No. 01-6978

In the

Supreme Court of the United States

Gary A. Ewing,
Petitioner,

v.

State of California,
Respondent.

On Writ of Certiorari to the
California Court of Appeal, Second Appellate District

BRIEF OF THE STATES OF ALABAMA, INDIANA, NEBRASKA, OKLAHOMA, OREGON, TEXAS, UTAH, WASHINGTON, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT STATE OF CALIFORNIA

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INTEREST OF AMICI CURIAE

Amici curiae States of Alabama, Indiana, Nebraska, Oklahoma, Oregon, Texas, Utah, Washington, and Wyoming respectfully submit this brief**,** pursuant to Sup. Ct. R. 37.4, in support of the respondent State of California, urging this Court to affirm the judgment of the California Court of Appeal and reject Ewing's claim that his sentence of twenty-five years to life in prison violates the Eighth Amendment. Because Ewing was sentenced under California's habitual offender statute (the "Three Strikes Law"), the outcome of this case may affect the validity of other criminal recidivist statutes. As of 1992, "[s]uch laws [were] in effect in all 50 States . . . and several ha[d] been enacted by the Federal Government, as well." *Parke v. Raley*, 506 U.S. 20, 26 (1992) (citations omitted). Amici submit this brief to defend these statutes and to protect their valid and long-recognized interest in punishing more severely those criminal offenders who "by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society . . . ." *Rummel v. Estelle*, 445 U.S. 263, 276 (1980).

SUMMARY OF ARGUMENT

To show that his is one of those rare sentences that violates the Eighth Amendment, Ewing must demonstrate more than just a lack of strict proportionality between the crime and sentence. Rather, he must demonstrate that he is suffering under an "extreme sentence [that is] 'grossly disproportionate' to the crime." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., joined by O'Connor and Souter, JJ.). Because Ewing's sentence was based not only on his most recent felony offense but also on

California's "valid interest in deterring and segregating habitual criminals," *Parke v. Raley*, 506 U.S. 20, 27 (1992) (citing *Rummel*, 445 U.S. 263, 284 (1980)), any proportionality review must place great weight on his status as a recidivist. Imposing a harsher sentence upon one with previous felony convictions is a "practice . . . no longer open to serious challenge." *Oyler v. Boles*, 368 U.S. 448, 451 (1962). For one who has previously been convicted of two serious or violent felonies and has now been convicted of a felony again, a sentence of twenty-five years to life does not raise an inference of gross disproportionality.

Even if Ewing could raise the inference that his sentence is "grossly disproportionate" to his offense, an intra/interjurisdictional comparative analysis does not validate the inference. Indeed, Ewing's attempt to demonstrate the contrary only establishes that such an analysis does not provide the "objective criteria" necessary for proportionality review. For example, in conducting his intrastate analysis, Ewing compares only what he considers comparable and ignores the relevance of sentences imposed upon recidivists who have committed similar offenses. According to Ewing's own brief (p. 23), however, more than 2,000 other recidivists in California have received identical sentences for committing "property crimes." His sentence is, therefore, not disproportionate to those imposed in similar circumstances.

Likewise, the interjurisdictional analysis conducted by Ewing is outcome-based and flawed. He discounts the comparative relevance of state statutes authorizing similar punishments on the basis that the imposition of the equivalent sentence is not mandatory, but simply at the top of the statutory range. If the goal is,

however, to seek "objective" evidence of whether other States deem similar punishments in similar circumstance to be appropriate, the maximum punishment authorized should be the only consideration. Considering that a judge in another State might impose a lesser sentence while ignoring the objective evidence of what the legislature has deemed an appropriate punishment does not provide a basis for meaningful comparison. Moreover, in discounting the severity of other state statutes because of discretionary aspects, Ewing ignores the discretionary aspects of California's "Three Strikes" law. Utilizing Ewing's reasoning, a court reviewing a sentenced imposed elsewhere could discount the severity of California's statute on the basis that, in California, a trial judge has the discretion to strike prior felony convictions thereby completely removing a defendant from the effects of the "Three Strikes" law. Similarly, making comparisons on the basis of parole eligibility does not result in the "objective criteria" necessary for proportionality review. Unless one takes into account the specific provisions of each parole system under consideration, no meaningful comparison can be made.

