



April 2, 2002

Crime, the Courts, the Constitution

Supreme Court To Decide on Constitutionality Of California's Three-Strikes-and-You're-Out Law

Yesterday, Monday, April 1, the United States Supreme Court announced that it would hear two cases that challenge the constitutionality of California's tough anti-crime initiative, which is nicknamed "three-strikes-and-you're-out." In the first case, *Lockyear v. Andrade*, a divided panel of a federal appeals court *struck down* California's law; in the second case, *Ewing v. California*, a state appellate court *upheld* the law.

It is foolhardy to predict which way the U.S. Supreme Court will decide, but the odds are very high that the Court will be narrowly divided. In similar cases over the past generation, whether the Court was upholding or striking down the laws of the States, the cases have all been decided by votes of five-to-four.* With respect to the California law that the High Court will now be reviewing, four justices already have said that applying it to petty offenses "raises a serious question" of constitutional law. *Riggs v. California*, 525 U.S. 1114 (1999) (two memorandum opinions on denying petition for certiorari).

The *Andrade* opinion was written by Judge Richard Paez who has been on the Federal bench just two years. (He was confirmed by the United States Senate by a vote of 59 to 39 on March 9, 2000.) Judge Paez held that California's "three-strikes" law was unconstitutional *as applied* to Leandro Andrade, a heroin addict who supports his drug habit by stealing.

* In *Harmelin v. Michigan*, 501 U.S. 957 (1991), the Court held that a sentence of mandatory life imprisonment *without* the possibility of parole imposed by Michigan on a *first-time offender* convicted of possessing more than 1.5 pounds of cocaine (enough for 32,000 to 65,000 doses) did *not* violate the 8th Amendment (5-to-4 decision). In *Solem v. Helm*, 463 U.S. 277 (1983), the Court held that a sentence of mandatory life imprisonment *without* possibility of parole imposed by South Dakota on a defendant who had six prior felony convictions for third degree burglary and other nonviolent crimes and then who was convicted of another felony for writing a bad check for \$100 *did violate* the 8th Amendment (5-to-4 decision). In *Rummel v. Estelle*, 445 U.S. 263 (1980), the Court held that a sentence of mandatory life imprisonment (with possibility of parole after 12 years) imposed by Texas on a defendant who had committed three felonies (\$80 credit card fraud, \$28 forged check, and \$121 obtained by false pretenses) did *not* violate the 8th Amendment (5-to-4 decision).

California’s Tough Law – and Its Powerful Impact Against Crime. Andrade was sentenced under California’s “three strikes” laws which were enacted in 1994 by the California Legislature (effective March 7, 1994) and separately by the people of California in a popular vote (approved by 71.8 percent of the voters on November 8, 1994).

That November initiative said, “It is the intent of the People of the State of California in enacting this measure to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.” The voters prohibited the Legislature from amending the law “except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring.”

The California law has worked as designed, and as its proponents hoped. Since enactment, crime has dropped sharply — much more than in the Nation as a whole, as is shown in the chart below. No one supposes that the law was solely responsible for California’s drop in crime, but many think it is an important element in a comprehensive, effective anti-crime strategy.

Crimes Per 100,000 Population, 1991-2000: United States Compared to State of California			
<u>Year</u>	<u>United States</u>	<u>California</u>	<u>Difference</u>
1991	5,898	6,773	+ 14.8 %
1992	5,661	6,680	+ 18.0%
1993	5,487	6,457	+ 17.7%
1994	5,374	6,174	+ 14.9%
1995	5,275	5,831	+ 10.5%
1996	5,088	5,208	+ 2.4%
1997	4,927	4,865	- 1.3%
1998	4,620	4,343	- 6.0%
1999	4,267	3,805	- 10.8%
2000	4,124	3,740	- 9.3%
% Change, 1991-2000	- 30.1%	- 44.8%	
 RPC Table using data from the U.S. Department of Justice. California’s “three strikes” law was enacted in 1994.			

The State of California asked the United States Supreme Court to review the *Andrade* decision (an invitation that the Court accepted yesterday). That fact alone shows that the State fears that its progress against crime is threatened by the *Andrade* decision.

If California's law is struck down, there may be a perception that the State has been forced to retreat in its fight against crime. Also, California is holding about 320 prisoners whose third offense was petty theft, see, *Durden v. California*, 121 S.Ct. 1183 (2001) (memorandum opinion of Souter, J., dissenting from denial of certiorari), and perhaps 3,500 others whose third offense was a nonviolent crime, see "Court to Review 'Three Strikes,'" *Washington Post*, April 2, 2002, page A2.

Criminal Records of the Defendants. The *Ewing* case is unreported, but we know that Ewing was arrested for stealing three golf clubs from the El Segundo Golf Club's pro shop. The clubs were priced at \$399 each. Ewing stuffed the clubs down his pants; we understand that the police arrested a man who was walking funny. According to the State's brief in opposition to Ewing's petition for certiorari, Ewing's criminal history "includes two violent felonies which involved the use of a weapon, and two other serious felonies." For the theft, Ewing was sentenced to prison for a term of 25-years-to-life.

