SUPREME COURT OF THE UNITED STATES

No. 01–6978

GARY ALBERT EWING, PETITIONER *v.* CALIFORNIA

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

[March 5, 2003]

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

JUSTICE BREYER has cogently explained why the sentence imposed in this case is both cruel and unusual.[1] The concurrences prompt this separate writing to emphasize that proportionality review is not only capable of judicial application but also required by the Eighth Amendment.

"The Eighth Amendment succinctly prohibits 'excessive' sanctions." *Atkins* v. *Virginia*, 536 U. S. 304, 311 (2002); see also U. S. Const., Amdt. 8 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"). Faithful to the Amendment's text, this Court has held that the Constitution directs judges to apply their best judgment in determining the proportionality of fines, see, *e.g.*, *United States* v.

[1] For "present purposes," *post* at 2, 19 (dissenting opinion), JUSTICE BREYER applies the framework established by *Harmelin* v. *Michigan*, 501 U. S. 957, 1004–1005 (1991), in analyzing Ewing's Eighth Amendment claim. I agree with JUSTICE BREYER that Ewing's sentence is grossly disproportionate even under *Harmelin*'s narrow proportionality framework. However, it is not clear that this case is controlled by *Harmelin*, which considered the proportionality of a life sentence imposed on a drug offender who had *no* prior felony convictions. Rather, the three-factor analysis established in *Solem* v. *Helm*, 463 U. S. 277, 290–291 (1983), which specifically addressed recidivist sentencing, seems more directly on point.

Bajakajian, 524 U. S. 321, 334–336 (1998), bail, see, *e.g.*, *Stack* v. *Boyle*, 342 U. S. 1, 5 (1951), and other forms of punishment, including the imposition of a death sentence, see, *e.g.*, *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977). It "would be anomalous indeed" to suggest that the Eighth Amendment makes proportionality review applicable in the context of bail and fines but not in the context of other forms of punishment, such as imprisonment. *Solem* v. *Helm*, 463 U. S. 277, 289 (1983). Rather, by broadly prohibiting excessive sanctions, the Eighth Amendment directs judges to exercise their wise judgment in assessing the proportionality of all forms of punishment.

The absence of a black-letter rule does not disable judges from exercising their discretion in construing the outer limits on sentencing authority that the Eighth Amendment imposes. After all, judges are "constantly called upon to draw . . . lines in a variety of contexts," *id.*, at 294, and to exercise their judgment to give meaning to the Constitution's broadly phrased protections. For example, the Due Process Clause directs judges to employ proportionality review in assessing the constitutionality of punitive damages awards on a case-by-case basis. See, *e.g.*, *BMW of North America, Inc.* v. *Gore*, 517 U. S. 559, 562 (1996). Also, although the Sixth Amendment guarantees criminal defendants the right to a speedy trial, the courts often are asked to determine on a case-by-case basis whether a particular delay is constitutionally permissible or not. See, *e.g.*, *Doggett* v. *United States*, 505 U. S. 647 (1992).[2]

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[2] Numerous other examples could be given of situations in which courts—faced with imprecise commands—must make difficult decisions. See, *e.g.*, *Kyles* v. *Whitley*, 514 U. S. 419 (1995) (reviewing whether undisclosed evidence was material); *Arizona* v. *Fulminante*, 499 U. S. 279 (1991) (considering whether confession was coerced and, if so, whether admission of the coerced confession was harmless error);

Throughout most of the Nation's history—before guideline sentencing became so prevalent—federal and state trial judges imposed specific sentences pursuant to grants of authority that gave them uncabined discretion within broad ranges. See K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1998) (hereinafter Stith & Cabranes) ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion"); see also *Mistretta* v. *United States*, 488 U. S. 361, 364 (1989). It was not unheard of for a statute to authorize a sentence ranging from one year to life, for example. See, *e.g.*, *State* v. *Perley*, 86 Me. 427, 30 A. 74, 75 (1894) (citing Maine statute that made robbery punishable by imprisonment for life or any term of years); *In re Southard*, 298 Mich. 75, 77, 298 N. W. 457 (1941) ("The offense of 'robbery armed' is punishable by imprisonment for life or any term of years"). In exercising their discretion, sentencing judges wisely employed a proportionality principle that took into account all of the justifications for punishment—namely, deterrence, incapacitation, retribution and rehabilitation. See Stith & Cabranes 14. Likewise, I think it clear that the Eighth Amendment's prohibition of "cruel and unusual punishments" expresses a broad and basic proportionality principle that takes into account all of the justifications for penal sanctions. It is this broad proportionality principle that would preclude reliance on any of the justifications for punishment to support, for example, a life sentence for overtime

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Strickland v. *Washington*, 466 U. S. 668 (1984) (addressing whether defense counsel's performance was deficient and whether any deficiency was prejudicial); *Darden* v. *Wainwright*, 477 U. S. 168 (1986) (assessing whether prosecutorial misconduct deprived defendant of a fair trial); *Christensen* v. *Harris County*, 529 U. S. 576, 589 (2000) (SCALIA, J., concurring in part and concurring in judgment) (addressing whether an agency's construction of a statute was "'reasonable'").

parking. See *Rummel* v. *Estelle*, 445 U. S. 263, 274, n. 11 (1980).

Accordingly, I respectfully dissent.