Finally, even if Ewing's analysis could accurately be labeled objective, and assuming he has established that his sentence is the most severe imposed for a similar offense in the Country, such would not render his sentence unconstitutional. "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other state." *Rummel*, 445 U.S. at 282 (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)). If California is that State, it may be a

result of unique concerns and issues which necessitate the distinction. Defining criminal offenses and sanctions requires a balancing of various penological goals such as retribution, deterrence, incapacitation, and rehabilitation. California has reasonable determined to place more weight upon deterrence and incapacitation in cases where an individual, having "been both graphically informed of the consequences of lawlessness and given an opportunity to reform, . . . commits yet another felony." *Rummel*, 445 U.S. at 278. Its judgment should not be overturned lightly.

ARGUMENT

In 2000, petitioner Gary Ewing was convicted of one count of felony grand theft of personal property, in violation of California Penal Code Section 487(a), for stealing three golf clubs valued at $1,200 from a pro shop. (Clerk's Tr. at 80–81) Ewing had previously been convicted of three counts of residential burglary and one count of robbery, each of which is considered to be a serious or violent felony under California's recidivist statute. (Clerk's Tr. at 90) Because he had two or more serious or violent felony convictions, the trial court sentenced Ewing to twenty-five years to life in a state penitentiary. (App. 13–15) In view of his habitual offender status, Ewing's sentence was not disproportionate to his crime.

I. This Court Need Not Engage in Any Intra/Interjurisdictional Analysis of Ewing's Sentence, Because His Sentence Is Not "Grossly Disproportionate" to His Crime When Considered in the Light of His Habitual Offender Status.

A. In *Harmelin v. Michigan*, this Court limited the intra/interjurisdictional analysis of *Solem v. Helm* to those rare cases in which the defendant makes the threshold demonstration that his sentence was "grossly disproportionate" to his crime.

This Court has rarely accepted the claim that a sentence is disproportionate to the crime and therefore violates the Eighth Amendment. *See Rummel v. Estelle*, 445 U.S. 263, 272 (1980) ("Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."). Most recently, in *Harmelin v. Michigan*, 501 U.S. 957 (1991), this Court rejected the petitioner's claim that his sentence to life in prison without the possibility of parole was "significantly disproportionate" to the crime he had committed — possession of 672 grams of cocaine. *Harmelin,* 501 at 961. The Chief Justice and Justice Scalia would have ruled that "the Eighth Amendment contains no proportionality guarantee" at all. *Id.,* at 965 (Scalia, J., joined by the Chief Justice). In a narrower statement that constitutes the controlling opinion in the case,[1] Justice Kennedy, joined by Justices O'Connor

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[1] *Nichols v. United States*, 511 U.S. 738, 745 (1994) ("When a fragmented Court decides a case and no single

and Souter, ruled that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.*, at 1001 (Kennedy, J., joined by O'Connor and Souter, JJ.).

Even before *Harmelin*, this Court had made clear that a defendant bore a heavy burden to establish that his sentence was disproportionate to his crime. In *Rummel v. Estelle*, 445 U.S. 263 (1980), this Court refused to strike down a sentence of life imprisonment imposed under a recidivist statute providing that "[w]hoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." *Id.,* at 264. While the petitioner's most recent offense was relatively minor — obtaining $120.75 by false pretenses — this Court acknowledged the State's interest to punish more severely "those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Id.*, at 276. Two years later, in a per curiam opinion, this Court likewise rejected a claim that a "40-year sentence was so grossly disproportionate to the crime of possessing less than nine ounces of marihuana that it constituted cruel and unusual punishment." *Hutto v. Davis*, 454 U.S. 370, 371 (1982).

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rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'") (quoting *Marks v. United States*, 430 U.S. 188 (1977)).

The 1983 case of *Solem v. Helm* was the first and only decision by this Court to invalidate as disproportionate a sentence imposed under an habitual offender statute. 463 U.S. 277, 303 (setting aside sentence of life without parole for habitual offender whose most recent crime had been passing bad check of $100). In so doing, *Solem* set forth a three-factor test — "(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" — for analyzing the proportionality of a given sentence. *Id.* at 292. In *Harmelin*, however, Justice Kennedy clarified that the *Solem* test did not come into play until after a reviewing court had made the threshold determination that the sentence was "grossly disproportionate" to the crime. *Harmelin*, 501 U.S. at 1005. "A better reading of [this Court's] cases," Justice Kennedy said, "leads to the conclusion that intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.*

B. The threshold determination whether a defendant's sentence is "grossly disproportionate" to his crime should logically take into account the defendant's habitual offender status.

