SUPREME COURT OF THE UNITED STATES

No. 01–6978

GARY ALBERT EWING, PETITIONER *v.* CALIFORNIA

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

[March 5, 2003]

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

The constitutional question is whether the "three strikes" sentence imposed by California upon repeat-offender Gary Ewing is "grossly disproportionate" to his crime. *Ante,* at 1, 18 (plurality opinion). The sentence amounts to a real prison term of at least 25 years. The sentence-triggering criminal conduct consists of the theft of three golf clubs priced at a total of $1,197. See *ante,* at 5. The offender has a criminal history that includes four felony convictions arising out of three separate burglaries (one armed). *Ante,* at 5–6. In *Solem* v. *Helm,* 463 U. S. 277 (1983), the Court found grossly disproportionate a somewhat longer sentence imposed on a recidivist offender for triggering criminal conduct that was somewhat less severe. In my view, the differences are not determinative, and the Court should reach the same ultimate conclusion here.

I

This Court's precedent sets forth a framework for analyzing Ewing's Eighth Amendment claim. The Eighth Amendment forbids, as "cruel and unusual punishments," prison terms (including terms of years) that are "grossly disproportionate." *Solem, supra,* at 303; see *Lockyer* v. *Andrade*, *post,* at 7. In applying the "gross disproportionality" principle, courts must keep in mind that "legislative

policy" will primarily determine the appropriateness of a punishment's "severity," and hence defer to such legislative policy judgments. *Gore* v. *United States,* 357 U. S. 386, 393 (1958); see *Harmelin* v. *Michigan,* 501 U. S. 957, 998 (1991) (KENNEDY, J., concurring in part and concurring in judgment); *Solem*, *supra,* at 289–290; *Rummel* v. *Estelle,* 445 U. S. 263, 274–276 (1980); *Weems* v. *United States,* 217 U. S. 349, 373 (1910). If courts properly respect those judgments, they will find that the sentence fails the test only in *rare* instances. *Solem*, *supra,* at 290, n. 16; *Harmelin*, *supra,* at 1004 (KENNEDY, J., concurring in part and concurring in judgment); *Rummel*, *supra,* at 272 ("[S]uccessful challenges to the proportionality of particular sentences have been exceedingly rare"). And they will only "'rarely'" find it necessary to "'engage in extended analysis'" before rejecting a claim that a sentence is "grossly disproportionate." *Harmelin*, *supra,* at 1004 (KENNEDY, J., concurring in part and concurring in judgment) (quoting *Solem*, *supra,* at 290, n. 16).

The plurality applies JUSTICE KENNEDY's analytical framework in *Harmelin*, *supra,* at 1004–1005 (opinion concurring in part and concurring in judgment). *Ante,* at 10–11. And, for present purposes, I will consider Ewing's Eighth Amendment claim on those terms. But see *ante,* at 1, n. 1 (STEVENS, J., dissenting). To implement this approach, courts faced with a "gross disproportionality" claim must first make "a threshold comparison of the crime committed and the sentence imposed." *Harmelin*, *supra,* at 1005 (KENNEDY, J., concurring in part and concurring in judgment). If a claim crosses that threshold—itself a *rare* occurrence—then the court should compare the sentence at issue to other sentences "imposed on other criminals" in the same, or in other, jurisdictions. *Solem*, *supra,* at 290–291; *Harmelin*, *supra,* at 1005 (KENNEDY, J., concurring in part and concurring in judgment). The comparative analysis will "validate" or invalidate "an

initial judgment that a sentence is grossly disproportionate to a crime." *Ibid.*

I recognize the warnings implicit in the Court's frequent repetition of words such as "rare." Nonetheless I believe that the case before us is a "rare" case—one in which a court can say with reasonable confidence that the punishment is "grossly disproportionate" to the crime.

II

Ewing's claim crosses the gross disproportionality "threshold." First, precedent makes clear that Ewing's sentence raises a serious disproportionality question. Ewing is a recidivist. Hence the two cases most directly in point are those in which the Court considered the constitutionality of recidivist sentencing: *Rummel* and *Solem*. Ewing's claim falls between these two cases. It is stronger than the claim presented in *Rummel*, where the Court upheld a recidivist's sentence as constitutional. It is weaker than the claim presented in *Solem*, where the Court struck down a recidivist sentence as unconstitutional.

Three kinds of sentence-related characteristics define the relevant comparative spectrum: (a) the length of the prison term in real time, *i.e.*, the time that the offender is likely actually to spend in prison; (b) the sentence-triggering criminal conduct, *i.e.*, the offender's actual behavior or other offense-related circumstances; and (c) the offender's criminal history. See *Rummel*, *supra,* at 265–266, 269, 276, 278, 280–281 (using these factors); *Solem*, *supra,* at 290–303 (same). Cf. United States Sentencing Commission, Guidelines Manual ch. 1, pt. A, intro., n. 5 (Nov. 1987) (USSG) (empirical study of "summary reports of some 40,000 convictions [and] a sample of 10,000 augmented presentence reports" leads to sentences based primarily upon (a) offense characteristics and (b) offender's criminal record); see *id.*, p. s. 3.

