No. 01-1127

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Petitioner*

v.

LEANDRO ANDRADE, *Respondent*

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Is an indeterminate life sentence, with no possibility of parole for 50 years, grossly disproportionate and thus a violation of the Eighth Amendment when imposed for shoplifting $153 worth of videotapes?

2. In light of this Court's consistent holdings that grossly disproportionate punishments violate the Eighth Amendment, was the state court's decision upholding an indeterminate life sentence, with no possibility of parole for 50 years, for stealing $153 worth of videotapes "contrary to" or an "unreasonable" application of clearly established federal law?

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STATEMENT OF THE CASE

On November 4, 1995, Leandro Andrade – a nine-year army veteran and father of three – was caught shoplifting five children's videotapes (*Snow White, Casper, The Fox and the Hound, The Pebble and the Penguin, and Batman Forever*), worth a total $84.70, from a K-Mart store in Ontario, California. The store's Loss Prevention Officer observed Andrade's actions and Andrade was stopped, the videotapes confiscated, and he was arrested for shoplifting.

On November 18, 1995, Andrade went to a different K-Mart store, in Montclair, California, and was caught shoplifting four children's videotapes (*Free Willy 2, Cinderella, Santa Claus, and Little Women*) worth $68.84. Again, Andrade was observed on store video cameras and he was stopped by security officers, the videotapes confiscated, and Andrade was arrested for shoplifting.

Under California law, these incidents generally would be regarded as the crime of petty theft, a misdemeanor, and punishable by a fine or a jail sentence of six months or less. California Penal Code §490.

California law, however, provides that petty theft with a prior conviction for a property offense is a "wobbler," a crime that can be punished, in the discretion of the prosecutor or the sentencing judge, as either a felony or a misdemeanor. California Penal Code §666. Because Andrade had at least two prior convictions for property offenses, albeit for the non-violent crime of burglary, his petty theft was prosecuted as a felony, "petty theft with a prior."

On January 19, 1996, a one-count information was filed by the San Bernardino County District Attorney charging Andrade with petty theft with a prior conviction in violation of California Penal Code §666. The allegation was that Andrade stole five videotapes, worth $84.70, from the K-Mart in Ontario, California. The information alleged that Andrade had three prior felony convictions arising from residential burglaries committed on April 26, 1983. On March 13, 1996, the court granted a joint motion to consolidate the case with the other prosecution for shoplifting, thereby adding a second count of petty theft with a prior. The second count was for stealing four videotapes, worth $68.84, from the K-Mart in Montclair, California.

Andrade's trial began on March 18, 1996, and on March 21, 1996, the jury found him guilty of "petty theft" on both counts of stealing videotapes. (Joint App. at 16-17). On March 27, 1996, the jury found, as required by California law, that Andrade did in fact have three prior convictions for burglary, as alleged by the prosecution. (Joint App., at 18-21).

Pursuant to the Three Strikes law, on April 24, 1996, the court sentenced Andrade to prison for 25 years to life on count 1, and 25 years to life on count 2, ordering the terms served consecutively. California Penal Code Ann. §667(e)(2)(A). As required by the Three Strikes law, Andrade's sentence is an indeterminate life sentence, with no possibility of parole for 50 years. (Joint App., at 65-69).

California's "Three Strikes" law was initially adopted by the California legislature as a statute, Stats. 1994, ch. 12, §1, and then approved by the voters as an initiative. Proposition 184, §1, approved by voters, Gen. Elec. (Nov. 8, 1994). Several aspects of the law, as interpreted by the California courts, led to Andrade being sentenced to 50 years to life for stealing $153 worth of videotapes. First, although only "serious" or "violent" felonies, as defined by California Penal Code §1192.70 and §667.50 respectively, qualify as prior strikes, *any* felony, including petty theft with a prior, may serve as a third strike and be the basis for a life sentence. Prior strikes need not be violent offenses as long as they are deemed "serious," and Andrade's prior burglary convictions meet this latter requirement. Cal. Penal Code, §§1192.7(c)(18), 460(a). Under the

California Three Strikes law, Andrade would have been subject to an indeterminate life sentence for any act of petty theft, even shoplifting a candy bar.

Second, Andrade was considered to have two prior strikes, even though both of his prior burglary convictions were sustained in the same proceeding. *See, e.g., People v. Askey*, 49 Cal.App.4th 381, 56 Cal.Rptr.2d 782, 785 (Ct.App. 1996). Third, it is irrelevant under the law that Andrade's prior convictions occurred in 1983, 12 years before his arrests for shoplifting. There is no "washout" period after which prior qualifying convictions will no longer be considered as strikes. *See, e.g., People v. Martinez*, 71 Cal.App.4th 1502, 84 Cal.Rptr.2d 638, 646 & n.9 (Ct.App. 1995). Fourth, defendants with prior strikes who are convicted of multiple felonies must serve consecutive sentences. Cal. Penal Code §§667(c)(6), 1170.12(a)(6). Thus, Andrade received two sentences of 25 years to life in prison, to run consecutively. Finally, each sentence is deemed to be an indeterminate life sentence, with no possibility of parole until at least 25 years have been served. *In re Cervera*, 24 Cal.4th 1073, 16 P.3d 176, 181 (Cal. 2001). Therefore, Andrade's earliest possible parole date is 50 years after his convictions in 1996, in the year 2046. In 2046, Andrade will be 87 years old.

The California Court of Appeal affirmed the judgment, finding that the sentence did not violate the Eighth Amendment's prohibition of cruel and unusual punishment. App. to Cert. Pet. at 68, 76-79. The Court of Appeal doubted whether proportionality analysis was appropriate under the Eighth Amendment and focused its Eighth Amendment analysis exclusively on *Rummel v. Estelle*, 445 U.S. 263 (1980). Based on that decision, the court affirmed Andrade's sentence. The California Supreme Court denied review. App. to Cert. Pet. at 81.

Andrade then filed a timely habeas corpus petition in the United States District Court for the Central District of California. The district court denied the habeas petition, App. to Cert. Pet. at 54-64, and Andrade appealed. The United States Court of Appeals for the Ninth Circuit reversed the judgment of the district court and remanded the case with instructions that Andrade be resentenced or released.

SUMMARY OF ARGUMENT

1. It is cruel and unusual punishment in violation of the Eighth Amendment for Andrade to have been sentenced to 50 years to life in prison for two counts of stealing videotapes worth a total $153.54. Under California law, thefts of this amount generally would be regarded as the crime of petty theft, a misdemeanor, and punishable by a fine or a jail sentence of six months or less. California Penal Code §490. California law, however, provides that petty theft with a prior conviction for a property offense is a "wobbler," subject to punishment as either a misdemeanor or a felony. California Penal Code §666. Thus, Andrade's misdemeanor, petty theft, was elevated to a felony because of his prior offenses. Because of these same prior offenses, Andrade's shoplifting also was treated as a "third strike," triggering consecutive sentences of 25 years to life in prison for each count of stealing videotapes.

The law is clearly established that "grossly disproportionate" punishments constitute cruel and unusual punishment in violation of the Eighth Amendment. *See, e.g., Atkins v. Virginia*, 122 S.Ct. 2242, 2246 (2002); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (seven Justices concluding that "grossly disproportionate" sentences violate the Eighth Amendment); *Solem v. Helm*, 463 U.S. 277 (1983).

