DANZIG: I do not know the answer to that,
25 Your Honor.

1 QUESTION: Mr. Danzig --

2 QUESTION: I don't understand why a parking
3 offense wouldn't qualify if a man is on parole, and any
4 breach of parole is always emphasized as being
5 particularly bad, and one of the things he can't do is
6 engage in parking in no-parking zones, and if he did that
7 in breach of a parole, and he had nine prior cases, I
8 don't know why you couldn't impose your three-strike
9 penalty on the overtime parker.

10 MR. DANZIG: The -- if the California
11 legislature chose --

12 QUESTION: It says, any violation -- it put it
13 in as a wobbler, any violation of a parole condition by a
14 person who's on parole.

15 MR. DANZIG: That is not a wobbler offense.
16 It's a parole revocation issue.

17 QUESTION: It would not, because the other, in
18 the other case they emphasized the fact he'd been on
19 parole a number of times, what -- his violations were
20 parole violations. Is the fact that whether or not it's a
21 parole violation relevant to our inquiry at all?

22 MR. DANZIG: It is in the sense that the Court
23 has held that when doing a proportionality analysis, his
24 entire criminal picture can be taken into consideration.
25 We're not -- the Court is not required to confine the

1 analysis only to the predicate and triggering offenses, so
2 in that sense it does -- it is an indication of continued
3 habitual criminality and an unwillingness to remain
4 law-abiding.

5 QUESTION: I think you're saying --

6 QUESTION: Mr. Danzig, there is something
7 missing in this case that was present in the other. That
8 is, the judge in the -- Mr. Ewing's case was asked to
9 reduce the wobbler to a misdemeanor, was asked to strike a
10 strike and she said no, it's not within the spirit of the
11 three-strikes law.

12 Here, the California Court of Appeals seemed
13 almost nonplussed that there had not been such requests
14 timely made to the trial judge, and twice the court of
15 appeal said it would still be open to Mr. Andrade to
16 pursue on State habeas both pleas, that is, the wobbler
17 should be reduced to a misdemeanor, a strike should be
18 out. Do you agree that that avenue of relief is open to
19 Mr. Andrade?

20 MR. DANZIG: Yes, but it requires an
21 explanation, Your Honor. He -- Mr. Andrade did, in fact,
22 ask the court for misdemeanor treatment under California
23 Penal Code section 17(b).

24 QUESTION: He didn't repeat it at the time of
25 sentencing.

1 MR. DANZIG: No, he did not, Your Honor, but
2 there is an odd chronological history here that's just --
3 that distinguishes this case.

4 The California Court of Appeal, or -- pardon me.
5 The judgment came down in this case a few weeks before the
6 California Supreme Court issued its decision in Romero
7 granting trial courts the discretion to dismiss priors, so
8 in the California Court of Appeals decision, they noted
9 that that Romero decision had said that if you got a
10 record that you can't determine whether the sentencing
11 judge knew whether he had or not -- he or she had
12 discretion to dismiss the strikes, then the proper basis
13 for addressing that is through State habeas.

14 Mr. Andrade then filed a petition for review to
15 the California supreme court which was denied, and without
16 prejudice to file a State habeas corpus petition based on
17 Romero, which he did. He went back to State court, filed
18 a habeas corpus petition -- pardon me. He did not file a
19 State habeas corpus petition -- pardon me. He did file a
20 State habeas corpus petition which was entertained by the
21 same sentencing court that had sentenced him, and that
22 court said that it did not find that he was appropriate
23 candidate for dismissing the strikes.

24 Curiously, though, that court also noted that if
25 it felt that it read the law as having discretion to

1 impose concurrent rather than consecutive sentences, it
2 might consider it. That wasn't an issue at the time. It
3 was just kind of dicta within the court's, the sentencing
4 court's decision.

5 Ultimately, though, about a year later, the
6 California supreme court issued another case called People
7 v. Garcia in which the supreme court said that sentencing
8 courts have a right to dismiss strikes on a count-by-
9 count basis, and Mr. Andrade has never asked by any
10 vehicle for a reconsideration of that issue, so in theory
11 he could go back at this point and file another State
12 habeas corpus petition and ask for what we would call
13 Garcia consideration, and -- which, based on what the
14 court, the sentencing court had previously indicated, the
15 court might be inclined to grant him, which would reduce
16 this sentence if, assuming it was applied to one of the
17 counts, to a 25-year-to-life sentence.

18 QUESTION: Would you object to that relief?

19 MR. DANZIG: We would not concede the issue,
20 but -- and I'm not saying that we would necessarily oppose
21 it, but it is available to him. We'd have to consider our
22 position on that if and when it was -- he made that
23 application.

