No. 01-1127

IN THE SUPREME COURT OF THE UNITED STATES

BILL LOCKYER, ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *et al*,
Petitioners-Appellees,
v.

LEANDRO ANDRADE,
Respondent-Appellant

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF ON THE MERITS OF AMICUS CURIAE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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QUESTIONS PRESENTED

1. Whether California's three-strikes law, providing for a twenty-five year-to-life prison term for a third strike conviction, violates the Eighth Amendment's prohibition against cruel and unusual punishment when applied to a defendant whose third strike conviction is for petty theft with a prior theft-related conviction?

2. Whether, in light of this Court's existing jurisprudence concerning the Eighth Amendment and proportionality in noncapital cases, the judgment of the California Court of Appeal, holding Andrade's consecutive twenty-five years to life sentences for convictions on two counts of petty theft with a prior, involved an unreasonable application of clearly established federal law as determined by this Court within the meaning of 28 U.S.C. § 2254(d)(1)?

3. Whether the Ninth Circuit or the Fourth Circuit is correct, concerning the necessity for a habeas court analyzing a claim under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, to first decide if the state court's determination was erroneous before deciding whether the determination was contrary to, or involved an unreasonable application of, clearly established federal law as determined by this Court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGES

Cases

Constitutional Provisions

Statutes

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE

The California District Attorneys Association (CDAA) has more than 2,400 prosecutors in its membership. We present this amicus brief, pursuant to Supreme Court Rule 37, in support of Petitioners.[1] The elected District Attorneys of San Bernardino and Contra Costa Counties submit this amicus brief as the attorneys authorized to represent CDAA. We also have obtained and filed the parties' written consent to this brief.

CDAA has a strong interest in preserving California's **right to sentence recidivist offenders** in the manner which the California State Legislature and the California electorate have deemed appropriate. CDAA seeks to ensure that California retains its right to develop an **independent penological scheme**. As representatives of California's citizens, CDAA also has **a compelling interest** in guarding **against the erosion of the basic tenets of federalism**.

While three questions are presented to this Court, CDAA's primary concern is only whether California's "Three Strikes" sentencing statutes constitute cruel and unusual punishment when applied to Respondent Andrade**.** Accordingly, we address only that issue.

[1] Pursuant to Rule 37.6, CDAA discloses that the Attorney General's Office copied and bound CDAA's amicus brief.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals' opinion in this case contains significant errors. As a consequence, that court determined that "Three Strikes" sentencing imposed a cruel and unusual punishment. The opinion mischaracterizes Respondent's **present crimes**, his **criminal history**, and his **present sentence.** The opinion is also **premised upon incorrect comparisons between recidivists' crimes and non-recidivists' crimes**.

Correct application Eighth Amendment principles establishes that Respondent's sentence ***is not* grossly disproportionate** to sentences authorized for and imposed upon recidivist criminals.

We ask this Court to so hold and, therefore, to determine that Respondent Andrade's sentence **did not** constitute cruel and unusual punishment.

I.
THE COURT OF APPEALS MISCONSTRUED CALIFORNIA PENAL LAW AND MISCHARACTERIZED THE FACTS OF THIS CASE. ITS CONCLUSIONS ARE THEREFORE WRONG.

The Court of Appeals held that California's "Three Strikes" statutes[2] imposed upon Respondent sentences grossly disproportionate to his crimes and, therefore, his overall sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment. We believe that the Court of Appeals **erred in its conclusion because it erred in numerous of its premises**.

A. RESPONDENT'S PRESENT CRIMES ARE NOT "MISDEMEANOR PETTY THEFT" UNDER CALIFORNIA LAW.

The Court of Appeals repeatedly characterized Respondent's present crimes as "misdemeanor petty theft." *See, e.g., Andrade v. Attorney General of State of California* (9th Cir. 2001) 270 F.3d 743, 746, 749, 760, 766, 767. This is **incorrect under California law**.

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[2] California has two "Three Strikes" statutes. The California State Legislature enacted the first statute. Cal. Pen. Code §§ 667(b)-(i). Effective March 7, 1994. The electorate enacted the second statute on November 8, 1994. Cal. Pen. Code § 1170.12. Because Respondent's crimes were committed on November 4, 1995, our references are to the initiative version.

Respondent's crimes were ***felony*** petty thefts. "Petty theft with a prior conviction of theft"[3] has been part of the California Penal Code since 1872. It is an "alternative felony crime" - one that is chargeable and punishable *either* as a felony or as a misdemeanor.[4]

An alternative felony crime or "wobbler" **charged as a felony remains a felony *unless*** a court imposes a misdemeanor sentence. *In re Anderson,* 69 Cal.2d 613, 664, fn.16, 73 Cal. Rptr. 21, 447 P.2d 117 (1968); *People v. Banks* 53 Cal.2d 370, 381-382, 1 Cal. Rptr. 669, 348 P.2d 102 (1959); *People v. Bozigian,* 270 Cal.App.2d 373, 379, 75 Cal.Rptr. 876 (1969); *People v. Washington,* 243 Cal.App.2d 681, 687-688, 52 Cal.Rptr. 668 (1966).

