No. 01-1127

In the Supreme Court of the United States

BILL LOCKYER, ATTORNEY GENERAL OF CALIFORNIA,

PETITIONER,

v.

LEANDRO ANDRADE,

RESPONDENT.

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

BRIEF OF DONALD RAY HILL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

This brief is filed on behalf of Donald Ray Hill ("Hill"). Like Respondent Leandro Andrade, Hill was sentenced pursuant to California's Three Strikes Law in violation of the Eighth Amendment's ban against cruel and unusual punishment. Hill was

[1] Pursuant to Rule 37.6 of the Rules of this Court, *Amicus* states that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *Amicus* or his counsel, has made a monetary contribution to the preparation or submission of this brief. Letters have been filed with the Clerk of the Court confirming that all parties have consented to the submission of this brief.

sentenced to a term of 40 years to life in prison for a single count of attempted residential burglary for breaking a $20 pane of glass, after having admitted, on the advice of counsel, the allegations of four prior nonviolent crimes. Hill's sentence is without the possibility of parole until he has served the minimum 40-year term, or until he is 82 years old. *See* Cal. Penal Code § 1170.12(c)(2)(A)(iii); *see also People v. Superior Court (Romero)*, 917 P.2d 628, 631 (Cal. 1996); *People v. Dotson*, 941 P.2d 56, 58-59 (Cal. 1997).

In the decision under review before this Court, the Ninth Circuit held unconstitutional under the Eighth Amendment a lifetime sentence without a meaningful possibility of parole imposed under California's Three Strikes Law in the context of a nonviolent property crime. *See Andrade v. California*, 270 F.3d 743, 767 (9th Cir. 2001), *cert. granted sub nom.*, *Lockyer v. Andrade*, 122 S.Ct. 1434, 152 L.Ed.2d 379 (U.S. Apr. 01, 2002) (No. 01-1127). Subsequently, in *Brown v. Mayle*, 283 F.3d 1019 (9th Cir. 2002), *petition for cert. filed*, 70 U.S.L.W. 3643 (U.S. Mar. 07, 2002) (No. 01-1487), the Ninth Circuit again held unconstitutional on Eighth Amendment grounds sentences of 25 years to life imposed on two recidivist defendants, emphasizing the absence of a realistic possibility of parole and the disproportionate penalty imposed for the *last* offense committed. *See Brown*, 283 F.3d at 1028. In both *Andrade* and *Brown*, the Ninth Circuit overturned the life sentences imposed as grossly disproportionate to the nonviolent property crimes at issue, namely, petty theft. *See Andrade*, 270 F.3d at 767; *Brown*, 283 F.3d at 1028.

Amicus has a vital interest in this Court's decision in this case. Like the defendants in *Andrade* and *Brown*, Hill was sentenced to an indeterminate sentence up to and including life in prison pursuant to California's Three Strikes Law for committing a single count of an attempted nonviolent property crime. Like Andrade, Hill, now 48 years old, will not be eligible for parole until he is over 80 years old. Mr. Hill will likely die in prison. Like the

property crimes committed in *Andrade* and *Brown*, the attempted burglary committed by Hill was nonviolent in nature and involved only minimal monetary damage.

More significantly, Hill's offense and his nonviolent criminal record bear a striking resemblance to the underlying circumstances of this Court's controlling opinion in *Solem v. Helm*, 463 U.S. 277 (1983). Both Hill and the defendant in *Solem* were convicted of low-impact felonies, i.e., nonviolent felonies causing minimal material damage, and both had prior convictions for burglary. Like the defendants' punishments in *Andrade*, *Brown* and *Solem*, Hill's sentence of 40 years to life in prison without a realistic possibility of parole, for the commission of a single count of a nonviolent attempted property crime, amounts to cruel and unusual punishment in violation of the Eighth Amendment.

In *Solem*, 463 U.S. at 291-292, and *Harmelin v. Michigan*, 501 U.S. 957, 1003 (1991) (Kennedy, J., concurring), this Court adopted a three-part test to determine the constitutionality of the punishment at issue. Pursuant to this test, the Court must first compare the gravity of the offense to the harshness of the penalty imposed. If that threshold comparison leads to an inference of gross disproportionality between the crime and the sentence, the Court must proceed to compare the sentence imposed with (1) sentences imposed for other crimes in the same jurisdiction, and (2) sentences imposed for the same crime in other jurisdictions. *See Solem*, 463 U.S. at 292; *Harmelin*, 501 U.S. at 1003-1004. Further, this Court has made clear that the protections of the Eighth Amendment rest on the proportionality of the crime of conviction to the penalty imposed and on the gravity of *that* crime; they do *not* hinge on the formal statutory classification of the crime as either a felony or misdemeanor, or on the political label attached accordingly by state legislatures. *See Solem*, 463 U.S. at 291-293; *Witte v. United States*, 515 U.S. 389, 400 (1995). No sentence is *per se* constitutional, and no state can insulate from this Court's constitutional review an otherwise unconstitutional

sentencing scheme simply by invoking concepts of federalism and deference to legislative determinations. *Solem*, 463 U.S. at 290.

Several Justices of this Court have expressed concern over the fact that California's Three Strikes Law applies to petty theft, a crime ordinarily classified as a misdemeanor. *See Riggs v. California*, 525 U.S. 1114 (1999) (Stevens, J., dissenting) (memorandum respecting denial of certiorari); *accord*, *Durden v. California*, 531 U.S. 1184 (2001) (Souter, J., dissenting) (memorandum respecting denial of certiorari). *Andrade* is a case directly on point. However, *Amicus* respectfully submits that the Justices' concerns should extend beyond the narrow issue in those cases. In *Solem*, the defendant, like Hill, was convicted of a felony; nevertheless, this Court, emphasizing the minimal damage and overall low impact caused by the offense, held that a lifetime prison term without possibility of parole violated the Eighth Amendment. *See Solem*, 463 U.S. at 296-297, 303. The distinction between a misdemeanor and a felony, like the penalty scheme applicable to repeat offenders, is a legislative classification based on a political agenda rather than on an individualized determination of the gravity of the triggering offense. While deference to legislative decisions is more pronounced when the crime of conviction is classified as a felony rather than as a misdemeanor (*Riggs*, 525 U.S. at 1114), it is always the gravity of the offense that must be determinative, *not* its formal classification. *See Solem*, 463 U.S. at 291-293. The political aim pursued with California's Three Strikes Law has failed in many respects, specifically with regard to property crimes, and it has led to a grossly disproportionate practice in sentencing within the state – both with regard to the crimes covered by the statute and with regard to the statute's target population. *See infra* Section III. The statute in its present form, therefore, simply cannot be considered a constitutional basis to uphold sentences like those imposed on Andrade or Hill.

