No. 01-6978

In the Supreme Court of the United States

GARY ALBERT EWING, PETITIONER

v.

STATE OF CALIFORNIA

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether petitioner's sentence under California's Three Strikes Law to a term of 25 years to life imprisonment for grand theft, after previously having been convicted of numerous offenses including at least two violent and serious felonies, violates the Eighth Amendment's prohibition against cruel and unusual punishments.

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INTEREST OF THE UNITED STATES

This case presents the question whether a sentence of 25 years to life imprisonment under a state three-strikes law for a conviction for grand theft violates the Eighth Amendment's prohibition against cruel and unusual punishments. A number of federal criminal statutes impose lengthy terms of imprisonment, including imprisonment for life, for recidivist offenses. See, *e.g.*, 18 U.S.C. 3559(c) (providing for mandatory sentence of life without parole for the commission of a "serious violent felony" after separate convictions for two or more "serious violent felonies," or for one or more "serious violent felonies" and one or more "serious drug offenses"); 21 U.S.C. 841(b) (prescribing sentence of mandatory life without parole for drug trafficking offenses if defendant has two prior felony drug convictions); 28 U.S.C. 994(h) (requiring the Sentencing Commission to provide for a sentence at or near the statutory maximum if the defendant is convicted of a felony that is a crime of violence or drug trafficking offense and has prior convictions for two or more such felonies); Sentencing Guidelines § 4B1.1 (career offender sentencing guideline). The United States has a

substantial interest in the constitutionality of lengthy sentences imposed for recidivism.

STATEMENT

1. California's Three Strikes Law was enacted in nearly identical form both by the California legislature (Cal. Penal Code § 667(e) (West 1999)) and by ballot initiative (*id.* § 1170.12(c) (Supp. 2002)) with the support of nearly 72% of the popular vote. In enacting the law, the legislature "acknowledged the will of Californians that the goals of retribution, deterrence, and incapacitation be given precedence in determining the appropriate punishment for crimes," and that "those goals [are] best achieved by ensuring 'longer prison sentences and greater punishment' for second and third 'strikers.'" *People* v. *Cooper*, 51 Cal. Rptr. 2d 106, 111 (Ct. App. 1996). The purpose of the law is "to deter offenders * * * who repeatedly commit * * * crimes and to segregate them from the rest of society." *People* v. *Ayon*, 53 Cal. Rptr. 2d 853, 862 (Ct. App. 1996).

Under the statute, when a defendant with one prior conviction for a "serious" or "violent" felony (a "strike") is convicted of any felony, he must be sentenced to a term of imprisonment twice as long as he otherwise would have received. See Cal. Penal Code § 667(d)(1) and (e)(1) (West 1999); *id.* § 1170.12(b)(1) and (c)(1) (Supp. 2002). When a defendant with two prior "strikes" is convicted of any felony, he ordinarily must receive an indeterminate prison term of 25 years to life—that is, he becomes eligible for parole after 25 years.[1] See *id.* § 667(d)(1) and (e)(2)(A) (1999); *id.*

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[1] The statute provides that:

> the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of
>
> (i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions, or

§ 1170.12(b)(1) and (c)(2)(A) (Supp. 2002). "Serious" and "violent" felonies are specified by statute, and typically are grave offenses that involve violence or the threat or serious risk of violence. See *id.* § 667.5 (1999 & Supp. 2002) (defining "violent felonies"); *id.* § 1192.7 (1982 & Supp. 2002) (defining "serious felonies"). The "triggering" offense, though it must be a felony, need be neither "serious" nor "violent." Prior offenses must be alleged in the charging document, and the defendant has a right to a jury trial on whether the prior strikes have been proved beyond a reasonable doubt. *Id.* § 1025 (1985 & Supp. 2002); *id.* § 1158 (1985).

Under California law, certain offenses may be either misdemeanors or felonies. There are two basic types of felony-misdemeanor (or "wobbler") offenses. Some crimes that would otherwise be misdemeanors become "wobblers" because of the defendant's prior criminal record. See, *e.g.*, Cal. Penal Code § 490 (West 1999); *id.* § 666 (1999 & Supp. 2002) (petty theft, a misdemeanor, becomes a felony-misdemeanor where the defendant has previously served a term of imprisonment for specified theft-related crimes). Others, such as grand theft, are felony-misdemeanors regardless of the defendant's prior record. See *id.* § 489(b) (1999). Both types of "wobblers" qualify as triggering offenses under the Three Strikes Law when they are felonies.[2]

(ii) twenty-five years or

(iii) the term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 190 or 3046.

Cal. Penal Code § 667(e)(2)(A) (West 1999); *id.* § 1170.12(c)(2)(A) (Supp. 2002).

[2] California law defines non-capital felonies by the place the sentence will be served, rather than by the length of incarceration: "A felony is a crime which is punishable with death or by imprisonment in the state prison." Cal. Penal Code § 17(a) (West 1999). Misdemeanors are punished "by fine or imprisonment in the county jail." *Id.* § 17(b). By statute,

Trial courts have "broad discretion" (*People* v. *Superior Court (Alvarez)*, 928 P.2d 1171, 1176 (Cal. 1997)) to reduce a "wobbler" charged as a felony to a misdemeanor before preliminary examination (Cal. Penal Code § 17(b)(5) (West 1999)) or at sentencing (*id.* § 17(b)(1)) and may thereby avoid imposition of a Three Strikes sentence. In exercising that discretion, "the court should examine the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior" as well as other "general objectives of sentencing," *Alvarez*, 928 P.2d at 1177-1178, and it should not act solely because of "an aversion to [the Three Strikes] statutory scheme." *Id.* at 1178 (internal quotation marks omitted). Appellate courts review decisions to reduce a wobbler to a misdemeanor under an "extremely deferential and restrained standard." *Id.* at 1179.

California law also gives trial courts "broad" authority, on motion of the prosecution or sua sponte, to strike prior offense allegations "in furtherance of justice." *People* v. *Superior Court (Romero)*, 917 P.2d 628, 647-648 (Cal. 1996). See generally Cal. Penal Code § 667(f)(2) (West 1999); *id.* § 1170.12(d)(2) (Supp. 2002); *id.* § 1385 (2000 & Supp. 2002). By reducing wobblers predicated on prior offenses to misdemeanors (which do not qualify as triggering offenses), or by striking prior serious or violent felonies, courts may avoid imposing a Third Strike sentence. In doing so, courts must determine that, "in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes sentencing] scheme's spirit, in whole or in part." *People* v. *Williams*, 948 P.2d 429,

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felonies are punishable by a year or more of imprisonment, and misdemeanors by a year or less. See *id.* §§ 18, 19.2.