24 QUESTION: Do you wish to reserve some time?

25 MR. DANZIG: Yes, I do, Your Honor.

1 QUESTION: Very well. Thank you, Mr. Danzig.

2 MR. DANZIG: Thank you.

3 QUESTION: Mr. Chemerinsky, we'll hear from you.

4 ORAL ARGUMENT OF ERWIN CHERMERINSKY

5 ON BEHALF OF THE RESPONDENT

6 MR. CHERMERINSKY: Mr. Chief Justice, and may it
7 please the Court:

8 Today, the State of California asks this Court
9 to disregard and essentially to overrule a century of
10 decisions that have held that grossly disproportionate
11 penalties violate the Eighth Amendment. If any sentence
12 is grossly disproportionate, it's that which was imposed
13 on Leandro Andrade.

14 QUESTION: A century of decisions? I thought we
15 decided this since I've been on the Court. I've been here
16 longer than I thought, I guess.

17 (Laughter.)

18 MR. CHERMERINSKY: I'm sorry, Justice Scalia, I
19 didn't hear the question.

20 QUESTION: You say there -- for a century we
21 have been engaged in proportionality analysis?

22 MR. CHERMERINSKY: Yes, Your Honor. In *Weems v.*
23 *United States* in 1910, this Court said that sentences must
24 be graduated in proportion to the offense. Most recently,
25 in *Harmelin v. Michigan*, seven Justices -- and Justice

1 Kennedy's opinion becomes the rule of Harmelin --
2 prescribed a three-part test based on Solem v. Helm for
3 deciding if a sentence is cruel and unusual punishment.

4 QUESTION: Mr. Chemerinsky --

5 QUESTION: I don't think that's quite accurate,
6 Mr. Chemerinsky. I think if you were to take points,
7 decisional points, you would look at Rummel on one side,
8 and then Solem moves away from that, and then Harmelin
9 moves back towards Rummel.

10 MR. CHEMERINSKY: Chief Justice Rehnquist, each
11 of the cases said it's consistent with all of the cases,
12 and each of these cases cites to Weems v. United States as
13 saying that grossly disproportionate punishments violate
14 the Eighth Amendment.

15 QUESTION: What do you do as a State court judge
16 trying to apply our cases when you take those three cases?
17 I mean, it isn't a very obvious answer, is it?

18 MR. CHEMERINSKY: Your Honor, many State courts,
19 and virtually every circuit has said that Justice
20 Kennedy's opinion from Harmelin becomes the rule of
21 Harmelin, because in United States v. Marks it was the
22 narrowest ground that a majority agreed to, and of course
23 Justice Kennedy's opinion is simply a modification of the
24 three-part Solem test.

25 QUESTION: Well, it -- Justice -- I've just read

1 it over, and it cites *Rummel* more often than it cites
2 *Solem*

3 MR. CHEMERINSKY: Your Honor --

4 QUESTION: So the point that I think you need to
5 address is the AEDPA point. That is, is the supreme court
6 of California way out of line, or whatever the test is,
7 you know, improperly applied --

8 (Laughter.)

9 QUESTION: -- in the light of these cases.

10 MR. CHEMERINSKY: Yes, Your Honor. Under this
11 Court's decision in *Williams v. Taylor*, in *Bell v. Cone*
12 and yes, in *Early v. Packer*, there are two ways in which a
13 Federal court can grant habeas relief. One is to find
14 that it is contrary to clearly established Federal law.
15 The other is to find that it's an unreasonable application
16 of clearly established Federal law. Both are present
17 here, and all --

18 QUESTION: But one must find in either case
19 clearly established Federal law, and frankly that's my
20 problem when you cite *Weems*. There are lots of grand
21 statements in our cases, but most of them come out
22 rejecting the claim, and you cited *Weems*. That was an
23 extraordinary case because it involved not simply hard
24 labor, but hard and painful labor. It was a kind of a
25 penalty that was foreign to Anglo-American law, and if

1 that's the one example before we get to Solem, you really
2 don't have anything concrete to go on. You just have
3 grandly general statements.

4 MR. CHEMERINSKY: Your Honor, there are cases
5 prior to Solem that found sentences to be cruel and
6 unusual punishment. In Robinson v. California in 1962,
7 for example --

8 QUESTION: That was a status crime.

9 MR. CHEMERINSKY: Yes, Your Honor, and it did
10 find a violation of the Eighth Amendment.

11 QUESTION: But you're not saying, are you, that
12 being an habitual criminal is like being a drug addict or
13 a drunk? That is, just being drunk, just being stoned on
14 drugs is not a crime?

15 MR. CHEMERINSKY: No. My point, Your Honor, is
16 that this Court has repeatedly said that grossly
17 disproportionate sentences violate the Eighth Amendment,
18 and the cases that I mentioned say that. In addition --

19 QUESTION: That's what they say, but you've
20 given Robinson as an example, and that's a case where I
21 thought the Court said there was no crime, not that it was
22 cruel and unusual punishment for a crime.

23 MR. CHEMERINSKY: Yes, Your Honor, and what I'm
24 simply saying is, these are examples which the Court has
25 repeatedly said that grossly disproportionate sentences

1 violate the Eighth Amendment.

2 QUESTION: Did the California courts contradict
3 that? Did the California courts here say, grossly
4 disproportionate crimes don't violate the Eighth
5 Amendment?