While *Andrade* addresses a significant aspect of California's Three Strikes Law, Hill's case demonstrates that a proper

evaluation of the constitutional issues implicated here requires full consideration of California's recidivist law and its social, political, and constitutional consequences. Specifically, this Court should consider the constitutionality of imposing a sentence of life in prison for the commission of a single nonviolent property crime, regardless of whether the core criminal conduct is legislatively classified as a felony or a misdemeanor. Indeed, by simultaneously granting certiorari in the matter of *Ewing v. California*, a case involving the theft of three golf clubs worth $399 each (and thus, an offense classified as a felony), this Court has indicated its willingness to consider more broadly the constitutional implications of California's Three Strikes Law as applied not only to misdemeanor, but to felony conduct as well. *See Ewing v. California*, 122 S.Ct. 1435, 152 L.Ed.2d 379 (U.S. Apr. 01, 2002) (No. 01-6978) (memorandum granting certiorari and granting motion to proceed in forma pauperis); *People v. Ewing*, No. S098041, 2001 Cal. LEXIS 4704 (Cal. July 11, 2001); *People v. Ewing*, No. B143745, 2001 WL 1840666 (Cal. App. Apr. 25, 2001). Hill's triggering offense, attempted residential burglary, was nonviolent in nature and caused less damage than the property crimes committed by Ewing ($20, only one-sixtieth of the financial damage caused by Ewing) and Andrade (7½ times less than that caused by Andrade). That his crime has been characterized by the California legislature as a felony, rather than a misdemeanor or a wobbler offense, has no bearing on whether and to what extent the imposition of a life sentence is unconstitutionally disproportionate to the gravity of that offense. The Constitution requires individualized assessments of criminality and culpability; categorical legislative determinations and popular will cannot undermine this Court's power to define the scope and content of the Eighth Amendment.

If the decision below stands, it will have far-reaching effects on sentencing practices not only in California but also in other states, as well as on the political and legislative process involved in drafting and revising repeat offender statutes. While still

allowing for harsher penalties for recidivist offenders, it will also serve to reinforce the outer boundaries of what is constitutionally permissible under the Eighth Amendment with regard to low-impact property crimes, emphasizing that zeal in keeping crime rates under control, while commendable, does not justify the imposition of penalties that are clearly excessive in relation to the triggering offense. Intervention by this Court is necessary. Despite *Solem*, *Brown* and *Andrade*, and notwithstanding the concerns expressed in *Riggs* and *Durden*, courts that have considered the application of the Three Strikes Law to nonviolent crimes have refused to apply the Ninth Circuit's reasoning, distinguishing the cases at hand solely on the basis of the defendants' prior criminal history, or on the misdemeanor/felony distinction. Neither distinction, however, is necessarily sufficient, without more, to satisfy the Constitution. *See Solem*, 463 U.S. at 296-297, 303 (invalidating a sentence imposed in a felony case); *Brown*, 283 F.3d at 1028, 1036 (penalty must be proportionate to the last crime committed, even in the face of violent prior offenses such as robbery, including armed robbery).

For all the aforementioned reasons, *Amicus* Hill submits this brief in support of Respondent and urges this Court to uphold the decision of the Ninth Circuit in *Andrade.* Hill further urges this Court to clarify that the constitutionality of California's Three Strikes law as applied to nonviolent property crimes must be determined through an individualized assessment of the gravity of the offense charged in relation to the penalty imposed, rather than by unchecked deference to legislative and political determinations.

SUMMARY OF ARGUMENT

I. This Court, in *Solem*, 463 U.S. at 291-292, and *Harmelin*, 501 U.S. at 1003, adopted a three-step test to determine the constitutionality of the penalty imposed. Under this test, the Court must first compare the sentence to the gravity of the offense. If that threshold comparison leads to an inference of gross disproportionality, the Court must proceed to compare the

sentence imposed with (1) sentences imposed for other crimes in the same jurisdiction, and (2) sentences imposed for the same crime in other jurisdictions. *See Solem*, 463 U.S. at 292; *Harmelin*, 501 U.S. at 1003-1004. Applying these criteria, this Court in *Solem* affirmed the court of appeal's decision holding a life sentence without possibility of parole for issuing a "no account" check disproportionate and in violation of the Eighth Amendment. *See Solem*, 463 U.S. at 303. So, too, the Ninth Circuit in *Andrade* reversed a sentence of 50 years to life, which was imposed for two counts of petty theft. *See Andrade*, 270 F.3d at 767. Like the defendant in *Solem*, Andrade was convicted of a low-impact property crime. Nobody was physically put in harm's way by the defendants' crimes, and the material damage caused was extremely small. Like the defendant in *Solem*, Andrade has no meaningful expectation of parole. Moreover, the core content of Andrade's offense is that of a misdemeanor elevated to felony status by virtue of a legislative decision alone. *See Andrade*, 270 F.3d at 759. These factors raise an inference of gross disproportionality between the crime of conviction and the sentence imposed. This inference is further confirmed by a comparison between Andrade's sentence and those imposed otherwise in California, and those imposed in the four other states where petty theft triggers the repeat offender law. A sentence of life in prison for the crime of petty theft is unconstitutional and, as such, the Ninth Circuit's decision should be upheld.

II. It would be inconsistent with this Court's controlling case law to limit the protections of the Eighth Amendment to misdemeanor conduct. The crime committed by the defendant in this Court's controlling opinion, *Solem*, was a felony fraud, and it was thus in a felony case that this Court emphasized that the Eighth Amendment prohibits grossly disproportionate sentences. *See Solem*, 463 U.S. at 291-293. Like the misdemeanor crime of petty theft, nonviolent property crimes causing minimal material damage and no risk of harm are insufficiently grave to warrant the imposition of a life sentence, notwithstanding the

felony/misdemeanor distinction. Thus, even where a crime is deemed a felony in the first instance without regard to wobbler status, the Eighth Amendment prohibits the application of Three Strikes, where such application results in a grossly disproportionate penalty.