A California sentencing court may reduce a "wobbler" to a misdemeanor ***even when*** the defendant has suffered prior "felony strike" convictions. *People v. Superior Court (Alvarez)* 14 Cal.4th 968, 979, 60 Cal.Rptr.2d 93, 928 P.2d 1171 (1997).[5] If the court does not do so, the crime is a felony.

When such a felon has suffered prior convictions within the meaning of California's "Three Strikes" statutes, they must be proven or admitted. After the "felony strikes" have been proven or admitted, the trial judge still may dismiss them.[6]

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[3] Cal. Pen. Code §666 requires a present theft event, a prior conviction for a theft-related crime and a term of imprisonment in county jail or state prison.

[4] Cal. Pen. Code §17.

[5] Respondent made an oral motion pursuant to California Penal Code §17 on March 20, 1996, to reduce one or more of his theft convictions to misdemeanors. The trial court denied the motion. (See *People v. Andrade*, No. E018257, unpublished opinion of Court of Appeal, May 13, 1997, page 9).

[6] Cal. Pen. Code §1385

People v. Superior Court (Romero), 13 Cal.4th 497, 53 Cal.Rptr.2d 789, 917 P.2d 628 (1996). When the defendant has been found guilty of multiple current charges, the court may dismiss "felony strikes" as to one crime and may decline to dismiss them as to another current crime. *People v. Garcia,* 20 Cal.4th 490, 499-500, 85 Cal.Rptr.2d 280, 976 P.2d 831 (1999).

If a court does not dismiss *all* "felony strikes," a defendant's conviction becomes subject to the "Three Strikes" sentencing statutes. The "Three Strikes" statutes supplant the ordinary sentencing scheme for the underlying felonies. *People v. Dotson,* 16 Cal.4th 547, 556, 66 Cal.Rptr.2d 423, 941 P.2d 56 (1997); *People v. Superior Court (Romero), supra,* at 524.

Thus, a defendant who is convicted of a **felony theft offense** and who has suffered at least two "felony strikes" **is not** punished ***simply*** for **felonious theft.** He is punished instead under the Three Strikes sentencing scheme, which mandates harsh punishment ***only*** for those with the qualifying prior convictions. In other words, he is **punished for his recidivism**. *People v. Lawrence*, 24 Cal.App.4th 219, 226-227 (2000) 99 Cal.Rptr.2d. 570.

Respondent's present convictions **are *not*** for "misdemeanor petty theft." Calling Respondent's present convictions "misdemeanor petty thefts" is wholly inaccurate.[7] They are for ***felony*** **petty theft, with a prior conviction of petty theft.** This is

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[7] The memorandum opinion in *Riggs v. California,* 525 U.S. 1114, 119 S.Ct. 890, 142 L.Ed.2d 789 (1999), makes the same error when it characterized Riggs' conviction as a "misdemeanor petty theft."

important. A sentence of 25 years to life for "misdemeanor petty theft" may be cruel and unusual punishment; the same sentence for a felony committed by a recidivist who has at least three prior serious felony convictions under state law is not.

B. "SHOPLIFTING" CARRIES WITH IT VIOLENCE POTENTIAL.

The opinion mischaracterizes Respondent's crimes by pretending that "petty thefts" are **crimes with no violence potential**.

Respondent's crimes involved thefts of merchandise from a department store.[8] On both occasions, store personnel stopped Respondent as he left. Such encounters frequently occur. Because shoplifting is a significant problem for retail establishments, businesses employ security personnel to detect and to apprehend shoplifters.

Shoplifters who are detected frequently attempt to escape. Some escape attempts result in **violent confrontations** when the thieves use force or fear

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[8] The economic seriousness of Respondent's crimes is not measured by the value of the property he stole - $153.54 in videotapes. Shoplifting causes annual losses to merchants estimated in the billions of dollars, forcing retail businesses like K-Mart, the victim of Respondent's crimes, to hire and maintain large security staffs to combat such pestilence. In 2000, for example, one source indicates that United States retailers lost $32.3 billion to theft, 1.75% of their total sales, up from $29 billion the year before, which was 1.69% of total sales. Richard C. Hollinger, PhD & Jason L. Davis, *2001 National Retail Security Survey*, (University of Florida 2001). Other sources have placed annual shoplifting losses at $7.2 billion. David A. Anderson, *The Aggregate Burden of Crime*, 42 J. Law & Econ. 611, 638 (Univ. Chi. 1999).

against store personnel or other citizens attempting to apprehend them. When a thief in California uses force or fear to escape with merchandise taken in a commercial shoplift, **the thief is properly charged with robbery**. *See, e.g., People v. Estes,* 147 Cal.App.3d 23, 194 Cal.Rptr. 909 (1983). These robberies are punishable under California Penal Code §211 in the manner in which all unarmed robberies are punishable.