437 (Cal. 1998). Decisions to strike are given "deferential" review on appeal. *Id.* at 438.

Although wobblers can be either felonies or misdemeanors, they are presumptively felonies and are "regarded as a felony for every purpose" (1 B.E. Witkin & N. Epstein, *California Criminal Law* § 73, at 119 (3d ed. 2000)), and "remain[] a felony except when the [court's] discretion is actually exercised" to make the crime a misdemeanor. *People* v. *Williams*, 163 P.2d 692, 696 (Cal. 1945) (internal quotation marks omitted).

2. On March 12, 2000, petitioner walked out of a shop in El Segundo, California, with three golf clubs concealed in his trouser leg. He did not pay for the clubs, which were priced at $399 each. An employee of the shop observed the theft and contacted the police, who arrested petitioner in the parking lot.

Petitioner has a lengthy criminal record dating back to 1984. His prior convictions are as follows:

DATE	OFFENSE(S)	SENTENCE
11-12-1984	(Ohio) grand theft	3 years' probation, jail suspended, $300 fine
9-9-1988	grand theft auto[3]	3 years' probation, 1 year in county jail
2-25-1990	petty theft with a prior	3 years' probation, 60 days in county jail
7-10-1992	battery	2 years' summary probation, 30 days in county jail
8-13-1992	theft	12 months' probation, 10 days in county jail

[3] Ewing was convicted of felony grand theft auto, but after he completed probation, the sentencing judge reduced the crime to a misdemeanor. See Cal. Penal Code § 17(b)(3) (West 1999). Acting pursuant to Penal Code § 1203.4 (1982 & Supp. 2002), the judge then allowed petitioner to withdraw his guilty plea and dismissed the case. Under Section 1203.4(a), that case is still considered a conviction for purposes of prior-conviction allegations in later prosecutions.

1-9-1993	burglary	1 year's summary probation, 60 days in county jail
2-24-1993	possession of drug paraphernalia	3 years' probation, 6 months in county jail
7-29-1993	appropriation of lost property	2 years' summary probation, 10 days in county jail
9-10-1993	possession of a firearm; trespassing	1 year's probation, 30 days in county jail
12-9-1993	robbery and 3 counts of burglary	9 years & 8 months in state prison

The record before the trial court indicated that the robbery and three burglaries that gave rise to petitioner's most recent prior convictions were committed at a Long Beach apartment complex over a five-week period. During the robbery/burglary, petitioner approached an individual at the complex and, claiming he had a gun, told the victim to turn over his wallet. When the victim resisted, petitioner pulled a knife and forced the victim to take petitioner to his apartment, which he then burgled. The other two burglaries involved petitioner's surreptitious entry into other apartments in the complex, one of which was occupied at the time of his crime. During the burglaries, petitioner stole cash, jewelry, electronic equipment, a firearm, a stun gun, and a passport. When petitioner was arrested in a common area of the complex 11 days after the robbery, he was carrying the knife used during that crime. See Br. of California at 2-4, *People* v. *Ewing*, No. B083830 (Cal. Ct. App. 1994).

3. Based on petitioner's theft of the golf clubs, the District Attorney for the County of Los Angeles filed an

information charging him with one count of grand theft[4] and one count of burglary. The information alleged that petitioner had incurred four prior "strikes" within the meaning of the three strikes law, consisting of petitioner's December 1993 robbery and burglary convictions.

After a jury trial, petitioner was convicted of grand theft and acquitted of burglary. Because petitioner had waived his right to a jury determination on prior offenses, the trial court acted as finder of fact and found the prior conviction allegations true. The court denied petitioner's motions to reduce the grand theft charge to a misdemeanor and to strike two of the prior felony convictions alleged in the information, concluding that petitioner's record of "consistent criminal activity" brought him within "the intent of the three strikes law." J.A. 14. The court did, however, strike the prior offense for purposes of a separate sentence enhancement for prior prison terms. J.A. 14-15. See generally Cal. Penal Code § 667.5 (West 1999 & Supp. 2002). Petitioner was sentenced to a term of imprisonment for 25 years to life.

4. The Court of Appeal of California affirmed. Pet. App. 23-31. The court rejected petitioner's claim that the trial court erred in declining to reduce his grand theft conviction to a misdemeanor, noting that, while the current offense was not violent, petitioner "had been convicted of nine offenses * * * in a five-year period from 1988 through 1993 and committed the current theft while on parole less than a year after being released from prison." *Id.* at 26-27. The court also rejected petitioner's claim that the trial court erred by refusing to strike one or more of his prior violent or serious convictions, noting the fact that "[t]wo of his prior strike convictions were violent and involved the use of a weapon,"

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[4] California law defines grand theft as the theft of money or property with a value exceeding $400. Cal. Penal Code § 487 (West 1999). The penalty for the felony offense is presumptively two years, unless there are circumstances in mitigation (in which case the sentence is 16 months) or aggravation (three years). See *id.* § 1170(b) (1985 & Supp. 2002).

the "bleak[ness]" of his "rehabilitative prospects," and the fact that defendant had continued to reoffend even though he had been on parole or probation continuously since 1988. In light of those factors, the court concluded that petitioner "was within the spirit of the Three Strikes law." *Id.* at 28.

The court also rejected petitioner's claim that his sentence was grossly disproportionate under the Eighth Amendment. The court observed that in *Rummel* v. *Estelle*, 445 U.S. 263 (1980), this Court upheld a mandatory life sentence under a Texas recidivist statute for a defendant convicted of obtaining $120.75 by false pretenses, where the defendant had two prior felony convictions for "nonviolent petty thefts." Pet. App. 29. The court noted that *Rummel* made clear that enhanced sentences under recidivist statutes serve the "legitimate goal" of deterring and segregating repeat offenders. *Ibid.* The California Supreme Court denied petitioner's petition for review.

SUMMARY OF ARGUMENT

To effectuate the settled principle that Eighth Amendment judgments should be based on objective factors, courts should be especially reluctant to hold unconstitutional legislatively mandated sentences for felonies that fall short of two types of punishment this Court has held are different in kind from all others: the death penalty and life imprisonment without parole. This Court's decisions reflect a recognition that, aside from the death penalty and other punishments different in kind from fine or imprisonment, there is little objective basis for distinguishing between sentences of different lengths.