In *Rummel*, the Court held constitutional (a) a sentence of life imprisonment *with parole available within 10 to 12 years*, (b) for the offense of obtaining $120 by false pretenses, (c) committed by an offender with two prior felony convictions (involving small amounts of money). 445 U. S., at 263; *ante,* at 8–9. In *Solem*, the Court held unconstitutional (a) a sentence of life imprisonment *without parole*, (b) for the crime of writing a $100 check on a nonexistent bank account, (c) committed by an offender with six prior felony convictions (including three for burglary). 463 U. S., at 277; *ante,* at 9–10. Which of the three pertinent comparative factors made the constitutional difference?

The third factor, prior record, cannot explain the difference. The offender's prior record was *worse* in *Solem*, where the Court found the sentence too long, than in *Rummel*, where the Court upheld the sentence. The second factor, offense conduct, cannot explain the difference. The nature of the triggering offense—viewed in terms of the actual monetary loss—in the two cases was about the same. The one critical factor that explains the difference in the outcome is the length of the likely prison term measured in real time. In *Rummel*, where the Court upheld the sentence, the state sentencing statute authorized parole for the offender, Rummel, after 10 or 12 years. 445 U. S., at 280; *id.,* at 293 (Powell, J., dissenting). In *Solem*, where the Court struck down the sentence, the sentence required the offender, Helm, to spend the rest of his life in prison.

Now consider the present case. The third factor, *offender characteristics—i.e.*, prior record—does not differ significantly here from that in *Solem*. Ewing's prior record consists of four prior felony convictions (involving three burglaries, one with a knife) contrasted with Helm's six prior felony convictions (including three burglaries, though none with weapons). The second factor, *offense behavior*, is worse than that in *Solem*, but only to a degree.

It would be difficult to say that the actual behavior itself here (shoplifting) differs significantly from that at issue in *Solem* (passing a bad check) or in *Rummel* (obtaining money through false pretenses). Rather the difference lies in the *value* of the goods obtained. That difference, measured in terms of the most relevant feature (loss to the victim, *i.e.*, wholesale value) and adjusted for the irrelevant feature of inflation, comes down (in 1979 values) to about $379 here compared with $100 in *Solem,* or (in 1973 values) to $232 here compared with $120.75 in *Rummel.* See USSG §2B1.1, comment., n. 2(A)(i) (Nov. 2002) (loss to victim properly measures value of goods unlawfully taken); U. S. Dept. of Labor, Bureau of Labor Statistics, Inflation and Consumer Spending, Inflation Calculator (Jan. 23, 2003), http://www.bls.gov. Alternatively, if one measures the inflation-adjusted value difference in terms of the golf clubs' sticker price, it comes down to $505 here compared to $100 in *Solem*, or $309 here compared to $120.75 in *Rummel*. See *ibid.*

The difference in *length* of the real prison term—the first, and critical, factor in *Solem* and *Rummel*—is considerably more important. Ewing's sentence here amounts, in real terms, to at least 25 years without parole or good-time credits. That sentence is considerably shorter than Helm's sentence in *Solem*, which amounted, in real terms, to life in prison. Nonetheless Ewing's real prison term is more than twice as long as the term at issue in *Rummel*, which amounted, in real terms, to at least 10 or 12 years. And, Ewing's sentence, unlike Rummel's (but like Helm's sentence in *Solem*), is long enough to consume the productive remainder of almost any offender's life. (It means that Ewing himself, seriously ill when sentenced at age 38, will likely die in prison.)

The upshot is that the length of the real prison term—the factor that explains the *Solem*/*Rummel* difference in outcome—places Ewing closer to *Solem* than to *Rummel*,

though the greater value of the golf clubs that Ewing stole moves Ewing's case back slightly in *Rummel*'s direction. Overall, the comparison places Ewing's sentence well within the twilight zone between *Solem* and *Rummel*—a zone where the argument for unconstitutionality is substantial, where the cases themselves cannot determine the constitutional outcome.

Second, Ewing's sentence on its face imposes one of the most severe punishments available upon a recidivist who subsequently engaged in one of the less serious forms of criminal conduct. See *infra*, at 10–12. I do not deny the seriousness of shoplifting, which an *amicus curiae* tells us costs retailers in the range of $30 billion annually. Brief for California District Attorneys Association as *Amicus Curiae* 27. But consider that conduct in terms of the factors that this Court mentioned in *Solem*—the "harm caused or threatened to the victim or society," the "absolute magnitude of the crime," and the offender's "culpability." 463 U. S., at 292–293. In respect to all three criteria, the sentence-triggering behavior here ranks well toward the bottom of the criminal conduct scale.

