

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GARY ALBERT EWING, :

4 Petitioner, :

5 v. : No. 01-6978

6 CALIFORNIA :

7 - - - - -x

8 Washington, D. C.

9 Tuesday, November 5, 2002

10 The above-entitled matter came on for oral argument  
11 before the Supreme Court of the United States at 10:09 a.m.

12 APPEARANCES:

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14 California; on behalf of the Petitioner.

15 DONALD E. DE NICOLA, ESQ., Deputy Attorney  
16 General, Los Angeles, California; on behalf  
17 of the Respondent.

18 MICHAEL CHERTOFF, ESQ., Assistant Attorney  
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21 supporting the Respondent.

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1 P R O C E E D I N G S

2 [ 10: 09 a. m. ]

3 CHIEF JUSTICE REHNQUIST: We'll hear argument now on  
4 number 01-6978, Gary Albert Ewing versus California.

5 Mr. Denvir.

6 ORAL ARGUMENT OF QUIN DENVIR

7 ON BEHALF OF THE PETITIONER

8 MR. DENVIR: Mr. Chief Justice, and may it please  
9 the Court: In March 2000, Gary Ewing walked into a Los  
10 Angeles pro shop, took three golf clubs, stuck them down the  
11 pants legs, and walked out. He was quickly apprehended for  
12 that crime. For that crime --

13 QUESTION: What was the value of the golf clubs?

14 MR. DENVIR: Because the value of the golf clubs was  
15 approximately \$1200, it was grand theft under California law.

16 For grand theft, as a general matter, California  
17 provides a maximum sentence of three years. It also --  
18 because Mr. Ewing had served a prior prison sentence, he would  
19 be subject to a recidivism enhancement of one year, so the  
20 maximum sentence that he would have faced under California  
21 law, but for the so-called "three-strikes law," would have  
22 been four years in prison, which could have been reduced by  
23 one-half by his conduct in prison and his work in prison.  
24 However, because Mr. Ewing had a prior conviction for first-  
25 degree burglary, which has been classified as a serious felony

1 by California, and for robbery, which has been classified as a  
2 violent felony by California --

3 QUESTION: Was it armed robbery?

4 MR. DENVIR: He was armed with a knife at that time.

5 And because of those two convictions, he came under  
6 the California "three strikes and you're out" law. And as a  
7 result of that, he received a sentence of life imprisonment  
8 and with a -- with an added bar that he could not even be  
9 considered for parole for 25 years.

10 QUESTION: Would it be fair to add that another  
11 reason for the sentence was that the judge did not disregard  
12 the priors, and that was because the judge had the record in  
13 front of him and the record showed other -- a history of other  
14 offenses? Would that be a fair statement?

15 MR. DENVIR: It is correct, Your Honor. It -- the  
16 judge did have discretion to strike the priors or to reduce  
17 this wobbler offense to a misdemeanor. She declined to do so,  
18 partly on the basis of his prior record. His prior record  
19 were all misdemeanor convictions prior to that time. But --

20 QUESTION: They were all misdemeanors?

21 MR. DENVIR: Yes, Your Honor. All his -- he had --  
22 the prior convictions that he had were felonies were four  
23 felonies, all occurred within one year, in 19- -- in one  
24 month, in 1993. There were three first-degree burglary  
25 convictions, and then there was one robbery conviction. He

1 had other --

2 QUESTION: Well, now, those surely are not  
3 misdemeanors.

4 MR. DENVIR: No, Your Honor. I was -- I thought  
5 Justice Kennedy's question was directed not to the -- what  
6 they call the "strike priors," but to the fact that he did  
7 have other --

8 QUESTION: Oh, other than --

9 MR. DENVIR: -- previous crimes that were  
10 misdemeanors.

11 QUESTION: -- other than the burglaries.

12 MR. DENVIR: I think that's -- the sentencing judge  
13 relied on that, to some degree, in denying him any  
14 discretionary --

15 QUESTION: Now --

16 MR. DENVIR: -- relief.

17 QUESTION: -- it actually went back to 1984, didn't  
18 it, with grand theft in '84, grand theft in '88?

19 MR. DENVIR: Your Honor, the grand theft actually  
20 was a misdemeanor, as we've shown in the appendix to our reply  
21 brief. There was -- there was a misconception that that was a  
22 felony. And in fact, it was a misdemeanor in Ohio, the  
23 first --

24 QUESTION: That was the Ohio offense.

25 MR. DENVIR: I --

1 QUESTION: The --

2 MR. DENVIR: I'm sorry.

3 QUESTION: -- the one that was alleged to be a  
4 felony, I think, in the government's brief --

5 MR. DENVIR: Is in --

6 QUESTION: -- I think that it was only a  
7 misdemeanor.

8 MR. DENVIR: In fact, we've attached the governing  
9 court records as an appendix to our reply brief that shows it  
10 was a misdemeanor.

11 QUESTION: How many -- how many convictions in all,  
12 felonies plus misdemeanors?

13 MR. DENVIR: Your Honor, I believe that he had the  
14 four -- the four prior convictions -- the strike convictions,  
15 the felonies, and I think he had another nine misdemeanors,  
16 and then this present offense. I think that's the --

17 QUESTION: And the purpose of the three-strikes law,  
18 as I understand it, is to take off of the streets that very  
19 small proportion of people who commit an enormously high  
20 proportion of crimes. I forget what the statistics are, but  
21 it's something like, you know, of those convicted, 20 percent  
22 commit 85 percent of the crimes. It sounds to me like your  
23 client is a very good candidate for that law.

24 MR. DENVIR: We got -- we got --

25 QUESTION: I mean, if that's a reasonable law. It

1 seems to me this is precisely the kind of person you want to  
2 get off the streets. He's obviously going to do it again.

3 MR. DENVIR: Your Honor, we believe that the law, in  
4 itself, is not unreasonable and it could result in a  
5 proportionate sentence. It did not in this case.

6 Under this Court's decision in Solem versus Helm,  
7 the Court has said that you can look to the prior record as  
8 relevant to the sentencing decision because it aggravates the  
9 present crime, but the focus must remain on the present crime.

10 QUESTION: Well, Solem stands with Rummel and with  
11 Harmelin. They're really three different points, and Solem is  
12 probably the case that favors you most. But certainly Rummel  
13 is good law, and Harmelin is good law. And I think those  
14 cases don't favor you.

15 MR. DENVIR: Well, Your Honor, I believe that  
16 Rummel -- the Court said in Solem -- the majority opinion said  
17 that Rummel would be controlling only in a similar factual  
18 situation. We do not believe we have that here. And as far  
19 as Harmelin was concerned, the basic principles of Solem were  
20 reaffirmed by seven justices in Harmelin and, we believe, when  
21 applied here, will show that this is a grossly  
22 disproportionate sentence.

23 QUESTION: Mr. Denvir, would you clarify whether  
24 your challenge is strictly as applied? Because some of the --  
25 some of the points that you make seem to be going to the

1 statute wholesale. So, for example, you talk about it -- the  
2 statute's infirm, because it has no washout for aging  
3 offenses, but there was no such offense at stake here. The  
4 strikes were all rather recent.

5 MR. DENVIR: That's correct, Your Honor.

6 And --

7 QUESTION: So --

8 MR. DENVIR: -- and to answer your question, we are  
9 challenging only the sentence that Mr. Ewing received for the  
10 crime that he committed, that he was sentenced at. There's  
11 much discussion on both sides of -- as -- I -- as the  
12 background of the three-strikes law. We have no doubt the  
13 three-strikes law could result in a -- in a constitutional  
14 sentence. It did not, in this case. So however the scheme is  
15 that reached this sentence, this life sentence for stealing  
16 three golf clubs, that sentence is -- falls under the Eighth  
17 Amendment, in our view.

18 QUESTION: But we -- so we should leave out things  
19 like no washout, that someone who never served any time would  
20 subject to the three strikes --

21 MR. DENVIR: I think that's correct, Your Honor,  
22 that they don't play into this case. And I think that -- as I  
23 said, that the three-strikes law is merely -- it's the process  
24 that produced an unconstitutional sentence. It could have  
25 been produced by a different sentencing scheme, also.