Confrontations between shoplifters and those trying to stop them **can escalate to deadly confrontations**. See *People v. Weddle,* 1 Cal.App.4th 1190, 1198, fn. 9, 2 Cal.Rptr.2d 714 (1991).

This Court has recognized that a crime presenting **a threat of violence** is more serious than **a clearly nonviolent offense**. *Solem v. Helm,* 463 U.S. 277, 293-294; 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) ["nonviolent crimes are less serious than crimes marked by violence **or the threat of violence.**" [emphasis added]].

C. THE COURT OF APPEALS' OPINION PRESENTS AN INACCURATE PICTURE OF RESPONDENT'S CRIMINAL HISTORY.

The goals of a recidivist criminal statute are to:

> [d]eter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense **but also on the *propensities he has demonstrated* over a period of time during which he has been convicted of and sentenced for other crimes.**

Rummel v. Estelle, 445 U.S. 263, 276, 100 S.Ct. 1133, 63, 284-285 [emphasis added]. The Court of Appeals failed to appreciate certain "propensities" in Respondent's background.

1. Respondent's Felony Strikes Carried the Potential For Violence.

Respondent's "felony strikes" consisted of three convictions for first-degree residential burglary.[9] The Court of Appeals characterized these burglary

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[9] This fact is noted in Judge Sneed's concurring and dissenting opinion in *Andrade v. Attorney General, supra,* at 772. Andrade's probation report establishes that he was arrested and booked by the Sheriff of San Joaquin County (Stockton), California, on no less than **10 residential burglaries** on November 30, 1982.

convictions as being **non-violent crimes**. *Andrade v. Attorney General, supra*, at 761. However, even if a residential burglary does not ***actually*** **involve** violence, it has **great *potential* for violence**.

In *Taylor v. United States,* 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990, the Court recognized that "burglary is one of 'the most common violent street crimes," and the character of a burglary "can change rapidly, depending on the fortuitous presence of the occupants of the home when the burglar enters, or their arrival while he is still on the premises." 495 U.S. at 581; *see also id*. at 588.

2. California Has Determined That Residential Burglary Is A Serious Felony.

California's courts have construed the language of the serious felony list in Cal. Penal Code § 1192.7(c) to mean that ***all*** **burglaries** of inhabited residences are **serious felonies is a matter of law**. *People v. Cruz*, 13 Cal. 4th 764, 773, 112 Cal.Rptr.2d 643, 919 P.2d 731 (1996); *People v. Garrett*, 92 Cal.App.4th 1417, 112 Cal.Rptr.2d 643 (2001); *People v. Gomez*, 24 Cal.App.4th 22, 29 Cal.Rptr.2d 94 (1994).

The Court of Appeals failed to appreciate this determination. The Court thus wrongly avoided **numerous important consequences** flowing from them. ***First***, there is no **plea-bargaining of "serious felony" charges**.[10] ***Second***, a defendant **may not be released without a hearing** and a finding of "unusual circumstances."[11] ***Third***, a prior conviction of a serious felony constitutes a **mandatory, non-strikeable five-year enhancement** to a current

[10] Cal. Pen. Code §§1192.7 (a) and (b).

[11] Cal. Pen. Code §§1270.1, 1275(c).

serious felony conviction.[12] ***Fourth***, a prior conviction of a serious felony **constitutes a "felony strike."**[13] ***Finally***, a serious felony conviction **may preclude probation or a suspended sentence** on a new felony conviction,[14] and **may make a defendant ineligible for drug treatment** for a current nonviolent drug possession offense.[15]

These restrictions on burglary prosecutions reflect the legislative and electoral determination that the crime of residential burglary is one of the **most serious crimes** against the citizens of this state. The failure of the Court of Appeals majority to acknowledge this determination makes their other conclusions flawed.

3. The Court of Appeals Disregarded Respondent's Federal Felony Convictions.

After Respondent served a prison term for his burglaries, he was convicted of transportation of marijuana in **two separate federal prosecutions**. Respondent was sentenced to federal prison after each conviction. The Court of Appeals majority gave **short shrift to these convictions**, saying that "there is no record that the court considered them when sentencing Andrade," and "the federal convictions therefore should not affect our analysis as they did not affect the imposition of Andrade's 50-year-to-life sentence." *Andrade v. Attorney General, supra,* at 760. This "logic" is error.

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12 Cal. Pen. Code §667 (a).
13 Cal. Pen. Code §§667(c), 1170.12(a).
14 Cal. Pen. Code §§1203.085(a)(b), 1203(k).
15 Cal. Pen. Code §1210.1(b)(1).