The Solicitor General has urged us to consider three other criteria: the "frequency" of the crime's commission, the "ease or difficulty of detection," and "the degree to which the crime may be deterred by differing amounts of punishment." Brief for United States as *Amicus Curiae* 24–25. When considered in terms of these criteria—or at least the latter two—the triggering conduct also ranks toward the bottom of the scale. Unlike, say, drug crimes, shoplifting often takes place in stores open to other customers whose presence, along with that of store employees or cameras, can help to detect the crime. Nor is there evidence presented here that the law enforcement community believes lengthy prison terms necessary adequately to deter shoplifting. To the contrary, well-publicized instances of shoplifting suggest that the offense

is often punished without any prison sentence at all. On the other hand, shoplifting is a frequently committed crime; but "frequency," standing alone, cannot make a critical difference. Otherwise traffic offenses would warrant even more serious punishment.

This case, of course, involves shoplifting engaged in by a *recidivist*. One might argue that *any* crime committed by a recidivist is a serious crime potentially warranting a 25-year sentence. But this Court rejected that view in *Solem*, and in *Harmelin*, with the recognition that "no penalty is *per se* constitutional." *Solem*, *supra,* at 290; *Harmelin*, 501 U. S., at 1001 (KENNEDY, J., concurring in part and concurring in judgment). Our cases make clear that, in cases involving recidivist offenders, we must focus upon "the [offense] that triggers the life sentence," with recidivism playing a "relevant," but not necessarily determinative, role. *Solem*, *supra,* at 296, n. 21; see *Witte* v. *United States,* 515 U. S. 389, 402, 403 (1995) (the recidivist defendant is "punished only for the offense of conviction," which "'is considered to be an aggravated offense because a repetitive one'" (quoting *Gryger* v. *Burke,* 334 U. S. 728, 732 (1948))). And here, as I have said, that offense is among the less serious, while the punishment is among the most serious. Cf. *Rummel*, 445 U. S., at 288 (Powell, J., dissenting) (overtime parking violation cannot trigger a life sentence even for a serious recidivist).

Third, some objective evidence suggests that many experienced judges would consider Ewing's sentence disproportionately harsh. The United States Sentencing Commission (having based the federal Sentencing Guidelines primarily upon its review of how judges had actually sentenced offenders) does not include shoplifting (or similar theft-related offenses) among the crimes that might trigger especially long sentences for recidivists, see USSG §4B1.1 (Nov. 2002) (Guideline for sentencing "career offenders"); *id.,* ch. 1, pt. A, intro., n. 5 (sentences based in

part upon Commission's review of "summary reports of some 40,000 convictions [and] a sample of 10,000 augmented presentence reports"); see also *infra*, at 11–12, nor did Congress include such offenses among triggering crimes when it sought sentences "at or near the maximum" for certain recidivists, S. Rep. No. 98–225, p. 175 (1983); 28 U. S. C. §994(h) (requiring sentence "at or near the maximum" where triggering crime is crime of "violence" or drug related); 18 U. S. C. §3559(c) (grand theft not among triggering or "strike" offenses under federal "three strikes" law); see *infra*, at 12. But see 28 U. S. C. §994(i)(1) (requiring "a substantial term of imprisonment" for those who have "a history of two or more prior . . . felony convictions").

Taken together, these three circumstances make clear that Ewing's "gross disproportionality" argument is a strong one. That being so, his claim *must* pass the "threshold" test. If it did not, what would be the function of the test? A threshold test must permit *arguably* unconstitutional sentences, not only *actually* unconstitutional sentences, to pass the threshold—at least where the arguments for unconstitutionality are unusually strong ones. A threshold test that blocked every ultimately invalid constitutional claim—even strong ones—would not be a *threshold* test but a *determinative* test. And, it would be a *determinative* test that failed to take account of highly pertinent sentencing information, namely, comparison with other sentences, *Solem*, *supra,* at 291–292, 298–300. Sentencing comparisons are particularly important because they provide proportionality review with *objective* content. By way of contrast, a threshold test makes the assessment of constitutionality highly subjective. And, of course, so to transform that *threshold* test would violate this Court's earlier precedent. See 463 U. S., at 290, 291–292; *Harmelin*, *supra,* at 1000, 1005 (KENNEDY, J., concurring in part and concurring in judgment).

III

Believing Ewing's argument a strong one, sufficient to pass the threshold, I turn to the comparative analysis. A comparison of Ewing's sentence with other sentences requires answers to two questions. First, how would other jurisdictions (or California at other times, *i.e.*, without the three strikes penalty) punish the *same offense conduct?* Second, upon what other conduct would other jurisdictions (or California) impose the *same prison term?* Moreover, since hypothetical punishment is beside the point, the relevant prison time, for comparative purposes, is *real* prison time, *i.e.*, the time that an offender must *actually serve*.