1                   QUESTION: Well, when we're examining the  
2                   constitutionality of the three-strikes law, as applied to this  
3                   sentence, we should take into account, should we not, the  
4                   purposes of the California law, which was to have a law which  
5                   was -- gave simple, clear notice of the three-strikes policy?  
6                   And if you want us to take case-by-case, then that whole  
7                   policy is undercut, it seems to me.

8                   MR. DENVIR: Well, Your Honor, I don't -- I don't  
9                   think that's true. In *Solem v. Helm*, the Court made very  
10                  clear that it was looking only to the sentence that was  
11                  imposed on Mr. Helm

12                 QUESTION: Yeah, I was going to ask you about that,  
13                  because you had said that the principal focus has to be on  
14                  this sentence. I'm just not sure what your authority for that  
15                  is when we have a recidivist scheme of this kind.

16                 MR. DENVIR: Well, Your Honor, the -- in  
17                  *Solem versus Helm*, the Court, of course, had a recidivist  
18                  scheme. The focus there was on number of prior offenses, as  
19                  opposed to the nature of the prior offenses. The Court said  
20                  that the defendant, under double-jeopardy principles, cannot  
21                  be punished for those prior crimes; however, they are relevant  
22                  to the -- to the sentence imposed for the present crime. And  
23                  the -- and the reason they are relative -- and the Court said  
24                  this best in *Gryger versus Burke* -- is what they -- what  
25                  they -- what they authorize is a, quote, "stiffened penalty

1 for the latest crime, which is considered to be an aggravated  
2 offense because of repetitive one." That's at page 8 in our  
3 reply brief.

4 But what Solem v. Helm made very clear is, although  
5 the prior crimes are relevant, the focus must remain, when  
6 judging proportionality or gross disproportionality, on what  
7 this -- what this defendant did at this time, what he is being  
8 sentenced for at this time.

9 QUESTION: I'm just not sure how that works. What  
10 am I supposed to do with recidivism as a factor in analyzing  
11 this sentence?

12 MR. DENVIR: Your Honor --

13 QUESTION: Give it some weight, but not controlling  
14 weight, or something like that?

15 MR. DENVIR: -- I think that what the Court can say  
16 is that his prior crimes are relevant, in the sense that they  
17 make this crime a more aggravated crime than a crime committed  
18 by a first offender --

19 QUESTION: Well --

20 MR. DENVIR: -- and that there can be a reasonable  
21 enhancement for that. But in this case, he has been sentenced  
22 to -- he has -- his sentence has gone from a maximum of three  
23 years for a first offender to life, all based on the  
24 recidivism

25 QUESTION: Well, why --

1 MR. DENVIR: At that point --

2 QUESTION: -- why can't the State say that -- where  
3 a person has a string of convictions like this man has, that  
4 it's time to get him off the street, as Justice Scalia says,  
5 that he simply cannot conform to the law?

6 MR. DENVIR: Your Honor, if he, in fact, committed a  
7 crime at this point that was a serious or a violent crime,  
8 they may have a basis, but what the Court has said very  
9 clearly is that --

10 QUESTION: What --

11 MR. DENVIR: -- is the focus remains on this,  
12 because otherwise --

13 QUESTION: What --

14 MR. DENVIR: -- he's being punished for the prior  
15 crimes. I'm sorry, Your Honor.

16 QUESTION: Well, what's the reason for saying that  
17 though -- that you can only -- that the focus remains on this  
18 crime, but others are relevant? I mean, that really is kind  
19 of meaningless, it seems to me.

20 MR. DENVIR: Well, I don't think so, Your Honor,  
21 because, as I say, what the Court has said over the years is  
22 that the important part about the prior crimes is that it  
23 shows that this is a repeat offense. And the fact that he has  
24 committed offenses in a row makes this particular offense  
25 worse. The fact that he has committed worse offenses in the

1 past does not aggravate this crime. I -- this is -- this  
2 still remains shoplifting three golf clubs, regardless if he  
3 had been a triple murderer or anything else, and that's what  
4 he's being punished for. Because if he's being punished  
5 because of those prior crimes, their nature, there's really  
6 serious double jeopardy --

7 QUESTION: What do you think would be enough?  
8 Thirty years? Would you like 30 years for walking off with  
9 three golf clubs?

10 MR. DENVIR: Your Honor, I -- the -- if you -- if  
11 you look at our --

12 QUESTION: I mean, if you're going to look on it as  
13 just stealing three golf clubs, and cast a blind eye to his  
14 long record of criminal activity, I don't know why you can  
15 give him any more than, you know, a couple of years.

16 MR. DENVIR: Well, Your Honor, if you look to our --  
17 to the comparison with other jurisdictions -- and I just don't  
18 think this has been highlighted in our brief -- there are  
19 only -- there are only five jurisdictions that would have  
20 allowed a life sentence. There's only one additional  
21 jurisdiction, Montana, that would have allowed a term of years  
22 as great as the minimum sentence here, and that's -- Montana  
23 allows -- is five to a hundred years. And most states allow  
24 for either grand theft or recidivist grand theft --

25 QUESTION: But we said --

1 MR. DENVIR: -- ten years at the most.

2 QUESTION: -- we said in Rummel, there's always  
3 going to be some state that punishes more harshly than others.  
4 And certainly it was not intimated that that state, therefore,  
5 would -- it was cruel and unusual.

6 MR. DENVIR: No, that's correct, Your Honor. In  
7 Solem v. Helm, the Court noted that he could -- that Mr. Helm  
8 could have received a comparable sentence in one other state,  
9 and nevertheless held that it fell under the Eighth Amendment.

10 QUESTION: Well, just help us one more time. The  
11 prior history is relevant, but then how relevant?

12 MR. DENVIR: Well, Your --

13 QUESTION: You say the principal focus has to be on  
14 the three golf clubs, like we're some judges out of Victor  
15 Hugo or something and that's all we have to focus on. But  
16 this -- there's a -- there's a long recidivism component here,  
17 and that's the whole purpose of the California law that you're  
18 asking us to ignore, it seems to me.

19 MR. DENVIR: Your Honor, and -- what I'm saying  
20 is -- I'm going back to what the Court said in Solem v. Helm  
21 in its analysis, which I think is controlling here. It  
22 made -- it made the point that the -- the prior convictions --  
23 he cannot be punished for those, but they do aggravate this  
24 present crime that he's being punished for. And the way they  
25 aggravate it is that -- is that this shows that it's a

1 repetitive offense.

2 Now, he can have a reasonable enhancement of the  
3 normal penalty for grand theft based on the repetition aspect  
4 of it, but at some point it becomes unreasonable. And it  
5 becomes unreasonable if you go from three years to life based  
6 on his prior crimes. At that --

7 QUESTION: Why isn't it reasonable to say if he  
8 commits another felony -- he's committed, you know, three  
9 already and nine other convictions -- "One more felony,"  
10 California tells him, "and you go away for life." Why isn't  
11 that reasonable? And this -- and this was a felony.

12 MR. DENVIR: Because of the nature of the crime that  
13 he committed, which is stealing three golf clubs, a crime that  
14 is not deemed either serious or violent under California law.

15 QUESTION: But is a felony under California law.

16 MR. DENVIR: It is a felony. It's actually a  
17 wobbler and could be charged either way.

18 QUESTION: Why --

19 MR. DENVIR: But in this case, it's a felony.

20 QUESTION: Why can't California decide that enough  
21 is enough, that someone with a long string like this simply  
22 deserves to be put away?

23 MR. DENVIR: Well, Your Honor, if that were true,  
24 then there would be no limiting principle on recidivist laws  
25 under the Eighth Amendment. It would -- at that point, you

1 could say the mere fact that he broke any law -- if he broke a  
2 traffic offense -- a petty offense would show that he couldn't  
3 follow the law and could get a life sentence.

4 QUESTION: Oh, I'd be with you there, if it was a  
5 misdemeanor or, you know, some -- but this is a felony under  
6 California law.

7 MR. DENVIR: It is a felony, and it's one of the  
8 least grave felonies in California.

9 QUESTION: But we have given -- we've said, at  
10 least, here, that we are going to give great latitude to state  
11 legislatures in determining how many years to give, and how to  
12 categorize an offense.

