

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 28 2016

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LEROY DALE HOLSEY,

Petitioner-Appellant,

v.

WILLIAM KNIPP, Warden,

Respondent-Appellee.

No. 15-17091

D.C. No.

2:13-cv-00962-KJM-GGH

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Kimberly J. Mueller, District Judge, Presiding

Argued and Submitted December 13, 2016
San Francisco, California

Before: **KOZINSKI, BYBEE** and **N.R. SMITH**, Circuit Judges.

We may grant federal habeas relief to a state prisoner if the state’s adjudication “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). The Supreme Court

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

has extended the Eighth Amendment’s prohibition on cruel and unusual punishment to non-capital sentences that are “grossly disproportionate” to the crime. Ewing v. California, 538 U.S. 11, 23 (2003). But successful proportionality challenges are “exceedingly rare,” Rummel v. Estelle, 445 U.S. 263, 272 (1980), and we cannot grant habeas relief if “fairminded jurists could disagree on the correctness” of the state court’s decision, Harrington v. Richter, 562 U.S. 86, 88 (2011) (internal quotation marks and citation omitted).

Our circuit has given federal habeas relief to a previous California prisoner convicted of the same offense and sentenced to the same term that Holsey now challenges. See Gonzalez v. Duncan, 551 F.3d 875 (9th Cir. 2008). But the California Court of Appeal distinguished Holsey’s case from Gonzalez based on Holsey’s greater propensity to recidivate, as did the district court. Because fairminded jurists could conclude that Holsey’s pattern of recidivism rendered his sentence constitutional, federal habeas relief is unavailable.

AFFIRMED.