I. Petitioner's sentence of imprisonment for 25 years to life for grand theft under California's Three Strikes Law does not violate this Court's narrow principle prohibiting grossly disproportionate sentences. Petitioner's enhanced penalty reflects the State's legitimate interest in imposing more severe penalties on persons whose record of convic-

tions demonstrates an inability to comply with the law. That interest is particularly compelling because of petitioner's record of violent crime. Petitioner's triggering offense of grand theft and his past convictions for armed robbery and residential burglary are more serious, and the penalty imposed not materially more severe, than was the case in *Rummel* v. *Estelle*, 445 U.S. 263 (1980). There, the Court upheld against an Eighth Amendment challenge a comparable life sentence imposed under a recidivist statute on a defendant convicted of obtaining $120.75 by false pretenses. And petitioner's triggering offense and prior crimes are more serious than in *Solem* v. *Helm*, 463 U.S. 277 (1983), where the Court invalidated a life sentence that, unlike the one here, afforded no possibility of parole.

The principle that courts should give substantial deference to legislatures to specify the classification and punishment of crimes applies with particular force where, as here, the legislature—rather than an individual judge—has itself determined the specific punishment for an offense. Although California law allows judges to sentence grand theft as a misdemeanor in the interests of rehabilitating deserving defendants, California courts have consistently held that the availability of that option does not detract from the crime's status as a presumptive felony and a serious offense. That the Three Strikes Law could conceivably be applied in an unduly broad manner to defendants with insignificant criminal records is not relevant in assessing the proportionality of its application here, in light of petitioner's long and continuous record of criminal offenses, including crimes of violence. In addition, California courts have broad discretion to avoid disproportionally harsh applications of the law.

II. No comparative analysis of sentences prescribed for other crimes in California and for the same crime in other jurisdictions is necessary because petitioner's case does not warrant an initial judgment that his sentence is grossly disproportionate to the crime. But in any event, compara-

tive analysis does not undermine the conclusion that petitioner's sentence is constitutional. Petitioner's comparison of his sentence to crimes he characterizes as "more serious" is based on the erroneous premise that penal codes must assign central importance to retribution. The Eighth Amendment permits California's decision to impose relatively lighter penalties on first offenders to promote rehabilitation, while imposing heavier penalties on habitual offenders, where interests in deterrence and incapacitation outweigh rehabilitation. Nor does interjurisdictional comparison support the suggestion that petitioner's punishment is grossly disproportionate to his offense. At least eight States authorize life sentences for habitual offenders convicted of theft, and several States have imposed such sentences on habitual offenders with criminal records comparable to petitioner's.

ARGUMENT

THE THREE STRIKES SENTENCE IN THIS CASE DOES NOT VIOLATE THE EIGHTH AMENDMENT

This Court has often observed that "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent." *Rummel* v. *Estelle*, 445 U.S. 263, 274-275 (1980) (quoting *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)); accord *Solem* v. *Helm*, 463 U.S. 277, 290 (1983) ("courts should be guided by objective factors" in conducting proportionality review). "The most prominent objective factor" guiding the Court in assessing disproportionality claims "is the type of punishment imposed." *Harmelin* v. *Michigan*, 501 U.S. 957, 1000 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

This Court's disproportionality decisions reflect a judgment that courts are better equipped to distinguish between types of punishment than degrees of punishment. This

Court has "draw[n] a 'bright line' between the punishment of death and * * * punishments short of that ultimate sanction" in holding that capital punishment is disproportionate to the crime of raping an adult woman. *Rummel*, 445 U.S. at 275 (citing *Coker*). In *Weems* v. *United States*, 217 U.S. 349 (1910), the Court "could differentiate in an objective fashion between the highly unusual *cadena temporal* and more traditional forms of imprisonment imposed under the Anglo-Saxon system." *Rummel*, 445 U.S. at 275. The Court has also distinguished sentences of life imprisonment imposed for recidivist property crimes when the defendant was eligible for parole from life sentences when he was not. See *Solem*, 463 U.S. at 297 (distinguishing *Rummel*). But once the barrier of parole eligibility is passed, the Court's decisions reflect a "relative lack of objective standards concerning terms of imprisonment," *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment); see *Solem*, 463 U.S. at 295; *Rummel*, 445 U.S. at 275.

In light of the lack of clear objective standards in this area, it is especially difficult to hold unconstitutional legislatively mandated felony sentences that fall short of two types of punishment that this Court has noted are different in kind from all others: the death penalty and—to a far lesser extent—life imprisonment without parole. See *Rummel*, 445 U.S. at 272 ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. * * * It is unique in its rejection of rehabilitation.") (quoting *Furman* v. *Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)); *Solem*, 463 U.S. at 297 (noting that "[o]nly capital punishment" is more severe than life imprisonment without parole); *Harmelin*, 501 U.S. at 1028 (Stevens, J., dissenting) (likening sentence of life without parole to death penalty because "[t]he offender will never regain his freedom," and accordingly "the sentence must rest on a rational determination that the punished 'criminal conduct is so atrocious that society's interest in deterrence and retribution

wholly outweighs any considerations of reform or rehabilitation of the perpetrator'") (quoting *Furman*, 408 U.S. at 307 (Stewart, J., concurring)). Proportionality challenges to felony sentences short of life imprisonment without parole should be successful only under the most exceptional circumstances. See, *e.g.*, *Robinson* v. *California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."); *Rummel*, 445 U.S. at 274 n.11 (suggesting proportionality principle might be implicated "if a legislature made overtime parking a felony punishable by life imprisonment"). As the Court noted in *Rummel*, "[o]nce the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence imposed under a recidivist statute for several separate felony convictions not involving 'violence' violates the cruel-and-unusual punishment prohibition of the Eighth Amendment." 445 U.S. at 283 n.27.[5] That principle is applicable

[5] Indeed, the Fourth and Sixth Circuits have held that proportionality review is limited to cases involving sentences of death or life without parole, and other courts of appeals have suggested that result. See *United States* v. *Organek*, 65 F.3d 60, 63 (6th Cir. 1995) ("This Court will not engage in a proportionality analysis except in cases where the penalty imposed is death or life in prison without possibility of parole.") (internal quotation marks omitted); *United States* v. *Lockhart*, 58 F.3d 86, 89 (4th Cir. 1995); see also *United States* v. *Meirovitz*, 918 F.2d 1376, 1381 (8th Cir. 1990) ("because Meirovitz was sentenced to life without parole, we will engage in the rare review of the constitutionality of a district court sentence"), cert. denied, 502 U.S. 829 (1991). But see *Hawkins* v. *Hargett*, 200 F.3d 1279, 1284 (10th Cir. 1999) ("While we recognize that the availability of parole is a relevant consideration, we are not willing to make it dispositive."), cert. denied, 531 U.S. 830 (2000). While that position is in tension with statements in some of this Court's opinions that "no penalty is *per se* constitutional," *Solem*, 463 U.S. at 290; *Robinson*, 370 U.S. at 667, it reflects an appreciation of the profound difficulty of drawing "any constitutional distinction between one term of years and a shorter or longer term of years." *Rummel*, 445 U.S. at 275.

here, where petitioner's sentence, though serious, affords him the opportunity for parole after 25 years.