In short, this Court should not engage in any sort of intra/interjurisdictional comparative analysis unless it first finds that Ewing's sentence of twenty-five years to life is "grossly disproportionate" to his crime. In making this threshold determination, moreover, this

Court should take into account an additional factor not present in *Harmelin*: the fact that the California court enhanced Ewing's sentence because he belonged to the category of offenders "who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Rummel*, 445 U.S. at 276. The harsher sentence imposed upon Ewing was a direct result of his habitual criminal activity, not just of his most recent crime. Any proportionality analysis of the sentence he received must, therefore, place great weight upon his habitual offender status.

This Court has long upheld the right of the States to punish habitual offenders much more severely than their instant violation might otherwise warrant. "States have a valid interest in deterring and segregating habitual criminals." *Parke v. Raley*, 506 U.S. 20, 27 (1992) (citing *Rummel*, 445 U.S. at 284). "Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times." *Parke*, 506 U.S. at 26. "The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England." *Graham v. West Virginia*, 224 U.S. 616, 623 (1912). By 1992, "[s]uch laws [were] in effect in all 50 States . . . and several ha[d] been enacted by the Federal Government, as well." *Parke*, 506 U.S. at 26–27 (citations omitted). Cf. *Atkins v. Virginia*, 536 U.S. ___, ___ (2002) (slip op. at 11) ("the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal").

In short, the States have found habitual offenders to be categorically *more* culpable than the average criminal.

This Court first upheld the constitutionality of a state recidivism statute in the 1895 case of *Moore v. Missouri*, 159 U.S. 673. "Similar provisions", the Court noted, "have been contained in state statutes for many years, and they have been uniformly sustained by the courts." *Id.,* at 676. In *Moore*, the petitioner had been indicted for burglary in the first degree and larceny in a dwelling house. *Id*., at 673. He had previously been convicted of grand larceny and had served a sentence of three years. *Id*. Moore was convicted of burglary in the second degree and, pursuant to Missouri's "Second Offence" statute, sentenced to life in prison. *Id*. Even though, because of the prior conviction, Moore was subjected to a much more severe sentence, the Court rejected Moore's claim that the punishment was "cruel and unusual" and held that a "state may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offenses than for a first offense against the law." *Id*., at 678. In so ruling, the Court did not conduct any sort of proportionality analysis. Rather, it simply cited *In re Kemmler*, 136 U.S. 436 (1890), a decision upholding execution by electrocution.

In 1901, this Court noted that "[s]tatutes imposing aggravated penalties on one who commits a crime after having already been twice subjected to discipline by imprisonment have long been in force in Massachusetts," and upheld a Massachusetts statute "aimed at habitual criminals." *McDonald v. Massachusetts*, 180 U.S. 311, 312. Eleven years later, this Court upheld against an Eighth Amendment challenge a West Virginia Statute requiring the

imposition of a life sentence upon any individual convicted after having "been twice before sentenced in the United States to confinement in a penitentiary." *Graham*, 224 U.S. at 622; see also *Gryger v. Burke*, 334 U.S. 728, 732 (1948). Recognizing this unbroken line of jurisprudence, this Court declared in 1962 "that the constitutionality of the practice of inflicting severer criminal penalties upon habitual offenders is no longer open to serious challenge." *Oyler v. Boles*, 368 U.S. 448, 451; see also *Spencer v. Texas*, 385 U.S. 554, 559 (1967) ("No claim is made here that recidivist statutes are themselves unconstitutional, nor could there be under our cases").

The decisions above did not turn on issues such as those considered by the Ninth Circuit in *Andrade v. Attorney General of California*, 270 F.3d 743, 748 (9th Cir. 2001)[2] — whether the "triggering offense" could be labeled "serious"; and, whether the statute in question provided for a "washout" period, after which prior convictions will no longer be considered. Rather, the decisions rested on the simple proposition that the States had an interest in "inflicting severer punishment upon old offenders." *Graham*, 224 U.S. at 616. Not until *Solem v. Helm* did this Court so much as suggest that, in considering the constitutionality of a sentence imposed pursuant to an habitual offender statute, the "focus [must be] on the principal felony — the felony that triggers the life sentence." 463 U.S. at 296 n. 21. Such a "requirement" is inconsistent with the very purpose of recidivism statutes, under which prior convictions are more than just "relevant to the

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[2] On April 1, 2002, this Court granted California's petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit in this case. *Lockyer v. Andrade*, 01-1127.

sentencing decision." *Id.*[3] When enhancing a sentence due to recidivism, the prior convictions are the main reason for the sentencing decision. *Graham*, 224 U.S. at 616 ("the repetition of criminal conduct aggravates . . . guilt and *justifies* heavier penalties") (emphasis added); *Moore*, 159 U.S. at 677 ("increase [in] punishment *by reason of the commission of the first offense* was not cruel and unusual") (emphasis added).

