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Mandatory Minimum Sentences: Three Strikes in the Supreme Court – *Ewing v. California and Lockyer v. Andrade*

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Summary

The Eighth Amendment's cruel and unusual punishments clause forbids grossly disproportionate sentences. The question of how to determine whether a particular term of imprisonment is grossly disproportionate under the facts of a particular case has divided the Court for years. The division was evident in the Court's recent treatment of the issue in two cases arising under the California Three Strikes law, *Lockyer v. Andrade*, 123 S.Ct. 1166 (2003), and *Ewing v. California*, 123 S.Ct. 1179 (2003). In *Andrade*, the Court conceded that its precedents were unclear. As a consequent, federal courts could not conduct habeas corpus review of a state court decision which had upheld application of the three strikes law against an Eighth Amendment challenge. In *Ewing*, the state prevailed when three justices found no disproportionality in the application of the California scheme and were joined by two Justices who found proportionality unworkable as a basis upon which to invalidate punishment in the form of imprisonment for crime.

Related CRS Reports include CRS Report RS21347, *Federal Mandatory Minimum Sentencing Statutes: An Overview of Legislation in the 107th Congress*; and CRS Report RL30281, *Federal Mandatory Minimum Sentencing Statutes: A List of Citation with Captions, Introductory Comments and Bibliography*.

California Law

The California Penal Code outlaws a number offenses (called "wobblers") which may be punished either as felonies or misdemeanors.[1] In such cases the prosecutor may charge the offense either as a felony or a misdemeanor. Even if the defendant is convicted under the felony charge, the court remains free to sentence the offense as a misdemeanor, CAL.PENAL CODE §17. Whether initially a felony or a misdemeanor, second and subsequent offenses are generally punishable with more severe penalties than are first offenses.[2] Under the California Three Strikes law, a defendant convicted of a *felony* who has two or more prior *serious or violent felony* convictions is subject to imprisonment for life and ineligible for parole for at least 25 years, CAL.PENAL CODE §§1170.12, 667. Either on its own motion or that of the prosecutor and under the appropriate circumstances, a court may disregard an earlier conviction that would otherwise be counted as a strike for "three strikes" sentencing purposes.[3]

Background

Gary Ewing was convicted of grand larceny for stealing three golf clubs from a golf pro shop. He had previously been convicted of first degree robbery and three separate residential burglaries. The trial court refused to either treat his grand larceny conviction as a misdemeanor or to disregard his prior felony convictions. It sentenced him under the Three Strikes law to a term of imprisonment of 25 years to life. The California Court of Appeals for the Second District, in an unpublished opinion, rejected Ewing's argument that the sentence amounted to cruel and unusual punishment and affirmed the judgment of the trial court, *People v. Ewing*, 2001 WL 1840666 (Cal.App. Apr. 25, 2001). The United States Supreme Court granted certiorari to hear the case on April 1, 2002, *Ewing v. California*, 535 U.S. 969 (2002), and affirmed the decision of the California courts on March 5, 2003, *Ewing v. California*, 123 S.Ct. 1179 (2003).

A second California defendant, Leandro Andrade, was convicted of petty theft for shoplifting from two KMART stores. At that time, Andrade had been convicted previously of a misdemeanor theft offense, three counts of residential burglary, petty theft, two instances of violating federal laws concerning the transportation of marijuana, and a parole violation for escaping from federal prison. The trial court refused to either treat the two recidivist petty theft charges as misdemeanors or to disregard any of the earlier convictions. It sentenced Andrade to a term of imprisonment of from 50 years to life (a consecutive 25 years to life term for each of the two shoplifting, petty offense charges). The California Court of Appeals affirmed in an unpublished opinion that rejected his cruel and unusual punishment argument. The United States District Court denied his habeas corpus petition, but the Ninth Circuit reversed, holding that Andrade's sentence was so grossly disproportionate to the offenses for which he had been convicted as to violate the cruel and unusual punishment clause of the Eighth Amendment, *Andrade v. Attorney*

[1] *E.g.*, CAL.PENAL CODE §489 ("Grand theft is punishable as follows: (a) When the grand theft involves the theft of a firearm, by imprisonment in the state prison for 16 months, 2, or 3 years. (b) In all other cases, by imprisonment in a country jail not exceeding one year [*i.e.*, as a misdemeanor] or in the state prison [*i.e.*, as a felony].