I. PETITIONER'S SENTENCE OF IMPRISONMENT FOR 25 YEARS TO LIFE IS NOT GROSSLY DISPROPORTIONATE TO THE CRIME OF GRAND THEFT BY AN HABITUAL OFFENDER

This Court's decisions make clear that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence." *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment). Rather, the "narrow proportionality principle" (*id.* at 996) recognized in this Court's Eighth Amendment jurisprudence forbids only sentences that are "grossly disproportionate" to the crime. *Solem*, 463 U.S. at 288, 303; *Rummel*, 445 U.S. at 271; *Weems*, 217 U.S. at 371. Petitioner claims that his sentence of imprisonment for 25 years to life for "shoplifting three golf clubs" (Pet. Br. 17) presents an "extreme circumstance" (*Harmelin*, 501 U.S. at 1006-1007 (Kennedy, J., concurring in part and concurring in the judgment)) that warrants invalidating a penalty specifically prescribed both by the California legislature and an overwhelming majority of California voters. Petitioner's sentence, evaluated in light of his criminal record, is within constitutionally permissible limits.

A. Petitioner's Sentence Is Within The Constitutional Limits Described By This Court's Eighth Amendment Decisions

1. Petitioner's claim that his sentence of imprisonment for 25 years to life is unconstitutionally disproportionate for the offense of "shoplifting three golf clubs" (see, *e.g.*, Pet. Br. i, 2, 11, 17, 19; Brief of Amicus Families Against Mandatory Minimums (FAMM Br.) 2, 6) incorrectly frames the issue. Petitioner did not receive that sentence simply because he was convicted of grand theft. Rather, petitioner was sentenced under the Three Strikes Law because he was

convicted of grand theft after previously having been convicted of at least two "violent" or "serious" felonies. Petitioner's mandatory penalty is "based not merely on [his] most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes." *Rummel*, 445 U.S. at 284; accord *Solem*, 463 U.S. at 296. As this Court has recognized, the interest of a State in enacting a recidivist-enhancement statute is not merely that of punishing the offense of conviction; "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; accord *Solem*, 463 U.S. at 296.

There is no merit to the suggestion (Pet. Br. 8-9; FAMM Br. 6, 8) that the Double Jeopardy Clause prohibits imposing an enhanced sentence on a person convicted of a nonviolent offense who has prior convictions for crimes of violence. A State has a valid interest in imposing more severe punishment on a recidivist who has previously been convicted of violent crimes even if his triggering offense does not involve violence, in recognition of the fact that he presents a greater danger to society than persons convicted of the same triggering offense with no history of violence. That is the same basic rationale that has traditionally supported habitual-offender sentencing, which has never been thought to raise double-jeopardy concerns. *Parke* v. *Raley*, 506 U.S. 20, 27 (1992) (collecting authorities). Although, as petitioner observes (Pet. Br. 8), the focus of disproportionality analysis is the triggering offense, the Court explicitly has "recognize[d] * * * that [a defendant's] prior convictions are relevant" to determining the proportionality of a sentence. *Solem*, 463 U.S. at 296 n.21. Indeed, *Solem* indicates that the presence or absence of violent prior crimes is a factor in determining the appropriateness of lengthy imprisonment. *Id.* at 297 & n.22; *id.* at 299 n.26.

2. This Court's resolution of past disproportionality claims indicates that petitioner's sentence is constitutional. In *Rummel* v. *Estelle*, *supra*, the Court upheld against an Eighth Amendment challenge a mandatory sentence of life imprisonment (with possibility of parole) imposed under a recidivist statute on a defendant convicted of obtaining $120.75 by false pretenses, who had prior convictions for fraudulently using a credit card to obtain $80 worth of goods and services and for passing a forged check in the amount of $28.36. Petitioner's prior crimes and triggering offense are more serious than the conduct at issue in *Rummel*. Petitioner's current offense, involving the theft of almost $1200 in merchandise, is more serious than Rummel's in both actual and inflation-adjusted dollars. Petitioner's prior serious or violent offenses, which include armed robbery and three residential burglaries (two with the victim present), indisputably are more serious than Rummel's nonviolent fraud and bad-check charges. See generally *McGruder* v. *Puckett*, 954 F.2d 313, 317 (5th Cir.) (armed robbery "certainly endangers life, limb, and property as much as any non-capital offense"), cert. denied, 506 U.S. 849 (1992). In addition, petitioner has been convicted on nine other occasions of numerous misdemeanor and felony offenses (some involving violence), served nine separate terms of incarceration, and committed the vast majority of his crimes —including the triggering grand theft offense—while on probation or parole.[6]

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[6] Because a defendant's entire criminal record (not just his qualifying "strikes") is relevant to his ability to "conform[] to the norms of society" (*Rummel*, 445 U.S. at 276), it may properly be considered in conducting proportionality review of recidivist sentences. Cf. *Solem*, 463 U.S. at 279-280, 296-297, 299 (considering Helm's six prior convictions, although the recidivist statute at issue required only three for eligibility). The California courts routinely consider prior convictions not alleged as "strikes" in resolving proportionality challenges under the federal and state constitutions. See, *e.g.*, *People* v. *Cuevas*, 107 Cal. Rptr. 2d 529, 540 (Ct. App. 2001); *People* v. *Cortez*, 86 Cal. Rptr. 2d 234, 240-241 (Ct. App. 1999).

As the court of appeals correctly concluded (Pet. App. 29), "by analogy" to *Rummel*, petitioner's sentence did not violate the Eighth Amendment. Petitioner's long criminal history, his demonstrated willingness to engage in violence, and his prompt return to crime after his release from prison, reflect an inability to conform his behavior to law despite having "been both graphically informed of the consequences of lawlessness and given an opportunity to reform." *Rummel*, 445 U.S. at 278. When a person has shown through a long history of criminal behavior an inability to abide by law, the Constitution does not require a State to protect itself by imprisoning him "on the installment plan" for a succession of relatively short sentences. Rather, the State is "entitled to place upon [the defendant] the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State" (*id.* at 284), and to "segregate [him] from the rest of society for an extended period of time" until he has shown himself ready to rejoin it. *Ibid.* Cf. *Graham* v. *West Virginia*, 224 U.S. 616 (1912) (upholding against Eighth Amendment challenge life sentence for third conviction for horse theft).