Further, the suspect double counting of petty theft (as in Andrade's case) is not the only instance of double counting contained in the California statute. To the contrary, California Penal Code section 667(a)(1) also allows for the dual use of prior convictions - first to bring an offense into the realm of the Three Strikes Law (and thus, trigger an automatically enhanced penalty of 25 years to life), and then again to further enhance that already-enhanced sentence by five years for each prior conviction counting as a "strike". Significantly, this method of double counting strikes as enhancements is expressly prohibited by other states' repeat offender sentencing schemes. This double counting of prior offenses gives rise to Double Jeopardy concerns. Other problematic features of the California system include: (1) the overall breadth of its application to low-impact nonviolent property crimes, an approach which presumes the application of the law and constrains judicial discretion in sentencing; (2) the significantly harsher penalties provided for low-impact property offenses; and (3) the substantial unavailability of parole. All these features apply to low-impact nonviolent property crimes regardless of whether the crime of conviction is a misdemeanor or a felony.

For all these reasons, the legislative decision whether to classify an act as a felony or a misdemeanor (or a misdemeanor elevated to felony status for purposes of the Three Strikes Law) cannot, ultimately, determine the scope of protection afforded by the Eighth Amendment. While deference to legislative decisions is less pronounced when the crime of conviction is classified as a misdemeanor rather than a felony, it must be the overall gravity of the crime of conviction, assessed on an individualized basis, which is determinative, not formal political classifications. *See Solem*,

463 U.S. at 291-293. It is true, as Petitioner contends, that the power to define the substance of criminal law is within the province of the State. However, that power is subject to this Court's constitutional mandate to define the scope and content of the Eighth Amendment. California is not free to invoke concepts of federalism and legislative deference to define out of existence federal constitutional protections. More fundamentally, the rights of the accused to be free from cruel and unusual punishment cannot be circumscribed by political or popular will.

III. While the purported aim of California's Three Strikes Law was crime control, that aim has failed. Instead, the law has resulted in a substantially disparate application with regard to the gender and race of the target population, the types of crimes involved, and the sentences imposed. The arbitrary and inconsistent application of the law within and among different counties of the state further undermines the constitutionality of Three Strikes. The application, prosecution and enforcement of the Three Strikes Law is arbitrary and irrational and, as such, Andrade's sentence cannot be considered proportionate under the Eighth Amendment.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING THAT A FUNCTIONAL LIFE SENTENCE FOR A LOW-IMPACT PROPERTY CRIME IS UNCONSTITUTIONAL IS IN CONFORMITY WITH THE GOVERNING CASE LAW OF THIS COURT.

The controlling three-part test to determine the constitutionality of a sentence under the Eighth Amendment was set forth by this Court in *Solem*, 463 U.S. at 291-292, and *Harmelin*, 501 U.S. at 1003-1004. Pursuant to these decisions, the Court must first compare the gravity of the offense to the harshness of the penalty. If that threshold comparison leads to an inference of gross disproportionality between the crime and the sentence, the Court must proceed to compare the sentence imposed

with (1) sentences imposed for other crimes in the same jurisdiction, and (2) sentences imposed for the same crime in other jurisdictions. *See Solem*, 463 U.S. at 292; *Harmelin*, 501 U.S. at 1003-1004. Furthermore, while a state is justified in imposing harsher penalties for recidivists, the enhanced punishment must not be an additional penalty for the earlier crimes but instead "a stiffened penalty for the latest crime, which is considered an aggravated offense" because of its repetitive nature. *See Witte*, 515 U.S. at 400.

This Court in *Solem* affirmed the Eighth Circuit's decision that a life sentence without possibility of parole for issuing a "no account" check was disproportionate and in violation of the Eighth Amendment's protection against cruel and unusual punishment. *See Solem*, 463 U.S. at 296-297, 303. Conversely, in *Harmelin*, this Court upheld a life sentence imposed for the possession of more than 650 grams of cocaine, emphasizing that the crime was "as serious and violent as felony murder without specific intent to kill." *See Harmelin*, 401 U.S. at 1002. So, too, in upholding a life sentence for obtaining money under false pretenses, which constituted the defendant's third felony, this Court in *Rummel v. Estelle*, emphasized the relatively prompt availability of parole within 10 to 12 years of the defendant's conviction. *See Rummel*, 445 U.S. at 280-281. In fact, according to the *Solem* Court, it was the realistic and relatively liberal availability of parole in *Rummel*, which largely distinguished it from the facts of *Solem*. *See Solem*, 463 U.S. at 301-302.

Like the defendant in *Solem*, Andrade was convicted of a low-impact property crime. Nobody was physically put in harm's way by either of the defendants' crimes, and the material damage caused was extremely small – $150 in stolen videotapes and a $100 "no account" check, respectively. Petitioner urges this Court to discount the fact that Andrade's crime was not a violent one and did not cause great financial damage. However, as the *Solem* Court expressly recognized, the absolute magnitude of the crime, particularly with regard to the violence involved, the resulting

harm, and the threat to society, is a key factor in determining the proportionality of the sentence. *See Solem*, 463 U.S. at 292-293 (observing that criminal laws make clear that nonviolent crimes are less serious than crimes marked by violence, that the law is more protective of people than property, and that even in the latter respect, "[s]tealing a million dollars is viewed as more serious than stealing a hundred dollars"). Further, like the defendant in *Solem* and unlike Rummel, Andrade has no meaningful expectation of parole. He has been sentenced to a functional lifetime prison term, being eligible for parole for the first time only years after his 80th birthday. *See Andrade*, 270 F.3d at 759. Moreover, the core content of Andrade's offense is that of a misdemeanor elevated to felony status by virtue of a legislative decision alone. *See Andrade*, 270 F.3d at 759. These factors raise an inference of gross disproportionality between the crime of conviction and the sentence imposed.

This inference is confirmed by a comparison of the sentences imposed under California's Three Strikes Law to other sentences imposed in California and the statutory schemes of other states. While Andrade's offenses would ordinarily be punishable by a fine not exceeding $1,000, or by imprisonment in the county jail not exceeding six months, or both (*see* Cal. Penal Code § 490), under the Three Strikes Law they are punished more severely than voluntary manslaughter, mayhem and arson. *See* Cal. Penal Code §§ 193, 204 and 451, respectively. In fact, by virtue of California Penal Code section 667 alone, for two counts of petty theft, Andrade was punished more severely than a defendant convicted of one count of first-degree murder, which carries a penalty of 25 years to life. *See* Cal. Penal Code § 190(a).

