IN THE SUPREME COURT OF THE UNITED STATES

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BILL LOCKYER, ATTORNEY GENERAL :

OF CALIFORNIA, :

Petitioner :

v. : No. 01-1127

LEANDRO ANDRADE :

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Washington, D.C.

Tuesday, November 5, 2002

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

APPEARANCES:

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

ERWIN CHEMERINSKY, ESQ., Los Angeles, California; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:10 a.m.)

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

Mr. Danzig.

ORAL ARGUMENT OF DOUGLAS P. DANZIG

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

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

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

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

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

basis for saying this sentence was grossly disproportionate?

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

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

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

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

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

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

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

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

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

QUESTION: Okay.

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

long sentences are appropriate.

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

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

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

QUESTION: -- in a harsh direction?

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

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

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

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

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

MR. DANZIG: In other words --

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

MR. DANZIG: I --

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

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

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

QUESTION: That's right.

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

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

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

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

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

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

MR. DANZIG: The limiting --

QUESTION: Is there one?

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

QUESTION: But that --

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

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

QUESTION: But --

QUESTION: You seem to be --

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

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

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

QUESTION: But they're consecutive.

MR. DANZIG: They are consecutive.

QUESTION: Well, why isn't that 50?

(Laughter.)

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

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

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

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

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

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

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

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

MR. DANZIG: Absolutely, Justice Kennedy.

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

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

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

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

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

QUESTION: Mr. Danzig --

QUESTION: Okay, but if we do that --

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

MR. DANZIG: That's correct.

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

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

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

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

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

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

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

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

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

your advice on that point.

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

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

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

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

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

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

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

MR. DANZIG: Correct.

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

MR. DANZIG: In many circumstances it may be.

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

MR. DANZIG: Correct.

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

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

MR. DANZIG: Yes.

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

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

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

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

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

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

QUESTION: No, that's right.

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

QUESTION: That's right.

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

QUESTION: So jay-walking?

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

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

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

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

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

QUESTION: Is it enforced at all?

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

QUESTION: Mr. Danzig --

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

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

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

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

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

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

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

QUESTION: I think you're saying --

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

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

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

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

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

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

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

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

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

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

QUESTION: Would you object to that relief?

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

QUESTION: Do you wish to reserve some time?

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

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

MR. DANZIG: Thank you.

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

ORAL ARGUMENT OF ERWIN CHEMERINSKY

ON BEHALF OF THE RESPONDENT

MR. CHEMERINSKY: Mr. Chief Justice, and may it please the Court:

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

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

(Laughter.)

MR. CHEMERINSKY: I'm sorry, Justice Scalia, I didn't hear the question.

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

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

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

QUESTION: Mr. Chemerinsky --

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

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

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

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

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

it over, and it cites Rummel more often than it cites Solem.

MR. CHEMERINSKY: Your Honor --

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

(Laughter.)

QUESTION: -- in the light of these cases.

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

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

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

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

QUESTION: That was a status crime.

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

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

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

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

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

violate the Eighth Amendment.

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

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

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

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

MR. CHEMERINSKY: No, Your Honor --

QUESTION: Do you disagree with that?

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

Solem analysis. It did not do Harmelin analysis.

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

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

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

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

This goes to Justice Stevens' question earlier.

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

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

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

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

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

MR. CHEMERINSKY: Yes, Your Honor. They used a

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

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

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

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

There was in this case, was there not, in

addition to the two strikes, some serious criminal activity?

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

QUESTION: I didn't ask you about --

MR. CHEMERINSKY: I'm sorry.

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

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

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

MR. CHEMERINSKY: No, Your Honor, because

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

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

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

QUESTION: Or her.

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

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

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

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

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

MR. CHEMERINSKY: No. Only the burglaries were

proven.

QUESTION: Were proven?

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

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

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

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

that the Cruel and Unusual Punishment Clause must give. All right. Why isn't it?

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

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

MR. CHEMERINSKY: Yes.

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

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

QUESTION: Yes, it could.

MR. CHEMERINSKY: And that would violate --

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

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

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

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

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

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

MR. CHEMERINSKY: Of course.

QUESTION: Recidivism is part of the analysis.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Although it didn't apply it, although

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

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

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

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

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

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

that was received here?

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

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

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

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

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

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

QUESTION: Was that a recidivist case?

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

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

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

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

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

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

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

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

QUESTION: Well --

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

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

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

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

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

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

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

QUESTION: But --

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

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

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

MR. CHEMERINSKY: In United States --

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

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

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

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

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

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

have occasion soon enough to deal with that issue --

QUESTION: Understood.

MR. CHEMERINSKY: -- but --

(Laughter.)

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

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

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

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

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

MR. CHEMERINSKY: But seven Justices --

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

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

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

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

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

Thank you.

QUESTION: Thank you, Mr. Chemerinsky.

Mr. Danzig, you have 4 minutes remaining.

REBUTTAL ARGUMENT OF DOUGLAS P. DANZIG

ON BEHALF OF THE PETITIONER

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

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

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

via a State court decision of Lynch.

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

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

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

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

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

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

MR. DANZIG: Correct, Your Honor.

Finally --

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

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

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

MR. DANZIG: Yes, Your Honor.

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

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

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

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

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

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

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

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Danzig.

MR. DANZIG: Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: The case is submitted.

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