Contrary to the claims of petitioner and his amicus (Pet. Br. 20; FAMM Br. 19), *Rummel* is not distinguishable on the grounds that the defendant in that case was eligible for parole in 12 years instead of 25, or because of the specific parole policies employed by Texas or California. *Rummel* did not turn on the specific length of time before parole eligibility, but on the simple fact that the crime was parole eligible. The Court observed that the mere "possibility of parole, however slim, serves to distinguish [a parole-eligible defendant] from a person sentenced under a recidivist statute * * * which provides for a sentence of life without parole." 445 U.S. at 281. In any event, differences between parole eligibility dates of this magnitude are not constitutionally significant. As the Court noted in *Solem*, "[i]t is clear that a 25-year sentence generally is more severe than a

15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not." 463 U.S. at 294; *Rummel*, 445 U.S. at 275 (noting difficulty of drawing "any constitutional distinction between" sentences for terms of years).

Solem v. *Helm*, *supra*, provides no support for holding petitioner's sentence unconstitutionally disproportionate; rather, the differences between the two cases underscore the proportionality of petitioner's sentence. There, Helm was sentenced to life imprisonment without possibility of parole under a South Dakota recidivist statute for uttering a "no account" check for $100. His prior convictions included three burglaries, obtaining money under false pretenses, and grand larceny. In finding the sentence unconstitutional, the Court stressed that Helm's "relatively minor" crimes "involved neither violence nor threat of violence to any person" (463 U.S. at 296-297), and observed that uttering a "no account" check was "one of the most passive felonies a person could commit."[7] *Id.* at 296. This case differs significantly from *Solem* in both the severity of the sentence and the gravity of the offense. The *Solem* Court twice noted the lack of parole availability in distinguishing *Rummel* (*id.* at 297, 303 n.32), emphasizing that life imprisonment without parole is "far more severe than [a] life sentence" with possibility of parole. *Id.* at 297. In contrast to the "passive" triggering offense in *Solem* (*id.* at 296), petitioner's triggering offense presented a risk of violent confrontation because it was

[7] While Helm's prior convictions included three burglaries, since deciding *Solem*, this Court has recognized that burglary presents an "inherent potential for harm to persons" by "creat[ing] the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." *Taylor* v. *United States*, 495 U.S. 575, 588 (1990). California law has long recognized "the dangers to personal safety created by" burglary. *People* v. *Gauze*, 542 P.2d 1365, 1368 (Cal. 1975). Petitioner's theft of a gun from an occupied apartment (Br. of California at 2, *People* v. *Ewing*, *supra*) starkly presents the risk of violence inherent in burglary.

committed in the presence of the victim.[8] Petitioner's prior criminal record is both longer than Helm's and involves graver offenses, including crimes of violence. Cf. *id.* at 297 n.22.

B. Mandatory Penalties Set By Legislatures Are Entitled To Particular Deference

Solem is distinguishable from this case in another critical respect. The sentence of life imprisonment at issue in that case was not mandatory, but rather represented a statutory maximum term that had been imposed at the discretion of the sentencing judge. Thus, the Court emphasized, its determination that the sentence was disproportional did "not question the legislature's judgment" about the appropriateness of the penalty. *Solem*, 463 U.S. at 299 n.26. Compare *Rummel*, 445 U.S. at 266 (involving mandatory sentence). Here, by contrast, both California's legislature and an overwhelming majority of its voters have made a judgment that persons who commit any felony who have two previous convictions for serious or violent felonies should receive a sentence of 25 years to life. Under such circumstances, "[t]o set aside petitioner's mandatory sentence would require rejection not of the judgment of a single jurist, as in *Solem*, but rather the collective wisdom of the [California] Legislature and * * * the [California] citizenry."[9] *Harmelin*, 501

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[8] Petitioner and his amicus err in suggesting that his "property crime" did not "create the risk of * * * bodily injury to any person." Pet. Br. 17; FAMM Br. 10, 11 n.8. As with burglary, theft poses a risk of confrontation and injury during commission of the offense or attempt to escape. Many courts have observed that "[s]o-called 'property crimes,' such as shoplifting, may turn violent if a chase ensues." *Galloway* v. *Bankers Trust Co.*, 420 N.W.2d 437, 439 (Iowa 1988) (quoting *Jardel Co.* v. *Hughes*, 523 A.2d 518, 525 (Del. 1987)); accord *Hopkinson* v. *Chicago Transit Auth.*, 570 N.E.2d 716, 729 (Ill. App. Ct. 1991).

[9] It is clear that voters were made aware that persons who had committed nonviolent felonies would be subject to the enhanced sentence. See, *e.g.*, Prop. 184 Increased Sentences Repeat Offenders Initiative Statute Voter Pamphlet, *Analysis by the Legislative Analyst*, General

U.S. at 1006 (Kennedy, J., concurring in part and concurring in the judgment).

Invalidating petitioner's sentence therefore would represent a stark challenge to "[t]he first of th[e] principles" that "give content to the uses and limits of proportionality review," *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in the judgment), the principle "that the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'" *Ibid.* (quoting *Rummel*, 445 U.S. at 275-276). This Court has emphasized the respect due to legislatures in classifying criminal behavior and determining to what extent the goals of retribution, deterrence, incapacitation, and rehabilitation ought to be served in meting out punishments. See *Gore* v. *United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, * * * these are peculiarly questions of legislative policy."); accord *Solem*, 463 U.S. at 290; *Rummel*, 445 U.S. at 274. Accordingly, this Court "ha[s] never invalidated a penalty mandated by a legislature based only on the length of sentence, and * * * should do so only in the most extreme circumstance." *Harmelin*, 501 U.S. at 1006-1007 (Kennedy, J., concurring in part and concurring in the judgment).