On the level of the intrajurisdictional comparison, only four other states have recidivist offender statutes which apply to petty theft at all, and all of these schemes contain features which ultimately would have made a less severe punishment a distinct probability. West Virginia does not count nonviolent priors, Texas has a liberal parole policy, the Rhode Island statute applies

only to thefts of more than $100, and in Louisiana, a sentence comparable to that imposed in California might well have been invalidated as excessive under the state's constitution. *See Andrade*, 270 F.3d at 763-765 (detailing the penalty schemes of Rhode Island, West Virginia, Texas and Louisiana). Significantly, no other state permits double counting of the defendant's crime of conviction. *See Riggs*, 525 U.S. at 1114. Only California's statutory scheme uses the defendant's recidivism to elevate petty theft to felony status and then raise the penalty from a fine or one-year term in the county jail to a term of 25 years to life in prison. California's Three Strikes Law contains another constitutionally problematic example of double counting, which affects other crimes, including attempted residential burglary. Specifically, California's law uses the defendant's prior offenses first to bring the case within the realm of the habitual offender statute and then again for further sentence enhancements. *See* Cal. Penal Code § 667(a)(1). Such double counting is not permitted in other states and is expressly prohibited by statute in North Carolina and Wisconsin. *See* N.C. Gen. Stat. § 14-7.6; Wis. Stat. Ann. § 973.12(2). In Indiana, the application of the recidivist statute has been held in violation of that state's constitutional prohibition against excessive sentences where it has the effect of double counting prior felonies. *See Wood v. State*, 734 N.E. 2d 296, 298-299 (Ind. 2000).

Taking all these circumstances into account, the Ninth Circuit's decision on review before this Court is squarely within the parameters established by *Solem* and *Harmelin*. *Rummel* is clearly distinguishable.

II. IT WOULD BE INCONSISTENT WITH THIS COURT'S CONTROLLING CASE LAW TO LIMIT THE PROTECTIONS OF THE EIGHTH AMENDMENT TO MISDEMEANOR CONDUCT.

Andrade's crime of conviction was misdemeanor petty theft and, as such, a seemingly obvious distinction between misdemeanor and felony conduct could be drawn in defining the

protective scope of the Eighth Amendment. In fact, several Justices of this Court have expressed concern over the inclusion of a traditional misdemeanor offense, which has been upgraded to felony status, in the catalogue of offenses that trigger the application of California's Three Strikes Law. *See Riggs*, 525 U.S. at 1114; *accord*, *Durden*, 531 U.S. at 1184. However, by simultaneously granting certiorari in the matter of *Ewing v. California*, a case involving the theft of three golf clubs worth $399 each (and thus, an offense classified as a felony), this Court has indicated that it is concerned with more than the limited facts of *Andrade*. *See Ewing*, 122 S.Ct. at 1435; *Ewing*, 2001 Cal. LEXIS 4704; *Ewing*, 2001 WL 1840666. Yet, the offense committed in *Ewing*, too, was a theft which, in the court's discretion, could have been downgraded to misdemeanor status. Like Andrade's crime, it was a so-called "wobbler" offense. *See id.* Conversely, the crime committed by the defendant in this Court's controlling opinion, *Solem*, was felony fraud. Significantly, therefore, it was in the context of a *felony* case that this Court clarified the Eighth Amendment prohibition on grossly disproportionate sentences and, in so doing, recognized that no sentence is *per se* constitutional. *See Solem*, 463 U.S. at 290, 291-293.

This Court's dissenting Justices in *Riggs* recognized the fundamental similarity between petty theft and the felony crime committed by the defendant in *Solem*, in that neither "involves . . . violence nor [the] threat of violence to any person; the amount of money involved is relatively small; and the State treats the crime as a felony." *See Riggs*, 525 U.S. at 1114 (internal citations omitted). It would be inconsistent with this Court's controlling case law to limit the protections of the Eighth Amendment to misdemeanor conduct or wobbler offenses. Like the misdemeanor crime of petty theft, nonviolent property crimes causing minimal material damage and no risk of harm are insufficiently grave to warrant the imposition of a life sentence, notwithstanding the

felony/misdemeanor distinction.[2] Thus, even where a crime is deemed a felony in the first instance without regard to wobbler status, the Eighth Amendment prohibits the application of Three Strikes, where such application results in a grossly disproportionate penalty.

Moreover, the suspect double counting of petty theft characterized as a "unique quirk" of California law by the dissenting Justices in *Riggs*, *see* 525 U.S. at 1114, is not the only instance of double counting contained in the California statute. Thus, any contention that *Andrade* should be limited to misdemeanor or wobbler offenses alone should be rejected. The statute also allows for the dual use of prior convictions first to bring an offense into the realm of the Three Strikes Law (and thus, trigger an automatically enhanced penalty of 25 years to life), and then again to further enhance that already-enhanced sentence by five years for each prior conviction counting as a "strike". Cal. Penal Code § 667(a)(1).[3] As this Court has repeatedly recognized, the double counting of prior offenses gives rise to Double Jeopardy concerns when it is unclear in what way exactly the prior offenses are considered. Specifically, the enhanced punishment imposed for the present offense must not be an additional penalty for the earlier crimes but instead "a stiffened penalty for the latest

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[2] The facts surrounding Hill's life sentence illustrate the point. Hill's offense of attempted residential burglary, although equally nonviolent and causing less damage than was the case in *Solem*, *Ewing* and even *Andrade* ($20, only one-sixtieth of the financial damage caused by Ewing, 7½ times less than that caused by Andrade, and one-fifth that caused by the *Solem* defendant), is statutorily classified as a felony, without regard to an individualized assessment of the gravity of his offense, and without discretion for the court to downgrade the classification to misdemeanor status. Further, unlike the *Andrade*, *Ewing* and *Solem* defendants' crimes, Hill's crime never progressed beyond the stage of attempt, a circumstance this Court has expressly recognized as one of the determinative factors in the context of the Eighth Amendment. *Solem*, 463 U.S. at 293 (stating that "attempts are less serious than completed crimes.").