Sentencing statutes often shed little light upon real prison time. That is because sentencing laws normally set *maximum* sentences, giving the sentencing judge discretion to choose an actual sentence within a broad range, and because many States provide good-time credits and parole, often permitting release after, say, one-third of the sentence has been served, see, *e.g.,* Alaska Stat. §33.20.010(a) (2000); Conn. Gen. Stat. §18–7a (1998). Thus, the statutory maximum is rarely the sentence imposed, and the sentence imposed is rarely the sentence that is served. For the most part, the parties' briefs discuss sentencing statutes. Nonetheless, that discussion, along with other readily available information, validates my initial belief that Ewing's sentence, comparatively speaking, is extreme.

As to California itself, we know the following: First, between the end of World War II and 1994 (when California enacted the three strikes law, *ante,* at 2), *no one* like Ewing could have served more than *10* years in prison. We know that for certain because the maximum sentence for Ewing's crime of conviction, grand theft, was for most of that period 10 years. Cal. Penal Code Ann. §§484, 489 (West 1970); see Cal. Dept. of Corrections, Offender In-

formation Services, Administrative Services Division, Historical Data for Time Served by Male Felons Paroled from Institutions: 1945 Through 1981, p. 11 (1982) (Table 10) (hereinafter Historical Data for Time Served by California Felons), Lodging of Petitioner. From 1976 to 1994 (and currently, absent application of the three strikes penalty), a Ewing-type offender would have received a maximum sentence of 4 years. Cal. Penal Code Ann. §489 (West 1999), §667.5(b) (West Supp. 2002). And we know that California's "habitual offender" laws did not apply to grand theft. §§644(a), (b) (West 1970) (repealed 1977). We also know that the time that any offender actually served was likely far less than 10 years. This is because statistical data shows that the median time actually served for grand theft (other than auto theft) was about two years, and 90 percent of all those convicted of that crime served less than three or four years. Historical Data for Time Served by California Felons 11 (Table 10).

Second, statistics suggest that recidivists *of all sorts* convicted during that same time period in California served a small fraction of Ewing's real-time sentence. On average, recidivists served three to four additional (recidivist-related) years in prison, with 90 percent serving less than an additional real seven to eight years. *Id.,* at 22 (Table 21).

Third, we know that California has reserved, and still reserves, Ewing-type prison time, *i.e.*, at least 25 real years in prison, for criminals convicted of crimes far worse than was Ewing's. Statistics for the years 1945 to 1981, for example, indicate that typical (nonrecidivist) male first-degree murderers served between 10 and 15 real years in prison, with 90 percent of all such murderers serving less than 20 real years. *Id.,* at 3 (Table 2). Moreover, California, which has moved toward a real-time sentencing system (where the statutory punishment approximates the time served), still punishes far less harshly

those who have engaged in far more serious conduct. It imposes, for example, upon nonrecidivists guilty of arson causing great bodily injury a maximum sentence of nine years in prison, Cal. Penal Code Ann. §451(a) (West 1999) (prison term of 5, 7, or 9 years for arson that causes great bodily injury); it imposes upon those guilty of voluntary manslaughter a maximum sentence of 11 years, §193 (prison term of 3, 6, or 11 years for voluntary manslaughter). It reserves the sentence that it here imposes upon (former-burglar-now-golf-club-thief) Ewing, for nonrecidivist, first-degree murderers. See §190(a) (West Supp. 2003) (sentence of 25 years to life for first-degree murder).

As to other jurisdictions, we know the following: The United States, bound by the federal Sentencing Guidelines, would impose upon a recidivist, such as Ewing, a sentence that, in any ordinary case, would not exceed 18 months in prison. USSG §2B1.1(a) (Nov. 1999) (assuming a base offense level of 6, a criminal history of VI, and no mitigating or aggravating adjustments); *id.*, ch. 5, pt. A, Sentencing Table. The Guidelines, based in part upon a study of some 40,000 actual federal sentences, see *supra,* at 3, 8, reserve a Ewing-type sentence for Ewing-type *recidivists* who currently commit such crimes as murder, §2A1.2; air piracy, §2A5.1; robbery (involving the discharge of a firearm, serious bodily injury, and about $1 million), §2B3.1; drug offenses involving more than, for example, 20 pounds of heroin, §2D1.1; aggravated theft of more than $100 million, §2B1.1; and other similar offenses. The Guidelines reserve 10 years of real prison time (with good time)—less than 40 percent of Ewing's sentence—for Ewing-type *recidivists* who go on to commit, for instance, voluntary manslaughter, §2A1.3; aggravated assault with a firearm (causing serious bodily injury and motivated by money), §2A2.2; kidnaping, §2A4.1; residential burglary involving more than $5 million, §2B2.1; drug offenses involving at least one pound of cocaine, §2D1.1;

and other similar offenses. Ewing also would not have been subject to the federal "three strikes" law, 18 U. S. C. §3559(c), for which grand theft is not a triggering offense.