In *Solem v. Helm*, this Court articulated a three-part test for determining whether sentences are grossly disproportionate. 463 U.S. at 292. First, courts are to compare "the gravity of the offense and the harshness of the penalty." Second, courts are to consider the sentences imposed on other criminals in the same jurisdiction. Finally, courts are to look to the "sentences imposed for commission of the same crime in other jurisdictions." 463 U.S. at 291. In *Harmelin v. Michigan*, Justice Kennedy's concurring opinion agreed with both *Solem*'s holding that a grossly disproportionate sentence of imprisonment violates the Eighth Amendment and its three-part test. 501 U.S. at 1001. Justice Kennedy said, though, that courts need not examine the second and third factors mentioned in *Solem* – the intra-jurisdictional and inter-jurisdictional reviews – unless a "threshold comparison of the crime committed and the sentence imposed

leads to an inference of gross disproportionality." *Id*. at 1005.

Under the *Solem/Harmelin* analysis, a sentence of 50 years to life in prison for two counts of stealing videotapes is "grossly disproportionate." The offense was minor, but the punishment was enormous: an indeterminate life sentence with no possibility of parole for 50 years. Petty theft is deemed a misdemeanor by California and two counts of petty theft are punishable by at most one year in jail. Absent the Three Strikes law, two counts of "petty theft with a prior" are punishable by at most three years and eight months in prison. California Penal Code §1170.1(a)

In California, only first degree murder and a few other violent crimes would receive a sentence greater than Andrade's punishment of an indeterminate life sentence with no possibility of parole for 50 years. *See, e.g.*, California Penal Code §193 (voluntary manslaughter is punishable by up to 11 years in prison); California Penal Code §264 (rape is punishable by up to eight years in prison); California Penal Code §190 (second degree murder is punishable by 15 years to life in prison). In fact, if Andrade's prior crimes had been for murder or rape, the maximum sentence for his shoplifting would have been one year in jail; under California law, the crime of petty theft with a prior requires that there be a previous property crime. Calif. Penal Code §§490, 666.

In no other state could Andrade have received an indeterminate life sentence with no possibility of parole for 50 years for stealing $153 worth of videotapes. As Justice Stevens recently noted: California is the "only state in the country in which a misdemeanor could receive such a severe sentence." *Riggs v. California*, 525 U.S. 1114 (1999) (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari).

This Court has recognized that states may punish recidivist conduct harshly, but it also has emphasized that there is a constitutional limit imposed by the Eighth Amendment. *See Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980); *Solem v. Helm*, 463 U.S. at 290. The Supreme Court never has approved a life sentence, with no possibility of parole for 50 years, for conduct that otherwise would be treated as a misdemeanor. If any sentence violates the constitutional standard of "gross disproportionality," it is Andrade's sentence of 50 years to life

in prison for two counts of stealing videotapes worth a total of $153.

The State's argument for deference to the political process has no limiting principle. Under the State's approach, any offense, no matter how trivial, could be punished by life imprisonment. The State contends that the only unconstitutional punishments are "those sentences that are not susceptible to debate among reasonable minds." Pet. Br. at 36. This approach would replace the three-part test from *Solem v. Helm*, which focuses on objective factors, with a very subjective test. Such an approach, besides being totally subjective, would allow "the views of one such judge who might think that relief is not warranted in a particular case [to] always have greater weight than the contrary, considered judgment of several other reasonable judges." *Williams v. Taylor*, 529 U.S. 362, 377-78 (2000).

2. Under the federal habeas corpus statute, relief is available if a state court decision is "contrary to, or involves 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). In *Williams v. Taylor*, 529 U.S. at 404-405, this Court explained that §2254(d)(1)'s "contrary to" and "unreasonable application" clauses have independent meaning, and a writ of habeas corpus is appropriate if either requirement is met.

The California Court of Appeal's decision was "contrary to" clearly established federal law because it applied "a different rule from the governing law set forth" in Supreme Court decisions and because it decided a case differently than the Supreme Court did "on a materially indistinguishable set of facts." *Bell v. Cone*, 122 S.Ct. 1843, 1850 (2002). Specifically, the California Court of Appeal did not apply the proportionality analysis required by *Solem* and *Harmelin.* Instead, the state court "question[ed]" whether "proportionality analysis applies under . . . [the] federal constitution." App. to Cert. Pet. at 77. The state court said: "[T]o the extent [Andrade] suggests that proportionality analysis applies under both the state and federal constitutions, we must question that assertion." *Id*. It further stated that "the current validity of the *Solem* proportionality analysis is questionable in light of *Harmelin*." *Id*. at 78. This Court, however, has repeatedly cited with approval to *Solem*, *see, e.g., Cooper Indus. v. Leatherman*

Tool Group, Inc., 532 U.S. 424, 434-35 (2001); *United States v. Bajakajian*, 524 U.S. 321, 336 (1998). Moreover, in *Harmelin*, seven Justices expressly concluded that proportionality analysis is required by the Eighth Amendment. By ignoring this Court's precedents, the California state courts acted "contrary to" clearly established federal law. In addition, the California Court of Appeal acted "contrary to" federal law by not following *Solem v. Helm*, which is materially indistinguishable from this case.

Finally, the California Court of Appeal "unreasonably" applied clearly established federal law by holding that an indeterminate life sentence, with no possibility of parole for 50 years, for stealing $153 worth of videotapes, did not violate the Eighth Amendment. The State's position that the appropriate inquiry is "whether the question is susceptible to debate among reasonable minds," Pet. Br., at 29-30, is virtually identical to the standard that this Court rejected in *Williams v. Taylor*, 529 U.S. at 377-78.

ARGUMENT

I. AN INDETERMINATE LIFE SENTENCE, WITH NO POSSIBILITY OF PAROLE FOR 50 YEARS, FOR THE MISDEMEANOR CONDUCT OF SHOPLIFTING $153 WORTH OF VIDEOTAPES, IS GROSSLY EXCESSIVE AND THUS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT[1]

> In fact, as this case illustrates, analysis often is clearer if a federal court first decides the content of the law and whether the state court decision was erroneous and then determines whether it was "contrary to" or an "unreasonable application" of federal law. The Ninth Circuit's opinion, and all of the briefs before this Court, begin with an analysis of the Eighth Amendment and whether the sentence imposed on Andrade is grossly disproportionate. Only following this analysis is it possible to determine whether the state court's decision approving the sentence was "contrary to" or an "unreasonable

[1]The State raises the issue of whether a federal court should decide whether a state court decision was erroneous before determining whether the state court decision was contrary to or an unreasonable application of clearly established federal law. Pet. Br. at 34. This issue also is raised in the *amicus* brief of the Criminal Justice Legal Foundation.