Respondent's convictions ***were*** listed in the "prior record" portion of Respondent's pre-sentence report. A California court is ***required*** to consider a defendant's **entire criminal history** when imposing sentence.[16] Unless the record "affirmatively reflects otherwise," the sentencing judge is deemed to have considered the relevant criteria.[17]

The concurring opinion of Justice Kennedy in *Harmelin v. Michigan* (1991) 501 U.S. 957, 1002, 111 S.Ct. 2680, 115 L.Ed.2d 836, expanded upon the *Solem* Court's description of the seriousness of illegal drug dealing[18] by pointedly concluding:

> "Possession, use, and distribution of illegal drugs represent 'one of the greatest problems affecting the health and welfare of our population.' [citation] Petitioner's suggestion that his crime was nonviolent and victimless. . . is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society."

The Court of Appeals erred again by casting aside Respondent's prior federal drug dealing offenses

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[16] Cal. Pen. Code §1203(b)(3); California Rules of Court, Rules 4.409 and 4.410.

[17] California Rules of Court, Rule 4.409; *People v. Noran* (1970) 1 Cal.3d 755, 83 Cal.Rptr. 411, 463 P.2d 763; California Evid. Code §664 [presumption that official duty has been regularly performed].

[18] In *Solem v. Helm*, *supra*, this Court described the crime of ***heroin dealing*** as a "very serious offense." 463 U.S. at 299.

before it measured Respondent's sentence against the Eighth Amendment.

4. If Respondent's Recidivism Was "Double-Counted," His Many Convictions Were Not.

Respondent's current offenses were charged as felonies under Penal Code § 666 because of his **1990 misdemeanor conviction of petty theft**. However, it was Respondent's **three felony residential burglary convictions**, not his misdemeanor petty theft convictions, which exposed him to the life terms. Thus, although literally true that Respondent's "recidivism" was double counted, *Andrade v. Attorney General, supra,* at 760, 761, ***different* aspects of his recidivism** had ***different* effects** on his state court sentence.

5. *Rummel* Mandated Consideration of Respondent's Prior Prison Terms.

Because this case involves the ***application*** of California's "Three Strikes" statutes **to Respondent**, *Andrade v. Attorney General, supra,* at 767, it is appropriate to consider ***all* relevant facts about the Respondent,** whether or not those facts -- such as **service of a prison term** -- are a component of "Three Strikes" sentence provisions.

The *Andrade* opinion described Respondent's "entire criminal history" as: "five felonies, two misdemeanors, and one parole violation." *Andrade v. Attorney General, supra,* at 760. It fails to mention that Respondent served **three separate prison terms**. Respondent was "in and out of state or federal prison a total of six times." *Andrade v. Attorney General, supra,* at 772 (Sneed, J., concurring and dissenting).

In *Rummel v. Estelle, supra,* this Court **emphasized** the importance of Rummel's **two prior prison terms**:

> "[A] recidivist must twice demonstrate that conviction and actual imprisonment do not deter him from returning to crime once he is released. One in Rummel's position has been both graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail."

445 U.S. at 278.

The failure of the Court of Appeals to ***mention*** Respondent's three prior prison terms casts great doubt upon the correctness of its ultimate conclusion.

6. Analysis

These shortcomings paint a false portrait of Respondent's "propensities." Respondent is a **heroin user** and **illegal drug distributor** who **repeatedly stole** to support his drug habit, who over the years before the present offenses committed and was convicted of at least **three residential burglaries**, which California law defines as serious felonies with serious violence potential, who committed and was convicted of **two separate charges of transportation of marijuana**, crimes which constitute **a threat to cause grave harm to society**, who was committed to prison on **three separate occasions on these felony convictions**, and whose **parole was violated** more than once.

D. THE COURT OF APPEALS' OPINION IS PREMISED UPON FALSE COMPARISONS.

1. Respondent's Sentence is Not "50 Years to Life."

The Court of Appeals characterized Respondent's sentence as a sentence of "50-years-to-life," or words to that effect, *Andrade v. Attorney General, supra*, at 746, 767, although at other times the Court of Appeals correctly called the sentence "two consecutive indeterminate sentences of 25 years to life in prison." *Id.*, at 758.

Respondent was sentenced for ***two*** separate felonies. The correct description of Respondent's sentence thus is **two consecutive indeterminate sentences of life in prison, each with a 25-year minimum term.** A correct characterization of Respondent's sentence is essential to compare properly his sentence with the sentences other felons face.

2. Respondent's Sentence is Not a "Life Without Possibility of Parole" Sentence.

The Court declared that Respondent's sentence was "the functional equivalent of the sentences ... in *Solem* and *Harmelin* - life in prison without the possibility of parole." *Andrade v. Attorney General, supra*, at 759. The court did so because the length of Andrade's **minimum term of his life sentence exceeded his expected life span**. *Id*.