[3] In Hill's case, this resulted in a further enhancement of the already-enhanced minimum term by 60%, from 25 to 40 years, and a corresponding delay in his eligibility for parole by the same amount of time.

crime, which is considered an aggravated offense" because of its repetitive nature. *See Witte*, 515 U.S. at 400; *Moore v. Missouri*, 159 U.S. 673, 677 (1895). Petitioner contends that California's statutory scheme adequately takes into account the defendant's recidivism without counting his prior offenses twice. *See* Pet.'s Brief, pp. 14-15. To the contrary, California's law transgresses the line between a "stiffened penalty for the latest crime" and an additional penalty for the earlier crimes. Not only does the California statute mandate the double counting of a prior misdemeanor offense in the context of elevating the defendant's current offense to felony status, it also specifically provides for further sentence enhancements of five years for every prior offense counting as a strike "*in addition to*" the [already-enhanced] "sentence imposed by the court for the present offense". Cal. Penal Code § 667(a)(1). These additional sentence enhancements have no recognizable connection to the crime of conviction and apply with equal force to misdemeanor and felony conduct. As such, they are double penalties for the defendant's prior crimes. By contrast, other states specifically prohibit any form of double counting and expressly provide that any enhanced penalty for the defendant's crime of conviction is merely enhanced (once) because that crime is a repeated one. *See* N.C. Gen. Stat. § 14-7.6; Wis. Stat. Ann. § 973.12(2); *see also Wood*, 734 N.E. 2d at 298-299.

Other aspects, which significantly distinguish California's Three Strikes Law from other repeat offender statutes, further confirm that California's refusal to require an individualized assessment of the gravity of each offense renders the application of that law to nonviolent property crimes unconstitutional. First, and most notably, some states' recidivist statutes do not apply to low-impact property crimes, including felonies such as attempted burglary. More specifically, the repeat offender statutes of Illinois, Maryland, Virginia and Wyoming are not applicable to low-impact property crimes such as residential burglary. *See e.g.* 720 Ill. Comp. Stat. 5/33B-1; 27 Md. Code Ann. § 643B; Va.

Code Ann. § 19.2-297.1; Wyo. Stat. Ann. §§ 6-1-1-4(xii), 6-3-301(a), 5-10-201(a). According to these states' statutory schemes, individuals committing attempted residential burglary are punished under the standard sentencing guidelines, which, for example, provide for a prison term of three to seven years in Illinois, or up to 10 years in prison in Virginia and Wyoming. *See* 730 Ill. Comp. Stat. 5/5-8-1;[4] Va. Code Ann. §§ 18.2-10, 18.2-26 and 18.2-91; Wyo. Stat. Ann. §§ 6-1-3-1(a).

Furthermore, several states permit the court wide discretion in determining the applicability of the habitual offender statute. In Connecticut, for example, a repeated offense *may* be treated as an offense of a higher class and thus punished more severely if the court determines such a penalty to be in the public interest. *See* Conn. Gen. Stat. §§ 53a-35a, 53a-40(c), 53a-103. In Florida, the court may similarly abstain from sentencing the defendant under the repeat offender statute if such a sentence is not necessary for the protection of the public. *See* Fla. Stat. Ann. § 775.084(4)(e). In Hawaii, too, the court can abstain from imposing the minimum sentence otherwise called for under the state's repeat offender law if there are mitigating circumstances, such as the fact that the defendant's criminal conduct neither caused nor threatened serious harm. *See* Hawaii Rev. Stat. §§ 706-606.5(5), 706-621(2)(a). In Idaho, while the state's statute provides for a mandatory minimum term of five years (which may extend to life) for a third felony conviction, *see* Idaho Code § 19-2514, courts have repeatedly emphasized the sentencing judge's wide discretion within the confines of the statute, which is mandatory only with regard to the five-year minimum term. *See State v. Holton*, 813 P.2d 923, 924 (Id. App. 1991) and *State v. Sena*, 674 P.2d 454, 458 (Id. App. 1983). Other states' recidivist statutes likewise provide for

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[4] 730 Ill. Comp.Stat. 5/5-5-3.2(b)(1), without bringing the crime within the realm of the repeat offender statute, allows for certain sentence enhancements pursuant to 730 Ill. Comp. Stat. 5/5-8-2 if the defendant has been convicted of a felony of the same or greater degree within the past 10 years.

discretion in their application. *See e.g.* Nev. Rev. Stat. Ann. § 207.010.2; N.J. Stat. Ann. §§ 2C:18-2, 2C:43-7 and 2C:44-3; Vt. Stat. Ann. tit. 13, § 11; *see also State v. Serr*, 664 P.2d 1301, 1305 (Wash. 1983) (prosecutorial discretion).

All these statutes not only provide for less-severe sentences in the context of their respective recidivist statutes – typically, maximum terms of up to 10 years – but they also require the sentencing judge to decide whether an enhanced sentence in application of the repeat offender statute is required *at all*. Such a sentence, then, is not presumed, but rather requires an affirmative determination, in each individual case, of whether or not it is necessary. Conversely, while California Penal Code section 1385(a) provides the court with some limited discretion to dismiss prior strikes under certain circumstances, California law presumes that "[t]he Three Strikes law . . . *takes the place* of whatever law would otherwise determine defendant's sentence for the current offense." *Romero*, 917 P.2d at 643. Thus, in stark contrast to the statutory schemes of Connecticut, Florida, Hawaii, Idaho, Nevada, New Jersey and Vermont, in California the court *presumes* that a third-time offender's case calls for a substantially longer sentence under Penal Code section 667 based on the existence of the defendant's prior offenses alone. The sentence then imposed falls out of that realm only if the court is permitted to exercise its discretion to strike enough prior strikes. California's approach, thus, is the reverse of that followed in the aforementioned other states.

Even where the imposition of enhanced sentences under the recidivist statute is not discretionary *per se*, other states provide for penalties significantly less severe than those imposed in California for low-impact felonies such as attempted residential burglary and other nonviolent property crimes. *See, e.g.*, Ariz. Rev. Stat. §§ 13-1507, 13-1001.C and 13-604(C) (eight to twelve years, presumptive term: 10 years for attempted unarmed residential burglary committed by a repeat offender); Tenn. Code Ann. §§ 39-14-403, 39-12-107, 40-35-106(a)(1) and 40-35-

112(b)(4) (four to eight years for attempted residential burglary committed by a repeat offender) and Wis. Stat. Ann. §§ 939.32(1), 939.50(3)(c), 939.62(1)(b) and 943.10(1)(a) (up to 13½ years for recidivist attempted burglary).