However, there is no reason for this Court to address this issue in this case because the order of analysis would make no difference here. For the reasons described in Part II below, the state court's decision was "contrary to" and an "unreasonable application" of federal law because the state court failed to apply the controlling test prescribed by this Court for the Eighth Amendment. This is exactly the same reason why the state court determination was erroneous, as explained in Part I.

application" of federal law. Logically, the content of the law must be determined before it is possible to assess whether a decision is "contrary to" or an "unreasonable" application of this law. For exactly this reason, in the qualified immunity context, this Court has said that federal courts first are to decide the content of the constitutional right and then to determine whether it is a clearly established right that a reasonable officer should know. *See, e.g., Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

A. Grossly Disproportionate Punishments Violate the Cruel and Unusual Punishment Clause of the Eighth Amendment

This Court recently declared: "The Eighth Amendment succinctly prohibits 'excessive sanctions.'" *Atkins v. Virginia*, 122 S.Ct. 2242, 2246 (2002). Almost a century earlier, in *Weems v. United States*, 217 U.S. 349, 367 (1910), the Court held that the Eighth Amendment prohibits "greatly disproportioned" sentences and stated "that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." On other occasions, too, this Court has declared sentences unconstitutional as being "grossly disproportionate." For example, in *Coker v. Georgia*, 433 U.S. 584, 592 (1977), the Court held that "a sentence of death is grossly disproportionate and excessive for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." In *Solem v. Helm*, 463 U.S. 277 (1983), the Court held that it was grossly disproportionate to sentence a person to life imprisonment for passing a bad check for $100 because of six prior non-violent offenses. Justice Powell, writing for the Court, observed that "the Court has continued to recognize that the Eighth Amendment prohibits grossly disproportionate punishments." *Id*. at 288 (citations omitted).

In *Harmelin v. Michigan*, 501 U.S. 957 (1991), seven Justices endorsed the principle that grossly disproportionate sentences are unconstitutional. Only Chief Justice Rehnquist joined Justice Scalia's opinion arguing otherwise. *Id*. at 985. Expressly disagreeing with Justice Scalia, Justice Kennedy declared in his concurring opinion that "*stare decisis* counsels [this Court's] adherence to the narrow proportionality principle that has existed in Eighth Amendment jurisprudence for 80 years." *Id*. at 995 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy explained: "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." *Id*. at 1001. Justices O'Connor and Souter joined this opinion and its conclusion that grossly disproportionate punishments are unconstitutional. The four dissenting Justices in *Harmelin*, actually the plurality in the case, argued that the Eighth Amendment prohibits disproportionate sentences and concluded that "gross disproportionality" was too restrictive a constitutional standard. *Id*. at 1009, 1012 (White, J., dissenting); *id*. at 1027 (Marshall, J., dissenting).

No decision since *Harmelin* has questioned the principle established by almost a century of Eighth Amendment decisions: grossly disproportionate punishments are cruel and unusual punishment in violation of the Eighth Amendment. In *United States v. Bajakajian*, 524 U.S. 321, 336 (1998), the Court, in an opinion by Justice Thomas, invalidated a forfeiture as violating the "excessive fines" clause of the Eighth Amendment and stated: "[W]e therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents."[2]

Indeed, the idea that grossly excessive punishments are cruel and unusual punishment is not new; it was part of English law for hundreds of years before the founding of the United States. As this Court has long recognized, the requirements of the Eighth Amendment were "taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta." *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (footnote omitted). Blackstone, in his Commentaries, observed that the Magna Carta, in 1215, prohibited excessive punishments. Blackstone, *Commentaries*, at *10.

As prison sentences became more common in later years, the English courts were equally insistent that "imprisonment ought always to be according to the quality of the offense." *Hodges v. Humkin*, 80 Eng.Rep. 1015, 1016 (KB 1615). In 1689, the English Bill of Rights adopted the

[2]The Court's adopting gross disproportionality analysis for the "excessive fines" clause of the Eighth Amendment is relevant here because, as the Court stated in *Solem v. Helm*, "It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of prison were not." 463 U.S. at 289.

reference to "cruel and unusual" punishments that was repeated verbatim by the framers of the Eighth Amendment. Only three months later, that language was interpreted by the House of Lords, which declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon was excessive and exorbitant, against magna charta, the common right of the subject, and the law of the land." *Earl of Devon's Case,* 11 State Tr. 133, 136 (1689), *quoted in Solem*, 463 U.S. at 285.

In fact, Blackstone specifically wrote that the prohibition of cruel and unusual punishment forbids excessively harsh sentences for recidivist conduct. Blackstone discussed the permissibility of capital punishment for those who repeatedly violated statutes prohibiting loaded wagons on public roads. Blackstone said that such a punishment for recidivism was impermissible because "the evil to be prevented is not adequate to the violence of the preventive" and the punishment would violate "dictates of conscience and harmony." Blackstone, *Commentaries*, at *10.

This principle of proportionality also was reflected in colonial laws, which served as the source of many constitutional provisions. The Maryland Charter of 1632, for example, authorized penalties if "the Quality of the offense requires it." *Sources of Our Liberties* (R. Perry & J. Cooper eds.) 107 (1959). The Massachusetts Body of Liberties of 1641 allowed whipping only if the "crime be very shamefull." *Id.* And the Charter of Rhode Island, adopted in 1663, explicitly extended proportionality to prison sentences, requiring "the imposing of lawfull and reasonable ffynes . . . and imprisonments." *Id.* at 773.

Following independence, numerous state constitutions adopted a similar view. The Pennsylvania Constitution of 1776 called for a revision of the penal system to make "punishments in some cases less sanguinary and in general more proportionate to the crime." Pa.Const. §38 (1776). The South Carolina Constitution also instituted reform to make punishments "more proportionate to the crime." S.C.Const. §XL (1776). When George Mason copied a cruel and unusual punishment clause almost verbatim into the Virginia Declaration of Rights, he intended to include the protections of both the English Bill of Rights and the common-

law rights of Englishmen as publicized by Blackstone. *Solem v. Helm*, 463 U.S. at 285 n.10. His goal, and that of the Eighth Amendment, was to continue the ban on disproportionate punishment.

Of course, "a claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Atkins v. Virginia*, 122 S.Ct. at 2247. This Court recently reaffirmed that "the basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id*., quoting *Trop v. Dulles*, 356 U.S. at 100-101.

B. The Imposition of an Indeterminate Life Sentence, With No Possibility of Parole for 50 Years, Is Grossly Disproportionate When, as Here, It Is Imposed for Conduct that Generally Would Be Regarded as a Misdemeanor

1. Under objective criteria prescribed by the Supreme Court, an indeterminate life sentence, with no possibility of parole for 50 years, is grossly excessive when imposed for shoplifting $153 worth of videotapes

This Court repeatedly has stated that proportionality is to be determined by "objective factors to the maximum possible extent." *Rummel v. Estelle*, 445 U.S. at 274-275; *Atkins v. Virginia*, 122 S.Ct. at 2247. In *Solem v. Helm*, 463 U.S. at 292, the Court stated such objective criteria: "[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions." In *Harmelin v. Michigan*, Justice Kennedy's concurring opinion agreed with *Solem*'s holding that a grossly disproportionate sentence of imprisonment violates the Eighth Amendment. 501 U.S. at 1001. Justice Kennedy also agreed with *Solem*'s three-part test. Justice Kennedy said, though, that courts need not

examine the second and third factors mentioned in *Solem* – the intra-jurisdictional and inter-jurisdictional reviews – unless a "threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id*. at 1005.