C. The Alleged Overbreadth Of The Three Strikes Law Does Not Render Petitioner's Sentence Unconstitutional

Petitioner and his amicus argue that certain features of the California Three Strikes Law render its application un-

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Election (Nov. 8, 1994), at 33 (noting the mandatory sentence would apply "for *any new* felony conviction (not just * * * serious or violent felon[ies]"); *id.* at 36 (Rebuttal to Argument in Favor of Proposition 184) ("PROPOSITION 184 LUMPS IN NONVIOLENT OFFENDERS WITH VIOLENT CRIMINALS").

constitutional. First, they argue that grand theft's classification as a felony-misdemeanor or "wobbler" reflects a legislative "judgment that * * * [it] is among the least serious [crimes] in the state" (Pet. Br. 18; see FAMM Br. 10), and insufficiently serious to authorize a three-strikes penalty of imprisonment for 25 years to life. Second, they argue that the Three Strikes sentencing scheme is unduly expansive, in that a defendant needs not have served a prior term of imprisonment; prior convictions need not be violent so long as they are "serious"; and there is no "washout" period for old strikes. Pet. Br. 15-16; see FAMM Br. 3, 9 n.6, 15-23.

1. Petitioner's argument fundamentally misconceives the nature of felony-misdemeanor offenses under California law. The California Supreme Court itself has noted the "seriousness]" of grand theft in the context of proportionality review. *In re Lynch*, 503 P.2d 921, 936 n.20 (Cal. 1972) (striking down sentence of life imprisonment for recidivist indecent exposure as disproportionate under state constitution; noting excessiveness of sentence in relation to "serious" crimes such as felony-misdemeanors forgery and grand theft). In addition, theft of $1200 in property is a felony under federal law, 18 U.S.C. 641, and in the vast majority of States. See Pet. Br. App. B, at 21a. While courts have discretion to reduce a felony grand theft charge to a misdemeanor after the preliminary hearing or at sentencing (see Cal. Penal Code §§ 17(a) and (b)(4)), 489(b) (West 1999)), it remains "a felony for all purposes" (*People* v. *Superior Court (Perez)*, 45 Cal. Rptr. 2d 107, 114 (Ct. App. 1995)), "unless and until the trial court imposes a misdemeanor sentence." *In re Anderson*, 447 P.2d 117, 152 (Cal. 1968) (Tobriner, J., concurring), cert. denied, 406 U.S. 971 (1972); see generally 1 B.E. Witkin & N. Epstein, *California Criminal Law* § 73, at 119 (3d ed. 2000).

Grand theft should not be treated as a trivial offense simply because the California legislature has authorized the crime to be charged and sentenced as a misdemeanor. "The

fact that [a] crime may also be punished by confinement in local custody for up to one year does not detract from its felony status." *People* v. *Haywood*, 54 Cal. Rptr. 2d 120, 123 (Ct. App. 1996) (internal quotation marks omitted). California law classifies many unquestionably grave crimes as "wobblers," such as assault with a deadly weapon, including certain firearms (Cal. Penal Code § 245 (West 1999 & Supp. 2002)), assaulting a judge or juror of a local, state, or federal court in retaliation for or to prevent the performance of the victim's official duties (*id.* § 217.1), assaulting a prison guard (*id.* § 241.1 (1999)), witness intimidation (*id.* § 136.1 (1999)), taking a bribe to conceal a crime (*id.* § 153 (1999)), and money laundering of up to $25,000 per month with intent to promote criminal activity. *Id.* § 186.10(a) (1999).

"The purpose of the trial judge's sentencing discretion" to downgrade certain felonies "is to impose a misdemeanor sentence in those cases in which the rehabilitation of the convicted defendant either does not require, or would be adversely affected by, incarceration in a state prison as a felon." *Anderson*, 447 P.2d at 152 (Tobriner, J., concurring); accord *People* v. *Bowden*, 150 Cal. Rptr. 633, 636 (App. Dep't Super. Ct. 1978) (to permit "more lenient treatment [for] an offender" in deserving cases). The reduction is not based on the "erroneous[] grounds that the offense is conceptually a misdemeanor but it is rather intended to extend misdemeanant treatment to a potential felon." *Necochea* v. *Superior Court*, 100 Cal. Rptr. 693, 695 (Ct. App. 1972). The crime is not tantamount to a misdemeanor in seriousness. *People* v. *Statum*, No. S097715 (Cal. July 25, 2002), slip op. 6 ("Our case law has consistently treated the misdemeanor as a lesser offense than the felony wobbler."); *Burris* v. *Superior Court*, 119 Cal. Rptr. 2d 221, 228 (Ct. App. 2002) ("[i]f the offense is potentially a felony, society has a much greater interest in its punishment" than if it is a straight misdemeanor) (internal quotation marks omitted). And California courts have long held that while treating the

crime as a misdemeanor may change its name, "the nature of the crime is not changed." *Doble* v. *Superior Court*, 241 P. 852, 859 (Cal. 1925); *In re Rogers*, 66 P.2d 1237, 1238 (Cal. Ct. App. 1937) ("the character of the offense is not changed from a felony to a misdemeanor by the mere imposition of a fine or jail sentence").

Many jurisdictions have enacted misdemeanors that closely correspond to felonies, and persons charged with felonies often have their charges resolved as misdemeanors when mitigating circumstances are present. In those jurisdictions, the existence of closely related misdemeanor charges has never been thought to undermine the seriousness of felony charges when they are brought. The outcome should be no different here simply because the California legislature essentially has combined the two in a single provision. Cf. *Davis* v. *Municipal Court*, 757 P.2d 11, 21 (Cal. 1988) (likening decision to charge wobbler as misdemeanor or felony to ordinary decision "to charge either a felony or misdemeanor").

2. The features that petitioner claims render the Three Strikes scheme unduly broad (Pet. Br. 15-16) are not implicated in his case. Although petitioner's prior "strikes" were incurred in a single proceeding, the concern that makes that factor relevant to the proportionality inquiry—that defendants should be given opportunities to reform themselves before incurring a life sentence (see *Rummel*, 445 U.S. at 278)—is satisfied here. Petitioner has served nine terms of incarceration for prior offenses. Petitioner has been convicted of crimes of violence, and his prior convictions are not unduly old—indeed, he was released from jail on his "strike" offenses just nine months before his current crime.