Furthermore, many states provide for individualized penalty scales, depending on the seriousness and/or violence of the last offense being punished. Hawaii, North Carolina and New York, in particular, each have multiple repeat offender statutes containing detailed distinctions between the number and types of offenses, the level of violence, and the danger involved. *See* Hawaii Rev. Stat. § 706-606.5; N.C. Gen. Stat. §§ 14-7.1, 14-7.7 and 14-7.12; N.Y. Penal Law §§ 70.04, 70.06, 70.08 and 70.10; N.Y. Criminal Procedure Law §§ 400.15, 400.16, 400.20 and 400.21.[5]

Significantly, even compared with those states where the sentence imposed in the case of a repeat offender would be more severe, the unavailability of parole distinguishes the punishment handed down under California law. Petitioner argues that the situation in California is akin to that underlying this Court's decision in *Rummel*, 445 U.S. at 280, and contends that the possibility of parole is not entirely insignificant here. *See* Pet.'s Brief, pp. 12, 19-20.[6] Petitioner's contention is without merit.

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[5] *See further* Ala. Code § 13A-5-9; Alaska Stat. §§ 12.55.125 and 12.55.155; Ark. Code Ann. §§ 5-4-501, 16-90-201; Colo. Rev. Stat. § 16-13-101; Conn. Gen. Stat. § 53a-40; Fla. Stats. Ann. § 775.084; Ga. Code Ann. § 17-10-7; La. Rev. Stat. Ann. § 15:529.1; Mo. Rev. Stat. § 558.016; N.J. Stat. Ann. §§ 2C:18-2, 2C:43-7 and 2C:44-3; Ohio Rev. Code Ann. §§ 2929.12 – 2929.14 (as amended); Or. Rev. Stat. §§ 161.725 and 161.737; Pa. Cons. Stat. § 9714; S.C. Code Ann. § 17-25-45 (as amended); Tex. Penal Code § 12.42 (held unconstitutional as applied to specific facts in *Scott v. State*, 55 S.W.3d 593 (Tex. Crim. App. 2001)); Utah Code Ann. 76-3-203.5; Vt. Stat. Ann. tit. 13, §§ 11 and 11a; Wyo. Stat. Ann. § 6-10-201.

[6] Petitioner urges that whenever a defendant's punishment consists of a term of years, even the most unlikely and remote eligibility for parole is sufficient to distinguish such a penalty from a life sentence. *See* Pet.'s Brief, pp. 19-20, 24. However, as this Court emphasized in *Solem*, and contrary to Petitioner's assertions, the determination of the proportionality of the sentence imposed is *not*

Under California Penal Code section 667, a recidivist offender is not eligible for parole before he has served a minimum term of 25 or more years (in Andrade's case: 50 years) – more likely than not, the rest of the defendant's natural life. It was precisely this type of ineligibility for parole that gave rise to the determination of gross disproportionality in *Solem*. *See id.*, 463 U.S. at 301-302. This substantially distinguishes the situation in California from that underlying *Rummel*, where the defendant was eligible for parole after only 10 to 12 years. *See Rummel*, 445 U.S. at 280-281.

The lack of a realistic possibility of parole renders California's law more punitive in comparison to other jurisdictions as well. For example, under the Arkansas parole provisions, individuals serving time for low-impact ("Class C") felonies become eligible for parole after serving one-third of their sentence. *See* Ark. Code Ann. § 16-93-608. In Montana, a prisoner may be paroled after having served one-fourth of his term. *See* Mont. Code Ann. § 46-23-201(2). In Nevada and New Hampshire, most repeat offenders are eligible for parole after having served a minimum of 10 years or less. *See* Nev. Rev. Stat. Ann. §§ 207.010.1(b)(2) and (3), 207.012; N.H. Rev. Stat. Ann. §§ 651-A:6(I), 651:6(I)(c) and (II)(a). Offenders committing a low-impact felony such as attempted residential burglary in Texas become eligible for parole after serving one-quarter of the sentence or 15 years, whichever is less. *See* Tex. Gov't Code § 508.145; *see also Rummel*, 445 U.S. at 280-281 (10–12 years). In Wisconsin, a defendant sentenced to one or more years in prison is eligible for parole after having served 25% of his sentence or six months, whichever is greater. *See* Wis. Stat. Ann. § 304.06(1)(b). In Wyoming, a defendant

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a matter of drawing a single bright line between "life without parole" sentences and functional life sentences only nominally expressed in years. Rather, it requires an evaluation of the circumstances surrounding each individual case; and the realistic availability of parole is a factor which must always be considered. *See Solem*, 463 U.S. at 294-295, 301-302; *see also Barker v. Wingo*, 407 U.S. 514, 533 (1972).

convicted of a low-impact felony such as attempted residential burglary is eligible for parole after having served the minimum term set by the trial court with a maximum sentence of up to 10 years. *See* Wyo. Stat. Ann. §§ 6-1-301(a), 6-3-301(a), 7-13-402(a).

Lastly, in several states where repeat offender statutes would otherwise mandate the imposition of life sentences (with or without a minimum term substantially higher than 10 or 15 years), state supreme courts have found such harsh sentences for nonviolent crimes involving little or no material damage unconstitutional under the respective provisions of their state constitutions' prohibitions against disproportionate sentencing. *See, e.g., Wanstreet v. Bordenkircher*, 276 S.E.2d 205, 214 (W.Va. 1981) (imposition of a life sentence for the third felony of forging a $43.00 check violates the West Virginia Constitution's proportionality principle); *accord, State v. Davis*, 427 S.E.2d 754, 757 (W.Va. 1993) (burglary); *State v. Hedrick*, 391 S.E.2d 614, 622 (W.Va. 1990) (same); *see also State v. Fain*, 617 P.2d 720, 726 (Wash. 1980) (quoting *Rummel*, 445 U.S. at 295 and holding unconstitutional a life sentence for low-impact property crimes where "[n]one of the crimes involved injury to one's person, threat of injury to one's person, violence, the threat of violence, or the use of a weapon").

