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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MYLVIN OTIS LEWIS,

Petitioner,

No. CIV S-03-2211 GEB EFB P

vs.

MIKE KNOWLES,

Respondent.

FINDINGS AND RECOMMENDATIONS

_____/

Petitioner is a state prisoner proceeding *in propria persona* with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges the sentence he received on a 2001 conviction for felony car theft and receiving stolen property. He seeks relief on the grounds that his sentence constitutes cruel and unusual punishment and the trial judge abused his discretion when he failed to strike any of petitioner’s prior convictions at sentencing. Upon careful consideration of the record and the applicable law, the undersigned recommends that petitioner’s application for habeas corpus relief be denied.

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1 **I. Background¹**

2 Defendant entered a plea of guilty to taking and driving a vehicle
3 (Veh.Code, § 10851) and receiving stolen property (Pen.Code, §
4 496; further undesignated section references are to the Penal
5 Code), and he admitted eight prior felony convictions within the
6 meaning of sections 667, subdivisions (b)-(I) and 1170.12.
7 Sentenced to a total indeterminate term of 25 years to life in state
8 prison, defendant appeals, contending the trial court abused its
9 discretion when it failed to strike seven of the eight prior felony
10 conviction allegations. We affirm the judgment.

11 **Facts**

12 On June 9, 2000, an officer stopped defendant for a traffic
13 violation and found he was in possession of a stolen car. At the
14 beginning of trial, defendant asked the court to exercise its
15 discretion to strike the prior felony conviction allegations from
16 1972 and 1976 as remote and dissimilar to the current offenses.
17 The court declined to do so at that time but did not foreclose a later
18 request at sentencing. Subsequently, defendant entered a plea of
19 guilty to the offenses charged in the complaint (Veh.Code, § 10851
20 and § 496) and admitted he had the following prior felony
21 convictions: (1) 1989 burglary (§ 459); (2) 1976 robbery (§ 211);
22 (3) 1976 burglary (§ 459); (4) 1976 burglary (§ 459); (5) 1976
23 attempted murder (§§ 664/187); (6) 1976 rape (§ 261.3); (7) 1976
24 attempted sodomy (§§ 664/286); and (8) 1972 robbery (§ 211).

25 According to the probation report, in addition to the above
26 offenses, defendant was committed to the California Youth
Authority (CYA) for an unknown adjudication in 1969 and
released in 1970. Defendant was committed to CYA a second time
for the offenses committed in 1972; he escaped from and was
returned to CYA in 1972 and was paroled in 1975. He was sent to
state prison for offenses committed in 1975 and 1976 and was
paroled in 1982. He violated parole once and was discharged from
parole in 1984. In 1984 and 1986 he was convicted of two
misdemeanors: disorderly conduct (§ 647, subd. (b)) and burglary
(§ 459). In 1988 and 1989 defendant suffered convictions for three
petty thefts with prior theft-related convictions (§ 666), possession
of cocaine (Health & Saf.Code, § 11350) and the charged prior
conviction for burglary (§ 459) and was sentenced to state prison

23 ¹ The following summary is drawn, in part, from the August 22, 2002 opinion by the
24 California Court of Appeal for the Third Appellate District (hereinafter Opinion), at pps. 1-4,
25 filed in this court on June 10, 2004, as part of Exhibit 4 to the Answer. This court presumes that
26 the state court's findings of fact are correct unless petitioner rebuts that presumption with clear
and convincing evidence. 28 U.S.C. § 2254(e)(1); *Davis v. Woodford*, 384 F.3d 628, 638 (9th
Cir. 2004). Petitioner has not attempted to overcome the presumption with respect to the
underlying events. The court will therefore rely on the state court's recitation of the facts.

1 for a total term of 10 years four months. He was paroled in 1995
2 and violated parole eight times before he was discharged from
3 parole in 1999. While on parole, defendant committed two more
4 theft-related misdemeanors: petty theft with a prior theft-related
5 offense (§ 666) in 1996 and unauthorized entry of a dwelling (§
6 602.5) in 1998. The probation report further stated that, while in
7 custody on the current offense, defendant had six minor and three
8 major jail infractions, one of which was assaulting another inmate.

9 Evidence at the sentencing hearing established that the
10 then-47-year-old defendant had some skills as an automobile
11 mechanic, and relatives believed he could become a productive
12 member of society. However, while encouraged to enter substance
13 abuse rehabilitation, defendant had not done so. Defendant
14 admitted he had stolen the car and driven from Oakland to
15 Sacramento to get food stamps, because he was on general
16 assistance in Sacramento.