The sentence known as "LWOP" is an acronym for "life without **the *possibility* of parole."** The difference is important. The sentences imposed upon

the defendants in *Solem v. Helm, supra,* and *Harmelin v. Michigan, supra,* were life sentences **without the possibility of parole**. *Solem v. Helm, supra,* at 282; *Harmelin v. Michigan, supra,* at 2684. Thus, they would **never outlive** their imprisonment, no matter what.

Respondent's sentence is ***different*** from the sentence imposed on Helm and Harmelin. Respondent's sentence **is not** "without the possibility of parole." While he might be 87 years old before he becomes eligible for parole, and he might not live to see his 87th birthday, Mr. Andrade has the ***possibility*** **of parole.** A defendant sentenced in California to an ordinary life term is eligible for parole when he or she has served the minimum term. Cal. Pen. Code §3046. Here, the "minimum term" for each conviction is 25 years.

If a criminal defendant's age and expected lifespan were determinative of the character of his life sentence, ***any defendant*** who is 55 years of age and who is sentenced to a determinate term 25 years in prison could thereafter claim that he is serving a life sentence without the possibility of parole because actuarial tables tell us that he probably could not outlive that sentence. Yet a defendant who is 20 years of age and who is sentenced to prison for 50 years to life could not make the cruel and unusual punishment claim, **because his or her expected lifespan would extend *beyond* the date of his parole eligibility.** Such thinking is dubious logic, at best.

3. Respondent's life sentence is the shortest per count life sentence permitted by "Three Strikes" and is not a generic sentence.

The Court of Appeals assumed that Respondent's sentence was **identical to every other life term sentence** because ***all*** California's "Three Strikes" sentences are life terms. *Andrade v. Attorney General, supra,* at 767, fn.24. The court then used this fact to conclude that Respondent's case "is unusual even when compared to other three-strikes defendants" who committed more serious crimes. *Id*.

In truth, Respondent's minimum term of his life sentence is the ***shortest per count*** minimum term that Three Strikes permits; it is ***significantly shorter*** than the ***minimum terms under "Three Strikes" for current crimes considered to be more serious.***

Every person sentenced under the life term component of California's "Three Strikes" statutes receives the same basic sentence - a life term.[19] However, the sentencing of a life term defendant is a three-step process. Step one is the imposition of the life term. Step two is the determination of the minimum term.[20] Step three is the imposition of enhancements.[21]

Therefore, although the basic life sentence under "Three Strikes" is the same for all defendants who are convicted of a new felony and who have two or more "felony strikes," the minimum terms and enhancements vary greatly depending upon the

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[19] Cal. Pen. Code §1170.12(c)(2)(A).

[20] Cal. Pen. Code §1170.12(c)(2)(A).

[21] Cal. Pen. Code §1170.12(c) ["in addition to any other enhancements or punishment provisions which may apply."]

seriousness of the current offense and the defendant's criminal record.

The first method of calculating the minimum term is a term that is "three times the term otherwise provided as punishment for each current felony conviction."[22] *People v. Dotson*, 16 Cal.4th 547, 552, 66 Cal.Rptr.2d 423, 941 P.2d 56 (1997) [determinate terms]; *People v. Murphy*, 25 Cal.4th 136, 105 Cal.Rptr.2d 387, 19 P.3d 1129 (2001); *People v. Mendoza* 78 Cal.App.4th 918, 93 Cal.Rptr.2d 216(2000) [indeterminate terms].

The second method of calculating the minimum term is **a fixed minimum term of 25 years**.[23] *People v. Dotson, supra*; *People v. Dozier,* 78 Cal.App.4th 1195, 1201-1202, 93 Cal.Rptr.2d 600 (2000). Respondent's minimum terms resulted from this option.

The third method of calculating the minimum term is to calculate the total sentence (including enhancements) as it would have been calculated in the absence of "Three Strikes."[24]

After calculating the minimum term for an offense under all three options, the court must impose the ***greatest*** minimum term.[25] Thus, the ***minimum***

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[22] Cal. Pen. Code §1170.12(c)(2)(A)(i).

[23] Cal. Pen. Code §1170.12(c)(2)(A)(ii).

[24] Cal. Pen. Code §1170.12(c)(2)(A)(iii) ["the term determined by the court pursuant to §1170 for the underlying conviction. . ."]; *People v. Ruiz* 44 Cal.App.4th 1653, 1665, 52 Cal.Rptr.2d 561 (1996) ["Option (iii) permits the sentencing court to calculate the minimum term pursuant to existing law."]