6 MR. CHEMERINSKY: Yes, Your Honor. The
7 California Court of Appeals, and you find this in the
8 appendix to the cert petition, said it questioned whether
9 gross disproportionality analysis would be applied, and it
10 questioned whether Solem v. Helm analysis applied, and
11 therefore the California Court of Appeals did not apply
12 the three-part test from Solem v. Helm and the three-part
13 test that comes from Justice Kennedy's opinion in
14 Harmelin.

15 And in answer to Justice Ginsburg's question, it
16 is those cases that announce the test that should have
17 been applied, and those cases are clearly established law.

18 QUESTION: Your opponent says that the
19 California court relied on a Lynch analysis, which is a
20 State court doing much the same thing.

21 MR. CHEMERINSKY: No, Your Honor --

22 QUESTION: Do you disagree with that?

23 MR. CHEMERINSKY: I do disagree. First, the
24 California Court of Appeal expressly said it was not going
25 to do gross disproportionality analysis. It did not do

1 Solem analysis. It did not do Harmelin analysis.

2 QUESTION: Well, I realize that, and my question
3 to you was, if the California court said we're going to do
4 a Lynch analysis, is that substantially the same thing?

5 MR. CHEMERINSKY: No, Your Honor. The
6 California Court of Appeal said the test under California
7 law is whether the sentence, quote, shocks the conscience.
8 That is a quite different test than the objective test of
9 Solem and Harmelin, which is carefully calibrated
10 determining whether a sentence is grossly
11 disproportionate.

12 Also, the three factors used by the California
13 Court of Appeal under the Lynch analysis were quite
14 different than the Solem analysis. First, there was no
15 comparison of the gravity of the offense to the harshness
16 of the punishment. Second, the court did not look to
17 similar punishments in the same jurisdiction.

18 In California, the punishment for rape would
19 have been 8 years in prison, the punishment for
20 manslaughter would have been 11 years in prison, the
21 punishment for second degree murder would have been 15
22 years in prison, and he received 50 years to life. In
23 fact, if his prior offenses had been rape and murder, he
24 could have at most gotten a year in jail.

25 This goes to Justice Stevens' question earlier.

1 His prior -- his crime here was the misdemeanor of
2 shoplifting. Because of double-counting it was elevated
3 first to petty theft with a prior, and then it triggered
4 the three strikes law, but in order for it to be petty
5 theft with a prior, there has to be a prior property
6 offense.

7 If his prior crimes had been rape and murder,
8 then his maximum sentence for stealing these videotapes
9 would have been a year in jail. It's because his prior
10 offenses were property crimes that the double-counting
11 could occur. Additionally --

12 QUESTION: I thought your opponent, or perhaps
13 the representative of the State, said that was not so.

14 MR. CHERMERINSKY: No, Your Honor. The confusion
15 here is that with regard to petty theft, petty theft, the
16 misdemeanor can become the wobbler petty theft with a
17 prior under California Penal Code section 666 only if the
18 prior crime is a property crime, and if you look at
19 California Penal Code section 66, it enumerates just
20 property crimes.

21 QUESTION: Mr. Chemerinsky, I thought that what
22 made the petty theft in this case into a wobbler was not
23 the crimes that were listed as strikes, but another petty
24 theft. Is that not true?

25 MR. CHERMERINSKY: Yes, Your Honor. They used a

1 petty theft, but they also used the burglaries to convert
2 the petty theft to a petty theft with a prior, and then
3 they used the petty theft with a prior to trigger the
4 three strikes law.

5 QUESTION: I thought they used -- they didn't --
6 there was a second petty theft. That was the crime of
7 conviction. I thought there was an earlier one that made
8 the crime of conviction the petty theft with a prior. Is
9 that wrong?

10 MR. CHEMERINSKY: That is correct. However,
11 Your Honor, under California Penal Code section 667(g) any
12 prior felonies must be pled and proven, and the only prior
13 felonies here that were ever mentioned were the
14 burglaries, and as a result, simply because of stealing
15 \$152 worth of videotapes in those burglaries, he received
16 a sentence of 50 years to life, and under the third prong
17 of the rule of Harmelin.

18 QUESTION: Well, is it not so that a judge
19 having the two strikes that are listed, and also having
20 the full record of the crimes that this person has
21 committed, that that's relevant to the discretion the
22 judge has to strike a strike, or to say I'm not going to
23 treat that petty theft as a felony, the petty theft with
24 prior as a felony. I'm not going to do that.

25 There was in this case, was there not, in

1 addition to the two strikes, some serious criminal
2 activity?

3 MR. CHEMERINSKY: No, Your Honor, they played no
4 role in the sentence here, and the reason, as I said, is
5 the California Penal Code says any prior felonies must be
6 pled and proven. If you look at the felony complaint --

7 QUESTION: I didn't ask you about --

8 MR. CHEMERINSKY: I'm sorry.

9 QUESTION: -- the ones that count as strikes.
10 I asked you about the sentencing judge who has discretion
11 could say, looking at -- if that's all we had on this
12 record, I'm not going -- I'm going to exercise my
13 discretion to knock down the wobbler to a misdemeanor.
14 I'm going to knock out a strike. Isn't that in effect
15 what sentencing judges would do? They would look not
16 simply to the two strikes that are formally pled, but this
17 person's entire record.