California law addresses each of the concerns raised by petitioner by "provid[ing] trial courts * * * substantial discretion to ensure that the three-strikes sentence fits" the crime (*People* v. *Romero*, No. E030010, 2002 WL 1481257, at *6 (Cal. Ct. App. July 11, 2002)), by sentencing wobblers as

misdemeanors and striking prior convictions for sentencing purposes. See generally *People* v. *Garcia*, 976 P.2d 831, 837 (Cal. 1999) ("the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences"). In exercising their "abundant discretion" (*People* v. *Trausch*, 42 Cal. Rptr. 2d 836, 841 (Ct. App. 1995)), courts routinely consider the age of prior convictions (*People* v. *Superior Court (Alvarez)*, 928 P.2d 1171, 1179 (Cal. 1997); *People* v. *Vessell*, 42 Cal. Rptr. 2d 241, 248 (Ct. App. 1995)), whether prior offenses were violent (*Alvarez*, 928 P.2d at 1179; *People* v. *Williams*, 948 P.2d 429, 438-439 (Cal. 1998)), whether prior convictions "arose from a single period of aberrant behavior for which [the defendant] served a single prison term" (*Garcia*, 976 P.2d at 839), whether the current offense reflected reduced culpability (*People* v. *Crossdale*, 39 P.3d 1115, 1117 (Cal. 2002)), and even whether the current offense is minor (*People* v. *Bishop*, 66 Cal. Rptr. 2d 347 (Ct. App. 1997) (affirming decision to strike "where present crime is a petty theft and prior violent offenses [are] remote")). Thus, contrary to claims of petitioner's amicus (FAMM Br. 23; *id.* at 20-23), a "disproportionately harsh sentence is * * * subject to judicial modification" under California law. *People* v. *Mantanez*, 119 Cal. Rptr. 2d 756, 765 (Ct. App. 2002).

II. COMPARATIVE ANALYSIS OF SENTENCES WITHIN AND BETWEEN JURISDICTIONS DOES NOT UNDERMINE THE CONCLUSION THAT PETITIONER'S SENTENCE IS CONSTITUTIONAL

Solem did not create a rigid requirement that sentences within and between jurisdictions must be compared to assess every disproportionality claim. Rather, as petitioner and his amicus recognize (Pet. Br. 12; FAMM Br. 5, 13), *Solem* and this Court's other disproportionality cases are best understood to hold that intrajurisdictional and interjurisdictional

analyses are appropriate only "to validate an initial judgment that a sentence is grossly disproportionate to a crime." See *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment). Because petitioner's case does not warrant an "initial judgment that [his] sentence is grossly disproportionate to [his] crime," *ibid.*, consideration of the comparative analyses prepared by petitioner and his amicus is not necessary to reject his claim. In any event, these comparisons only highlight the limitations of such analysis.

A. Petitioner's Comparison Of California Penalties Overlooks The Distinct Penological Purposes Served By Habitual Offender Penalties

Intrajurisdictional comparison is principally useful in reviewing unusual sentences imposed by individual judges from an array of authorized punishments by showing that the sentence departs radically from sentences imposed on similarly-situated defendants in the same jurisdiction. See *Enmund* v. *Florida*, 458 U.S. 782, 795-796 (1982). To draw constitutionally significant conclusions from the comparison of sentences prescribed by the legislature for different crimes within the same jurisdiction is both difficult and runs counter to the principle that the fixing of prison terms for crimes involves judgments that generally are "properly within the province of legislatures, not courts." *Rummel*, 445 U.S. at 275-276. As the Court has recognized, different "crimes * * * implicate other societal interests, making any [intrajurisdictional] comparison inherently speculative." *Id.* at 282 n.27. The severity of the penalty a legislature attaches to a particular crime may be a function not only of the perceived seriousness and moral culpability of the crime—the sole factors petitioner considers relevant to punishment (see Pet. Br. 27-29)—but also of the frequency with which the crime is committed, the ease or difficulty of detection, the degree to which the crime may be deterred by

differing amounts of punishment, the particular penological theory employed by the legislature in that instance, and even budgetary restrictions. See *Harmelin*, 501 U.S. at 988-989 (opinion of Scalia, J.); *id.* at 999 (Kennedy, J., concurring in part and concurring in the judgment).

The limitations of intrajurisdictional comparisons are apparent in petitioner's claim that his punishment is more severe than sentences California prescribes for first- and second-offense crimes he characterizes as more "violent, socially destructive, and/or morally reprehensible." Pet. Br. 27. Petitioner's argument assumes a penal code must assign central importance to retribution. The Eighth Amendment, however, "does not mandate adoption of any one penological theory." *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment). The California legislature could rationally conclude that the penological interest in rehabilitation justifies comparatively short sentences for first- and second-time offenders, and indeed, that courts should have discretion to sentence some offenses as misdemeanors. At the same time, the legislature could validly conclude that interests in deterrence and incapacitation warrant comparatively heavy sentences for habitual offenders, even if their triggering offenses alone would be considered less serious if viewed in the abstract. See *Rummel*, 445 U.S. at 283 n.27 ("the three-time offender's conduct supports inferences about his ability to conform with social norms that are quite different from possible inferences about first- or second-time offenders"). Indeed, the central purpose of the Three Strikes Law was to deter and incapacitate habitual offenders, see *Ayon*, 53 Cal. Rptr. 2d at 861, in light of studies before the legislature indicating that a small number of recidivist offenders were committing a disproportionate share of all crimes.[10] The California legisla-

[10] See *Ways and Means Comm. Analysis*, 1993-1994 Reg. Sess., AB 971, at 2 (Cal. Jan. 13, 1994) (noting proponents' claims that the average

ture and voters could therefore reasonably conclude that a habitual criminal's activity is more "socially destructive" (Pet. Br. 27) than isolated acts of violent crime.[11] *Mantanez*, 119 Cal. Rptr. 2d at 765 ("[r]ecidivism * * * poses a manifest danger to society") (internal quotation marks omitted). Nothing in this Court's Eighth Amendment jurisprudence prohibits that decision.

B. Other States Impose Comparable Penalties For Recidivist Theft

Comparison between jurisdictions suffers from many of the same flaws, as well as an additional one: Because of differences in perspectives and problems from State to State, "[t]he inherent nature of our federal system * * * result[s] in a wide range of constitutional sentences." *Solem*, 463 U.S. at 291 n.17; *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment). States

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repeat offender commits 187-278 crimes per year and RAND Corp. analysis indicating that typical repeat offenders commit 15 crimes per year, and that 10% of repeat offenders in a study committed 600 crimes each per year); Prop 184 Increased Sentences Repeat Offenders Initiative Statute Voter Pamphlet, *Analysis by the Legislative Analyst*, General Election (Nov. 8, 1994), at 34 (noting "offenders will serve much longer sentences * * *, thus limiting their ability to commit additional crimes"); see also J. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 McGeorge L. Rev. 1, 9 (2000) (one framer of Three Strikes Law states that law was based on idea that "a relatively small group of people commit a large percentage of all crime").