13 Why don't -- why don't we look to the Harmelin case  
14 for the standards, rather than Solem? Harmelin came later.

15 MR. DENVIR: Well, Your Honor, I think you do,  
16 because, as I understand the Harmelin case, if you take the  
17 dissent and the plurality, they both agreed on the basic  
18 principle here, which is that there cannot be gross  
19 disproportion between the offense and the sentence. And the  
20 reason I go back to Solem versus Helm is that it was a  
21 recidivist case and there was some further information.

22 I don't -- as I read the Court's opinion, at least  
23 the plurality opinion, in Harmelin, the big change was that  
24 you would -- you would not look automatically to intra-  
25 jurisdictional or inter-jurisdictional comparisons. You would

1 first have to find an inference of gross disproportionality  
2 before you'd go to the second -- the other two steps. That's  
3 what I understood to be the major -- the major refinement of  
4 *Solem v. Helm* that was in the plurality opinion.

5 QUESTION: I'm slightly stuck on this, because I --  
6 I'd like -- there is some relevant information that I can't  
7 get a hold of, and you may have some in your experience, but  
8 it isn't in the brief.

9 Imagine -- let's take the set of people who have  
10 committed at least two serious crimes or more, maybe 50  
11 serious crimes. They're very serious criminals. And they're  
12 warned, "If you do anything again, you've had it." So think  
13 of that set of people.

14 Now, I would like to know, in light of that set of  
15 people, now one of the members of that set commits a crime  
16 equal to stealing \$1200 -- whether they steal \$1200 or equal  
17 to that; that's a very subjective judgment -- what's the  
18 longest sentence such a person has ever actually served?  
19 Here, they are going to 25 years, real years.

20 And the second question I'd like to know is, What is  
21 the least bad crime that such a person ever committed who did  
22 serve 25 real years?

23 MR. DENVIR: Well, Your Honor --

24 QUESTION: I'd like to know both of those things.  
25 And, obviously, they're find-outable.



1           MR. DENVIR: I -- let me see if I can answer your  
2 question. As far as under the three-strikes law, there is --  
3 because it sets this absolute minimum of 25 years -- it's a  
4 life sentence, but it adds a kicker to it which says, unlike  
5 other life sentences, you have to wait at least 25 years  
6 before you can even be considered. So we -- since this law  
7 was passed in 1994, we have no experience with this law.

8           QUESTION: Obviously, I don't want  
9 experience --

10          MR. DENVIR: Right.

11          QUESTION: -- under this law. That would be  
12 circular.

13          MR. DENVIR: Well, Your Honor --

14          QUESTION: What I'm looking for is, in the absence  
15 of this law --

16          MR. DENVIR: Oh, I'm sorry. I understand --

17          QUESTION: -- in the absence of this law, what is  
18 the longest sentence a person like yours -- and I'm defining  
19 "a person like yours" to be a really bad criminal who now will  
20 commit another crime equal to or the same as stealing \$1200.  
21 And there's loads of records -- I mean, in the California  
22 Adult Authority before this law was passed, et cetera.

23                     And the second question is, what is the least bad  
24 thing such a person who really served 25 years did?

25          MR. DENVIR: Your --

1           QUESTION: That -- those are empirical questions,  
2 and you're talking about this being unusual. I don't know if  
3 it's unusual unless I know what happened to other people.

4           MR. DENVIR: Well, Your Honor, I don't -- I --  
5 there's nothing in the record that would answer that, but let  
6 me see if I can answer it in a different way. But for the  
7 three-strike law, Mr. Ewing, with his record, could receive no  
8 more than four years. Now, there are other recidivist laws in  
9 California besides the three-strike law.

10          QUESTION: Under the California Adult Authority,  
11 which was only the law in California for 70 years, people  
12 could receive very, very, very long sentences.

13          MR. DENVIR: They could, Your Honor, and California  
14 is --

15          QUESTION: And -- not this long for this thing,  
16 but -- but -- but --

17          MR. DENVIR: I think that's right. I think the long  
18 sentence -- the -- California substituted determinate  
19 sentencing law for indeterminate in 1977, and -- but under the  
20 old indeterminate sentencing law, my clear recollection is  
21 that those long, indeterminate sentences were always triggered  
22 by serious or violent felonies, and that is something that --

23          QUESTION: No, they -- I've looked it up,  
24 actually --

25          MR. DENVIR: No?

1           QUESTION: -- and you're quite right that this is  
2 not as -- you couldn't get this long a sentence, but you could  
3 get a pretty long one for being a third offender and  
4 committing a property crime.

5           MR. DENVIR: And --

6           QUESTION: But I -- that doesn't tell us how long  
7 the people actually served.

8           MR. DENVIR: Well, Your Honor, if you look for the  
9 question of parole in California, which the -- which the State  
10 suggests is -- saves his life sentence, the Court looked at  
11 this in 1995 in the case California Department of Corrections  
12 versus Morales. And what the Court said at that time was that  
13 90 percent of all defendants who came up for their first  
14 parole hearing were found unsuitable for parole and that  
15 85 percent were found unsuitable at subsequent hearings. Now,  
16 that has not improved any, because, as you'll see in the  
17 amicus brief of Families Against Mandatory Minimums, at page  
18 18, as of 2000, the Board of Prison Terms, which is the --  
19 which is the parole authority -- their official records show  
20 that they only recommended parole in 1 percent of the 2000  
21 cases that came before them with a life sentence.

22           QUESTION: Mr. Denvir, can't the people of -- this  
23 thing, by the way, was not adopted by the legislature, was it?  
24 It was adopted by plebiscite, of the people of California --

25           MR. DENVIR: By both, Your Honor.

1           QUESTION: By both.

2           MR. DENVIR: Both by legislature and by --

3           QUESTION: By plebiscite. So the people of  
4 California decided, "We want to be tougher." Why do we have  
5 to be bound by whatever the more permissive scheme was  
6 earlier? The people of California knew that scheme, and they  
7 decided, "This is no good. We still have too much crime.  
8 We're not punishing people enough, or we're not keeping  
9 them -- keeping them incarcerated long enough." Why do we  
10 have to be bound by whatever the previous record was?

11          MR. DENVIR: Well --

12          QUESTION: It seems to me the question before us is,  
13 is it unreasonable to put away somebody who has this record?

14          MR. DENVIR: Your Honor, first of all, as to the  
15 question of initiative versus legislation, it is my  
16 understanding that the Court, in other areas, has said that  
17 there's no greater deference given to one than the other.

18                 But the other question is, there's no doubt that  
19 some deference has to be paid by this Court to legislative  
20 judgments or initiative judgments in the questions of  
21 punishment and in dealing with recidivists. The Court has  
22 made that very clear. But it is that deference that has led  
23 to the Court setting a very forgiving standard. The Court  
24 said that it would not require, in this area, or as excessive  
25 fines, strict proportionality between the crime being punished

1 and the sentence. It has said it was only when there was a  
2 gross disproportion, and that's a very deferential standard.  
3 That is a standard that allows the legislature to make many  
4 reasonable judgments, but says that --

5 QUESTION: So how do you decide --

6 MR. DENVIR: -- some judgments are unreasonable.

7 QUESTION: -- how much is too much?

8 MR. DENVIR: Well, Your Honor --

9 QUESTION: What's the --

10 MR. DENVIR: -- life imprisonment for -- for the  
11 crime of stealing three golf clubs, we believe, is cruel and  
12 unusual punishment.

13 QUESTION: It's not life imprisonment.

14 QUESTION: But we're just doing --

15 QUESTION: It's 25 years.

16 MR. DENVIR: Your Honor --

17 QUESTION: It's 25 years that he'll really serve.

18 We know that. As far as -- what happens after those 25 years  
19 is a matter of parole or a decision by other people.

20 MR. DENVIR: Your Honor, the sentence that he's been  
21 given is life in prison. He's been consigned to die in prison  
22 unless some administrative agency determines to let him out.

23 And as I've just quoted you --

24 QUESTION: But I mean, parole, in all the cases  
25 you're citing, is relevant, so you can describe it as you

1 want. We both know what the facts are. The facts are he has  
2 to be in jail for at least 25 years, and then he might be  
3 paroled.