18 MR. CHEMERINSKY: Your Honor, that not what
19 occurred here. If you look at the sentencing transcript
20 on page 37 of the Joint Appendix, you'll see that the
21 sentencing judge made no mention to anything other than
22 the three burglaries.

23 QUESTION: Well, isn't he presumed to know what
24 the record is?

25 MR. CHEMERINSKY: No, Your Honor, because

1 California Penal Code requires an order, for it to be
2 considered a strike, it has to be pled and proven. The
3 criminal complaint here, the criminal information, the
4 jury finding was just as to those burglaries, and the
5 sentencing judge focused it just on those burglaries.

6 QUESTION: Well, no. No. That's true as to the
7 strikes, but that doesn't mean that he didn't notice the
8 entire record in order to inform his discretion.

9 MR. CHEMERINSKY: Your Honor, there's no --

10 QUESTION: Or her.

11 MR. CHEMERINSKY: -- indication here that there
12 was ever any consideration other than the burglaries.

13 QUESTION: But there's no indication that the
14 record was not before the judge.

15 QUESTION: Doesn't he have that record before
16 him? Isn't there a presentence or an equivalent of a
17 presentencing report? Doesn't he get the record of what
18 this person he's about to sentence has done in the past?

19 MR. CHEMERINSKY: There was a probation report,
20 but because under California law prior strikes have to be
21 pled and proven, because only the burglaries were
22 mentioned, there's no reason here for the judge --

23 QUESTION: Excuse me. Only the burglaries were
24 mentioned in the presentencing report?

25 MR. CHEMERINSKY: No. Only the burglaries were

1 proven.

2 QUESTION: Were proven?

3 MR. CHEMERINSKY: The jury, on pages 18 and 19
4 of the joint appendix, found the burglaries, thus there
5 was no reason for Andrade to challenge the contents of the
6 probation report, and the judge never mentioned the
7 probation report. He focused just on the burglaries.

8 And the other thing that makes this case, I
9 think, quite unique is no other State in the country would
10 impose a punishment like this on Andrade. The Solicitor
11 General's brief points to some instances where in essence
12 grand theft, stealing more than \$400 has led to a
13 sentence. The State can't identify, and there is no
14 instance where anybody else has received this sentence.

15 QUESTION: They're saying, I take it, on this
16 point that let's think of the class of serious criminals,
17 and we've decided in California to tell all people in that
18 class one more crime, you've had it.

19 Now, they have to define one more crime, and so
20 where they choose to draw the line is the line not before
21 you get to wobblers, but the line after you get to
22 wobblers, and they say that takes jay-walking and parking
23 offenses and everything and says, we're not talking about
24 those, we're talking about these, and what the other side
25 is arguing is, that's within the legislative discretion

1 that the Cruel and Unusual Punishment Clause must give.

2 All right. Why isn't it?

3 MR. CHEMERINSKY: Justice Breyer, the reason
4 this case is different is the underlying conduct here is a
5 misdemeanor that's double-counted in order to become the
6 basis for a life sentence. Earlier, for example, Justice
7 Scalia even invoked the distinction between misdemeanor
8 and felony. A key point here is, there is no limiting
9 principle that --

10 QUESTION: Well, no, they're saying on that
11 particular point, and I'm trying to get your response --

12 MR. CHEMERINSKY: Yes.

13 QUESTION: -- they say, there are felonies which
14 are not wobblers, and they're quite serious. There are
15 wobblers which are medium-serious, and there are those
16 things that can't even wobble. They are trivial, and
17 where we choose to draw the line is between the last --
18 you know, between -- below the wobblers and not above.
19 What's wrong with that?

20 MR. CHEMERINSKY: Because that could lead to an
21 indeterminate life sentence for stealing a candy bar or
22 even a gum ball.

23 QUESTION: Yes, it could.

24 MR. CHEMERINSKY: And that would violate --

25 QUESTION: It could, and they'll say yes, that

1 is true in certain circumstances, and then they will
2 repeat the argument I just made. I'm not holding him to
3 my argument. I'm trying to push you a little bit, and to
4 say, if people are told, one more gum ball and you've had
5 it, that's a legitimate purpose of sentencing.

6 Now, how do I come back in some other than
7 purely subjective way and say, well, you know, you've gone
8 too far? Is there anything one is to appeal to other than
9 a judge's subjective reaction?

10 MR. CHEMERINSKY: It is not subjective, it is
11 the three-part objective test that is the rule of
12 Harmelin. It is first comparing the gravity of the
13 offense to the harshness of the punishment.

14 In *Solem v. Helm*, this Court said the courts can
15 evaluate the gravity of the offense, looking to see if
16 it's a violent versus a nonviolent offense. Leandro
17 Andrade never committed any violent offense.