[25] The "Three Strikes" statutes incorrectly use the term "greater." Since the correct grammatical term when comparing three or more choices is "greatest," California courts

term of a defendant with two "felony strikes" convicted of first degree murder **would be *75* years**, the ***greatest*** minimum term.[26]

This method of calculating the minimum term under "Three Strikes" means that the minimum term of a defendant convicted of a current ***violent*** offense **will always be greater** than the minimum term of Respondent's life terms.

The third step in the sentencing of a life term defendant is the addition of sentence enhancements - e.g., enhancements for use of a firearm or a deadly weapon or for infliction of great bodily injury, and status enhancements for prior convictions.[27] The enhancements must be added to and must be consecutive to the life term,[28] and are in addition to the minimum term of the life term. *People v. Dotson, supra.*

These last two steps produce *great* gradations in the length of time that defendants who are sentenced to life term sentences under California's "Three Strikes" statutes must actually serve in prison. For example, the first degree murderer who utilizes a firearm and who has two "felony strikes" must be sentenced under "Three Strikes" to life in prison, with a **75 year minimum term**, ***and*** two forms of

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have construed the statutory term "greater" to mean "greatest." *People v. Dotson, supra,* at 552-553.

[26] The prescribed sentence in California for first-degree murder without special circumstances is 25 years to life. Cal. Pen. Code §190(a).

[27] Cal. Pen. Code §1170.12(c) ["[I]n addition to any other enhancements or punishment provisions which may apply. . . ."]

[28] Cal. Pen. Code §1170.12(c)(2)(B); *People v. Hendrix,* 16 Cal.4th 508, 515, 66 Cal.Rptr.2d 431, 941 P.2d 64 (1997).

enhancements - 25 years to life in prison for the firearm use[29] and ten years for the prior serious felonies.[30] The total sentence would be **110 years to life in prison.**

Thus, life-term sentences **of violent felons** under "Three Strikes" are **considerably longer** than Respondent's terms.

4. Comparing Multiple Conviction Sentences With Single Conviction Sentences.

The Court of Appeals' opinion compared Respondent's **total sentence**, which is comprised of shorter sentences on ***multiple current convictions***, to sentences for other persons based on a ***single current conviction***. The concurring and dissenting judge in the Court of Appeal caught this error. *Andrade v. Attorney General, supra,* at 771, fn.4 (Sneed, J., concurring and dissenting).

To compare Respondent's total sentence for ***two new and separate felonies*** to the sentence of other persons convicted of only ***one*** new felony is **a faulty comparison**. *See, e.g., United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988); *accord, Hawkins v. Hargett*, 200 F.3d 1270, 1285, fn.5 (10th Cir. 1999).

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[29] Cal. Pen. Code §12022.53(d).

[30] Cal. Pen. Code §667(a).

5. Comparing A Recidivist Sentence With A Non-Recidivist Sentence.

The Court of Appeals pointedly rejected Petitioner's argument that the appropriate comparison of Respondent's sentence is to the sentences of **other** non-violent recidivists in California, saying that the argument

> "attempts to justify the constitutionally-suspect application of a statute by pointing to other applications of the same statute. We find this approach less than convincing."

Andrade v. Attorney General, supra, at 762.

We disagree. It is **illogical** to compare the sentence for a habitual criminal under a recidivist statute, which includes the fact that the felon is a recidivist offender, to the punishment of other persons who have committed crimes that in a vacuum are more serious, but who have ***not*** qualified as repeat felons. The appropriate comparison is between Respondent's sentence and the sentences for other persons who are ***similarly situated***.

II.
RESPONDENT'S SENTENCE DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

In *Solem v. Helm, supra,* this Court articulated a three-part test for conducting a proportionality analysis under the Eighth Amendment. These three parts are: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." 463 U.S. at 292.

In *Harmelin v. Michigan, supra,* a three justice concurring opinion articulated five principles that "give content to the uses and limits of proportionality review." These principles are: (A) **Deference to legislative authority** in making punishment choices, (B) **Acceptance of different penological theories**, (C) **Acceptance of divergent state views on crimes**, (D) Evaluating only **objective factors**, and (E) **Avoiding extreme, grossly disproportionate sentences**. 501 U.S. at 998-1001.

A. DEFERENCE TO LEGISLATIVE AUTHORITY

The power to define crimes and prescribe the punishments for their commission is "purely a matter of legislative prerogative." *Rummel v. Estelle, supra,* at 274. The legislature makes a judgment of the severity of a crime when it fixes the punishment for that crime. *Solem v. Helm, supra,* at 292. Federal courts should be "'reluctan[t] to review legislatively mandated terms of imprisonment'," *Hutto v. Davis*, 454 U.S. 370, 374,

102 S.Ct., 703, 70 L.Ed. 2d 556 (1982) citing *Rummel v. Estelle, supra,* at 274, and should "grant ***substantial deference*** to the broad authority that legislatures necessarily possess in determining the types and limits for crimes. . . ." *Solem v. Helm, supra,* at 290 (emphasis ours).