Andrade's history is better known because his case was reported. He is generally described in the press as a small-time shoplifter, but that characterization is highly misleading. It is true, of course, that his last conviction was for shoplifting of videotapes.

Andrade is a life-time thief who also has been convicted of trafficking in drugs. Andrade is now about 40 years of age, but he was first convicted of theft when he was in his teens. He has been in and out of state and federal prisons a total of six times.

Andrade was first convicted of petty theft in 1982, and for that crime he spent six days in a county jail. While on probation for the theft, Andrade pled guilty to six counts of felony burglary. In 1988, Andrade was convicted in federal court for transporting marijuana, a felony. He was sentenced to eight years in prison but served less than 18 months. In 1990, he was convicted again of petty theft and then convicted again of transporting marijuana. He was sentenced to six years for the federal felony but served less than 30 months. In 1991, he escaped from federal prison, which was a violation of his California parole. In November 1995, he stole five videotapes worth \$85. Two weeks later he stole four videotapes worth \$69. (Not all of the crimes listed here were used in calculating Andrade's criminal history under California's law.)

Although the amount of money was not great, the two 1995 thefts were charged as felonies because of Andrade's previous record, as permitted under California law. Those crimes also counted as Andrade's third and fourth "strikes" under California's "three strikes and you're out" law. He was sentenced to a term of 25-years-to-life for each of the two thefts, with the sentences to run consecutively. He would not have been eligible for parole for 50 years.

There is no question that California treats its repeat offenders harshly. The question is, does the Constitution of the United States prevent it from doing so?

The Opinions in *Andrade*. Judge Paez, joined by Chief Judge Schroeder, concluded that Andrade's sentence violated the Eighth Amendment to the Constitution of the United States which forbids cruel and unusual punishments (and which seems to have first been applied to the States in 1947).

Andrade v. Attorney General of the State of California, 270 F.3d 743 (9th Circ., Nov. 2, 2001). Judge Paez wrote, “[T]he Eighth Amendment does not permit the application of a law which results in a sentence grossly disproportionate to the crime. Andrade’s sentence of life in prison with no possibility of parole for 50 years is grossly disproportionate to his two misdemeanor thefts of nine videotapes, even when we consider his history of non-violent offenses. . . .” *Andrade* at 21 (Westlaw print). Some of Judge Paez’s critics think the *Andrade* decision is perfectly consistent with his record and reputation.**

In dissent, Judge Sneed wrote, “The sentence imposed in this case is not one of the ‘exceedingly rare’ terms of imprisonment prohibited by the Eighth Amendment’s proscription against cruel and unusual punishment. Two consecutive sentences of 25 years to life – with parole eligibility only after the minimum 50 years – is obviously severe. Nevertheless, it is the sentence mandated by the citizens of California through the democratic initiative process and, additionally, legislated by their elected representatives.” *Id.* (citations to the leading Supreme Court cases, *Harmelin v. Michigan*, *Solem v. Helm*, and *Rummel v. Estelle*, omitted).

Policy Versus Constitutional Law. The sentence imposed on Leandro Andrade by the laws of California is, indeed, severe. Many Americans, including many legislators, will believe that it was too severe. It is not, however, a judge’s duty to substitute his own policy preferences for the people’s or the legislature’s. In his concurring opinion in *Rummel v. Estelle*, *supra*, Justice Stewart wrote:

“If the Constitution gave me a roving commission to impose upon the criminal courts of [the States] my own notions of enlightened policy, I would not join the Court’s opinion [holding that the sentence in the case did *not* constitute cruel and unusual punishment under the 8th and 14th Amendments]. For it is clear to me that the recidivist procedures adopted in recent years by many other States . . . are far superior to those utilized here. But the question for decision is not whether we applaud or even whether we personally approve the procedures followed [by the State]. The question is whether those procedures fall below the minimum level the Constitution will tolerate. . . .” 445 U.S. at 285.

The *Andrade* and *Ewing* cases will be watched closely — and probably they will be closely decided. Whichever way the Supreme Court decides, however, the people of the United States and their legislators must not retreat from the tough, no-nonsense, we’re-fed-up-to-here laws that have

** When Paez was nominated to the federal district court, the executive director of the American Civil Liberties Union of Southern California said, “It’s been a while since we’ve had these kinds of appointments to the federal court. I think it’s a welcome change after all the pro-law enforcement people we’ve seen appointed to the state and federal courts.” The fear that Judge Paez might be “soft on crime” was compounded when he gave former U.S. Representative Jay Kim a light sentence although Kim had pleaded guilty to receiving more than \$250,000 in illegal campaign contributions, the largest such sum in congressional history. The sentence given to Kim prompted *Roll Call* newspaper to say, the “Senate Judiciary Committee ought to question whether Paez isn’t too soft on criminals to be an appellate judge.”

helped reduce crime in recent years.

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