4 MR. DENVIR: And he might be, but on -- there is  
5 no -- there is nothing in this record that would suggest he  
6 has a reasonable expectation in that regard. In fact -- in  
7 fact, what's before the Court would suggest that there is not  
8 a reasonable expectation, particularly if the animus that  
9 drives -- that drove the passage of this law continues for 25  
10 years and they still think, "Well, gee, if they committed  
11 these prior crimes, they ought to be locked up for life,  
12 because they may commit other crimes."

13 QUESTION: In the statistics that you were quoting,  
14 though, those were not three-strikes cases.

15 MR. DENVIR: Those are not three-strikes cases.

16 QUESTION: Those are cases where people might have  
17 gotten reduced time for good behavior --

18 MR. DENVIR: That's correct.

19 QUESTION: -- none of which is -- and one question I  
20 wanted to ask you, in view of the infirmities of Mr. Ewing --  
21 is he still alive?

22 MR. DENVIR: He is alive, Your Honor. He is --

23 QUESTION: Counselor --

24 MR. DENVIR: -- he's lost -- he's aged and has lost  
25 eyesight in one eye as a result, but he's still alive at this

1 point --

2 QUESTION: How old was he at the time of sentence?

3 MR. DENVIR: He was 38 years old. He's 40 years old

4 now. So --

5 QUESTION: Counselor --

6 MR. DENVIR: -- as a practical matter -- I mean,  
7 this -- 25 years is probably a life sentence for him, unless  
8 there's some major medical development that --

9 QUESTION: Mr. Denvir, you conceded a moment ago  
10 that the prior offenses can be considered for purposes of  
11 treating this offense as an aggravated offense, given the  
12 prior record; and yet when you answer -- you've done this more  
13 than once -- when you have answered the question of going to  
14 disproportionality, you have said, "It's 25 to life for  
15 stealing three golf clubs."

16 I don't think you can have it both ways. Either  
17 your argument is it's 25 -- the appropriate comparison is --  
18 or the appropriate characterization is "25 to life for three  
19 golf clubs," in which case you, in effect, are telling us,  
20 "Ignore the priors; they don't aggravate," or you've got to  
21 say, "It's 25 to life for stealing three golf clubs when you  
22 have a prior record" -- whatever it was, nine prior offenses,  
23 including four felonies, in this case. Which is it? Because  
24 I assume it may well affect the result.

25 MR. DENVIR: Your Honor, I -- if -- I misspoke.

1 What we say is the focus must be on the present offense. It  
2 is an aggravated offense. He is a repeat --

3 QUESTION: But when you said that --

4 MR. DENVIR: -- a repeat offender. He is a repeat  
5 offender. He is someone who committed this offense with a  
6 prior record of nine offenses?"

7 QUESTION: Is it inconsistent with your position --  
8 when you say, "The focus must be on this offense," is it  
9 inconsistent with that to say, "This offense -- is stealing  
10 three golf clubs worth \$1200 by somebody with a prior record  
11 of nine offenses"? Is that consistent with putting the focus  
12 on this offense, in the terms that you're using?

13 MR. DENVIR: I think it is, in the sense that it  
14 shows that there has -- there has been some -- there has been  
15 a series of repetition. But what I'm suggesting to the Court  
16 is that regardless of the repetition, the fact that it's a  
17 repetitive offense, if the focus remains on what he did now,  
18 the triggering offense, which, under *Solem v. Helm*, is the  
19 focus, then no matter what he has done in the past, no matter  
20 how much repetition, it is -- it is grossly disproportional to  
21 sentence him to a life sentence. At that point --

22 QUESTION: A hundred prior instances of stealing  
23 three golf clubs would not affect the analysis then on your  
24 view?

25 MR. DENVIR: Your Honor, if there -- if there were



1 a -- if there were a series of crimes of the same nature --  
2 for instance, if there --

3 QUESTION: Well, I've just -- I've just given you  
4 one.

5 MR. DENVIR: Yes.

6 QUESTION: A hundred prior -- three golf clubs every  
7 time, a hundred times -- would that justify the treatment that  
8 he has gotten?

9 MR. DENVIR: Your Honor, I think that that would --  
10 that would show a propensity to steal golf clubs, but, again,  
11 I don't believe --

12 QUESTION: I would concede that, but the --

13 (Laughter.)

14 MR. DENVIR: -- I don't believe --

15 QUESTION: Posit further that his score has not  
16 improved.

17 (Laughter.)

18 MR. DENVIR: He shouldn't be penalized for that.  
19 That may be beyond his control.

20 QUESTION: Okay, but if we -- if we've got our crazy  
21 example of a hundred priors exactly like this, and we follow  
22 your verbal criterion at least of focusing on this offense as  
23 aggravated, would this be disproportionate, grossly?

24 MR. DENVIR: I believe that life is, because it is  
25 still -- the crime that has to be punished -- I mean, and this

1 is what the Court said in Solem v. Helm -- this is --

2 QUESTION: Well, maybe we were trying --

3 MR. DENVIR: -- you know, in Solem v. Helm --

4 QUESTION: -- maybe we were trying to have it both  
5 ways verbally because we were imprecise. But with respect, I  
6 think that's what you're trying to do. Because on the one  
7 hand, you concede, yes, it may be regarded as an aggravated  
8 offense in light of the priors, and then in the next breath  
9 you say, "But the focus has got to be on this offense."

10 MR. DENVIR: Your Honor, I -- Your Honor, there's no  
11 doubt that the prior record -- and the Court has said that is  
12 relevant to the punishment for the present crime, and it does  
13 aggravate it. But there are limits to how aggravated  
14 shoplifting three golf clubs can be, no matter what has  
15 happened before --

16 QUESTION: Even with the hundred prior instances?

17 MR. DENVIR: Your Honor, it's still three -- it's  
18 still stealing three golf clubs. It's not robbery, rape,  
19 murder, or something of that nature. I mean, it is -- it is  
20 still there. I mean, the -- to raise your question, what if  
21 someone had a long history of jay-walking and had seven or ten  
22 or a hundred convictions for jay-walking and jay-walked again?  
23 I think the Court would not say you could get a life sentence  
24 for that just --

25 QUESTION: I don't --

1 MR. DENVIR: -- because it's repetitive.

2 QUESTION: -- I don't think it would. And the  
3 reason it wouldn't is -- I assume you would concede -- is that  
4 jay-walking does not hurt other people the way 100 instances  
5 of stealing golf clubs worth \$1200 hurts other people.

6 MR. DENVIR: It hurts in the sense that it's a  
7 property crime and causes --

8 QUESTION: Well, you know, and --

9 MR. DENVIR: -- a loss, that's correct.

10 QUESTION: -- and may lead to something beyond  
11 property crime. Isn't grand larceny much more likely to  
12 result in physical confrontation and --

13 MR. DENVIR: Your Honor, I --

14 QUESTION: -- physical injury than jay-walking?

15 MR. DENVIR: -- Your -- it is -- it is, Your Honor,  
16 and I think --

17 QUESTION: Which is why it's a felony.

18 MR. DENVIR: -- and I think that if there had been  
19 some -- some violence that had actually occurred out of this,  
20 then he undoubtedly would have been punished under a different  
21 statute with higher --

22 QUESTION: It's a serious crime, in part because of  
23 that -- in part because of the risk of physical confrontation  
24 that it poses.

25 MR. DENVIR: But Your Honor, California determined

1 that when it set the ranges for grand theft --

2 QUESTION: Would you like -- would you like to reserve time,  
3 Mr. Denvir?

4 MR. DENVIR: If the Court has further questions, I'd  
5 rather answer the questions --

6 QUESTION: Very well --

7 MR. DENVIR: -- than reserve time.

8 QUESTION: Very well. You asked for it, you --

9 MR. DENVIR: California considered that when they  
10 set the penalties for grand theft. And they set the penalty  
11 as a maximum of three years in prison. If they set different  
12 penalties for grand theft from a person, and for robbery,  
13 there is -- there is -- all those things are taken into  
14 consideration here. And the fact that this could have  
15 eventuated into something else, the fact of the matter is that  
16 it did not. And in fact, if anything, Mr. Ewing seemed to be  
17 doing everything he can to be -- to get out of there  
18 undetected, if that -- if you look at the facts of this crime.