[2] *E.g.*, CAL.PENAL CODE §666 (petty theft committed by a defendant previously convicted of petty theft is punishable by imprisonment in the county jail or in the state prison); CAL.PENAL CODE §666.7 (relating to a schedule by imprisonment term of sentence enhancements).

[3] CAL.PENAL CODE §§1385, 1170.12; *People v. Superior Court (Romero)*, 13 Cal.4th 497, 529-30, 917 P.2d 628, 647-48, 53 Cal.Rptr. 789, 808-9 (1996); *People v. Williams*, 17 Cal.4th 148, 161, 948 P.2d 429, 437, 69 Cal.Rptr.2d 917, 925 (1998)("in ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strike law, on its own motion, in furtherance of justice . . . the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted . . .").

General, 270 F.3d 743, 754-66 (9th Cir. 2001). The Supreme Court granted certiorari at the same time it agreed to hear *Ewing*, *Lockyer v. Andrade*, 535 U.S. 969 (2002), reversed the Ninth Circuit on March 5, 2003, *Lockyer v. Andrade*, 123 S.Ct. 1166 (2003).

Supreme Court Precedent

The Eighth Amendment declares that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," U.S.Const. Amend. VIII. The cruel and unusual punishments clause is binding on the states through the Fourteenth Amendment, *Robinson v. California*, 370 U.S. 660, 666-67 (1962). The Court has experienced considerable difficulty in formulating a test or series of tests for when a punishment is cruel and unusual.

In the early 1980's, the Court attempted to clarify the question of when a recidivist sentencing statute implicates the clause. *Rummel v. Estelle*, 445 U.S. 263 (1980), found no cruel and unusual punishment infirmity in the sentence of mandatory life imprisonment imposed under a Texas habitual offender statute for a false pretense conviction involving $120.75 and based on prior convictions for credit card fraud ($80) and check forgery ($28.36).

Scarcely three years later, *Solem v. Helm*, 463 U.S. 277 (1983), came to the opposite conclusion on seemingly comparable facts. Helm was sentenced to life imprisonment following his bad check conviction ($100), on the basis of three prior burglary convictions and convictions for grand larceny, false pretenses, and driving while intoxicated. The Court determined that the sentence of life imprisonment imposed on the bad check conviction was cruel and unusual punishment, 463 U.S. at 292-303. The difference between Rummel and Helm? Helm was sentenced to life without the possibility of parole; Rummel was sentenced to life but eligible for parole in 12 years at the latest, 463 U.S. at 297.

Another difference was the test the court used to judge the sentence. *Solem* saw cruel and unusual punishments as punishments that were grossly disproportionate to the crime of conviction judged by "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions," 463 U.S. at 292. *Rummel* found limitations in these intrastate and multistate comparative analyses, *e.g.,* 445 U.S. at 282 ("Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some state will always bear the distinction of treating particular offenders more severely than any other state"). In fact in a later case, Justice Scalia went so far as to say that *Rummel* had rejected the three part test that *Solem* embraced, *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991) (Scalia, J. with Rehnquist, Ch.J.).

In any event, *Harmelin v. Michigan*, 501 U.S. 957 (1991), soon made it clear that a sentence without the possibility of parole is not per se cruel and unusual and that gross disproportionality judged by the *Solem* three part standard is not the sole means of surviving a cruel and unusual punishment challenge. Harmelin was a large scale drug trafficker with no prior convictions who had been sentenced to life imprisonment without the possibility of parole. A majority of the Justices rejected Harmelin's cruel and unusual punishment clause claim. They could not agree on why. Justice Scalia and Chief Justice Rehnquist refused to accept a proportionality standard, gross or otherwise, 501 U.S. at 965. Justices Kennedy, O'Connor, and Souter, who joined Justice Scalia and the Chief Justice in upholding Harmelin's sentence and the statute under which it was imposed, felt that the deference owed the legislative policy decisions of the states and the enormity of the crime precluded any finding that Harmelin's sentence might be a cruel and unusual punishment, 501 U.S. at 1008 (Kennedy, J., with O'Connor and Souter, JJ.).