[11] Petitioner errs in suggesting (Pet. Br. 10, 25, 29) that the Three Strikes Law does not draw distinctions between recidivists based on the gravity of their current offense. The law provides for an alternative minimum term of incarceration of three times the term otherwise specified for the triggering offense, see note 1, *supra*, which would apply instead of the default 25-year term to current felonies having maximum terms of imprisonment greater than eight years and four months. *E.g.*, Cal. Penal Code § 190 (West 1999 & Supp. 2002) (murder); *id.* § 193 (1999) (voluntary manslaughter); *id.* § 213 (1999) (robbery of an inhabited dwelling); *id.* § 208(b) (1999) (kidnapping person under age of 14); *id.* § 215 (1999) (carjacking); *id.* § 269 (1999) (aggravated sexual assault on a child); *id.* § 451(a) (1999) (arson causing great bodily injury).

must be given broad leeway to punish offenses differently, because "[o]ur federal system recognizes the independent power of a State to articulate societal norms through criminal law." *McCleskey* v. *Zant*, 499 U.S. 467, 491 (1991). Tolerance for a variety of approaches is particularly appropriate with respect to recidivism offenses, which involve a number of particularly difficult legislative judgments about the appropriate role of deterrence and rehabilitation, the cost of housing prisoners, which triggering and prior crimes warrant enhanced punishment, "the point at which a recidivist will be deemed to have demonstrated the necessary propensities[,] and the amount of time that the recidivist will be isolated from society." *Rummel*, 445 U.S. at 285. All "are matters largely within the discretion of the punishing jurisdiction." *Ibid.*

Petitioner and his amicus assert that California imposes the harshest penalty of any State for petitioner's criminal conduct. Pet. Br. 30-38; FAMM Br. 13-26. Even if it were true that California alone imposes life imprisonment on habitual offenders with records similar to petitioner's, that fact alone does not suggest gross disproportionality. As the Court has observed, "[a]bsent 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.

In any event, a comparison of the sentences prescribed for conduct similar to petitioner's reveals far more widespread application of the punishment than was the case in *Solem*. There, the Court emphasized that "Helm could not have received such a severe sentence in 48 of the 50 states," and there was no indication that a sentence of life without parole had been imposed for similar conduct in the only other State that authorized that sentence. 463 U.S. at 299-300. Taking into account all of petitioner's prior convictions, at least eight States would authorize a life sentence under the circum-

stances of petitioner's case, which hardly suggests such a consensus that "reasonable [persons] cannot differ as to the inappropriateness of a punishment." *Id.* at 311 n.3 (Burger, C.J., dissenting). Alabama mandates a term of life, or a term of imprisonment of not less than 20 years (Ala. Code § 13A-5-9 (1994 & Supp. 2001); *id.* § 13A-8-3 (1994)); Idaho mandates a term of five years to a maximum of life (Idaho Code § 18-2407(b) (1997 & Supp. 2000); *id.* § 19-2514 (1997)); Montana mandates a term of imprisonment from ten to 100 years (Mont. Code Ann. §§ 46-18-501, 46-18-502 (2001)); Nevada mandates life without parole, life with parole eligibility after ten years, or imprisonment for 25 years (Nev. Rev. Stat. Ann. § 207.010 (Michie 2001)); Oklahoma authorizes imprisonment for four years to life (Okla. Stat. Ann. tit. 21, § 51.1 (West 1983 & Supp. 2002)); South Dakota authorizes imprisonment for life (S.D. Codified Laws § 22-1-2 (Michie 1998 & Supp. 2002); *id.* §§ 22-6-1, 22-7-7, 22-7-8 (1998)); Vermont authorizes imprisonment for life (Vt. Stat. Ann. tit. 13, § 11 (1998)); and West Virginia mandates a term of life imprisonment. W. Va. Code §§ 61-3-13, 61-11-18(c) (2000). At the time of the offense, Louisiana also would have mandated a sentence of life imprisonment. La. Rev. Stat. Ann. § 15:529.1 (West 1992 & Supp. 1999).[12]

Furthermore, it is clear that, unlike in *Solem*, 463 U.S. at 300, life sentences have been imposed in several of these States based on records similar to petitioner's.[13] Thus, an

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[12] After petitioner was convicted, Louisiana amended its habitual offender statute, which previously required that either the triggering offense or one of two prior felonies be a qualifying offense, to require that all three be qualifying crimes of violence, sex offenses, drug offenses, or other qualifying offenses. La. Rev. Stat. § 15:529.1 (West 2002). Press accounts suggested that budgetary constraints weighed heavily in the decision. See M. Antrobus, *Bill Reduces Prison Terms: Louisiana Hopes to Save Millions*, Dallas Morning News, June 9, 2001, at 31A ("Proponents estimated the measure could save the state $63 million per year.")

[13] See, *e.g.*, *Ex parte Howington*, 622 So.2d 896 (Ala. 1993) (affirming life sentence for first-degree theft; prior convictions for grand theft,

interjurisdictional comparison of penalties does not suggest that the California legislature and electorate acted unreasonably in selecting penalties.

* * * * *

California's Three Strikes Law reflects that State's effort to deal with the serious problem of crime by recidivists. The State's determination to impose a life sentence with parole eligibility after 25 years on a recidivist grand theft offender does not violate the Eighth Amendment. Evaluated in light of "the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors," the sentence in this case cannot be found to be "grossly disproportionate" (*Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment)) to petitioner's recidivist offense.

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unauthorized taking, and theft); *Sims* v. *State*, 814 P.2d 63, 64 & n.2 (Nev. 1991) (rejecting disproportionality challenge to sentence of life without parole for grand larceny of $476, where defendant had three prior felonies, including one armed robbery); *State* v. *Heftel*, 513 N.W.2d 397 (S.D. 1994) (sentence of 70 years' imprisonment, with 20 years suspended, for recidivist convicted of theft by deception of $700; prior convictions unspecified). Contrary to the claims of amicus FAMM (FAMM Br. 25), West Virginia courts would be unlikely to find petitioner's sentence disproportionate in light of his recent prior convictions for crimes of violence. See *State* v. *Evans*, 508 S.E.2d 606, 610 (W. Va. 1998) (affirming life sentence imposed on habitual offender for burglary and petit larceny; noting burglary is a crime of violence for proportionality review); accord *State* v. *Housden*, 399 S.E.2d 882, 884-886 (W. Va. 1990).

CONCLUSION

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

Respectfully submitted.

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