19 QUESTION: I'm curious about one thing. Was he  
20 really a very tall man, or were these irons rather than wood?

21 (Laughter.)

22 MR. DENVIR: Your Honor, to tell you the truth, I  
23 have no idea how he could have done that. It seems to me a  
24 miracle that he could have -- actually got out the door, but  
25 he apparently did. He's not a very tall man, as I recall.

1 QUESTION: It is a good thing that walking is not an  
2 essential part of golf, because otherwise walking with  
3 those --

4 MR. DENVIR: I think --

5 QUESTION: -- golf clubs in his pants would have  
6 been very difficult.

7 (Laughter.)

8 MR. DENVIR: I think he was planning on removing  
9 them before he used them, I take it --

10 QUESTION: He took a golf cart out to the car.

11 (Laughter.)

12 MR. DENVIR: Your Honor, I would reserve any  
13 additional time, unless there's additional questions.

14 QUESTION: Very well, Mr. Denvir.

15 MR. DENVIR: Thank you.

16 QUESTION: Mr. De Nicola, we'll hear from you.

17 ORAL ARGUMENT OF DONALD E. DE NICOLA

18 ON BEHALF OF THE RESPONDENT

19 MR. DE NICOLA: Mr. Chief Justice, and may it please  
20 the Court: First, I think, in answer to Justice Breyer's  
21 question, I don't know what the statistics are under the old  
22 indeterminate sentencing law that was in effect in California  
23 until 1976. But in a way, I think the -- Your Honor's  
24 question triggers an issue that I think is central here.

25 The ISL, the old California law, was premised very

1 explicitly on a penological theory that emphasized  
2 rehabilitation of the offender. I think the question that's  
3 raised in this case, and it's a question that's particularly  
4 apt in light of the Harmelin opinion, is, when can a state  
5 decide that they're going to move away from a more lenient  
6 policy of rehabilitation or extending leniency to a first-  
7 time offender, and move toward a policy, a tougher policy, of  
8 incapacitation?

9           QUESTION: So, tell me, am I fair to assume there  
10 never, in the history of the United States, has been a person  
11 who -- of the set -- I'm only -- I don't want to be  
12 pejorative; I want to characterize it your way, and I'll  
13 characterize it as taking the set of very serious criminals  
14 with very serious records, and a person in that set commits  
15 another crime, and the other crime is approximately theft of  
16 \$1200 -- and am I fair in saying there hasn't been, ever, a  
17 sentence in the history of the United States in the last  
18 hundred years anywhere close to this one? And I base that on  
19 my knowledge -- which you could get; it's public -- of 35,000  
20 real cases in the federal system where to get a sentence like  
21 this one for a prior offender, you had to -- you have to now,  
22 you know, hijack an airplane, commit murder, something really  
23 serious beyond belief compared to this, and that the worst  
24 sentence you could get for something like this is about four,  
25 five years.

1           And then I look to the California Adult Authority,  
2 and I see, under that sentencing, nobody could have gotten  
3 more than ten real years, and, indeed, the average was  
4 somewhere around five. And you have all those records, and  
5 you have come up with nothing in your brief. And therefore,  
6 can I say -- my assumption is, this is by an order or factor  
7 of two or three times higher than anyone ever was sentenced  
8 before in the United States for such a thing?

9           You see, I'm making a very extreme statement  
10 empirically, and I want to know what the response is to my  
11 statement, and I want to know why I shouldn't hold you to my  
12 statement since you have the information, and why I shouldn't  
13 say that's just way too much.

14           MR. DE NICOLA: Well, again, Your Honor, I -- the --  
15 my answer is that I do not know what those records would have  
16 shown.

17           QUESTION: I guess he shouldn't hold you to it,  
18 since you don't have the burden of persuasion here, do you? I  
19 thought you're defending a -- a decision below.

20           MR. DE NICOLA: Yes, and I did interpret the issue  
21 to be a proportionality issue rather than an unusualness  
22 issue. But I do -- something in the recesses of my mind tells  
23 me that we had a three-time loser statute in California, and I  
24 think that put people away for life without parole.

25           QUESTION: Well, all right, how do we decide -- how

1 do we decide if you say, of this serious set of criminals, you  
2 go to jail for life if you jay-walk -- I mean, the next time.  
3 Is that -- is that disproportionate? How am I supposed to say  
4 what is or was -- is not if I don't look to the empirical  
5 facts? And I'm not holding you to present empirical facts.  
6 I'm just saying, Why shouldn't I decide on the basis of  
7 empirical fact that is available?

8 MR. DE NICOLA: Well, in our view, the most  
9 prominent, kind of, objective factor that this Court could  
10 look to in weighing this sentence is what the legislature has  
11 said are felonies. What California has done in this case is,  
12 they've narrowed their target to a subclass of felons who have  
13 committed what the legislature has deemed to be -- and I think  
14 what, on the face of it, can reasonably be interpreted as  
15 being -- serious or violent crimes.

16 QUESTION: What's the limit for being -- what is the  
17 dividing line between grand theft and petty theft in  
18 California?

19 MR. DE NICOLA: Four hundred dollars, Your Honor.

20 QUESTION: When I went to law school, it was \$100,  
21 except if it was citrus you stole, it was \$50.

22 (Laughter.)

23 MR. DE NICOLA: Now it's \$100 if it's citrus.

24 (Laughter.)

25 MR. DE NICOLA: But once there is that predicate of



1 serious or violent felonies set in place, then what the three-  
2 strikes law does is, I think, reasonably moves toward a policy  
3 of incapacitation upon the commission of, not just any new  
4 crime, not a misdemeanor or an infraction, but a new crime  
5 that the legislature has --

6 QUESTION: One of the things that puzzles me about  
7 the statute -- maybe you can enlighten me -- I thought that if  
8 there were two priors that were violent but not related to  
9 property, such as murder and rape, that the third related to  
10 property wouldn't trigger the statute.

11 MR. DE NICOLA: No, Your Honor. The way the statute  
12 is written is that if the prior felonies meet the statutory  
13 definition of being serious or violent -- if you have two of  
14 those, then any new felony triggers the three-strike sentence.

15 QUESTION: Even if you -- if you had, say, a murder  
16 conviction and a rape conviction and then you committed a  
17 wobbler that was a property crime? Would the statute treat  
18 that as a third strike?

19 MR. DE NICOLA: Yes, because wobblers are felonies,  
20 by definition, in California, and any felony qualifies.

21 QUESTION: Regardless of the character of the first  
22 two strikes.

23 MR. DE NICOLA: As long as the first two strikes  
24 meet the level of being serious or violent, which --

25 QUESTION: I see. So -- and there's no requirement

1 that it be related to property. I misunderstood.

2 MR. DE NICOLA: No, Your Honor.

3 QUESTION: All right.

4 QUESTION: Also, I don't know how to work with  
5 felony and misdemeanor, because, across the nation, my  
6 impression is that those are classified in very different  
7 ways, and they're classified sometimes according to the prison  
8 that you serve in, as in Massachusetts, and sometimes you can  
9 find a felony that, in ordinary common sense, is a lot less  
10 serious than certain misdemeanors. That's why I'm very pushed  
11 to know what to work with unless you work with empirical fact.

12 MR. DE NICOLA: Well, we -- in California, the  
13 felony is defined by the -- not just the locus of where the  
14 term will be served, but also by the length. It's more than a  
15 year. And we think that that's a traditional line of  
16 demarcation between offenses that, over the course of time,  
17 society deems to be of elevated seriousness.

18 QUESTION: I think some of our constitutional  
19 jurisprudence makes it -- makes -- turns upon the distinction  
20 between felonies and misdemeanors, doesn't it?

21 MR. DE NICOLA: Yes, Your Honor, I think that is so,  
22 and there are political restraints on the legislature in  
23 enacting laws in general applicability. There are certainly  
24 economic restraints on a legislature in deciding to set a  
25 punishment scheme that provides for long terms of

1 imprisonment. That's costly. And that to -- for a court to  
2 second-guess that, comes, we think, perilously close to the  
3 court suggesting that the legislature can, in some instances,  
4 not declare a certain crime to be a felony, but must declare  
5 it to be a misdemeanor, and we don't think there's anything in  
6 the Court's jurisprudence that would -- that would support  
7 that type of an intrusion.