Under these well-established criteria, Andrade's sentence was grossly disproportionate to the offense. First, the offense was minor, shoplifting a small amount of merchandise that was recovered before he left the store, but the punishment was extreme: a sentence of 50 years to life in prison. Under California law, this is deemed to be an indeterminate life sentence, *People v. Dozier*, 93 Cal.Rptr.2d 600, 605-06 (2000). Andrade is not eligible for parole until he has served 50 years in prison. *In re Cervera*, 16 P.3d 176, 177 (Cal. 2000). For Andrade, this is likely a life sentence; he will not be eligible for consideration for release from prison until the year 2046 when he will be 87 years old.

Andrade's crime is very similar to that in *Solem v. Helm*, where this Court found that a life sentence for "uttering a no account check" worth about $100 violated the Eighth Amendment. The crimes of both Jerry Helm and Leandro Andrade "involved neither violence nor [the] threat of violence to any person" and a "relatively small amount of money." 463 U.S. at 296.[3] Both passing a bad check and shoplifting are the types of crime that are "viewed by society as among the less serious offenses." *Id.* Furthermore, as the Court of Appeals explained, "[b]y classifying such conduct as a misdemeanor, the California legislature has indicated that petty theft is regarded as a relatively minor offense." *Andrade v. Attorney General*, 270 F.3d 743, 759-760 (2001).

The facts of this case are quite different, therefore, from *Harmelin v. Michigan*, where this Court upheld a life sentence for possession of more than 650 grams of cocaine. As Justice Kennedy noted, Harmelin possessed enough cocaine for between 32,500 and 65,000 doses. 501 U.S. at 1002. Justice Kennedy distinguished Harmelin's offense from the "relatively minor,

[3]The similarities between *Solem v. Helm* and this case are notable: both Helm and Andrade were in their late thirties at the time of conviction for their principle crimes; each had received his first felony conviction approximately 14 years earlier, each for residential burglary; each had a history of nonviolent offenses, principally property crimes; and each was sentenced to life in prison for a minor offense.

nonviolent crime at issue in *Solem*," concluding that Harmelin's crime was "as serious and violent as the crime of felony murder without specific intent to kill." *Id*. at 1004. The same cannot be said here. Andrade's shoplifting, like Solem's bad check, did not pose a "grave harm to society." *Id.* 1002.[4] California's Three Strikes law, in contrast to the Michigan law, did not provide "clear notice" to defendants in Andrade's position regarding the severity of the penalty, and "the complexity of the scheme" did obscure "the possible sanction for a crime." First, when Andrade committed his shoplifting in November 1995, no published appellate decision had held that a defendant could get two strikes from a single past case. The first case to so hold, *People v. Allison*, 41 Cal.App.4th 481, 48 Cal.Rptr.2d 756 (1995), was filed December 29, 1995, after Andrade's current offenses. Second, when Andrade engaged in shoplifting, the California Supreme Court had not yet settled whether consecutive sentences were required for multiple offenses. This did not occur occur until *People v. Deloza*, 18 Cal.4th 585, 76 Cal.Rptr.2d 255 (1998). The Three Strikes sentencing provisions are labyrinthine, to say the least, and a defendant well could have been "shocked" to learn that a 50-years-to-life rather than a 25-years-to-life sentence was required. Third, at the time Andrade committed his current offenses, the California Supreme Court had not determined how much of a 25-to-life sentence a defendant must serve before being eligible for parole. It was not until 2001, in *In re Cervera*, 24 Cal.4th 1073, 103 Cal.Rptr.2d 762 (2001), that it was decided that 25 years of a 25-to-life sentence, or 50 years when two such sentences are imposed consecutively, must be served before there is eligibility for parole. Yet, the punishment imposed on Andrade, an indeterminate life sentence with no possibility of parole for 50 years, is essentially the same sentence that the Supreme Court declared unconstitutional when imposed on a seven-time recidivist felon in *Solem*.

Rummel v. Estelle, 445 U.S. 263 (1983), also is easily distinguishable. In *Rummel*, this

[4]This case is distinguishable from *Harmelin* in another important respect. In *Harmelin*, Justice Kennedy emphasized that the law "provide[d] clear notice of the severe consequences that attach to possession of drugs in wholesale amounts." 501 U.S. at 1008. Justice Kennedy stressed that Michigan's law was not one where "the complexity of the scheme obscures the possible sanction for a crime, resulting in a shock to the offender who learns the severity of his sentence only after he commits the crime." *Id*.

Court upheld a life sentence for obtaining $120.75 by false pretenses because Rummel was eligible for parole within 12 years. Andrade, by contrast, must serve more than four times the length of Rummel's sentence before he becomes eligible for parole.

The second factor to be considered is the sentences imposed on other criminals in the same jurisdiction. Under California law, Andrade's crimes constitute petty theft -- theft of goods or money worth less than $400 -- a misdemeanor punishable by a fine or a jail sentence of six months or less. California Penal Code §490. The penalty for two counts of petty theft, punished to the maximum of one year in jail, is vastly different from a sentence of 50 years to life in prison.

Petty theft with a prior – that is, when committed after a conviction and time served for petty theft, grand theft, auto theft, burglary, carjacking, robbery, receiving or concealing stolen property – is a "wobbler" and thus is punishable either as a misdemeanor with up to one year in county jail or as a felony with up to three years in state prison. California Penal Code Ann. §§666, 496. Two counts of petty theft with a prior, prosecuted as felonies, would receive a maximum sentence of three years, eight months.[5]

In fact, for purposes of the intra-jurisdictional comparison, it is noteworthy that if Andrade's prior convictions had been for violent crimes, such as murder or manslaughter, his maximum punishment for the two acts of shoplifting would have been one year in prison. Under California law, the felony of petty theft with a prior requires that there be a prior property crime; if petty theft is committed after multiple prior convictions for non-theft offenses, including serious and violent offenses, then the petty theft must be charged as a misdemeanor and cannot trigger application of the Three Strikes law. Calif. Penal Code Ann., §§ 490, 666. So, for example, if Andrade's prior convictions had been for felonious assault or manslaughter or rape, only a one year sentence for two counts of petty theft would have been possible.

[5]Under California Penal Code §1170.1(a), a defendant receives only one-third of the middle term of the second count in this situation; here it would be one-third of a middle term of two years, that is, eight months. Therefore, the maximum sentence for two counts of petty theft with a prior would be three years and eight months in prison.

The gross disproportionality of Andrade's sentence is revealed by comparing, as required by *Solem* and *Harmelin*, his sentence to that imposed by the same jurisdiction for other crimes. As the Court of Appeals noted: "Andrade's indeterminate sentence of 50 years to life is exceeded in California only by first-degree murder and a select few violent crimes." *Andrade v. Attorney General*, 270 F.3d at 762. For example, in California, voluntary manslaughter is punishable by up to 11 years in prison, California Penal Code §193; rape is punishable by up to eight years in prison, California Penal Code, §264; second degree murder is punishable by 15 years to life in prison, California Penal Code §190; and sexual assault on a minor is punishable by up to eight years in prison, California Penal Code §288.