If a defendant's recidivism is a legitimate basis for an increase in his punishment, it logically should also be a factor considered by a court that is reviewing the proportionality of that punishment. Prior to *Solem*, this Court had rejected the notion that a reviewing court had to determine proportionality by reference only to the "triggering offense." In *Rummel*, this Court stated that it "need not decide whether Texas could impose a life sentence upon Rummel merely for obtaining $120.75 by false pretenses." *Id.* at 276. "[H]ad Rummel only committed that crime, . . . he could have been imprisoned for no more than 10 years." *Id.* This Court gave considerable weight to the State of Texas' interest in punishing recidivism in determining

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[3] This is not the only reasoning employed in *Solem* that is demonstratively inconsistent with other decisions of this Court. For example, in striking down the sentence in *Solem*, the Court considered individual characteristics of the petitioner – e.g., his age, his addiction to alcohol – and determined that, because parole was not available, "[n]either Helm nor the State will have an incentive to pursue clearly needed treatment for his alcohol problem, or any other program of rehabilitation." *Id.* In *Harmelin*, a clear majority of this Court expressly rejected the relevance of such considerations. *Harmelin*, 501 U.S. at 996 ("We have drawn the line of required individualized sentencing at capital cases and see no basis for extending it further.").

that the life sentence Rummel received did not violate the Eighth Amendment. Similarly, here, "the interest of the State of [California] is not simply that of making criminal the unlawful acquisition of another person's property; it is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." 445 U.S. at 276.

Solem did not expressly overrule *Rummel*, and *Harmelin* in turn limited the reasoning of *Solem* to those rare cases in which a defendant was able to make a threshold demonstration that his sentence appears "grossly disproportionate" to his crime. Logically, then, the defendant's habitual offender status must remain at least a factor in the threshold determination of "gross disproportionality." Here, Ewing's recidivism is the primary reason for the sentence imposed upon him. It would make little sense for it to be separated from the "threshold comparison of the crime committed and the sentence imposed." *Harmelin*, 501 U.S. at 1005 (Kennedy, J., joined by O'Connor and Souter, JJ.).

C. Ewing's sentence is not "grossly disproportionate" to his crime of felony grand theft and his habitual offender status.

In short, contrary to Ewing's contention (Br. 23), the "threshold comparison" here is not whether "a sentence of life imprisonment without possibility of parole for twenty-five years for shoplifting three golf clubs raises an inference of gross disproportionality." Rather, the question is whether, upon conviction for a felony after having been previously convicted of two

serious or violent felonies, a sentence of twenty-five years to life raises an inference of gross disproportionality.

Under the analysis Ewing erroneously proposes, his repeat offender status would not be relevant unless an inference of gross disproportionality is drawn. At that point, moreover, Ewing contends (Br. 29) that his repeat offender status would be relevant only to consider "whether the state's interest in enhancing punishment for habitual offenders can rebut the inference of gross disproportionality." This proposition is inconsistent with the indisputable fact that Ewing's recidivism is the reason for his harsher sentence. As demonstrated, separating the recidivism factor from the analysis is irreconcilable with the purpose of recidivist statutes and this Court's unbroken line of cases affirming that purpose.

In attempting to bolster his claim of "gross disproportionality," Ewing points (Br. 29) to what he describes as "grand theft's modest placement on the spectrum of crimes" and notes that "the state has established a low sentencing range for the offense (absent application of the Three Strikes law)." Because he is a recidivist, Ewing's comparison of his plight to that of a first-time offender — as well as his analysis of other kinds of enhancements that are not related to prior convictions (Br. 26) — is little more than wishful thinking. The sentence imposed upon the habitual offender is a result of the State's legitimate interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Rummel*, 445 U.S. at 276. A first-time offender has not yet

demonstrated that criminal sanctions will not be a deterrent to future criminal activity or that efforts at rehabilitation will be futile. Ewing, on the other hand, has demonstrated both. He committed the current offense while on parole less than a year after his early release from prison. His sentence was not, therefore, "grossly disproportionate" to his offense. [4]

II. Even if Ewing Were to Pass the Difficult Threshold Requirement That His Sentence Be "Grossly Disproportionate" to His Crime, the Intra/Interjurisdictional Analysis of *Solem v. Helm* Would Be Unavailing to Him.