With three exceptions, see *infra* this page and 13, we do not have before us information about actual time served by Ewing-type offenders in other States. We do know, however, that the law would make it legally impossible for a Ewing-type offender to serve more than 10 years in prison in 33 jurisdictions, as well as the federal courts, see Appendix, Part A, *infra*, more than 15 years in 4 other States, see Appendix, Part B, *infra*, and more than 20 years in 4 additional States, see Appendix, Part C, *infra*. In nine other States, the law *might* make it legally possible to impose a sentence of 25 years or more, see Appendix, Part D, *infra*—though that fact by itself, of course, does not mean that judges have actually done so. But see *infra* this page and 13. I say "might" because the law in five of the nine last-mentioned States restricts the sentencing judge's ability to impose a term so long that, with parole, it would amount to at least 25 years of actual imprisonment. See Appendix, Part D, *infra*.

We also know that California, the United States, and other States supporting California in this case, despite every incentive to find someone else like Ewing who will have to serve, or who has actually served, a real prison term anywhere approaching that imposed upon Ewing, have come up with precisely three examples. Brief for United States as *Amicus Curiae* 28–29, n. 13. The Solicitor General points to *Ex parte Howington*, 622 So. 2d 896 (Ala. 1993), where an Alabama court sentenced an offender with three prior burglary convictions and two prior grand theft convictions to "life" for the theft of a tractor-trailer. The Solicitor General also points to *State* v. *Heftel*, 513 N. W. 2d 397 (S. D. 1994), where a South Dakota court sentenced an offender with seven prior felony convictions to 50 years' imprisonment for theft. And the Solicitor

General cites *Sims* v. *State*, 107 Nev. 438, 814 P. 2d 63 (1991), where a Nevada court sentenced a defendant with three prior felony convictions (including armed robbery) and nine misdemeanor convictions to life without parole for the theft of a purse and wallet containing $476.

The first of these cases, *Howington*, is beside the point, for the offender was eligible for parole after 10 years (as in *Rummel*), not 25 years (as here). Ala. Code §15–22–28(e) (West 1982). The second case, *Heftel*, is factually on point, but it is not legally on point, for the South Dakota courts did not consider the constitutionality of the sentence. 513 N. W. 2d, at 401. The third case, *Sims*, is on point both factually and legally, for the Nevada Supreme Court (by a vote of 3 to 2) found the sentence constitutional. I concede that example—a single instance of a similar sentence imposed outside the context of California's three strikes law, out of a prison population now approaching two million individuals. U. S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Prison Statistics (Jan. 8, 2003), http://www.ojp.usdoj.gov/bjs/prisons.htm (available in Clerk of Court's case file).

The upshot is that comparison of other sentencing practices, both in other jurisdictions and in California at other times (or in respect to other crimes), validates what an initial threshold examination suggested. Given the information available, given the state and federal parties' ability to provide additional contrary data, and given their failure to do so, we can assume for constitutional purposes that the following statement is true: Outside the California three strikes context, Ewing's recidivist sentence is virtually unique in its harshness for his offense of conviction, and by a considerable degree.

IV

This is not the end of the matter. California sentenced Ewing pursuant to its "three strikes" law. That law repre-

sents a deliberate effort to provide stricter punishments for recidivists. Cal. Penal Code Ann. §667(b) (West 1999) ("It is the intent of the Legislature . . . to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses"); *ante,* at 11–12. And, it is important to consider whether special criminal justice concerns related to California's three strikes policy might justify including Ewing's theft within the class of triggering criminal conduct (thereby imposing a severe punishment), even if Ewing's sentence would otherwise seem disproportionately harsh. Cf. *Harmelin*, 501 U. S., at 998–999, 1001 (noting "the primacy of the legislature" in making sentencing policy).

I can find no such special criminal justice concerns that might justify this sentence. The most obvious potential justification for bringing Ewing's theft within the ambit of the statute is administrative. California must draw some kind of workable line between conduct that will trigger, and conduct that will not trigger, a "three strikes" sentence. "But the fact that a line has to be drawn somewhere does not justify its being drawn anywhere." *Pearce* v. *Commissioner,* 315 U. S. 543, 558 (1942) (Frankfurter, J., dissenting). The statute's administrative objective would seem to be one of separating more serious, from less serious, triggering criminal conduct. Yet the statute does not do that job particularly well.

The administrative line that the statute draws separates "felonies" from "misdemeanors." See Brief for Respondent 6 ("The California statute relies, fundamentally, on traditional classifications of certain crimes as felonies"). Those words suggest a graduated difference in degree. But an examination of how California applies these labels in practice to criminal conduct suggests that the offenses do not necessarily reflect those differences. See *United States* v. *Watson,* 423 U. S. 411, 438–441 (1976) (Marshall,

J., dissenting) (felony/misdemeanor distinction often reflects history, not logic); *Rummel*, 445 U. S., at 284 ("The most casual review of the various criminal justice systems now in force in the 50 States of the Union shows that the line dividing felony theft from petty larceny, a line usually based on the value of the property taken, varies markedly from one State to another"). Indeed, California uses those words in a way unrelated to the seriousness of offense conduct in a set of criminal statutes called "wobblers," see *ante,* at 4, one of which is at issue in this case.