Finally, in evaluating gross disproportionality, as *Solem* and *Harmelin* require, courts are to consider the sentences imposed in other jurisdictions. As Justice Stevens recently noted: California is the "only state in the country in which a misdemeanor could receive such a severe sentence." *Riggs v. California*, 525 U.S. 1114 (1999) (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari). As the court below amply demonstrated in its catalogue of recidivist statutes, a defendant like Andrade would not have faced a fifty-year-to-life sentence for his offenses anywhere but in California or Louisiana; and in Louisiana, he would have had a strong claim for relief under the state constitution. *Andrade v. Attorney General*, 270 F.3d at 763.

Petty theft with a prior qualifies for recidivist sentencing in only four other jurisdictions: Rhode Island, West Virginia, Texas and Louisiana. But Rhode Island's recidivist statute is not triggered by theft of less than $100, *see* R.I. Gen. Laws §§11-41-20(d), 12-19-21(a) (1981), and West Virginia does not count non-violent priors such as Andrade's previous offenses. *See State v. Deal*, 358 S.E.2d 226, 231 (W.Va. 1987). Furthermore, under Texas law, parole is generally available in 15 years or less. *See* Tex. Gov't Code Ann. §508.145(f) (Vernon 1998).

Although Louisiana, in 1995, might have imposed a comparable sentence for shoplifting, it has since amended its law so that petty theft (even with Andrade's prior record) cannot trigger recidivist sentencing. *See* 2001 La. Sess. Law Serv. 403 (West). Even under the older law, such

a sentence would quite possibly have been held excessive under the state constitution. *See State v. Hayes*, 739 So.2d 301, 303-304 (La.Ct.App. 1999) (invalidating, as excessive under the state constitution, a life sentence for misappropriating over $500, where prior record was minor); *State v. Burns*, 723 So.2d 1013, 1018-20 (La.Ct.App. 1998) (invalidating, as excessive, under state constitution, a life sentence for possession and distribution of crack cocaine, where prior record was non-violent and mitigating circumstances existed).

In *Solem v. Helm*, this Court noted that another state authorized life without parole under similar circumstances, but the Court said that it was "not advised that any defendant [in that other state], whose prior offenses were so minor, actually ha[d] received the maximum penalty." 463 U.S. at 299-300. California has not identified any other defendant, in Louisiana or elsewhere in the United States, other than in California, regardless of background, who has received an indeterminate life sentence, with no parole possible for 50 years, for shoplifting.

The State, in its brief to this Court, concedes that California's law "is the most stringent in the nation," but says that should not make it "suspect." Pet. Br. at 22. In its recent decision in *Atkins v. Virginia*, this Court emphasized that a majority of states prohibiting the death penalty for the mentally retarded demonstrated a "consensus" and that such executions were thus cruel and unusual punishment in violation of the Eighth Amendment. 122 S.Ct. at 2249. Forty-nine of 50 states would not permit the life sentence for misdemeanor shoplifting that was imposed on Andrade. The State's acknowledgment that California's law is the most stringent and that Andrade could not have received his sentence in any other state makes his punishment more than merely "suspect"; it provides a compelling basis for concluding that Andrade's sentence is grossly disproportionate and violates the Eighth Amendment.

Application of the *Solem/Harmelin* test confirms what should in any event be clear: the sentence of 50 years to life that Andrade received for shoplifting was both cruel and unusual. In assessing the cruelty of a particular sentence, this Court has explained that "courts are competent to judge the gravity of an offense, at least on a relative scale." *Solem v. Helm*, 463 U.S. at 292. In particular, this Court has observed that "[s]tealing a million dollars is viewed as more serious

than stealing a hundred dollars -- a point recognized in statutes distinguishing petty theft from grand theft." Id. at 293. Here, Andrade was convicted for shoplifting videotapes worth $153.64, an amount well below the dividing line California has established distinguishing petty theft from grand theft. Calif. Penal Code §487(a) (grand theft is stealing property worth more than $400).

Andrade's punishment is also "unusual" -- under any common understanding of that term -- because California is the only state in which misdemeanor conduct can be the basis for a sentence of 25 years to life in prison; let alone, as here, 50 years to life in prison. Indeed, other states have expressly ruled that it is unconstitutional to impose a life sentence for misdemeanor conduct. For example, in *People v. Gaskins*, 923 P.2d 292 (Colo. App. 1996), the Colorado court found that it violates the United States Constitution to impose a life sentence for misdemeanor conduct, even if there have been prior felony convictions. *See also State v. Deal*, 358 S.E.2d 226, 231 (W.Va. 1987) (life sentence imposed for non-violent third offense violated state constitution's proportionality requirement). As explained above, in no other state could Andrade have received this sentence for his conduct. This Court's Eighth Amendment jurisprudence has often "look[ed] to other jurisdictions in deciding where lines between sentences should be drawn." *Solem v. Helm*, 463 U.S. at 295. On these facts, the line is unwavering, and only California is on the other side of it.

If any sentence is "grossly disproportionate," surely this case is it. Andrade was sentenced to an indeterminate life sentence, with no possibility of parole for 50 years, for two acts of sholifting videotapes worth a total of $153.54.

2. Although the government constitutionally may punish recidivist conduct harshly, a life sentence for conduct that otherwise would be a misdemeanor violates the Eighth Amendment

The Supreme Court has recognized that generally the government may punish recidivist conduct harshly. *See, e.g., Rummel v. Estelle*, 445 U.S. at 278. But there are several reasons why this principle does not justify the sentence imposed here and why *Rummel* is

distinguishable. First, California essentially "double counts" the prior offenses. Under California law, Andrade's conduct generally would be regarded as the crime of petty theft, a misdemeanor, and punishable by a fine or a jail sentence of six months or less. California Penal Code §490. Because of his prior offenses, Andrade's misdemeanor conduct, is converted by statute into a "wobbler," "petty theft with a prior conviction." California Penal Code §666. Once prosecuted as a felony, that felony is used, under the "Three Strikes" law, to impose a sentence of 25 years to life in prison on each count. In other words, the prior offenses are used twice: first to convert a misdemeanor into a felony and then to impose a life sentence based on it being a felony.

States can punish recidivists more harshly, but there is a limit. In *Rummel v. Estelle*, the Court expressed the need for great deference to legislative choices regarding punishments for recidivists, but stated: "This is not to say that a proportionality principle would not come into play in [an] extreme example . . ., if a legislature made overtime parking a felony punishable by life imprisonment." 445 U.S. at 274 n.11. Yet, that is exactly what California does through its double counting; a misdemeanor is deemed a felony because of the prior offenses and then as enhanced, the relatively trivial conduct, twice stealing videotapes worth less than $100, becomes the basis for a sentence of 50 years to life imprisonment.

Second, this Supreme Court never has approved such harsh sentences for misdemeanor conduct, even when the offender is a recidivist. The distinction between misdemeanors and felonies is deeply embedded in the law. The Court recently recognized the fundamental historical difference between felony and misdemeanor conduct. In *Apprendi v. New Jersey*, 530 U.S. 466, 480 n.7 (2000), the Court observed that "[t]he common law punishment for misdemeanors -- those smaller faults, and omissions of less consequence" did not include prison sentences. The Court stated that "[a]ctual sentences of imprisonment for such offenses, however, were rare at common law until the 18th century for 'the idea of prison as a punishment would have seemed an absurd expense.'" *Id*. at 480 n.7 (citations omitted).