That the legislature should be the repository of the power to set prison terms for crimes is not new or novel.

> "[H]owever socially desirable the goals sought to be advanced. . ., advancing them through a freewheeling nonelected judiciary is quite unacceptable in a democratic society."

William H. Rehnquist, *The Notion of a Living Constitution,* 54 Tex. L. Rev. 693, 699 (1976). That these ultimate decisions as to people's freedoms should be in the hands of the legislature, instead of the hands of the judiciary, which is the least democratic branch of the government,[31] is a well-established principle ignored below.

The "Three Strikes" statutes were enacted in 1994 by an overwhelming vote of California's legislature and then by more than **71% of the California electorate** on November 8, 1994. *People v. Ingram,* 40 Cal.App.4th 1397, 1416, 48 Cal.Rptr.2d 256 (1995). **This reflects social values of Californians**. *People v. Ayon,* 46 Cal.App.4th 385, 400, 53 Cal.Rptr.2d 853 (1996). That "Three Strikes"

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[31] Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument,* 72 Iowa L.Rev. 35, 36 (1986); Jesse H. Choper, *Judicial Review and the National Political Process,* 4, 5 (1980); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, 73-75, 77-78 (1980).

was enacted with almost 75% support of the electorate is evidence that the punishments of "Three Strikes" are neither cruel nor unusual.[32] *See Rummel v. Estelle, supra,* at 275-276.

As the dissent perceptively wrote:

> "Our deference [to a state's legislative authority] should be at its apex. We have before us ***the clearest indication possible*** that a severe, mandatory sentence for recidivist offenders is the express penal philosophy of the citizens of California. The initiative process permits the electorate to speak for itself, and its voice ***should be heard, not ignored***."

Andrade v. Attorney General, supra, at 768 (Sneed, J., concurring and dissenting (emphasis ours)).

In passing the Three Strikes laws, California's legislature and electorate have determined that a defendant who commits **any** new felony (serious or not) **knowing that he faces dire consequences by virtue of prior convictions of serious felonies** is an intransigent criminal impervious to deterrence. *See People v. Edwards,* 97 Cal.App.4th 161, 165-166, 118 Cal.Rptr.2d 256 (2002).

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[32] The California Court of Appeal observed in 1996, "it may be inferred from the passage of Proposition 184 that considerably more than two-thirds of California voters do not consider it cruel or unusual punishment for a recidivist offender convicted of a serious felony with prior convictions for violent or serious felonies to receive a 25-year-or-more-to-life sentence." *People v. Ayon,* 46 Cal.App.4th 385, 400, 53 Cal.Rptr.2d 853 (1996).

B. ACCEPTANCE OF DIFFERENT PENOLOGICAL THEORIES

The "Eighth Amendment does not mandate adoption of any one penological theory." *Harmelin,* 501 U.S. at 999. California adopted the Determinate Sentence Law (DSL) and expressly declared that the purpose of **incarceration is *punishment***.[33] The "Three Strikes" statutes are an important part of **California's punitive penological theory**. The uncodified preface of the initiative version stated:

> "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."[34]

The principal penological theory of California's "Three Strikes" statutes is ***incapacitation of the habitual serious/violent felony offender***. *People v. Ingram, supra,* at 1415.[35]

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[33] Cal. Pen. Code §1170(a)(1) ["The Legislature finds and declares that the purpose of imprisonment for crime is punishment."]

[34] Similar language is codified in the "Three Strikes" statute enacted by the Legislature. Cal. Pen. Code §667(b).

[35] The change to a penological theory of incapacitating habitual criminals appears to have worked. California has enjoyed a 41% drop in its crime rate since it adopted the "Three Strikes" laws in 1994, while the rest of the country experienced a decline of only 19%. Federal Bureau of Investigation, *Crime in the United States,* Unified Crime Reports (1993, 1999).

C. ACCEPTANCE OF DIVERGENT STATE VIEWS ON CRIME AND PUNISHMENT

It is "an inevitable and often beneficial result of a federal structure" that there will be "marked divergences" in sentences and in the length of prison terms among the states. *Harmelin v. Michigan, supra,* at 1000 (Kennedy, J. concurring). The Eighth Amendment ***does not*** compel a state to enact criminal statutes that mirror those of the other states. Thus, there will always be ***some state*** whose punishments for crimes are the greatest. *Rummel v. Estelle, supra,* at 282.

Even if the *Andrade* majority opinion is correct and California's "Three Strikes" statutes are the most severe, *Andrade v. Attorney General, supra,* at 765, that fact is **in itself** meaningless. California is not mandated to conform its penal statutes to the "majority rule" or to the least common denominator of nationwide penalties. "Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct." *People v. Martinez*, 71 Cal.App.4th 1502, 1516, 84 Cal.Rptr.2d 638 (1999).