8           QUESTION: Mr. De Nicola, there's a lot of  
9 discretion built into this scheme. It comes across as three  
10 strikes and you're out, and that's it; but it's not. There's  
11 discretion in the prosecutor and discretion in the judge. Are  
12 there, in Los Angeles or in California, any guides to  
13 prosecutors in exercising their discretion, say, whether to  
14 treat a wobbler as a misdemeanor or a felony?

15           MR. DE NICOLA: There are no statewide standards.  
16 Each elected district attorney in the various counties in  
17 California has the option of promulgating guidelines. Some of  
18 them have. And the fact of the matter is some of them -- some  
19 of them differ. We think that's a rather unremarkable event  
20 in light of the fact that prosecutorial discretion is always  
21 going to lead to some sort of different approach depending on  
22 local conditions. But there is not, as far as I know, any  
23 statewide guideline, and certainly nothing that would be  
24 binding on the local prosecutors.

25           QUESTION: The prosecutor can charge something as a

1 misdemeanor. As far as the striking a strike is concerned, is  
2 that solely for the judge? Or, I suppose, it depends on  
3 what's charged. The prosecutor can decide not to charge two  
4 strikes.

5 MR. DE NICOLA: Yes, the prosecutor, under the  
6 statute, is required to allege the priors, but the prosecutor  
7 may seek dismissal of the prior strikes either in the  
8 furtherance of justice, or because of problems of proof. But  
9 the judge also has authority to strike strikes, even without  
10 the consent of the prosecutor, in California. And so --

11 QUESTION: And similarly, to reduce a wobbler to a  
12 misdemeanor.

13 MR. DE NICOLA: Yes, the prosecutor, in a way, has  
14 that discretion, because he or she can charge a -- an  
15 alternative felony or misdemeanor as a misdemeanor in the  
16 first place, but even under the three-strikes law, the trial  
17 judge retains the discretion to sentence a -- an alternative  
18 felony misdemeanor as a misdemeanor, and that would take the  
19 case out of the three-strikes scope.

20 QUESTION: May I ask you a question about your  
21 theory of the limits of the constitutional protection here?  
22 Supposing the offense was speeding -- and it can be dangerous  
23 speeding -- and you had a -- you said that -- 15 arrests for  
24 speeding gives you this very sentence we got in this case.  
25 Would that be permissible, do you think? Just on the theory

1 that Justice Scalia has explained -- where this guy is just  
2 too dangerous, we just don't want him on the street anymore,  
3 so we'll put him in jail for life, 25 years without  
4 possibility of parole.

5 MR. DE NICOLA: Well, we think that might possibly  
6 be constitutional, Your Honor. I --

7 QUESTION: Possibly be constitutional or  
8 unconstitutional?

9 MR. DE NICOLA: Might possibly be constitutional. I  
10 think it's more likely that it would  
11 be --

12 QUESTION: Well, why wouldn't it clearly be  
13 constitutional if we're thinking about protecting the public  
14 from repetitive offenders?

15 MR. DE NICOLA: Well, because I think the limiting  
16 principle that we're seeking here, Your Honor, is one that's  
17 premised on the felony classification. If  
18 the --

19 QUESTION: Do you think the statute would have been  
20 unconstitutional if they had said it's a misdemeanor when it's  
21 \$1200 -- if the legislature just, say, called the three golf  
22 clubs for \$1200 by a misdemeanor instead of by felony, would  
23 that change the constitutional analysis?

24 MR. DE NICOLA: It -- I think it would make the  
25 constitutional -- it might change the constitutional analysis.

1 It might make the result different. I think, again, once you  
2 have the predicate in place of the serious or violent  
3 felonies, then I think the reason you're --

4 QUESTION: But serious or violent -- it really  
5 doesn't have to be violent; it has to be serious. But you could  
6 have had \$1200 thefts, four or five of them, and he would  
7 still qualify, wouldn't he?

8 MR. DE NICOLA: No, Your Honor. If -- the prior  
9 crimes have to qualify as serious or violent under the  
10 definitions of a separate statutory scheme, so they would  
11 not --

12 QUESTION: But are there not serious crimes that are  
13 not violent?

14 MR. DE NICOLA: Yes, I think that's true. There are  
15 serious crimes where no injury is inflicted, but the crimes, I  
16 think, by their nature, tend to be crimes where the prospect  
17 of violence is rather imminent.

18 QUESTION: But they're -- I'm just trying to -- I'm  
19 trying to understand the theory. Is violence an absolute  
20 requirement, in your view, in one of the priors?

21 MR. DE NICOLA: No, I think -- I think --

22 QUESTION: Okay. So then we could have something  
23 equivalent -- maybe instead of \$1200, \$2000 or something. But  
24 if you just had five -- or three or four \$2,000 burglaries,  
25 that -- do you -- would that be permissible to put him in jail

1 on the same sentence that you have in this case?

2 MR. DE NICOLA: I -- again, Your Honor, I -- it's  
3 a -- it's a much tougher call. I think it might be  
4 permissible to do it, provided that the sentence allows for a  
5 possibility of parole, after the --

6 QUESTION: After 25 years.

7 MR. DE NICOLA: Yes. That would distinguish it from  
8 Solem, Your Honor. But nevertheless, here, the predicate,  
9 even though the prior crimes don't necessarily have to involve  
10 the actual infliction of violence, they are crimes that by  
11 their nature --

12 QUESTION: But in your view, violence is really more  
13 significant than the number of prior offenses, if I understand  
14 you correctly.

15 MR. DE NICOLA: Well, I think it might be a sliding  
16 scale, but I think violence does play a significant role and  
17 can justify a scheme like this, even in the absence --

18 QUESTION: Okay.

19 MR. DE NICOLA: -- of a great number of priors.

20 QUESTION: But you -- but I'm not quite sure what  
21 your view would be if there were no violence, but just seven  
22 or eight high-speed offenses, say, speeding, or \$1200 golf  
23 clubs.

24 MR. DE NICOLA: Well, we think a lot would depend on  
25 whether the legislature in the jurisdiction had determined

1 for -- for -- on an historical basis and for reasons  
2 independent --

3 QUESTION: Well, speeding is dangerous. People get  
4 hurt in automobile accidents. It seems to me it's exactly the  
5 same risk to the public that you have with this kind of crime.

6 MR. DE NICOLA: But we think -- if the legislature  
7 declares those to be a felony, then I think we become a lot --  
8 we come a lot closer to --

9 QUESTION: It depends on what the legislature calls  
10 the offense.

11 MR. DE NICOLA: Yes, it does, Your Honor, in a very  
12 significant respect, because what the legislature calls the  
13 offense in connection with it being a misdemeanor or a felony  
14 does reflect, we think, a reliable longstanding consensus of  
15 the -- of the community. And under the Harmelin principles of  
16 deference and reliance and objective factors, we think that's  
17 a prominent objective factor.

18 QUESTION: On Justice Stevens' hypo, taking it one  
19 step further, I guess we would have to say that if there were  
20 15 prior speeding offenses, and they had been classified as  
21 felonies in California, that there was no disproportion  
22 between 25-to-life for 15 -- with a predicate of 15 prior  
23 speeding offenses, on the one hand, and the penalties for  
24 torture and murder, on the other hand. Because I think it's  
25 undisputed that the only standalone penalties that are this



1 great are the penalties for torture and homicide. That would  
2 be rather a stretch, wouldn't it, regardless of whether the  
3 legislature wants to put a felony label on them or not?

4 MR. DE NICOLA: Well, again, Your Honor --

5 QUESTION: Speeding's important, but --

6 MR. DE NICOLA: Yes.

7 QUESTION: -- I mean, torture and murder?

8 MR. DE NICOLA: I do think that it is a much tougher  
9 case for us, and I'm not at all certain that it would be  
10 constitutional if all of the crimes, the predicate through the  
11 new crime, were simply speeding. I think --

12 QUESTION: Might it be an abuse of the judge's  
13 discretion not to reduce such a -- if it's a wobbler, in such  
14 a case, or not to strike a strike?