18 QUESTION: But in that, there's nothing in
19 Harmelin as I reread it that indicates that you must
20 preclude or prescind from that analysis, that initial
21 analysis, the fact that there is a recidivist element
22 here.

23 MR. CHEMERINSKY: Of course.

24 QUESTION: Recidivism is part of the analysis.

25 MR. CHEMERINSKY: It is, and recidivists can --

1 QUESTION: So we're not just talking about gum
2 balls. We're talking about all of the offenses, including
3 breaking and entering with knives and so forth.

4 MR. CHEMERINSKY: But Leandro Andrade never was
5 accused or convicted of breaking and entering with knives
6 and in fact, Your Honor, even if you look at all of his
7 offenses, his criminal pattern is virtually identical to
8 that of Helm in *Solem v. Helm*.

9 I would go back to Chief Justice Rehnquist's
10 question --

11 QUESTION: On that matter, what about what Judge
12 Sneed said in his dissent in the Ninth Circuit when he
13 pointed out that there was much in this criminal history
14 record in addition to the two strikes, including Federal
15 marijuana transportation offenses and a parole violation
16 for escape from Federal prison?

17 MR. CHEMERINSKY: First, Your Honor, as I said
18 before, there's no indication that those were ever
19 considered, nor could they be by the sentencing court, but
20 second, Your Honor, even if you consider all of those,
21 then his criminal record is virtually identical to Helm's
22 in *Solem v. Helm*, and this does go to Chief Justice
23 Rehnquist's initial question.

24 One way that this Court has said that you can
25 find that a penalty or a sentence is contrary to clearly

1 established Federal law is if a State court ignores a
2 decision that is on all fours. Solem v. Helm --

3 QUESTION: Well, on all fours, on that point, is
4 there any decision where a term of years was struck down
5 as disproportionate? Solem, I take it, was a life
6 sentence.

7 MR. CHEMERINSKY: Your Honor, in Solem v. Helm
8 it was a life sentence, but there's nothing in Solem or
9 Harmelin that indicates that disproportionality analysis
10 is only where there's no possibility of parole. If that
11 were the analysis, then a State could avoid
12 disproportionality review just by calling every life
13 without possibility of parole a 75-year sentence.

14 QUESTION: If the question is what's clearly
15 established, and if I'm a trial court judge, I'll look to
16 see what the court did, not grandly general statements
17 that it made about constitutional principle, and if I --
18 if my investigation led me to find that no, there has not
19 been a single case in which a term of years has been
20 struck down, then I might assume that the law for terms of
21 years is not clearly established.

22 MR. CHEMERINSKY: Your Honor, Solem v. Helm
23 answers that question. Here, Leandro Andrade received an
24 indeterminate life sentence with no possibility of parole
25 for 50 years. That is the functional equivalent of the

1 sentence that Helm received in *Solem v. Helm*, and yet the
2 California Court of Appeal expressly said it would not
3 apply *Solem v. Helm*.

4 QUESTION: Mr. Chemerinsky, the difficulty that
5 I have with your argument is, number 1, the point that
6 Justice Ginsburg made, but a further point that has come
7 out this morning.

8 When we are asking whether there is clearly
9 established law, I think we've got to take into
10 consideration something that has become clear from, I
11 think has become clear from this argument, and that is
12 that there is a question as to whether the test is
13 genuinely a proportionality or a gross disproportionality
14 test, or whether that is simply an example of a kind of
15 rational basis test, because we've had this difficulty in
16 fitting the recidivism into the structure of
17 proportionality analysis, and I think what tends to come
18 out in the answers that we've gotten this morning is,
19 there's more than just proportionality which is being
20 considered here.

21 If that is true, if that is a fair
22 characterization of the way our reasoning is working, then
23 don't we have great difficulty in saying that there was
24 clearly established law simply by looking to *Solem* and to
25 *Harmelin*?

1 MR. CHEMERINSKY: No, Your Honor. The reason
2 is, two things were clearly established at the time the
3 California Court of Appeal decision came down, first, that
4 grossly disproportionate sentences violate the Eighth
5 Amendment, and the court said it questioned it, didn't
6 apply it, and second, the test that's supposed to be used,
7 the objective test from the rule of Harmelin -- from
8 Solem v. Helm, and the court did not apply that three-
9 part test, and in that way the court acted contrary to
10 clearly established law.

11 Also, since Solem v. Helm is really factually
12 indistinguishable in this case, the court acted contrary
13 to in not following, and in addition --

14 QUESTION: You're saying that if the law is
15 going to become unclear, it's going to be as a result of
16 what we say this morning, as -- rather than what we have
17 said before.

18 MR. CHEMERINSKY: Yes, Your Honor, at least
19 with -- insofar as gross disproportionality violates the
20 Eighth Amendment, and the test for gross
21 disproportionality being clearly established, and the
22 California courts followed neither of those.