17 At the close of testimony, defense counsel again moved to strike
18 seven of the prior felony conviction findings, arguing defendant
19 had changed and no longer committed crimes of violence. Counsel
20 suggested that, with the single remaining prior felony conviction
21 finding, the court would still have the ability to impose a
22 substantial period of imprisonment.

23 The court denied the application to strike the prior felony
24 conviction findings and sentenced defendant to an indeterminate
25 term of 25 years to life for violation of Vehicle Code section
26 10851 and stayed imposition of sentence on the violation of
section 496 pursuant to section 654, because the act underlying the
two counts was identical. The court then discussed the reasons for
denying defendant's application to strike the prior felony
conviction findings. The court relied on "the seriousness of his
historical crimes," defendant's continued pattern of criminality
after release from a substantial term in state prison, the seriousness
of the current offense, and the lack of effort on defendant's part to
deal with his drug problem and to change his lifestyle. The court
further noted defendant was cheating on the welfare system when
the crime was committed. Overall, the court concluded defendant
did come within the spirit of the three strikes law.

27 Petitioner filed a timely appeal of his conviction in the California Court of Appeal.
28 Answer, Ex. 1. Therein, he argued that the trial court abused its discretion in declining to
29 dismiss his prior convictions at the sentencing proceedings, and that his sentence constituted
30 cruel and unusual punishment. *Id.* The Court of Appeal rejected both of petitioner's claims and
31 affirmed his judgment of conviction in its entirety. Answer, Ex. 3. Petitioner subsequently filed

1 a petition for review in the California Supreme Court, raising a sole claim that his sentence under
2 the Three Strikes law constituted cruel and unusual punishment. Answer, Ex. 4. That petition
3 was summarily denied. Answer, Ex. 5.

4 The instant habeas petition was filed in this court on October 22, 2003. Therein,
5 petitioner claimed that his sentence constitutes cruel and unusual punishment. He also claimed
6 that the trial court abused its discretion in not striking his prior convictions at sentencing, and
7 that his plea had been induced by the trial court and the attorneys acting in concert. On
8 December 29, 2003, respondent filed a motion to dismiss, arguing that petitioner's latter claims
9 (not striking priors and that the plea was induced) had not been exhausted in state court. On
10 April 2, 2004, petitioner elected to file an amended habeas petition raising his only exhausted
11 claim: that his sentence constitutes cruel and unusual punishment. Respondent filed an answer
12 on June 10, 2004, and petitioner filed a traverse on August 24, 2004.

13 **II. Analysis**

14 **A. Standards for a Writ of Habeas Corpus**

15 Federal habeas corpus relief is not available for any claim decided on the merits in state
16 court proceedings unless the state court's adjudication of the claim:

17 (1) resulted in a decision that was contrary to, or involved an
18 unreasonable application of, clearly established Federal law, as
determined by the Supreme Court of the United States; or

19 (2) resulted in a decision that was based on an unreasonable
20 determination of the facts in light of the evidence presented in the
State court proceeding.

21 28 U.S.C. § 2254(d).

22 Under section 2254(d)(1), a state court decision is "contrary to" clearly established
23 United States Supreme Court precedents "if it 'applies a rule that contradicts the governing law
24 set forth in [Supreme Court] cases,' or if it 'confronts a set of facts that are materially
25 indistinguishable from a decision'" of the Supreme Court and nevertheless arrives at a different
26 result. *Early v. Packer*, 537 U.S. 3, 8 (2002) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406

1 (2000)).

2 Under the “unreasonable application” clause of section 2254(d)(1), a federal habeas
3 court may grant the writ if the state court identifies the correct governing legal principle from the
4 Supreme Court’s decisions, but unreasonably applies that principle to the facts of the prisoner’s
5 case. *Williams*, 529 U.S. at 413. A federal habeas court “may not issue the writ simply because
6 that court concludes in its independent judgment that the relevant state-court decision applied
7 clearly established federal law erroneously or incorrectly. Rather, that application must also be
8 unreasonable.” *Id.* at 412; *see also Lockyer v. Andrade*, 538 U.S. 63, 75 (2003) (it is “not
9 enough that a federal habeas court, in its independent review of the legal question, is left with a
10 ‘firm conviction’ that the state court was ‘erroneous.’”)

11 The court looks to the last reasoned state court decision as the basis for the state court
12 judgment. *Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002). Where the state court reaches a
13 decision on the merits but provides no reasoning to support its conclusion, a federal
14 habeas court independently reviews the record to determine whether habeas corpus relief is
15 available under section 2254(d). *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000).