If there is a "proper role for comparative analysis of sentences, [it] is to validate an initial judgment that a sentence is grossly disproportionate to a crime." *Harmelin*, 501 U.S. at 1005. Here, because Ewing's sentence is not "grossly disproportionate" to his crime, no such analysis is necessary. In addition, the analysis offered by Ewing — and that conducted by the Ninth

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[4] In reaching an initial determination that Andrade's sentence was "grossly disproportionate," the Ninth Circuit considered Andrade's age and, applying life expectancy statistics, concluded that "it is thus more likely than not that [he] will spend the remainder of his life in prison." *Andrade v. Attorney General of California*, 270 F.3d 743, 759 (9th Cir. 2001). In doing so, that court ignored this Court's admonition that it has "drawn the line of required individualized sentencing at capital cases, and see[s] no basis for extending it further." *Harmelin*, 501 U.S. at 996. To his credit, Ewing does not appear to rely upon any of his individual characteristics and circumstances in asserting that his sentence is disproportionate.

Circuit in the *Andrade* case — demonstrates that such a rule is unworkable.

A. An intrajurisdictional comparative analysis of Ewing's sentence requires much more information than Ewing has provided in this case.

In conducting his "intrastate analysis," Ewing does not address what would seem to be the most relevant comparison — sentences imposed upon recidivists for offenses similar to his own. Worse yet, the Ninth Circuit expressly discounted this aspect of the analysis in *Andrade*, instead "compar[ing] what *they* consider[ed] comparable." *Harmelin*, 501 U.S. at 988 (Scalia, J., joined by the Chief Justice). Specifically, the Ninth Circuit "agree[d] that comparisons to sentences for other recidivists are relevant, [but expressed a] problem with . . . attempt[ing] to justify the constitutionally-suspect application of a statute by pointing to other applications of the same statute." *Andrade*, 270 F.3d at 762.

The issue as framed by that court, however, was not the constitutionality of California's Three Strikes Law, but instead whether "the application of the Three Strikes law to the unusual circumstances of Andrade's case" resulted in a constitutionally disproportionate sentence. *Id.* at 767. To determine whether a particular sentence is "disproportionate," it would seem necessary to consider sentences imposed in similar cases. When such a consideration is undertaken, an intrastate analysis reveals that Ewing's sentence is not disproportionate. Ewing himself notes (Br. 23) that 2,158 other habitual offenders were "sentenced to twenty-five years to life for property crimes, including

grand theft (108), petty theft with a prior (344), vehicle theft (217), receiving stolen property (164), forgery (58), and second degree burglary (455)."

As pointed out above, moreover, because Ewing was sentenced as an habitual offender, comparing his sentence to those imposed upon first-time offenders is meaningless. Even if the crime of the first time offender is more severe — assuming that point can be agreed upon — the penological goal in imposing the sentence is different.

For example, Ewing asserts (Br. 40) that "if a person with no criminal past had entered the golf pro shop the day after [he] did, and was later convicted of detonating a bomb with the intent to kill the clerk," that individual would be parole-eligible much sooner than he would. The sentence imposed upon the hypothetical first-time offender, however, is determined by weighing various penological considerations such as retribution, deterrence, rehabilitation, and incapacitation. "[T]he responsibility for making these fundamental choices . . . lies with the legislature." *Harmelin*, 501 U.S. at 998 (citing *Gore v. United States*, 357 U.S. 386, 393 (1958)). That the parole eligibility date in such a case would arrive sooner than Ewing's simply reflects a reasonable determination that, as a first-time offender, the hypothetical individual should be given a chance — just as Ewing was given a chance — to demonstrate that the criminal sanctions imposed had rehabilitated him and were sufficient to deter future criminal activity.

Ewing, by contrast, has demonstrated that spending approximately five years in prison did not deter him from committing another felony less than a

year after his release. He has also demonstrated that he was not receptive to opportunities for rehabilitation by committing felony grand theft within ten months of his early release on parole.