23 QUESTION: Well, do you -- Mr. Chemerinsky, do
24 you -- do you think that Solem v. Helm was as strong a
25 case after our decision in Harmelin as it was before?

1 MR. CHEMERINSKY: Yes, in two ways. First, the
2 three-part test that it prescribes is still followed,
3 though Justice Kennedy's opinion from Harmelin says
4 there's only a need to consider the latter two prongs if
5 there is an inference of gross disproportionality
6 comparing the gravity of the offense to the harshness of
7 the punishment.

8 And second, no subsequent case, including
9 Harmelin, has ever ruled, overruled *Solem v. Helm*, so --

10 QUESTION: Well, but do you think a State court
11 judge is acting unreasonably if he says we have three
12 cases, *Rummel*, *Solem*, and *Harmelin*, and it just isn't
13 quite all that clear?

14 MR. CHEMERINSKY: No, Your Honor, I think that
15 is unreasonable here, because the California Court of
16 Appeal applied only *Rummel*, but in footnote 32 in *Solem*,
17 the Court said that *Rummel* is confined to its facts,
18 because it's before the three-part test.

19 QUESTION: Yes, but then *Harmelin* goes ahead
20 and, as I say, cites *Rummel* more often than it does *Solem*.

21 MR. CHEMERINSKY: And *Rummel* remains good law
22 insofar as result, but *Harmelin* affirms the three-part
23 test. This Court has repeatedly affirmed that three-part
24 test.

25 QUESTION: Although it didn't apply it, although

1 it said, we don't have to go beyond the first step, and it
2 said, you might get to those others in exceedingly rare
3 cases.

4 MR. CHEMERINSKY: That's correct, Your Honor --

5 QUESTION: And I suppose what you are telling us
6 is, this is that rare case.

7 MR. CHEMERINSKY: This is that rare case,
8 because in this instance, a man who had never committed a
9 violent crime received an indeterminate life sentence with
10 no possibility of parole for 50 years for stealing a small
11 amount of videotapes.

12 QUESTION: May I ask this question that's -- is
13 a practical one, is, in view of what I referred to before
14 that Judge Sneed brought out in his dissent, if any of
15 those other activities could have been priors, wouldn't a
16 resentencing here likely yield the very same result,
17 except that this time the prosecutor would spell out what
18 that entire course of conduct was?

19 MR. CHEMERINSKY: I think, Your Honor, that
20 there is very little likelihood, based on all of the
21 California cases, that a resentencing would lead to a
22 different result here, so in that sense I agree with you,
23 and that's why it really is a constitutional issue. Does
24 an indeterminate life sentence for this conduct, even
25 taking into account his recidivism, justify the penalty

1 that was received here?

2 This Court has prescribed exactly the objective
3 factors to be considered, and to treat stealing \$153 worth
4 of videotapes more seriously than second degree murder
5 doesn't even meet a rational basis test, and it is an
6 unreasonable application, and in that way, this case --

7 QUESTION: Well, it wasn't that they were
8 treating this person as someone whose prior record
9 warranted incapacitating him. They weren't merely
10 punishing a single offense. They were punishing a person,
11 or they were incapacitating a person that they found to be
12 an incorrigible offender.

13 MR. CHEMERINSKY: Based on three burglaries that
14 were 13 years earlier, and twice shoplifting a small
15 amount of videotapes, and that's why our argument is that
16 this is that rare case where it is grossly
17 disproportionate punishment to in essence --

18 QUESTION: But that case hasn't been seen yet.
19 This would be it. This -- there has been -- am I wrong in
20 thinking there has been no case since Harmelin where we
21 have said that a sentence is grossly disproportionate, and
22 no lower Federal court has struck down a sentence since
23 then?

24 MR. CHEMERINSKY: It is correct that this Court
25 has not found any sentence to be grossly disproportionate

1 since Harmelin -- you've not dealt with this issue since
2 Harmelin -- but there are lower court cases. For example,
3 a year ago the Eighth Circuit in Henderson v. Norris found
4 a life sentence for possessing a small amount of cocaine
5 was grossly disproportionate, applying the rule of
6 Harmelin and also applying the Solem v. Helm test.

7 QUESTION: Was that a recidivist case?

8 MR. CHEMERINSKY: I don't think it was a
9 recidivist case, Your Honor.

10 QUESTION: Has there been a recidivist case
11 since that trilogy that you recited?

12 MR. CHEMERINSKY: There are State courts that
13 have found recidivist sentencing structures to violate
14 United States Constitution, but there are not -- then
15 those would also involve recidivists, and those would have
16 applied both Solem and Helm

17 The West Virginia Court in State v. Deal, for
18 example, found a recidivist sentencing structure to be
19 cruel and unusual punishment. The Colorado court of
20 appeals in People v. Gaskins came to the same result, and
21 that also explains why this case is different than Early
22 v. Packer, which you decided yesterday, and there the
23 criticism was that it was a situation where the State
24 court didn't cite to or mention the controlling Supreme
25 Court decision.