D. EVALUATION BASED ONLY ON OBJECTIVE FACTORS.

A cruel and unusual punishment determination should not totter upon the subjective views of the nine justices who happen to sit on this Court's bench when such a claim is presented. *Coker v. Georgia,* 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). The objective factors which have been identified are the following: (1) the gravity of the offense; (2) the harshness and the type of the punishment; (3) sentences imposed on other criminals in the same jurisdiction; and (4) sentences imposed for the same crime in other jurisdictions. *Harmelin v. Michigan, supra,* at 1000 (Kennedy, J., concurring); *Solem v. Helm, supra,* at 290-292.

Differences in the severity of terms of imprisonment are extremely difficult for a court to assess. Indeed, such measurements have been declared "purely a matter of legislative prerogative." *Rummel v. Estelle, supra,* at 274. In *Solem v. Helm, supra,* at 294, the Court expanded upon the same theme:

> "It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not."

This led the concurring justices in *Harmelin v. Michigan, supra,* at 1001, to state:

> "[W]e lack clear objective standards to distinguish between sentences for different terms of years. . . the relative

> lack of objective standards concerning terms of imprisonment has meant that " '[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [are] exceedingly rare.' " [citations]"

E. AVOIDANCE OF EXTREME, GROSSLY-DISPROPORTIONATE SENTENCES.

The Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin v. Michigan, supra,* at 1001 (Kennedy, J., concurring). A punishment is not cruel and unusual unless that punishment is "grossly disproportionate" or "significantly disproportionate" to the crime. *Rummel v. Estelle, supra,* at 281; *Solem v. Helm, supra,* at 288, 290, fn.17, 303.

Where distinctions in punishments are "subtle rather than gross," *Rummel v. Estelle, supra,* at 279, even where the challenged punishment is the "most stringent found in the 50 States, that severity hardly would render [a challenged] punishment 'grossly disproportionate' to his offenses or to the punishment he would have received in the other States." *Rummel v. Estelle, supra,* at 281.

Here, we submit that Respondent's sentence is not grossly disproportionate **in light of his criminal background:** the felony thefts, burglaries, drug dealing and addiction more than justify the two 25 to life terms he received.

F. APPLICATION

These principles lead to the conclusion that Respondent's sentence **does not constitute cruel and unusual punishment**. He is a recidivist of the first water, who has chosen to deal drugs and commit thefts to support his heroin habit, ***after*** having suffered multiple convictions of residential burglary, a crime California defined as "serious" before he chose to commit them and as a "strike" after he did so. Having committed serious property crimes and serious drug offenses, it is hardly surprising that Respondent's recidivism has earned him a harsh sentence.

CONCLUSION

Respondent's punishment is **a manifestation of California's penological theory that *recidivist* felons should be punished, deterred, and incapacitated**. Where an incorrigible recidivist felon like Andrade shuns rehabilitation, rejects the lessons of previous punishment, and fails to be deterred, the safety and comfort of society demands incapacitation. The means chosen by California are **indeterminate prison terms**, which have **high minimum terms and a maximum of life in prison**.

This penological theory is the product of overwhelming support in the California Legislature and among the California electorate. The punishment inflicted upon Respondent is severe, but is not grossly disparate when compared to punishments imposed upon other recidivist felons in California and recidivist felons in other jurisdictions.

That other criminals—some bloodthirsty—are more dangerous than Andrade does *nothing* for Andrade. He is a scoundrel, too, a scoundrel who has had his chances. Andrade meets the threshold; he

has descended below the line. He is a danger to California and so we have incapacitated him. We doubt that the framers of the Eighth Amendment or the states that ratified it would have had *any* objection.

In order to generate sympathy, counsel paints a false picture of our Three Strikes law, and so does the Court of Appeals. **Petty thieves are *not* rotting in California dungeons for their petty thievery**. Instead, "Three Strikers" have ***earned*** their long sentences because they are the most thick-skulled and predictably wicked of felons. They hurt people, they hurt communities, and they hurt our economy. What remains but to remove them from us for long periods of time?

Additionally, **our Three Strikes law is not a merciless machine**. Lest the law prematurely ensnare an offender who is not yet hopelessly hardened, there are avenues of escape along the way. Most of these are controlled by the judiciary, not the prosecution. Trial courts may reduce "wobbler" felonies to misdemeanors, thus removing defendants from the clutches of the Three Strikes scheme. They may also, in their sound discretion, strike the prior strike allegations from the charges in the furtherance of justice and where a defendant falls "outside the spirit" of the law, thus reducing the strike sentence or eliminating it altogether. That the California judiciary took a look at Andrade and determined he had nothing coming only reinforces our contention that ***he deserves his long sentence.***

Andrade **is not** the poster child for **overturning** California's just laws, and the Eighth Amendment does not so require.

Respectfully submitted,

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