16 **B. Petitioner’s Claims**

17 Petitioner claims that his sentence of twenty-five years to life in state prison pursuant to
18 California’s Three Strikes law constitutes cruel and unusual punishment. Petitioner raised this
19 claim for the first time in his direct appeal. The California Court of Appeal rejected the claim,
20 reasoning as follows:

21 **1. Cruel and Unusual Punishment**

22 For the first time on appeal, defendant argues his sentence is so
23 disproportionate to his crime as to violate both the Eighth
24 Amendment of the federal Constitution and article I, section 17 of
25 the California Constitution. Although subject to waiver for failing
26 to assert the issue in the trial court (*see People v. DeJesus* (1995)
38 Cal.App.4th 1, 27, 44 Cal.Rptr.2d 796), we shall address the
question.

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1 The Eighth Amendment “forbids only extreme sentences that are
2 “grossly disproportionate” to the crime.” (*People v. Cartwright*
3 (1995) 39 Cal.App.4th 1123, 1135, 46 Cal.Rptr.2d 351.)
4 Defendant’s sentence, 25 years to life, is neither extreme nor
5 grossly disproportionate in light of his history of recidivism,
6 continuous parole violations, the seriousness of the current offense
7 and evidence of ongoing violent propensities. (*Ibid.*; cf. *Harmelin*
8 *v. Michigan* (1991) 501 U.S. 957 [115 L.Ed.2d 836], mandatory
9 life sentence without possibility of parole for possession of more
10 than 650 grams of cocaine; *Rummell v. Estelle* (1980) 445 U.S.
11 263 [63 L.Ed.2d 382], life sentence for nonviolent recidivist
12 convicted of obtaining \$120.75 by false pretenses.)

13 Similarly, a “punishment may violate the California Constitution ...
14 if ‘it is so disproportionate to the crime for which it is inflicted that
15 it shocks the conscience and offends fundamental notions of
16 human dignity.’” (*People v. Cartwright, supra*, 39 Cal.App.4th
17 1123 at p. 1136, 46 Cal.Rptr.2d 351.) Considering defendant’s
18 long history of criminal conduct and his failure to rehabilitate
19 despite opportunities to do so, his lengthy sentence as a recidivist
20 under the three strikes law cannot be said to shock the conscience.

21 Defendant relies on the recent decision of *Andrade v. Attorney*
22 *General of California* (9th Cir. 2001) 270 F.3d 743. We are not
23 bound by the decisions of the lower federal courts. (*People v.*
24 *Bradley* (1969) 1 Cal.3d 80, 86, 81 Cal.Rptr. 457, 460 P.2d 129.)
25 The case is factually distinct (although by distinguishing it, we do
26 not mean to suggest that we agree with *Andrade* even on the facts
it was called on to consider). The current felony is significantly
more serious than the petty theft at issue in *Andrade*, which was
elevated to a felony by the existence of a prior theft-related
offense.

Disposition

The judgment is affirmed.

Opinion at 6-7.

The United States Supreme Court has held that the Eighth Amendment includes a
“narrow proportionality principle” that applies to terms of imprisonment. *See Harmelin v.*
Michigan, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring). *See also Taylor v. Lewis*, 460
F.3d 1093, 1097 (9th Cir. 2006). However, successful challenges in federal court to the
proportionality of particular sentences are “exceedingly rare.” *Solem v. Helm*, 463 U.S. 277,
289-90 (1983). *See also Ramirez v. Castro*, 365 F.3d 755, 775 (9th Cir. 2004). “The Eighth

1 Amendment does not require strict proportionality between crime and sentence. Rather, it
2 forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Harmelin*, 501
3 U.S. at 1001 (Kennedy, J., concurring) (citing *Solem v. Helm*). In *Lockyer v. Andrade*, the
4 United States Supreme Court found that in addressing an Eighth Amendment challenge to a
5 prison sentence, the “only relevant clearly established law amenable to the ‘contrary to’ or
6 ‘unreasonable application of’ framework is the gross disproportionality principle, the precise
7 contours of which are unclear and applicable only in the ‘exceedingly rare’ and ‘extreme’ case.”
8 538 U.S. at 73 (citing *Harmelin*, 501 U.S. at 957; *Solem*, 463 U.S. at 277; and *Rummel v. Estelle*,
9 445 U.S. 263, 272 (1980)). In that case, the Supreme Court held that it was not an unreasonable
10 application of clearly established federal law for the California Court of Appeal to affirm a
11 “Three Strikes” sentence of two consecutive 25 year-to-life imprisonment terms for a petty theft
12 with a prior conviction involving theft of \$150.00 worth of videotapes. *Andrade*, 538 U.S. at 75;
13 *see also Ewing v. California*, 538 U.S. 11, 29 (2003) (holding that a “Three Strikes” sentence of
14 25 years-to-life in prison imposed on a grand theft conviction involving the theft of three golf
15 clubs from a pro shop was not grossly disproportionate and did not violate the Eighth
16 Amendment).