When compared to other statutory schemes, California's Three Strikes Law imposes penalties for misdemeanor conduct and low-impact felonies which are not only substantially harsher than those in other jurisdictions but, as detailed above, also are disproportionate to the crime of conviction; without, at the same time, providing for a realistic possibility of parole. Nevertheless, and notwithstanding *Solem*, *Andrade*, *Brown*, *Durden* and *Riggs*, courts that have reviewed the application of California Penal Code section 667 to nonviolent crimes have uniformly rejected Eighth Amendment claims on the basis of the defendant's prior criminal

history or on the basis of the felony/misdemeanor distinction.[7] However, as illustrated *supra*, neither distinction has any merit. *See Brown*, 283 F.3d at 1028, 1036 (penalty must be proportionate to the last crime committed, even in the face of violent prior offenses such as robbery, including armed robbery); *Solem*, 463 U.S. at 296-297, 303 (invalidating a sentence imposed in a felony case). *Amicus* therefore urges this Court to clarify that the constitutionality of California's Three Strikes Law as applied to nonviolent property crimes must be determined through an individualized assessment of the gravity of the offense charged in relation to the penalty imposed, rather than by unchecked deference to legislative and political determinations or by reliance on prior convictions alone.

Petitioner repeatedly contends that the California legislature was justified in enacting Penal Code section 667 and urges this Court to uphold the statute as applied to nonviolent property crimes in its current form. *See* Pet.'s Brief, pp. 13-14, 16-17, 18-19, 22-23. Petitioner further contends that this Court should defer to California's legislative determinations and expressions of political and popular will. However, *Amicus* respectfully submits that the legislative decision whether to classify an act as a felony or a misdemeanor (or a misdemeanor elevated to felony status for purposes of the Three Strikes Law) cannot, ultimately, determine the scope of protection afforded by the Eighth Amendment. While deference to legislative decisions is less pronounced when the crime of conviction is classified as a misdemeanor rather than a felony (*see Riggs*, 525 U.S. at 1114), it is always the gravity of the offense which must be determinative, *not* its formal classification. *Solem*, 463 U.S. at 292-293. The protections of the Eighth

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[7] *See Franklin v. Lewis*, No. C 00-3421, 2002 WL 552333 (C.D. Cal. Apr. 9, 2002) (second-degree burglary); *Esparza v. Lockyer*, No. C 99-3781, 2001 WL 1528384 (N.D. Cal. Nov. 20, 2001) (driving under the influence); *People v. Romero*, No. E030010, 2002 WL 1481257 at *1 (Cal. App. July 11, 2002) (petty theft).

Amendment rest on the proportionality of the crime of conviction to the penalty imposed and on an individualized assessment of the gravity of *that* crime. The substantive protection of the Eighth Amendment simply does not hinge on legislative classifications or political distinctions between misdemeanor and felony conduct, or on the democratic decision to "get tough on crime." *See Solem*, 463 U.S. at 291-293; *Witte*, 515 U.S. at 400.

While states are justified in punishing recidivist offenders more harshly, they are not justified in legislating away a criminal defendant's constitutional rights.[8] California's power to criminalize, classify, and punish behavior is subject to the constitutionally mandated power of this Court to define the scope and content of the Eighth Amendment. As Petitioner concedes, California's Three Strikes Law is the expression of a decade of legislation under the motto "get tough on crime." Contrary to Petitioner's arguments, *see e.g.* Pet.'s Brief pp. 13-14, the statute's provisions are *not* based on the gravity of the offenses concerned. *See* Michael Vitiello, *Three Strikes: Can We Return To Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395 (1997); FRANKLIN E. ZIMRING, GORDON HAWKINS, SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA, Oxford University Press 2001, pp. 5-6. Notwithstanding Petitioner's assertions to the contrary, Three Strikes is not immune from constitutional scrutiny merely because it appears to pursue a rational goal such as crime prevention, or because it involves the exercise of legislative judgment. On Petitioner's reasoning, there is virtually no limit to the type of act which could be subjected to severe criminal punishment, so long

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[8] Indeed, *Amicus* respectfully submits that if this Court were to define the constitutional floor solely in terms of categorical and politically determined classifications, such as the felony/misdemeanor distinction, then states would be free to define out of existence Eighth Amendment protections simply by deeming all crimes to be felonies. Rather, the constitutional inquiry must turn on an individualized assessment of the gravity of the last offense charged, regardless of the state's legislative classifications.

as the state articulates a rational goal. However, it is the province, indeed, the duty of this Court, to check the exercise of that judgment and ensure that the application of California's statutory scheme passes constitutional muster as applied to every *individual* case. *Amicus* submits that in many cases, it does not.

III. THE POLITICAL AND LEGISLATIVE GOALS PURSUED BY THE ENACTMENT OF CALIFORNIA'S THREE STRIKES LAW HAVE FAILED, AND THE LAW PRODUCES DISPARATE RESULTS.

Petitioner asserts that California's Three Strikes Law targets only those criminals who pose the greatest danger to society, and that it is effective in deterring recidivist offenders. *See* Pet.'s Brief, pp. 17, 21. A closer analysis of the statute's history and effect to date shows that this rather sweeping assumption, while reflecting popular sentiment, is in fact not sustainable.

California's Three Strikes Law was passed on a wave of popular support for "tough" crime control legislation after the abduction, sexual assault and murder of Polly Klaas, a 12-year-old girl from a small Northern California town. *See* ZIMRING, HAWKINS, KAMIN, pp. 5-6. By the end of 1998, four years after the law had been passed, California had generated more than 40,000 sentences under that statute. In sharp contrast, each of the other jurisdictions that had recidivist offender laws at that time had accumulated less than 1,000 sentences under their respective statutes. Fourteen of those other jurisdictions had even fewer than ten sentences each, and the federal system had 35. *See id.* at 20-21, 224. Yet, in 1993, the year prior to the passage of the California law, only 4.3% of all felony convictions involved defendants who had a record of two or more prior offenses, and only 9.6% of all defendants had one prior conviction. Thus, 86% of all defendants were first-time offenders. *See id.* at 43. Similarly, of the defendants arrested for violent felonies, 87% had no criminal record, 9.6% had one prior conviction, and only 3% had two or more prior convictions. *See id*. at 46.