Andrade and *Ewing*

Federal law limits review of state court decisions under habeas corpus to instances where state court consideration of a constitutional claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States," 28 U.S.C. 2254(d)(1). This doomed Andrade's challenge in the eyes of a majority of the Court. In the opinion for the Court, Justice O'Connor explained that "the only relevant clearly established law amendable to the 'contrary to' or 'unreasonable application' framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case," 123 S.Ct. at 1173. The facts in *Andrade* fell between *Rummel* and *Solem*. The California courts could not be said to have acted contrary to Supreme Court precedent for following *Rummel* nor to have unreasonably applied it to Andrade when they rejected his Eighth Amendment attack on the application of the three strikes law to him, 123 S.Ct. at 1173.

Four Justices dissented. Joining Justice Souter's opinion, they contended that the facts in *Andrade* were virtually indistinguishable from those in the more recently decided *Solem*, 123 S.Ct. at 1176. The California decisions were contrary to and should have been controlled by *Solem*. Like the life sentence without the prospect of parole in *Solem* the 50 year sentence with the prospect of parole at age 87 should have been considered grossly disproportionate, 123 S.Ct. 1176-177.

Ewing split the five member *Andrade* majority. Justice O'Connor, with whom Chief Justice Rehnquist and Justice Kennedy joined, concluded that Ewing's sentence of 25 years to life imprisonment was not grossly disproportionate and consequently was not contrary to the demands of the Eighth Amendment, *Ewing v. California*, 123 S.Ct. 1179, 1190. Justices Scalia and Thomas agreed with the result but not the rationale, 123 S.Ct. at 1190 (Scalia, J., concurring in the judgment); 123 S.Ct. at 1191 (Thomas, J., concurring in the judgement).

Justice O'Connor's opinion turned on the gravity of Ewing's offense (grand theft of property valued at nearly $1200) weighed down further by his "numerous misdemeanor and felony offenses," 123 S.C. at 1190. Justices Scalia and Thomas found application of the grossly disproportionate standard unworkable. Moreover, for Justice Scalia the proscriptions of the Eighth Amendment's cruel and unusual clause speak only to modes punishment, 123 S.Ct. at 1190-191. For Justice Thomas, the clause simply "contains no proportionality principle," 123 S.Ct. at 1191.

The dissenters, Justices Breyer, Stevens, Souter and Ginsburg, joined in two opinions – one by Justice Breyer, 123 S.Ct. at 1193, and the other by Justice Stevens, 123 S.Ct. at 1191. Justice Breyer found within the Court's precedents a two-part test for determinations of whether a particular punishment was grossly disproportionate, 123 S.Ct. at 1194-195. First comes "a threshold comparison of the crime committed and sentence imposed," taking into consideration "(a) the length of the prison term in real time . . . (b) the sentence-triggering criminal conduct . . . and (c) the offender's criminal history, 123 S.Ct. at 1194. Second comes a comparison of how other jurisdictions punish the same offense and how the same jurisdiction punishes other offenses, 123 S.Ct. at 1197. Ewing's sentence under the California Three Strikes Law fails under both counts for its comparative harshness as far as dissenters are concern, a deficiency that is aggravated in their minds by the fact that its special severity cannot be justified special criminal justice concerns, 123 S.Ct. at 1199-1202. Justice Stevens' dissent takes specific issue with the concurrences of Justices Scalia and Thomas. In Justice Stevens' view "proportionality review is not only capable of judicial application but also required by the Eighth Amendment,"123 S.Ct. at 1191-192.

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