1 Here, the California supreme court said it was
2 rejecting the test prescribed by this Court, rejecting the
3 test from Harmelin v. Michigan, which is a very different
4 situation than this case.

5 QUESTION: What were the words that it used? I
6 don't think it was that strong. I thought it questioned
7 whether those -- that was still good law.

8 MR. CHEMERINSKY: Yes, Your Honor. The exact
9 wording from the court was the question. The exact
10 wording was, and I quote to you from page 76 of the
11 appendix to the cert petition, however, to the extent that
12 the defendant suggests that proportionality analysis
13 applies under both the State and Federal Constitutions, we
14 must question that assertion, and then the court said, on
15 the same page, the current validity of the Solem
16 proportionality analysis is questionable.

17 And having said it was questionable, the court
18 then did not apply the rule that grossly disproportionate
19 sentences violate the Eighth Amendment. The court did not
20 apply the Solem analysis, the rule of Harmelin that the
21 court identified in Harmelin v. Michigan, and it was the
22 failure of the court to apply the controlling test, it was
23 the failure of the court to follow the controlling
24 precedent --

25 QUESTION: Well --

1 MR. CHEMERINSKY: -- that made the decision
2 contrary.

3 QUESTION: -- they say, Mr. Chemerinsky, on that
4 same page, they say that the Solem proportionality
5 analysis is questionable in the light of Harmelin against
6 Michigan. They certainly weren't saying they were
7 refusing to apply Harmelin.

8 MR. CHEMERINSKY: But Your Honor, they then did
9 not apply the three-part test that Justice Kennedy
10 articulated, which is the rule of Harmelin --

11 QUESTION: But I thought you said they simply
12 refused to follow Harmelin.

13 MR. CHEMERINSKY: Well, they didn't --

14 QUESTION: I -- you're not meaning, then, that
15 they expressly refused to follow Harmelin, you're saying
16 that, in fact, they didn't use the same formula as
17 Harmelin suggested?

18 MR. CHEMERINSKY: Well, that's correct, Your
19 Honor, they didn't use in any way the three-part test from
20 Harmelin.

21 QUESTION: But --

22 MR. CHEMERINSKY: All they did was analogize to
23 *Rummel v. Estelle*.

24 QUESTION: That was not the Court's test, that
25 was Justice Kennedy's test, which you say was the lowest

1 common denominator. You think it's clearly established
2 law that where you have a split decision, the lowest
3 common denominator is the law of the land?

4 MR. CHEMERINSKY: In United States --

5 QUESTION: I think that's a highly controverted
6 proposition myself.

7 MR. CHEMERINSKY: Your Honor, in United States
8 v. Marks this Court described how to determine the rule
9 when there is no majority opinion, but especially here,
10 where Justice Kennedy is simply slightly modifying a prior
11 test from Solem v. Helm, the law is clearly established.

12 QUESTION: Not an opinion of the Court, an
13 opinion of Justice Kennedy, and you say that all the
14 States' courts have to accept the proposition that that is
15 the law of the land?

16 MR. CHEMERINSKY: Your Honor, virtually every
17 circuit has said that is the rule of Harmelin, but
18 especially so here, where it is simply slightly modifying
19 a test that's been on the books for 20 years, since
20 Solem v. Helm, that says three considerations are used to
21 calibrate whether a sentence is cruel and unusual.

22 QUESTION: So Justice Powell's opinion in Bakke
23 is the law of the land, and you think that that is
24 generally accepted?

25 MR. CHEMERINSKY: My sense is you're going to

1 have occasion soon enough to deal with that issue --

2 QUESTION: Understood.

3 MR. CHEMERINSKY: -- but --

4 (Laughter.)

5 QUESTION: My point is that the proposition is
6 not, is simply not well-established, that you must accept
7 a less than majority opinion of the Supreme Court as being
8 the law of the land so long as it's the lowest common
9 denominator.

10 MR. CHEMERINSKY: Your Honor, I think there's
11 three reasons why it is. First, this Court's opinion in
12 United States v. Marks describes how to determine what the
13 holding is.

14 Second, every circuit -- and we cite this in our
15 brief -- refers to the rule of Harmelin, and virtually
16 every State that's considered it refers to the rule of
17 Harmelin, which shows that it's clearly established.

18 And third, the Solem v. Helm test was not in any
19 way overruled. Seven Justices in this Court in Harmelin
20 adhered to the Solem test.

21 QUESTION: But they split 4 to 3 as to what the
22 test required in that case, didn't they?

23 MR. CHEMERINSKY: But seven Justices --

24 QUESTION: So you -- doesn't that throw some
25 doubt as to how closely you follow that?

1 MR. CHEMERINSKY: No, Your Honor. Seven
2 Justices agreed that grossly disproportionate sentences
3 violate the Constitution. Four would apply an even more
4 protective standard for criminal defendants, but seven
5 Justices clearly adhered to that. Seven Justices adhered
6 to the Solem v. Helm test.

7 QUESTION: But doesn't that suggest that the
8 test isn't that clear if they apply it and three come out
9 one way and four come out the other?