At the same time, the statute disproportionately targeted male and African-American defendants. Whereas in 1993, the number of male defendants was roughly five times as high as that of female defendants, the ratio of male defendants who would have been subject to punishment under California Penal Code section 667 one year later for at least a second or third offense was 19 times that of the number of female defendants (approximately 95% male, compared to 5% female defendants). *See* ZIMRING, HAWKINS, KAMIN, p. 55. Similarly, in 1993, the year before the Three Strikes Law went into effect, the percentages of first-time African-American, Hispanic and Caucasian offenders were within 10 percentage points of each other. The number of African-American defendants who would have been eligible for sentencing under the Three Strikes Law, however, was twice that of Hispanic and Caucasian defendants for second strikers (50%, compared to 24% Caucasians and 26% Hispanics). Of the defendants convicted of a third or higher number of offenses, the number of African-Americans was three times that of Caucasians and four times that of Hispanics (64%, compared to 21% and 16% respectively). *See id.* at 57.

So, too, there is disparity in the degree to which the new law enhanced the minimum sentences imposed for different types of crimes. For example, the minimum term for rape was raised by a little over four times (from six to 25 years). The minimum term for second-degree burglary, however, a significantly less serious crime and, like theft, a so-called wobbler offense, which can be charged as either a misdemeanor or a felony, was raised by a factor of 25 (from one to 25 years). The minimum term for grand theft was raised 12½ times (from two to 25 years). Thus, the escalation of punishment under the Three Strikes Law is diametrically opposite to the gravity of the crime of conviction. Similarly, there is no difference between the minimum term imposed on a recidivist offender whose third crime of conviction is rape, and that imposed in the case of a repeat offender whose third crime of conviction is second-degree burglary or petty theft.

These features are plainly inconsistent with the statute's stated goal of providing punishment that is proportionate to the offense charged. *See* Cal. Penal Code §§ 667(b), 1170(1)(a); *see also* ZIMRING, HAWKINS, KAMIN, pp. 120-121.

While in the years following the passage of California Penal Code section 667 the median and mean prison terms for first-time offenders stayed approximately the same, *see* ZIMRING, HAWKINS, KAMIN, p. 57, there were dramatic increases in the terms imposed in repeat offender cases. For third-strikers alone, the median prison term increased by 200% from 24 to 72 months, and the overall mean term increased by more than 400%, from roughly 28 to 123 months. The effect of the new law was to create a significant bias in the distribution of punishments, producing an increased disproportion of sentences in the process. *See id.* at 74-75. While this trend was apparent with regard to all types of offenses, it was noticeable particularly with regard to nonviolent property crimes such as burglary and theft. The mean incarceration of burglary first-strikers increased over threefold (from 27 to 88 months), that of burglary multiple-strikers fivefold (from 27.5 to 139.2 months). While the mean incarceration of theft first-strikers increased only by a little over one-fourth (from 23 to 28 months), that of theft multiple-strikers jumped to almost seven times its prior length, from 12.4 to 83.3 months. In individual cases like Andrade's, the actual disparity is even greater. *See id*. at 77, 122-123. Statistically, the expected cumulative burden of the admission of third-time repeat offenders sentenced to a prison term of 25 years to life in the California prison system is, on average, 20 times larger in its 20th year as it is in its first year, and the expected cumulative effect of second-strike offenders is even greater. *See id*. at 135, 137.

At the same time, the application of the new law throughout California has been extremely uneven, in that in San Francisco and Alameda Counties, for example, little net change occurred as a result of the Three Strikes Law alone. In contrast, courts in San Diego, Los Angeles and Sacramento Counties immediately started

to make ample use of the law's 25-years-to-life sentencing feature, bringing the number of convictions under the statute to a total of seven times those in San Francisco and Alameda Counties. *See* Mile Males, *Striking Out: The Failure of California's 'Three Strikes and You're Out' Law*, 11 STAN. L. & POL'Y REV. 65, 68 (1999); Samara Marion, *Justice by Geography? A Study of San Diego County's Three Strikes Sentencing Practices from July – September 1996*, 11 STAN. L. & POL'Y REV. 29 (1999); ZIMRING, HAWKINS, KAMIN, pp. 81-83. Similarly, while 80% of the longest pre-Three Strikes Law sentences were handed down for violent offenses, almost half of the longest prison terms imposed after the passage of the statute were sentences for nonviolent crimes, and a majority of the penalties of 15 years or more were for property crimes resulting in a third strike 25-years-to-life sentence. All of these sentences were significantly longer than those for the much more serious crimes of murder, voluntary manslaughter and robbery imposed after the Three Strikes Law took effect. These disparate impacts plainly belie the language of Penal Code section 1170, which characterizes the statute's purpose as being "best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentence of an offender committing the same offense under similar circumstances." *See* Cal. Penal Code § 1170(1)(a); ZIMRING, HAWKINS, KAMIN, pp. 117-118, 195. [9]

Significantly, while crime control was a pronounced purpose of California's Three Strikes Law, the existing downward trend in the state's crime rate cannot be attributed to the passage of the statute. First, the trend began in October 1991, long before passage of the statute was even considered likely, let alone before it actually took effect. Second, the trend did not increase in significance after the law took effect. Rather, the rate of decrease stayed approximately the same. Third, there was no statistically

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[9] The death risk from robbery is 50 times as great as from burglary. *See* ZIMRING, HAWKINS, KAMIN, p. 195.

significant decline of the share of the law's target groups in the total crime committed before and after the passage of the law. Fourth, although the absolute numbers of years of incarceration in California are significantly higher than those recorded nationwide, the trend in California mirrors that in the United States as a whole, regardless of the existence and scope of repeat offender statutes elsewhere, both with regard to the decline in crime and with regard to rates of incarceration. *See* ZIMRING, HAWKINS, KAMIN, pp. 88, 96-98, 101, 154-159.

Consequently, the only results thus far achieved by the Three Strikes Law are gross disparities in sentencing with regard to the gender and racial makeup of the target population and with regard to the prison terms provided and imposed (both on average and with regard to individual types of crimes). The arbitrary and inconsistent application of the law within and among different counties of the state further undermines the constitutionality of Three Strikes, both generally and as applied to nonviolent crimes. While the purported aim of California's Three Strikes Law was crime control, that aim has failed. The disparate application, prosecution and enforcement of the Three Strikes Law must be considered in this Court's evaluation of the constitutionality of California's imposition of a lifetime sentence for the commission of a nonviolent property crime. Given these serious flaws, Andrade's sentence cannot be considered proportionate under the Eighth Amendment.

CONCLUSION

For all the aforementioned reasons, *Amicus* Hill respectfully urges this Court to uphold the decision of the Ninth Circuit.

Respectfully submitted,

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