In *Rummel v. Estelle*, this Court repeatedly emphasized that it was considering

permissible punishment for felony conduct. *See* 445 U.S. at 274, 278, 284. In fact, the Court stressed the "line dividing felony theft from petty larceny." *Id*. at 284. *Rummel* involved felony theft, while this case concerns what California deems to be petty theft.

Justice Stevens recently explained the importance of this distinction: "While this Court has traditionally accorded to state legislatures considerable (but not unlimited deference) to determine the length of sentences 'for crimes concededly classified and classifiable as felonies,' petty theft does not fall into that category." *Riggs v. California*, 525 U.S. at 1114 (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari). Indeed, Justice Stevens said that punishing petty theft with a prior conviction by imposing a life sentence is closely analogous to the punishment declared unconstitutional in *Solem*: "[P]etty theft has many characteristics in common with the crime for which we invalidated a life sentence in *Solem*, uttering a 'no account' check for $100. 'It involves neither violence nor (the) threat of violence to any person'; the amount of money involved is relatively small; and the State treats the crime as a felony (here, only under some circumstances) pursuant to a quirk in state law." *Id.* at 1114 (citations omitted).[6]

Third, although a state may impose harsher punishments on recidivists, Andrade cannot be punished now for his earlier offenses. That unquestionably would violate the Constitution's prohibition on double jeopardy. *See, e.g., North Carolina v. Pearce*, 395 U.S. 711, 717-718 (1969); *Ex parte Lange*, 85 U.S. 163, 172 (1873) (double jeopardy is violated if there is subsequent punishment for the same offense). Nor can a defendant be punished for the "status" of being a felon. *See, e.g., Powell v. Texas*, 392 U.S. 514 (1968); *Robinson v. California*, 370 U.S. 660 (1962) (status cannot constitutionally be made a crime). Therefore, the punishment must be proportionate for *this* offense, while taking into account the individual's prior criminal record. *Witte v. United States*, 515 U.S. 389, 400 (1995) ("the enhanced punishment imposed for the [present] offense is not to be viewed as an . . . additional penalty for the earlier crimes, but

[6]In *Harmelin v. Michigan*, Justice Scalia, in an opinion joined only by Chief Justice Rehnquist, recognized the possibility of "extreme examples" of very harsh punishments for relatively trivial offenses, but said that "they are certain never to occur." 501 U.S. at 985-986. But that is exactly what occurred in this case: Andrade was sentenced to 50 years to life imprisonment for petty theft.

instead as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repeated one.") As this Court declared in *Solem v. Helm*: "In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted." 463 U.S. at 290.

An indeterminate life sentence, with no possibility of parole for 50 years, is obviously not proportionate to the crimes for which Andrade was convicted: stealing $153 worth of videotapes. In *Solem*, the Court said that "[w]e must focus on the principal felony – the felony that triggers the life sentence – since Helm already has paid the penalty for his prior offenses. But we recognize, of course, that Helm's prior convictions are relevant to the sentencing decision." 463 U.S. at 296 n. 21. Andrade's prior offenses, as the state concedes, were for non-violent offenses.[7] Pet. Br. at 15. The sole prior offenses used to trigger the Three Strikes law, and the indeterminate life sentence, were three burglary convictions from the same day in 1983.[8] Although a state may punish recidivists more harshly, an indeterminate life sentence, with no possibility of parole for 50 years, is cruel and unusual punishment when imposed in circumstances such as these.

Fourth, the State offers no evidence, and there is none, that punishing shoplifting with life sentences serves any rational purpose. The State attempts to show that the Three Strikes law

[7]Although the State admits, as it must, that Andrade never had committed a violent offense, Pet. Br. at 15, it argues that his crimes had a potential for violence. *Id*. at 15. Likewise, the California District Attorney Association, in its *amicus* brief, says that "shoplifting carries with it violence potential." Brief of *Amicus Curiae* California District Attorney's Association, at 6. Since Andrade had no weapon of any kind with him when the shoplifting occurred, it is impossible to see how violence might have happened. Besides, this speculation should not obscure the fact that Andrade never committed any act of violence, not in this or any prior crime, and is serving an indeterminate life sentence for stealing videotapes from a department store while he was unarmed.

[8]The State, in its brief, recites other crimes that it says that Andrade committed. Pet. Br. at 24. *See also* Brief on the Merits of the Amicus Curiae California District Attorneys Association, at 8. This list of other offenses, however, whether accurate or not, played absolutely no role in the sentence imposed on Andrade. The Felony Complaint filed against Andrade and the Information filed against him listed *only* the burglaries as his prior offenses. Joint App., at 4, 9. The jury found *only* that there were prior convictions for burglary. Joint App., at 18-20. The transcript of the sentencing hearing shows that only the prior burglaries were considered as the basis for the application of the Three Strikes law. Joint App. at 37-69. The other convictions, listed in the probation report, whether accurate or inaccurate, played no role in the sentence imposed. Thus, the sole issue is whether it is grossly disproportionate to impose an indeterminate life sentence on Andrade for stealing $153 worth of videotapes in light of his prior convictions for burglary.

decreases crime by quoting an editorial written, after this Court granted certiorari, by a sponsor of the legislation. Pet. Br. at 23. But careful studies of the effects of the Three Strikes law have shown that it has had no such effect on crime in California. One empirical study of "the relationship between Three Strikes and the recent decline of crime in California" concluded "that there is no evidence that Three Strikes played an important role in the drop in the crime rate." Linda S. Beres & Thomas D. Griffith, *Did "Three Strikes" Cause the Recent Drop in California Crime? An Analysis of the California Attorney General's Report*, 32 Loyola L.A. L. Rev. 101, 102 (1998). The most extensive study of the effects of the Three Strikes law, by three prominent professors, also concluded that the "decline in crime observed after the effective date of the Three Strikes law was not the result of the statute." Franklin E. Zimring, Gordon Hawkins & Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* 101 (2001). This is supported by another empirical study which found that "[c]ounties that vigorously and strictly enforce the Three Strikes law did not experience a decline in any crime category relative to the more lenient counties." Mike Males & Dan Macallair, *Striking Out: The Failure of California's "Three Strikes and You're Out Law,"* 11 Stan. L. & Pol'y Rev. 65, 66-67 (1999). Analysts at RAND compared crime rates between "three strikes" states and "non-three strikes" states and found that three strikes laws had no independent effect on the crime rate in states with such statutes. Susan Turner, Peter Greenwood, Elsa Chen & Terry Fain, *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates,* 11 Stan. L & Pol'y Rev. 11, 75 (1999).

Moreover, the State's claim of the overall benefit of the Three Strikes law is irrelevant in this case because the State shows no benefit to imposing an indeterminate life sentence, with no possibility of parole for 50 years, on a person for shoplifting. A state can chose to punish recidivists more harshly, but a life sentence for stealing $153 worth of videotapes makes no rational sense and is clearly grossly disproportionate in violation of the Eighth Amendment.