Most "wobbler" statutes classify the same criminal conduct either as a felony or as a misdemeanor, depending upon the actual punishment imposed, Cal. Penal Code Ann. §§17(a), (b) (West 1999); *ante,* at 4, which in turn depends primarily upon whether "the rehabilitation of the convicted defendant" either does or does not "require" (or would or would not "be adversely affected by") "incarceration in a state prison as a felon." *In re Anderson*, 69 Cal. 2d 613, 664–665, 447 P. 2d 117, 152 (1968) (Tobriner, J., concurring in part and dissenting in part); *ante,* at 16. In such cases, the felony/misdemeanor classification turns primarily upon the nature of the offender, not the comparative seriousness of the offender's conduct.

A subset of "wobbler" statutes, including the "petty theft with a prior" statute, Cal. Penal Code Ann. §666 (West Supp. 2002), defining the crime in the companion case, *Lockyer* v. *Andrade*, *post,* p. —, authorizes the treatment of otherwise misdemeanor conduct, see Cal. Penal Code Ann. §490 (West 1999), as a felony only when the offender has previously committed a property crime. Again, the distinction turns upon characteristics of the offender, not the specific offense conduct at issue.

The result of importing this kind of distinction into California's three strikes statute is a series of anomalies. One anomaly concerns the seriousness of the triggering behavior. "Wobbler" statutes cover a wide variety of

criminal behavior, ranging from assault with a deadly weapon, §245, vehicular manslaughter, §193(c)(1), and money laundering, §186.10(a), to the defacement of property with graffiti, §594(b)(2)(A) (West Supp. 2002), or stealing more than $100 worth of chickens, nuts, or avocados, §487(b)(1)(A) (West Supp. 2003); §489 (West 1999). Some of this behavior is obviously less serious, even if engaged in twice, than other criminal conduct that California statutes classify as pure misdemeanors, such as reckless driving, Cal. Veh. Code Ann. §23103 (West Supp. 2003); §23104(a) (West 2000) (reckless driving causing bodily injury), the use of force or threat of force to interfere with another's civil rights, Cal. Penal Code Ann. §422.6 (West 1999), selling poisoned alcohol, §347b, child neglect, §270, and manufacturing or selling false government documents with the intent to conceal true citizenship, §112(a) (West Supp. 2002).

Another anomaly concerns temporal order. An offender whose triggering crime is his third crime likely will *not* fall within the ambit of the three strikes statute provided that (a) his *first* crime was chicken theft worth more than $100, and (b) he subsequently graduated to more serious crimes, say crimes of violence. That is because such chicken theft, when a first offense, will likely be considered a misdemeanor. A similar offender likely *will* fall within the scope of the three strikes statute, however, if such chicken theft was his *third* crime. That is because such chicken theft, as a third offense, will likely be treated as a felony.

A further anomaly concerns the offender's criminal record. California's "wobbler" "petty theft with a prior" statute, at issue in *Lockyer* v. *Andrade*, *post,* p. —, classifies a petty theft as a "felony" if, but only if, the offender has a prior record that includes at least one conviction for certain theft-related offenses. Cal. Penal Code Ann. §666 (West Supp. 2002). Thus a violent criminal who has committed two violent offenses and then steals $200 will *not*

fall within the ambit of the three strikes statute, for his prior record reveals no similar *property* crimes. A similar offender *will* fall within the scope of the three strikes statute, however, if that offender, instead of having committed two previous violent crimes, has committed one previous violent crime and one previous petty theft. (Ewing's conduct would have brought him within the realm of the petty theft statute prior to 1976 but for inflation.)

At the same time, it is difficult to find any strong need to define the lower boundary as the State has done. The three strikes statute itself, when defining prior "strikes," simply lists the kinds of serious criminal conduct that falls within the definition of a "strike." §667.5(c) (listing "violent" felonies); §1192.7(c) (West Supp. 2003) (listing "serious" felonies). There is no obvious reason why the statute could not enumerate, consistent with its purposes, the relevant triggering crimes. Given that possibility and given the anomalies that result from California's chosen approach, I do not see how California can justify on *administrative* grounds a sentence as seriously disproportionate as Ewing's. See Parts II and III, *supra*.

Neither do I see any other way in which inclusion of Ewing's conduct (as a "triggering crime") would further a significant criminal justice objective. One might argue that those who commit several *property* crimes should receive long terms of imprisonment in order to "incapacitate" them, *i.e.*, to prevent them from committing further crimes in the future. But that is not the object of this particular three strikes statute. Rather, as the plurality says, California seeks "'to reduce *serious* and *violent* crime.'" *Ante,* at 12 (quoting Ardaiz, California's Three Strikes Law: History, Expectations, Consequences, 32 McGeorge L. Rev. 1 (2000) (emphasis added)). The statute's definitions of both kinds of crime include crimes against the person, crimes that create danger of physical harm, and drug crimes. See, *e.g.,* Cal. Penal Code Ann.