B. An interjurisdictional comparative analysis of Ewing's sentence is similarly unworkable.

While an intrastate comparison is difficult enough, much more problematic is the "objective" comparison of Ewing's sentence to "sentences imposed for commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 291. This requires the comparison of what was essentially deemed incomparable in *Harmelin*. More specifically, an interstate comparative analysis is inconsistent with the "common principles . . . of proportionality review" that Justice Kennedy identified in that case. *Harmelin,* 501 U.S. at 998. One such principle recognizes that "[t]he efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system." *Id*. at 998. A second principle, however, is that the Constitution requires no such agreement between the varying sentencing systems of the States — "that the Eighth Amendment does not mandate adoption of any one penological theory." *Id*. at 999. A third principle requires recognition that the lack of consensus among the States is both unavoidable and beneficial — that "marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure." *Id*. If agreement on the purposes and objectives of the penal system is a prerequisite to comparison, but no such agreement exists, it necessarily follows that no

legitimate comparative analysis can be undertaken. *Harmelin*, 501 U.S. at 999–1000 ("State sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise"). Moreover, "even assuming identical philosophies, differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes." *Id.*, at 1000.

Contrary to the reasoning of *Solem*, therefore, an interstate comparison does not result in the consideration of "objective criteria." *Id.* Rather, as is demonstrated by the interstate analysis proffered by Ewing and the one employed by the Ninth Circuit in *Andrade*, it allows judges to "compar[e] what *they* consider comparable," thereby providing an excellent opportunity to accept the "invitation to imposition of subjective values." *Harmelin*, 501 U.S. at 986, 988 (Scalia, J., joined by the Chief Justice) (emphasis in original).

For example, "a State ha[ving] the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate." *Harmelin*, 501 U.S. at 1000 (Kennedy, J., joined by O'Connor and Souter, JJ.) (citing *Rummel*, 445 U.S. at 281). Indeed, it might be that other States are to be faulted for being too lenient. *See Howard v. Fleming*, 191 U.S. 126, 135–136 (1903) ("That for other offenses, which may be considered by most, if not all, of a more grievous character, less punishments have been inflicted, does not make this sentence cruel. Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one"). Yet

Ewing goes to great lengths (Br. 43–53) to demonstrate that his sentence is, in fact, the most severe punishment imposed in the country. The Ninth Circuit did the same in *Andrade*. 270 F.3d at 766 ("Andrade could not have received such a severe sentence anywhere else, with the possible exception of Louisiana"). Ewing's and the Ninth Circuit's analyses are outcome-based and flawed.

First, Ewing discounts the relevance of other state statutes authorizing similar sentences if the equivalent punishment was not mandatory, but simply at the top of the statutory range. For example, according to Ewing (Br. 51), Alabama's habitual offender statute is not as severe because "Alabama would not require a court to sentence Mr. Ewing to life imprisonment" but would provide "the option . . . to sentence a defendant to either life imprisonment or a term of not less than twenty years." Logic dictates, however, that if a comparison is to be helpful at all, the maximum punishment authorized for the crime at issue is the only relevant consideration. If the goal is to seek "objective" evidence of what other States consider appropriate punishment for a particular crime, it makes no sense to ignore a sentence deemed to be appropriate. Cf., e.g., *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (stating that "first among the objective indicia that reflect the public attitude toward a given sanction are statutes passed by society's elected representatives") (citations and internal quotations omitted).

In other words, in Alabama, a life sentence is within the statutory sentencing range for a recidivist with a criminal history like that of Ewing's. That Alabama does not declare life imprisonment to be the

only available punishment does not change the fact that Alabama has deemed a life sentence to be appropriate and, therefore, not "grossly disproportionate" to the offense.

Second, in declaring that California's sentencing scheme is the "most severe" because other States allow for discretion, Ewing demonstrates the subjectivity that necessarily invades an interstate comparison. For example, Ewing acknowledges that in Vermont he "could have been sentenced to up to life imprisonment under the state's recidivist statute," (Br. 52) but declares Vermont's statute less severe because such a sentence would not "have been mandatory."[5] Taking this "would have/could have" reasoning even further, the Ninth Circuit, in *Andrade*, declared Louisiana's recidivist system less severe than California's on the basis that "there is a distinct possibility, unlike in California, that a Louisiana court might have invalidated such a sentence as excessive under its state constitution." 270 F.3d at 765. Comparisons and distinctions of mere possibilities are irreconcilable with *Solem*'s directive that "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria." *Solem*, 463 U.S. at 292. A lesser sentence that might be imposed in another State — as opposed the maximum sentence authorized by law in that State — is no basis for meaningful comparison.