3. The State's proposed standard, that punishment is cruel and unusual only if the sentence is "not susceptible to debate among reasonable minds," is inconsistent with the decisions of this Court and an undesirable constitutional principle

The State repeatedly urges this Court to defer to the legislative judgment in California that allows a shoplifter to be sentenced to an indeterminate life sentence with no possibility of parole for 50 years. Pet. Br. at 13, 23, 27. In the State's view, the government may impose virtually any punishment for any crime. The government could, if it chose, impose a life sentence for a traffic ticket, or jaywalking, or literally any offense no matter how trivial. There simply is no limiting principle within the State's argument. This cannot be correct. For almost a century the Supreme Court has been clear that grossly disproportionate punishments violate the Eighth Amendment. *See, e.g., Weems v. United States*, 217 U.S. at 367; *Atkins v. Virginia*, 122 S.Ct. at 2246. Accordingly, there must be a judicially enforceable limit on the state's ability to impose punishments.

In an attempt to offer some content to the Eighth Amendment's prohibition of cruel and unusual punishment, the State argues that the only unconstitutional sentences are "those sentences that are not susceptible to debate among reasonable minds." Pet. Br. at 36. This approach would replace the three-part test from *Solem v. Helm*, which focuses on objective factors, with a very subjective test. What is "susceptible to debate" is entirely a matter of opinion and defies analysis through any objective criteria. The State's approach is thus at odds with this Court's consistent command that "[p]roportionality review . . . should be informed by 'objective factors to the maximum possible extent.'" *Atkins v. Virginia*, 122 S.Ct. at 2247, quoting *Harmelin v. Michigan*, 501 U.S. at 1000, and *Rummel v. Estelle*, 445 U.S. at 274-75.

There is nothing in this Court's prior rulings, or anything in the jurisprudence of the Eighth Amendment, that offers support for the State's claim that a sentence is permissible so long as some reasonable person would defend it. To the contrary, this approach is completely at odds with this Court's consistent holdings that grossly disproportionate punishments violate the Eighth Amendment, even if some reasonable people in a state want such penalties imposed. As

this Court explained in *Gregg v. Georgia*, 428 U.S. 153, 182 (1976), "the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society." The State's approach would mean that the "views of one such judge" who might find a sentence permissible would "always have greater weight than the contrary, considered judgment of several other reasonable judges." *Williams v. Taylor*, 529 U.S. at 377-78.

Moreover, applying the State's proposed standard here offers further indication that the sentence imposed on Andrade violates the Eighth Amendment. It is hard to believe that any reasonable person would believe that an indeterminate life sentence, with no possibility of parole for 50 years, is other than grossly disproportionate when it is for the crime of shoplifting $153 worth of videotapes.[9] Unfortunately, change in the California law is very difficult because it was adopted through a voter initiative. The Three Strikes law can be changed only by another initiative or by a statute approved by the voters. *See* Calif. Const. Art. II, §10 ("The Legislature may . . . amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.") *See also People v. Snyder*, 22 Cal.4th 304, 311, 92 Cal.Rptr.2d 734 (2000) (describing the process for changing statutes adopted through the initiative process).

[9]There is no indication that the California legislature which adopted the Three Strikes law or the voters who approved it in an initiative ever contemplated that it would be used to put a person in prison for 50 years to life for stealing $153 worth of videotapes. The law's goal was to put *violent* criminals in prison for long periods of time. *See* Cal. Ballot Pamphlet Gen. Election 37 (November 8, 1994) ("soft on crime judges, politicians, defense lawyers and probation officers care more about violent felons than they do victims. They spend all of their time looking for loopholes to get rapists, child molesters and murderers out on probation, early parole, or off the hook altogether.") *See also*, Robert J. Caldwell, *Violent Crime: Keeping the Most Violent Criminals Locked Up Is Society's Best Defense*, San Diego Union-Tribune, Dec. 12, 1993, at G1; Deroy Murdock, *Get Tough on Violent Crime; New Bill Promises 'Three-Time Losers' Life Behind Bars*, San Diego Union-Tribune, March 31, 1993, at B9. Andrade's extreme sentence is the unintended consequence of super-imposing the Three Strikes law on California statutes that already punish recidivist property offenders more harshly through the crime of petty theft with a prior.

II. ANDRADE IS ENTITLED TO A WRIT OF HABEAS CORPUS BECAUSE THE STATE COURT'S DECISION WAS "CONTRARY TO" AND AN "UNREASONABLE" APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW

The federal habeas corpus statute, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, requires a federal court to grant habeas corpus relief to a state prisoner if the state court's decision is "contrary to, or involves 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). In *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000), this Court explained that §2254(d)(1)'s "contrary to" and "unreasonable application" clauses have independent meaning and a writ of habeas corpus is appropriate if either requirement is met. Federal courts are not required to defer to state court determinations of constitutional law and must decide *de novo* what is clearly established federal law. *Id.* at 401.

Recently, in *Bell v. Cone*, 122 S.Ct. 1843, 1850 (2002), this Court explained the requirements for relief under §2254(d)(1):

> A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a different rule from the governing law set forth in our cases, or if it decides a case differently than we have done on a materially indistinguishable set of facts. The Court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decision but unreasonably applies it to the facts of the particular case. The focus of the latter inquiry is on whether the state court's application of clearly established law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one. (citations omitted)

The Court of Appeals was correct in granting Andrade a writ of habeas corpus because the state court's decision was both "contrary to" and an "unreasonable" application of clearly established federal law.

A. The California Court of Appeal Decision Approving an Indeterminate Life Sentence, With No Possibility of Parole for 50 Years, For Shoplifting Was "Contrary To" Clearly Established Federal Law

The indeterminate life sentence imposed on Andrade was "contrary" to clearly established federal law both because the California Court of Appeal applied "a different rule from the governing law set forth" in Supreme Court decisions and because it decided a case differently than this Court did "on a materially indistinguishable set of facts." *Bell v. Cone*, 122 S.Ct. at 1850.

As discussed above, this Court long has held that grossly disproportionate punishments violate the Eighth Amendment and in *Solem v. Helm*, 463 U.S. at 291, 304, it prescribed a three-part test for determining whether a sentence violates the Eighth Amendment. In *Harmelin v. Michigan*, seven Justices reaffirmed this principle. *See, e.g.*, 501 U.S. at 1005 (Kennedy, J., concurring). Virtually every federal court of appeals has recognized the "rule of *Harmelin*" and treats as controlling Justice Kennedy's opinion's threshold inquiry of gross disproportionality and its affirmation of the continuing validity of *Solem*. *See, e.g., Spearman v. Burkett*, 10 Fed.Appx. 288 (6th Cir. 2001); *Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001); *United States v. Jones*, 213 F.3d 1253 (10th Cir. 2000); *United States v. Valenti*, 199 U.S.App. LEXIS 26949 (7th Cir. 1998); *United States v. Harris*, 154 F.3d 1082 (9th Cir. 1998); *United States v. Cardoza*, 129 F.3d 6 (1st Cir. 1997); *United States v. Kratsas*, 45 F.3d 63 (4th Cir. 1995); *United States v. Brant*, 62 F.3d 367 (11th Cir. 1995); *McGruder v. Puckett*, 954 F.2d 313 (5th Cir. 1992); *United States v. Salmon*, 944 F.2d 1106 (3d Cir 1991). Moreover, the Second Circuit recently cited to Justice Kennedy's opinion in *Harmelin* to support the application of proportionality analysis to life sentences. *See Matias v. Artuz*, 8 Fed.Appx. 9, 10 (2d Cir. 2001).