§667.5(c)(1) (West Supp. 2002), §1192.7(c)(1) (West Supp. 2003) (murder or voluntary manslaughter); §667.5(c)(21) (West Supp. 2002), §1192.7(c)(18) (West Supp. 2003) (first-degree burglary); §1192.7(c)(24) (selling or giving or offering to sell or give heroin or cocaine to a minor). They do not include even serious crimes against property, such as obtaining large amounts of money, say, through theft, embezzlement, or fraud. Given the omission of vast categories of property crimes—including grand theft (unarmed)—from the "strike" definition, one cannot argue, on *property-crime-related incapacitation grounds*, for inclusion of Ewing's crime among the triggers.

Nor do the remaining criminal law objectives seem relevant. No one argues for Ewing's inclusion within the ambit of the three strikes statute on grounds of "retribution." Cf. Vitiello, Three Strikes: Can We Return to Rationality?, 87 J. Crim. L. & Criminology 395, 427 (1997) (California's three strikes law, like other "[h]abitual offender statutes[, is] not retributive" because the term of imprisonment is "imposed without regard to the culpability of the offender or [the] degree of social harm caused by the offender's behavior," and "has little to do with the gravity of the offens[e]"). For reasons previously discussed, in terms of "deterrence," Ewing's 25-year term amounts to overkill. See Parts II and III, *supra*. And "rehabilitation" is obviously beside the point. The upshot is that, in my view, the State cannot find in its three strikes law a special criminal justice need sufficient to rescue a sentence that other relevant considerations indicate is unconstitutional.

V

JUSTICE SCALIA and JUSTICE THOMAS argue that we should not review for gross disproportionality a sentence to a term of years. *Ante,* at 1 (SCALIA, J., concurring in judgment); *ante,* at 1 (THOMAS, J., concurring in judg-

ment). Otherwise, we make it too difficult for legislators and sentencing judges to determine just when their sentencing laws and practices pass constitutional muster.

I concede that a bright-line rule would give legislators and sentencing judges more guidance. But application of the Eighth Amendment to a sentence of a term of years requires a case-by-case approach. And, in my view, like that of the plurality, meaningful enforcement of the Eighth Amendment demands that application—even if only at sentencing's outer bounds.

A case-by-case approach can nonetheless offer guidance through example. Ewing's sentence is, at a minimum, 2 to 3 times the length of sentences that other jurisdictions would impose in similar circumstances. That sentence itself is sufficiently long to require a typical offender to spend virtually all the remainder of his active life in prison. These and the other factors that I have discussed, along with the questions that I have asked along the way, should help to identify "gross disproportionality" in a fairly objective way—at the outer bounds of sentencing.

In sum, even if I accept for present purposes the plurality's analytical framework, Ewing's sentence (life imprisonment with a minimum term of 25 years) is grossly disproportionate to the triggering offense conduct—stealing three golf clubs—Ewing's recidivism notwithstanding.

For these reasons, I dissent.

APPENDIX TO OPINION OF BREYER, J.

A

Thirty-three jurisdictions, as well as the federal courts, have laws that would make it impossible to sentence a Ewing-type offender to more than 10 years in prison[1]:

Federal: 12 to 18 months. USSG §2B1.1 (Nov. 1999); *id.,* ch. 5, pt. A, Sentencing Table.

Alaska: three to five years; presumptive term of three years. Alaska Stat. §§11.46.130(a)(1), (c), 12.55.125(e) (2000).

Arizona: four to six years; presumptive sentence of five years. Ariz. Rev. Stat. Ann. §§13–604(C), 13–1802(E) (West 2001).

Connecticut: 1 to 10 years. Conn. Gen. Stat. §§53a–35a(6), 53a–40(j), 53a–124(a)(2) (2001).

Delaware: not more than two years. Del. Code Ann., Tit. 11, §840(d) (Supp. 2000); §4205(b)(7) (1995). Recidivist offender penalty not applicable. See §4214; *Buckingham* v. *State*, 482 A. 2d 327 (Del. 1984).

District of Columbia: not more than 10 years. D. C. Code Ann. §22–3212(a) (West 2001). Recidivist offender penalty not applicable. See §22–1804a(c)(2) (West 2001) (amended 2001).

Florida: not more than 10 years. Fla. Stat. Ann. §§775.084(1)(a), (4)(a)(3) (West 2000) (amended 2000); §812.014(c)(1) (West 2000).

Georgia: 10 years. Ga. Code Ann. §16–8–12(a)(1) (1996); §17–10–7(a) (Supp. 1996).