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[5] See also pp. 51-52 of Ewing's brief, in which he discounts the relevance of South Dakota's scheme because, "while Mr. Ewing would have been subject to a sentence of up to life imprisonment, there would be no mandatory term."

Nevada's recidivism statute would have permitted Ewing to be sentenced to life without parole (Br. 52) — a sentence harsher than the one he received. Nevertheless, Ewing declares California's system more severe (Br. 52) because, in Nevada, "a life sentence without parole is not mandatory, but rather discretionary," and "[a] Nevada court [may] alternately impose a sentence of life *with* possibility of parole." In conducting his "objective" interstate analysis, Ewing ignores the discretionary aspects of California's Three Strikes law, such as the fact that a judge in California has the discretion to strike prior felonies from consideration. *People v. Romero*, 917 P.2d 628, 647 (Cal. 1996) ("section 1385(a) does permit a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law"). Presumably, had he been sentenced in Nevada, Ewing would alter his rankings and declare Nevada "most severe" by noting that, in California, he might not have been treated as a recidivist at all.

Likewise, that other States provide for parole does not supply the objective criterion deemed necessary for proportionality review. For example, Ewing acknowledges (Br. 53) that in "five other states [he] would be subject . . . to a discretionary life term." He contends that "the severity of such a sentence in those states is significantly mitigated by the availability of early parole or probation." Admittedly, in upholding the life sentence imposed in *Rummel*, this Court noted that, due to the possibility of parole, "a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life." 445 U.S. at 280–81. This Court did not, however, "rely simply on the existence of some system of parole. Rather, it looked to

the provisions of the system presented, including the fact that Texas had 'a relatively liberal policy of granting "good time" credits to its prisoners . . . .'" *Solem*, 463 U.S. at 301 (quoting *Rummel*, 445 U.S. at 280).

Ewing, by contrast, does not provide any information regarding the parole systems relied upon to support his conclusion. Instead, he points "simply [to] the existence of some system of parole." *Solem*, 463 U.S. at 301. If parole eligibility is to be considered in comparing the severity of sentences, the chance of receiving parole under a particular system is a relevant and necessary consideration. The injection of parole eligibility also begs the question: If Ewing's twenty-five-year-sentence without possibility of parole is unconstitutionally disproportionate, does a life sentence with the possibility of parole — imposed for the same crime in another jurisdiction — become unconstitutional should parole not be granted within twenty-five years?

Finally, even if California has imposed a more severe punishment than Ewing would have received elsewhere, this Court has made it clear that such a distinction "does not by itself render the punishment grossly disproportionate." *Harmelin*, 501 U.S. at 1000 (Kennedy, J., joined by O'Connor and Souter, JJ.) (citing *Rummel*, 445 U.S. at 281). Assuming that an objective ranking could be reached, striking down the "most severe" punishment would simply result in the "runner-up" becoming immediately and accurately susceptible to the same charge. "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular

offenders more severely than any other state." *Rummel*, 445 U.S. at 282 (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)). If California is that State for purposes of punishing recidivism, it may be due to unique concerns that warrant such a distinction. Indeed, "California is the most populous state, with the largest problem of crime and recidivism" (Brief of Petitioner in *Lockyer v. Andrade*, No. 01-1127, at 23). "Since the adoption of three-strikes, [it] has experienced a forty-one percent drop in its crime rate, whereas the rest of the nation experienced a nineteen percent drop." *Id.* See also *Howard v. Fleming*, 191 U.S. 126, 136 (1903) ("If the effect of this sentence is to induce like criminals to avoid its territory, North Carolina is to be congratulated, not condemned").

C. The second-stage, three-part, intra/interjurisdictional analysis of *Solem v. Helm* is flawed and should be discarded.