Thus, federal law is clearly established, by decisions of this Court, that the constitutionality of Andrade's indeterminate life sentence for shoplifting should be determined using the *Solem/Harmelin* framework. The California Court of Appeal therefore should have

compared the harshness of the punishment with the gravity of the offense to determine if it gives rise to an inference of gross disproportionality. If so, then both intra-jurisdictional and inter-jurisdictional analyses should have been undertaken to ascertain whether the sentence was grossly disproportionate.

But the California Court of Appeal did not follow this law or apply this analysis. The court never compared the gravity of the offense with the harshness of the punishment. Instead, the state court "question[ed]" even whether "proportionality analysis applies under . . . [the] federal constitution." App. to Cert. Pet. at 77. The state court said: "[T]o the extent [Andrade] suggests that proportionality analysis applies under both the state and federal constitutions, we must question that assertion." *Id*. It further stated that "the current validity of the *Solem* proportionality analysis is questionable in light of *Harmelin*." *Id*. at 78. This was clearly wrong because of *Solem*, this Court's repeated citation to it, *see, e.g., Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434-35 (2001); *United States v. Bajakajian*, 524 U.S. at 336, and its express reaffirmation by seven Justices in *Harmelin.*

The state court expressly disregarded the test prescribed in *Solem* and *Harmelin* and instead applied only *Rummel* in approving Andrade's life sentence for shoplifting. This, too, was plainly "contrary to" clearly established federal law because in *Solem* this Court declared: "[S]ince the *Rummel* Court . . . offered no standards for determining whether an Eighth Amendment violation has occurred, it is controlling only in a similar factual situation." 463 U.S. at 303 n.32. Moreover, in relying solely on *Rummel*, the state court ignored a crucial distinction between this case and *Rummel*: Rummel was eligible for parole in 12 years, 445 U.S. at 280-281, but Andrade is not eligible for parole for at least 50 years. Also, Rummel's crime was a felony under Texas law; Andrade's conduct was a misdemeanor under California law until his prior offenses were used to make it into a felony and trigger the application of the Three Strikes law.

By expressly disregarding *Solem* and *Harmelin*, and failing to engage in proportionality analysis under the Eighth Amendment,[10] the California Court of Appeal acted "contrary to"

[10]The only discussion of proportionality analysis in the state court decision was in connection with the "cruel and

clearly established federal law as prescribed by this Court. Moreover, the state court's decision was "contrary to" federal law in that it decided a case differently than the Supreme Court did "on a materially indistinguishable set of facts." *Bell v. Cone*, 122 S.Ct. at 1850. As explained above, the factual similarities between this case and *Solem v. Helm* make that case materially indistinguishable. Both Andrade and Helm were in their mid-thirties when sentenced to life in prison. *Compare Solem*, 463 U.S. at 297 n.22 (noting that Helm was 36 at sentencing), with *Andrade*, 270 F.3d at 759 (noting that Andrade was 37 at sentencing). Both had received their first felony convictions approximately 15 years earlier, each for residential burglary. *Compare Solem*, 463 U.S. at 279. 281 n.6 (Helm's first conviction was in 1964; the life sentence was imposed in 1979), with *Andrade*, 270 F.3d at 748 (first conviction in 1983, indeterminate life sentence was imposed in 1996). Both had purely non-violent prior records, principally financial and property crimes. *Compare Solem*, 463 U.S. at 279-280 (listing "six non-violent felonies"), with *Andrade*, 270 F.3d at 761 ("All of [Andrade's prior] offenses were non-violent.") Both grappled with substance abuse problems. *Compare Solem*, 461 U.S. at 297 n.22 (noting Helm's alcohol addiction), with *Andrade*, 270 F.3d at 748 (describing Andrade as "a longtime heroin addict"). Both received a life sentence, under state recidivist statutes for minor offenses: Helm for uttering a no account check worth approximately $100; Andrade for shoplifting $153 worth of videotapes.

This case is thus materially indistinguishable from *Solem v. Helm* and the California Court of Appeal acted "contrary to" clearly established federal law in refusing to apply and follow that decision.[11]

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unusual" claim under the California state constitution. App. to Cert. Pet. at 76. There was no discussion of proportionality under the Eighth Amendment because the court deemed *Solem* to no longer be good law in requiring proportionality analysis.

[11]The State characterizes the state court as simply not following the "reasoning" in *Solem*. Pet. Br. at 31. This characterization, however, fails to recognize that the state court ignored the controlling test under the Eighth Amendment as prescribed in *Solem* and *Harmelin* and fails to acknowledge that this case is materially indistinguishable from *Solem v. Helm*.

III. The California Court of Appeal Decision Approving an Indeterminate Life Sentence, With No Possibility of Parole for 50 Years, Was an "Unreasonable Application" of Clearly Established Federal Law

Habeas corpus relief also is appropriate if a state court "unreasonably applies" clearly established federal law to the facts of the particular case. As explained above, this Court has consistently held for almost a century that grossly disproportionate punishments violate the Eighth Amendment. *Weems v. United States*, 217 U.S. at 367; *Atkins v. Virginia*, 122 S.Ct. at 2246. As argued above, an indeterminate life sentence, with no possibility of parole for 50 years, for stealing $153 worth of videotapes, is clearly gross disproportionate. The state court unreasonably applied federal law in approving this sentence. As the Ninth Circuit explained: "[The state court's] disregard for *Solem* results in an unreasonable application of clearly established Supreme Court law. . . . The state court's failure to address *Solem* yields an unreasonable conclusion that a non-violent recidivist sentenced to such a severe sentence for two misdemeanor offenses does not raise an inference of gross disproportionality." 270 F.3d at 766.

The State repeatedly argues that the appropriate inquiry is "whether the question is susceptible to debate among reasonable minds." Petitioner's Brief on the Merits, at 29-30; *see also, id.*, at 27 (law is not clearly established "if a survey of the legal landscape shows reasonable jurists may differ about the outcome.") This is virtually identical to the definition of "unreasonable application" of federal law that this Court rejected in *Williams v. Taylor*. In rejecting the Fourth Circuit's conclusion that a state court judgment is unreasonable only if all reasonable jurists would agree that the state court was unreasonable, this Court stated:

> But the statute says nothing about "reasonable judges," presumably because all, or virtually all, such judges occasionally commit error; they make decisions that in retrospect may be characterized as "unreasonable." Indeed, it is most unlikely that Congress would impose such a requirement of unanimity on federal judges. As Congress is acutely aware, reasonable lawyers and lawgivers regularly disagree with one another. Congress surely did not intend that the views of one such judge who might think that relief is not warranted in a particular case should always have greater weight than the contrary, considered judgment of several other reasonable judges.

529 U.S. at 377-78.

Simply put, the state court's approval of an indeterminate life sentence, with no possibility of parole for 50 years, for shoplifting $153 worth of videotapes is an unreasonable application of the clearly established principle that grossly disproportionate punishments violate the Eighth Amendment.

CONCLUSION

For almost a century, this Court has held that grossly disproportionate punishments violate the cruel and unusual punishment clause of the Eighth Amendment. If any punishment is grossly disproportionate, it is Andrade's sentence of 50 years to life in prison for shoplifting $153 worth of videotapes. The California Court of Appeal in affirming this sentence acted "contrary to" clearly established federal law and "unreasonably" applied legal principles long established by this Court. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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