17 In assessing the compliance of a non-capital sentence with the proportionality principle, a
18 reviewing court must consider “objective factors” to the extent possible. *Solem*, 463 U.S. at 290.
19 Foremost among these factors are the severity of the penalty imposed and the gravity of the
20 offense. “Comparisons among offenses can be made in light of, among other things, the harm

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1 caused or threatened to the victim or society, the culpability of the offender, and the absolute
2 magnitude of the crime.” *Taylor*, 460 F.3d at 1098.²

3 The court finds that in this case petitioner’s sentence does not fall within the type of
4 “exceedingly rare” circumstance that would support a finding that his sentence violates the
5 Eighth Amendment. His sentence of twenty-five years to life is certainly a significant penalty.
6 However, as noted by the California Court of Appeal, petitioner had a long history of criminal
7 conduct which continued essentially unabated until he was arrested for his crime of conviction.
8 In addition, petitioner had suffered prior convictions for violent crimes, including rape and
9 attempted murder, and a prior prison sentence in the California Youth Authority. In *Harmelin*,
10 the petitioner received a sentence of life without the possibility of parole for possessing 672
11 grams of cocaine. In light of the *Harmelin* decision, as well as the decisions in *Andrade* and
12 *Ewing*, which imposed sentences of twenty-five years to life for petty theft convictions, a
13 twenty-five years to life sentence under the circumstances of this case is not grossly
14 disproportionate. Because petitioner does not raise an inference of gross disproportionality, this
15 court need not compare petitioner’s sentence to the sentences of other defendants in other
16 jurisdictions. This is not a case where “a threshold comparison of the crime committed and the
17 sentence imposed leads to an inference of gross disproportionality.” *Solem*, 463 U.S. at 1004-05.

18 ² As noted in *Taylor*, the United States Supreme Court has also suggested that reviewing
19 courts compare the sentences imposed on other criminals in the same jurisdiction, and also
20 compare the sentences imposed for commission of the same crime in other jurisdictions. 460
21 F.3d at 1098 n.7. However,

21 consideration of comparative factors may be unnecessary; the *Solem* Court “did
22 not announce a rigid three-part test.” See *Harmelin*, 501 U.S. at 1004, 111 S.Ct.
23 2680 (Kennedy, J., concurring). Rather, “intra-jurisdictional and inter-jurisdictional
24 analyses are appropriate only in the rare case in which a threshold comparison of
25 the crime committed and the sentence imposed leads to an inference of gross
26 disproportionality.” *Id.* at 1004-05, 111 S.Ct. 2680; see also *Rummel v. Estelle*,
445 U.S. 263, 282, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) (“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.”).

Id.

1 The state court's reliance on *Harmelin* and *Rummel* and its determination that petitioner's
2 sentence did not violate the Eighth Amendment was not an unreasonable application of the
3 Supreme Court's proportionality standard. Accordingly, this claim for relief should be denied.

4 **2. Failure to Strike Prior Convictions**

5 Petitioner also argues that the trial court abused its discretion in failing to strike some of
6 his prior convictions at sentencing. Pet., Attach. 1, Mem. of P. & A. at 1, 5, 6; Traverse at 2.

7 Although this claim has apparently not been exhausted in state court proceedings, the court will
8 nevertheless address it. See 28 U.S.C. § 2254(b)(2) (“[a]n application for a writ of habeas corpus
9 may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies
10 available in the courts of the State”); *Cassett v. Stewart*, 406 F.3d 614, 624 (9th Cir. 2005) (a
11 federal court considering a habeas petition may deny an unexhausted claim on the merits when it
12 is perfectly clear that the claim is not “colorable”).

13 The California Court of Appeal rejected petitioner's claim in this regard, reasoning as
14 follows:

15 Defendant contends the trial court abused its discretion in denying
16 the request to strike seven of the prior felony conviction findings,
17 because it failed to assess individualized factors, particularly his
18 future prospects.