The practical problems identified above in conducting an intra/interjurisdictional analysis of Ewing's sentence point to a deeper theoretical flaw in the premises of *Solem v. Helm*. Whatever their differences, *Rummel*, *Solem*, and *Harmelin* all recognize "the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as . . . the discretion that trial courts possess in sentencing convicted criminals." *Solem*, 463 U.S. at 290; see also *Rummel*, 445 U.S. at 274 ("one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, . . . the length of the sentence actually imposed is purely a matter of legislative prerogative"); *Harmelin*,

501 U.S. at 989 (Scalia, J., joined by the Chief Justice) (sentencing determinations depend upon the "objective of criminal punishment (which is an eminently legislative judgment)"); *id*. at 998 (Kennedy, J., joined by O'Connor and Souter, JJ.) ("the responsibility for making these fundamental choices [involved in any sentencing system] and implementing them lies with the legislature") (citing *Gore v. United States*, 357 U.S. 386, 393 (1958)). Indeed, three of the "common principles" identified by Justice Kennedy in *Harmelin* — "the primacy of the legislature, the variety of legitimate penological schemes, [and] the nature of our federal system" — each require deference to legislative judgment on matters of criminal sentencing. 501 U.S. at 1001.

Defining criminal offenses and their respective sanctions necessarily requires a balancing of various penological goals such as retribution, deterrence, incapacitation, and rehabilitation. The amount of weight placed upon these goals may vary not only with the passage of time, as society's viewpoints regarding the purpose of the penal system change, but also with the nature of the crime and, in the case of recidivist statutes, with the type of offender.

For example, if deterrence were the only goal at issue regarding a certain offense, it would seem logical to punish that offense as severely as the law will allow. If, on the other hand, the goal were rehabilitation, the sentencing scheme would likely provide more flexibility and include opportunities, such as parole and probation, for an offender to demonstrate his or her reformation. Certain crimes, such as murder, may be deemed to warrant severe sentences based primarily upon the concerns of deterrence and retribution, rather

than an offender's possible receptiveness to rehabilitation. Indeed, some crimes — those deemed to warrant the death penalty — are punished solely on the basis of deterrence, retribution, and incapacitation. No consideration at all is given to whether the perpetrator might be receptive to efforts at rehabilitation.

Differences existing between the States' sentencing schemes may be a result of differing philosophies, values, unique problems with specific crimes, or crime rates. *Harmelin*, 501 U.S. at 999–1000 (Kennedy, J., joined by O'Connor and Souter, JJ.) ("State sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise"). A State with an already low crime rate may not place as much weight upon deterrence as would a State seeking primarily to lower its crime rate. Whatever the reasons, it is clear that "[t]he federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation." *Harmelin*, 501 U.S. at 999 (Kennedy, J., joined by O'Connor and Souter, JJ.) (comparing *Mistretta v. United States*, 488 U.S. 361, 363–366 (1989), with *Williams v. New York*, 337 U.S. 241, 248 (1949)). Because criminal sentencing determinations are directly related to these various penological goals, "[t]he efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system." *Id.*

For these reasons, it is difficult to conduct proportionality review of criminal punishments by way of a comparative analysis. "While there are relatively

clear historical guidelines and accepted practices that enable judges to determine which modes of punishment are 'cruel and unusual,' proportionality does not lend itself to such an analysis." *Harmelin*, 501 U.S. at 985 (Scalia, J., joined by the Chief Justice). Although one can likely always find differences between punishments imposed for "similarly grave" crimes — assuming an agreement can be reached on the question of which crimes are "similarly grave" — "there are many justifications for [the] difference[s]." *Id.,* at 988–89 (Scalia, J., joined by the Chief Justice). One such justification is the states' interest in "inflicting severer punishment upon old offenders." *Graham*, 224 U.S. at 623; see also, e.g., *Parke*, 506 U.S. at 27 ("States have a valid interest in deterring and segregating habitual criminals") (citing *Rummel*, 445 U.S. at 284).

In other words, imposing a sentence that emphasizes opportunities for rehabilitation makes less sense when the offender has demonstrated that he or she is not a viable candidate for rehabilitation. The prospect of rehabilitation weighs less heavily in the balance when an individual has demonstrated — through repetitive criminal behavior — that any such efforts would likely be futile. In such cases, a legislative body may reasonably decide to place more weight upon the goals of deterrence and incapacitation. *Rummel*, 445 U.S. at 263 ("Having twice imprisoned him for felonies, Texas was entitled to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State"). The State of California has done just this through its "Three Strikes Law," reasonably placing more weight upon deterrence and incapacitation in cases in which an individual, having "been both graphically informed of the consequences of

lawlessness and given an opportunity to reform, . . . commits yet another felony." *Rummel*, 445 U.S. at 278. Its judgment should not be overturned lightly.

CONCLUSION

The ruling of the California Court of Appeal should be affirmed.

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