10 MR. CHEMERINSKY: Your Honor, often Justices
11 will disagree, but the question here is, is the rule
12 clearly established, and the rule that grossly
13 disproportionate sentences violate the Constitution, the
14 rule that there's an objective three-part test, is what is
15 the clearly established law, and Your Honor, if any
16 sentence is grossly disproportionate, it's this case.

17 The punishment here isn't just cruel and
18 unusual, it's cruel and unique. The State can't point to
19 even one other person in the history of the United States
20 who has received a sentence of 50 years to life for
21 shoplifting a small amount of merchandise. Even in
22 California this sentence would be regarded as quite --
23 much larger than, say, second degree murder, manslaughter,
24 rape, which shows that it is a grossly disproportionate
25 punishment.

1 Thank you.

2 QUESTION: Thank you, Mr. Chemerinsky.

3 Mr. Danzig, you have 4 minutes remaining.

4 REBUTTAL ARGUMENT OF DOUGLAS P. DANZIG

5 ON BEHALF OF THE PETITIONER

6 MR. DANZIG: Thank you. Given the limited time,
7 there are just a couple of brief points I would like to
8 make about respondent's argument.

9 I think it's clear that when he's arguing that
10 the proportionality analysis has to be confined to the
11 predicate offenses and the triggering offense, without
12 regard to the entire record, what he is essentially doing
13 is raising a facial challenge to the statute despite the
14 fact that the Ninth Circuit claimed that they were not
15 invalidating the statute, and to that extent that any
16 facial challenge can be made, the ameliorating provisions
17 of the California scheme would result in a finding that
18 the statute is not -- in -- unconstitutional on its face.

19 Secondly, just as a points, a couple of points
20 of correction -- the Court has already touched upon it --
21 the court of appeal did not question whether the
22 proportionality analysis was correct. It questioned
23 whether Solem's version of the proportionality analysis
24 was still correct. That's what the State court did, and
25 it still went ahead and applied a proportionality analysis

1 via a State court decision of Lynch.

2 And in terms of whether gross disproportionality
3 was addressed or not, the State used, or the State court
4 used a standard articulated from Lynch, which is shocks
5 the conscience, and it is much stronger language and is at
6 least reasonably a euphemism for grossly disproportionate.

7 Also, I will find the page in just a moment, but
8 I believe at the sentencing hearing the judge did indicate
9 that he had considered the probation report. It's in the
10 joint appendix, and I will find the cite in a moment.

11 Ultimately, if there's any doubt about whether
12 there's clear precedent or not, the -- I think that the
13 State court determination should be given deference in
14 this case, and almost finally, not -- Andrade did not
15 receive life for three burglaries and two petties, he
16 received that because the ameliorating provisions go into
17 the analysis, and as he was not granted the benefit of any
18 of them, and in fact hasn't even asserted one of them, he
19 did not receive that sentence for that, for strictly life
20 for three burglaries and two petties. He's received it
21 based on his overall record.

22 In terms of whether there are -- anyone else in
23 California has suffered a similar sentence, while we -- I
24 have no reference to any 50-year-to-life sentences based
25 on two convictions, there are 300 and -- approximately 344

1 defendants in California serving 25-year-to-life sentences
2 for petty offense, offense with a prior which constitutes
3 the one 25-to-life sentence.

4 QUESTION: But that's under the three strikes
5 regime?

6 MR. DANZIG: Correct, Your Honor.
7 Finally --

8 QUESTION: So that doesn't tell us much about
9 the constitutionality of the three strikes regime.

10 MR. DANZIG: No. It was simply a response to
11 respondent's assertion that we could not point to anyone
12 else serving a similarly severe sentence for a similar
13 crime --

14 QUESTION: But we have the SG's footnote, which
15 does have a few.

16 MR. DANZIG: Yes, Your Honor.

17 QUESTION: But not this serious. I mean, not
18 this trivial.

19 MR. DANZIG: Well, I don't think -- I would not
20 characterize it as trivial, but I understand --

21 QUESTION: Not this -- I'm looking for the right
22 word. Not this minor?

23 MR. DANZIG: I think that under the California
24 scheme it's clear presumptively that theft is a felony
25 offense, and we simply grant -- and California simply

1 grants the first-time offender an opportunity to reform
2 I don't consider it trivial or minor.

3 Ultimately, we would ask the Court to disapprove
4 Van Tran. It's presenting significant problems. It's
5 inconsistent with this Court's pronouncements in
6 Williams v. Taylor and in Bell v. Cone and Penry v.
7 Johnson. It establishes a methodology that is simply
8 incorrect, and finally, in 1996, Congress limited the
9 scope of Federal habeas corpus review.

10 Here, the Ninth Circuit failed to properly apply
11 those, the principles guiding that analysis.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Danzig.

13 MR. DANZIG: Thank you, Your Honor.

14 CHIEF JUSTICE REHNQUIST: The case is submitted.

15 (Whereupon at 12:10 p.m., the case in the above-
16 entitled matter was submitted.)

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