19 “[I]n ruling whether to strike or vacate a prior serious and/or
20 violent felony conviction allegation or finding under the Three
21 Strikes law, on its own motion, ‘in furtherance of justice’ pursuant
22 to Penal Code section 1385(a), ... the court in question must
23 consider whether, in light of the nature and circumstances of his
24 present felonies and prior serious and/or violent felony
25 convictions, and the particulars of his background, character and
26 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 of one or more serious and/or
violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161,
69 Cal.Rptr.2d 917, 948 P.2d 429.)

The trial court had read the probation report and heard the
testimony of the defense witnesses, and was fully aware of
defendant's talents and limitations. However, the court also
recognized that defendant had failed, over many years, to make use
of his opportunities for change. There was no reason for the court

1 to believe, based upon defendant's demonstrated indifference to
2 becoming a productive member of society, that defendant's future
3 prospects were any brighter than his past had been. The evidence
4 showed defendant was unable to live outside the structure of prison
5 commitment for any significant period without committing crimes.

6 Further, even when incarcerated, defendant's propensity for
7 violence and lack of respect for authority reasserted itself, resulting
8 in serious violations of jail rules. Nothing in the evidence before
9 the court suggested defendant had taken himself outside the spirit
10 of the three strikes law. The trial court did not abuse its discretion
11 in denying defendant's application to strike the prior felony
12 conviction allegations.

13 Opinion at 4-6.

14 Petitioner's claim that he was improperly sentenced because the trial court abused its
15 discretion in declining to strike his prior convictions essentially involves an interpretation of
16 state sentencing law. "It is not the province of a federal habeas court to reexamine state court
17 determinations on state law questions." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991). So long as
18 a state sentence "is not based on any proscribed federal grounds such as being cruel and unusual,
19 racially or ethnically motivated, or enhanced by indigency, the penalties for violation of state
20 statutes are matters of state concern." *Makal v. State of Arizona*, 544 F.2d 1030, 1035 (9th Cir.
21 1976). Thus, "[a]bsent a showing of fundamental unfairness, a state court's misapplication of its
22 own sentencing laws does not justify federal habeas relief." *Christian v. Rhode*, 41 F.3d 461,
23 469 (9th Cir. 1994).³

24 The trial court's decision not to strike petitioner's two prior robbery convictions was not
25 fundamentally unfair. The sentencing judge understood his discretion to strike but declined to
26 do so because of his belief that petitioner was not "outside of the spirit of the three-strike law."
27 April 2, 2004 Pet., Attach., Reporter's Transcript at 10. The judge noted petitioner's
28 "horrendous record." *Id.* at 88. He concluded that, while petitioner had made some

29 ³ Under California law, a trial court's discretionary act at sentencing will not be
30 disturbed unless the record suggests a "manifest miscarriage of justice." *See People v. Arviso*,
31 201 Cal. App.3d 1055, 1059 (1988).

1 improvement in terms of the violent nature of his offenses, he was not a “reformed person.” *Id.*
2 at 89. The judge expounded at some length upon his reasons for declining to strike petitioner’s
3 prior convictions. *Id.* at 87-89. His conclusion that the situation did not warrant the exercise of
4 his discretion to dismiss petitioner’s strike priors was not unreasonable under the circumstances
5 of this case. After a careful review of the sentencing proceedings, the undersigned finds no
6 federal constitutional violation in the state trial judge’s exercise of his sentencing discretion.⁴
7 Accordingly, this claim should be denied.

8 For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner’s
9 application for a writ of habeas corpus be denied.

10 These findings and recommendations are submitted to the United States District Judge
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one
12 days after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Such a document should be captioned
14 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections
15 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*
16 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). If
17 petitioner files objections to the findings and recommendations, he may address whether a
18 certificate of appealability should issue in the event he files an appeal of the judgment in this
19 case. *See* Rule 11, Federal Rules Governing Section 2254 Cases (the district court must issue or
20 deny a certificate of appealability when it enters a final order adverse to the applicant). A


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24 ⁴ If petitioner’s sentence had been imposed under an invalid statute and/or was in excess
25 of that actually permitted under state law, a federal due process violation would be presented.
26 *See Marzano v. Kincheloe*, 915 F.2d 549, 552 (9th Cir. 1990) (due process violation found where
petitioner’s sentence of life imprisonment without the possibility of parole could not be
constitutionally imposed under the state statute upon which his conviction was based).
However, petitioner has failed to make such a showing.

1 certificate of appealability may issue under 28 U.S.C. §2253 “only if the applicant has made a
2 substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

3 DATED: January 28, 2010.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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