15 MR. DE NICOLA: Well, I don't -- in the California  
16 context, the question would only arise -- well, I don't think  
17 it would arise at all, because you wouldn't have a speeding --  
18 even as a predicate, any felony-triggering offense, and the  
19 speeding wouldn't qualify as a serious or violent felony under  
20 the statute anyway. So this hypothetical is very far removed  
21 from the three-strikes scheme that California has in place.

22 QUESTION: I would have thought that your response  
23 to Justice Souter would have been that it might seem  
24 disproportionate insofar as the penal goal of punishment or  
25 retribution is concerned, but it depends on what you want your

1 penal goals to be. California has decided that disabling the  
2 criminal is the most important thing, and in -- from that  
3 point of view, it's not necessarily disproportionate. The one  
4 is disabled as the other.

5 MR. DE NICOLA: Well --

6 QUESTION: I mean, proportionality -- you  
7 necessarily have to look upon what the principal objective of  
8 the punishment is. If the objective of -- if the objective is  
9 retribution, then, sure, I guess it's disproportionate to  
10 execute somebody for killing only one person, when you do no  
11 more than execute somebody for killing 20 people. But if your  
12 purpose is disabling the criminal, I'm not sure that it --  
13 that the example that Justice Souter gave is disproportionate.

14 MR. DE NICOLA: Well, again, Your Honor, I don't --  
15 I don't think I would absolutely concede that it would be  
16 unconstitutional. I'm just saying that --

17 QUESTION: Well, do you adopt Justice Scalia's  
18 analysis? I mean, this came up in the briefs, and this was an  
19 interesting point. Does the State, for purposes of  
20 proportionality analysis, have the option to adopt a different  
21 theory of penalty? And he's given an example. Do you -- do  
22 you adopt that argument here? And do you think that is a  
23 justification that you want to rely on in this case?

24 MR. DE NICOLA: Yes, we do adopt the theory of  
25 incapacitation, and we do rely on incapacitation as a theory

1 that justifies the sentence in this case.

2 QUESTION: All right. Here's the problem that I  
3 have with that, and this is -- this is -- this is what I wish  
4 you would address. If we allow, for purposes of  
5 proportionality or gross disproportionality analysis, this  
6 kind of -- the consideration of varying intentions --  
7 retribution, incapacitation, deterrence, and so on -- and  
8 every time the State gets to a very high offense, the State  
9 says, "Oh, we've changed the theory. We've gone from  
10 deterrence to retribution," it seems to me that it makes this  
11 kind of analysis of comparables -- this proportionality  
12 analysis -- impossible because we no longer have two  
13 comparable entities on either side of our comparison. What we  
14 have is a low sentence on the one hand for deterrence, and a  
15 high sentence for incapacitation or retribution. We have  
16 apples and oranges instead of oranges and oranges.

17 So my question is, if we accept the State's option  
18 to say, "We've changed the theory," don't we read  
19 comparability analysis right out of the law? Doesn't it  
20 simply become logically impossible?

21 MR. DE NICOLA: Well, I think it becomes much more  
22 difficult, but I don't think it necessarily becomes logically  
23 impossible, because I think there is still room for judicial  
24 scrutiny, within the context of the Harmelin narrow  
25 proportionality principle, to take a hard look --

1           QUESTION: But my problem is, I don't know what  
2 we're supposed to -- what we can compare for comparable  
3 examples on proportionality analysis if it can be  
4 fundamentally affected by the State's change of intention from  
5 one theory in one crime, or one set of penalties, to another  
6 theory in another set of penalties. I don't see what we can  
7 compare. We no longer have comparables.

8           MR. DE NICOLA: Well, but I think the Court can  
9 still look at whether the phenomenon of -- as in this case, of  
10 heightened recidivism based on prior violence, or serious  
11 offenses threatening violence and triggered by a new crime  
12 that, say -- that's classified as a felony by the legislature  
13 and that offers a sentence of -- a lengthy sentence, but that  
14 still offers a possibility of  
15 parole --

16           QUESTION: I guess the conclusion that Justice  
17 Souter's questions would lead to is that a State cannot use  
18 any factor except retribution. Or if it uses any other  
19 factor, it does so at the risk of our simply holding it to be  
20 disproportionate.

21           MR. DE NICOLA: Yes, Your Honor --

22           QUESTION: And I don't know that our -- I'm sure  
23 that our cases don't support that.

24           MR. DE NICOLA: It -- and I acknowledge it -- to  
25 Justice Souter, it makes it a very difficult situation. But

1 under Harmelin, those, I think, are penological objectives  
2 that the Judiciary ought to defer to the State.

3 QUESTION: But maybe -- maybe, and I -- we've -- we  
4 haven't said this -- maybe our assumption is that the State,  
5 in establishing a penal system, is going to establish it on a  
6 set of consistent and neutral principles from beginning to  
7 end. Would that be a legitimate basis for us to ground our  
8 constitutional analysis?

9 MR. DE NICOLA: No, Your Honor. It disables the  
10 states from changing -- from dealing with changing conditions.

11 QUESTION: Thank you, Mr. De Nicola.

12 Mr. Chertoff, we'll hear from you.

13 ORAL ARGUMENT OF MICHAEL CHERTOFF

14 ON BEHALF OF THE RESPONDENT

15 MR. CHERTOFF: Mr. Chief Justice, and may it please  
16 the Court: I think the last series of questions which Justice  
17 Souter posed to Mr. De Nicola really framed the issue in light  
18 of this case's most recent pronouncement in Harmelin -- this  
19 Court's most recent pronouncement in Harmelin.

20 I would have read Harmelin as establishing two  
21 principles, at a minimum. One is, the analysis is not  
22 proportionality; it's gross disproportionality, an extremely  
23 rare basis to invalidate a statute. Second, we recognize that  
24 the states are entitled to adopt different penological  
25 theories, or a mix of theories. In fact, I would have thought

1 that a state's entitled to say, for example, that certain  
2 types of crimes ought to be addressed in terms of retribution;  
3 other types of crimes posing other kinds of issues can be  
4 dealt with in terms of deterrence and incapacitation.

5           And if the consequence of that principle is that  
6 this Court has very limited review on comparability of  
7 sentences, at least where you're dealing with sentences that  
8 allow for the possibility of parole, then I think the  
9 conclusion is that it is the extremely rare case in which a  
10 sentence gets --

11           QUESTION: Well, why isn't that this case? I mean,  
12 I don't know how to approach proportionality other than to  
13 say, what sentences are given for the same crime, or what  
14 crimes are treated with the same sentence?

15           Now, suppose, looking at that, I find this is the  
16 rare case. If it isn't, why isn't it? I mean, all the  
17 information we have, as I've said before, seems to suggest  
18 that this is higher by a factor of two or three times anything  
19 else you can find.

20           MR. CHERTOFF: Well --

21           QUESTION: Now, if that isn't grossly  
22 disproportionate, why isn't it?

23           MR. CHERTOFF: It's not for several reasons, Your  
24 Honor. First of all, although there's nothing in the record  
25 to speak to what the pre-1977 proportions were in terms of

1 sentencing, we do know, for example, that elsewhere in the  
2 country there have been comparable sentences. We've cited in  
3 the United States --

4 QUESTION: Cited a lot of instances in which the law  
5 permits such a sentence, but that's quite different from  
6 saying there was such a sentence.

7 MR. CHERTOFF: Actually, I think in footnote 13,  
8 we've cited several cases in other states where you have very  
9 comparable punishments, where you have larcenies between 4-  
10 and \$700 as the third strike --

11 QUESTION: And do you have instances where people  
12 were sentenced to 25 real years in prison for having committed  
13 such an offense? Or were you citing that the law would permit  
14 such a sentence?

15 MR. CHERTOFF: We cited review and rejection of  
16 disproportionality challenges in one case in Nevada to a life  
17 sentence without parole for a grand larceny of --

18 QUESTION: Good, okay, thank you.

19 MR. CHERTOFF: -- \$476, and a similar one, I think,  
20 in South Dakota.

21 Also, of course, as we look at the current  
22 sentencing regime, this is not, as in *Solem versus Helm*, where  
23 you have single judge who is apparently an outlier under the  
24 state sentencing scheme. In this case, if one takes, in fact,  
25 a petitioner's own figures, you have at least 2- to 300

1 individuals whose third strike, under the California scheme as  
2 it now exists, has, in fact, been a property-based crime.

3           And I think the most compelling reason why this is  
4 not that very, very rare case where we strike down a sentence  
5 is precisely what Justice Ginsburg has been repeatedly asking  
6 about, the discretion that the courts have to tailor the  
7 particular sentence in this case to the facts of the case. If  
8 we look at the record in this case, in the joint appendix, the  
9 sentencing judge carefully considered the entirety of the file  
10 with respect to the trigger -- or the predicate offenses,  
11 which involved, actually, three burglaries in the course of a  
12 single month, one of which involved pulling a knife and  
13 threatening somebody, as well as at least nine prior offenses.

14           And interestingly, in no case since 1988 had the  
15 petitioner ever successfully completed probation or parole.  
16 He was always violating probation or parole by committing his  
17 next offense. And that's precisely what the sentencing judge  
18 looked at and explicitly referred to in rejecting the request  
19 on the part of the petitioner either to downgrade the  
20 triggering offense to a misdemeanor, or to eliminate some of  
21 the strikes.

22           And I would have thought that is precisely what we  
23 expect and want judges to do in a rational sentencing system

24           QUESTION: In effect, you're -- going back to the  
25 beginning of your argument, I think you're -- I think you're



1 saying that what the judge here did in rejecting the request  
2 to downgrade or to disregard, in effect, was saying, "Yes, I  
3 am finding that this is a case in which it is appropriate to  
4 sentence on an entirely different theory, a theory of putting  
5 them away, as opposed to a theory of deterrence," and I --  
6 that seems to be the logic of what's going on.

7 MR. CHERTOFF: That's correct; an entirely different  
8 theory, though, that is embraced by the State in passing this  
9 law.

10 QUESTION: And may I ask you one more question on  
11 that? Because again, you started toward it in responding to  
12 me at the beginning. Like you, I came in here assuming that  
13 the State could change its theories. If that is so, then I  
14 guess what that means for proportionate or gross  
15 disproportionality analysis is this: A State can do it and  
16 can pass our Eight Amendment test if it has a reasonable basis  
17 for saying, "We are going, under certain circumstances, to say  
18 there is a changed theory of sentencing. The theory changes  
19 from deterrence or mere retribution to a theory of public  
20 protection, putting away the person who simply will repeat and  
21 repeat and repeat."

22 So, for purposes of our proportionality analysis,  
23 the question would come down, do they have a reasonable basis  
24 for doing that under their statute, in general? And in  
25 particular, is there a reasonable basis for saying that this

1 is a case for that? And if the answers to those two questions  
2 are yes, then it passes the test. Is that -- would you adopt  
3 that analysis?

4 MR. CHERTOFF: I would absolutely agree that if it  
5 satisfies those two, it passes the test. That's not to say  
6 that if it flunks those, it automatically fails the test. But  
7 certainly if you meet those conditions, I think you pass the  
8 test. And I think there's a common sense to that.

9 One could look, for example, at certain types of  
10 violent crimes, like murders and rapes and say, irrespective  
11 of whether it was a crime of passion or something that will  
12 never happen again, "It is so heinous, our philosophy is we  
13 have to punish it." But one can also look at comparatively  
14 small crimes, at least if they're felonies, and say, "If  
15 someone is repetitiously unable to conform their conduct to  
16 the requirements of the law, we don't have to wait until he  
17 commits the next felony or the next two felonies before we put  
18 an end to it."

19 And interestingly, if one goes back to Blackstone,  
20 who talks a little bit about the issue of proportionality as  
21 it related back in his day, he discusses the fact that when  
22 you deal with habitual offenders, it would be cruel to the  
23 public to simply allow that person to get out again and commit  
24 their next crime.

25 So, I don't know that it's so much that the State

1 changes its theory, as that the State adapts its theory to the  
2 particular type of crime and particular type of offender. And  
3 that's, of course, what we want to have in sentencing.

4           And, finally, I would say this. In a scheme like  
5 California, where the state judge has the power to tailor to  
6 the particular offender and the particular offense what the  
7 right answer is, for the federal courts to come in under gross  
8 disproportionality analysis and recalibrate that -- even if,  
9 sitting as state trial judges, the justices might feel we  
10 would do it differently -- would be essentially converting the  
11 courts into a constitutional sentencing commission. And if  
12 one looks at the companion case --

13           QUESTION: Excuse me, would be essentially  
14 to --

15           MR. CHERTOFF: Convert the court into a  
16 constitutional sentencing commission. Doing the kind of  
17 analysis that we now have, a sentencing commission --

18           QUESTION: And that would be a very bad thing. I  
19 agree.

20           (Laughter.)

21           MR. CHERTOFF: It would be a -- certainly very  
22 complicated thing, Justice Breyer.

23           So -- and if one looks at the companion case,  
24 Andrade, and the subsequent cases in the Ninth Circuit that  
25 have flowed from that case, one sees this phenomenon beginning

1 to emerge, where every fact pattern is evaluated slightly  
2 differently. One court views burglary as being a violent  
3 offense; one court says it's not a violent offense.

4 QUESTION: Could you argue that, because discretion  
5 is consistent with the goals of the statute before the  
6 sentencing, that some discretion is also permitted to a  
7 reviewing court after the sentencing, and they can still  
8 maintain the symmetry and the purpose of the statute?

9 MR. CHERTOFF: The state law could certainly provide  
10 for some kind of review as a matter of state sentencing law in  
11 terms of abuse of discretion by the sentencing judge.

12 QUESTION: But in this -- in California, does the  
13 appellate court ever set aside sentences on the ground there  
14 was an abuse of discretion to invoke the three strikes law?

15 MR. CHERTOFF: I know of cases where they have  
16 affirmed trial judges that have set aside strikes. I don't  
17 know of a case --

18 QUESTION: No, I -- has -- has a trial judge ever  
19 been set aside for imposing the third strike?

20 MR. CHERTOFF: I'm not aware of it.

21 QUESTION: I don't think --

22 MR. CHERTOFF: I'm not aware --

23 QUESTION: -- there are any --

24 MR. CHERTOFF: -- of such a case. Certainly the  
25 state law could allow that to happen.

1           If there are no further questions, I will return the  
2 rest of my time to the Court.

3           QUESTION: Thank you, Mr. Chertoff.

4           Mr. Denvir, you have one minute remaining.

5                           REBUTTAL ARGUMENT OF QUIN DENVIR

6                           ON BEHALF OF THE PETITIONER

7           MR. DENVIR: Your Honor, the point I -- I'd like to  
8 make two points. One is, if the discretion in -- under the  
9 California law is very limited. One thing would be to treat a  
10 wobbler, if it is a wobbler, and reduce it to a misdemeanor;  
11 so you would go from 25 to life, or life, to one-year maximum  
12 penalty. That's not used very often. The other one is to  
13 strike a prior conviction. But that's a -- the California  
14 Supreme Court in *Romero* said that's a very limited discretion,  
15 that it is only when you can find that this offender is  
16 outside the "spirit of the law," whatever that is. And  
17 there's an amicus brief filed by the Los Angeles public  
18 defender in *Romero* that shows that that discretion has been  
19 used very little in California. So the -- this limited  
20 discretion has no effect on it.

21           The only other point I'd make, as far as the  
22 repetition -- as far as the labeling, if all the legislature  
23 has to do is say, "What we're doing here is incapacitation,  
24 and, therefore, the Court can't look at that," then it really  
25 writes the Eighth Amendment protections against grossly

1   disproportional sentences out totally.  If it's just a  
2   question of -- they say, "Here's our reason," and you can't  
3   even question that, because they can always claim they want to  
4   incapacitate any criminal for any amount of time.

5                   CHIEF JUSTICE REHNQUIST:  Thank you, Mr. Denvir.  The  
6   case is submitted.

7                   (Whereupon, at 11:09 a.m., the case in the  
8   above-entitled matter was submitted.)

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