Hawaii: 20 months. Haw. Rev. Stat. §§708–831(1)(b),

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[1] Throughout Appendix, Parts A–D, the penalties listed for each jurisdiction are those pertaining to imprisonment and do not reflect any possible fines or other forms of penalties applicable under the laws of the jurisdiction.

706–606.5(1)(a)(iv), (7)(a) (Supp. 2001).

Idaho: 1 to 14 years. Idaho Code §§18–2403, 18–2407(b)(1), 18–2408(2)(a) (1948–1997). Recidivist/habitual offender penalty of five years to life in prison, §19–2514, likely not applicable. Idaho has a general rule that "'convictions entered the same day or charged in the same information should count as a single conviction for purposes of establishing habitual offender status.'" *State* v. *Harrington*, 133 Idaho 563, 565, 990 P. 2d 144, 146 (Ct. App. 1999) (quoting *State* v. *Brandt*, 110 Idaho 341, 344, 715 P. 2d 1011, 1014 (Ct. App. 1986)). However, "the nature of the convictions in any given situation must be examined to make certain that [this] general rule is appropriate." *Ibid.* In this case, Ewing's prior felony convictions stemmed from acts committed at the same apartment complex, and three of the four felonies were committed within a day of each other; the fourth offense was committed five weeks earlier. See App. 6; Tr. 45–46 (Information, Case No. NA018343–01 (Cal. Super. Ct.) (available in Clerk of Court's case file)). A review of Idaho case law suggests that this case is factually distinguishable from cases in which the Idaho courts have declined to adhere to the general rule. See, *e.g., Brandt, supra,* at 343, 344, 715 P. 2d, at 1013, 1014 (three separately charged property offenses involving three separate homes and different victims committed "during a 2-month period"); *State* v. *Mace*, 133 Idaho 903, 907, 994 P. 2d 1066, 1070 (Ct. App. 2000) (unrelated crimes (grand theft and DUI) committed on different dates in different counties); *State* v. *Smith*, 116 Idaho 553, 560, 777 P. 2d 1226, 1233 (Ct. App. 1989) (separate and distinguishable crimes committed on different victims in different counties).

Illinois: two to five years. Ill. Comp. Stat., ch. 730, §5/5–8–1(a)(6) (Supp. 2001); ch. 720, §5/16–1(b)(4) (Supp. 2001). Recidivist offender penalty not applicable. ch. 720, §5/33B–1(a) (2000).

Indiana: 18 months (with not more than 18 months added for aggravating circumstances). Ind. Code Ann. §35–43–4–2(a) (West 1998); §35–50–2–7(a) (West Supp. 2002). Recidivist offender penalty not applicable. See §35–50–2–8 (West 1998) (amended 2001).

Iowa: three to five years. Iowa Code Ann. §714.2(2) (West Supp. 2002); §902.8 (West 1994); §902.9(5) (West Supp. 2002).

Kansas: 9 to 11 months. Kan. Stat. Ann. §§21–3701(b)(2), 21–4704(a) (1995). Recidivist offender penalty not applicable. See §21–4504(e)(3).

Kentucky: 5 to 10 years. Ky. Rev. Stat. Ann. §514.030(2) (Lexis Supp. 2002); §§532.060(2)(c), (d), 532.080(2), (5) (Lexis 1999).

Maine: less than one year. Me. Rev. Stat. Ann., Tit. 17–A, §353 (West 1983); §362(4)(B) (West Supp. 2000) (amended 2001); §1252(2)(D) (West 1983 and Supp. 2002). Recidivist offender penalty not applicable. See Tit.17–A, §1252(4–A) (West Supp. 2000) (amended 2001).

Massachusetts: not more than five years. Mass. Gen. Laws Ann., ch. 266, §30(1) (West 2000). Recidivist offender penalty not applicable. See ch. 279, §25 (West 1998); *Commonwealth* v. *Hall*, 397 Mass. 466, 468, 492 N. E. 2d 84, 85 (1986).

Minnesota: not more than five years. Minn. Stat. §609.52, subd. 3(3)(a) (2002). Recidivist offender penalty not applicable. See §609.1095, subd. 2.

Mississippi: not more than five years. Miss. Code Ann. §97–17–41(1)(a) (Lexis 1973–2000). Recidivist offender penalty not applicable. See §99–19–81.

Nebraska: not more than five years. Neb. Rev. Stat. §28–105(1) (2000 Cum. Supp.); §28–518(2) (1995). Recidivist offender penalty not applicable. See §29–2221(1).

New Jersey: Extended term of between 5 to 10 years (instead of three to five years, N. J. Stat. Ann. §§2C:43–6 (1995)), §2C:43–7(a)(4) (Supp. 2002), whether offense is

treated as theft, §2C:20–2(b)(2)(a) (Supp. 2002), or shoplifting, §§2C:20–11(b), (c)(2), because, even if Ewing's felonies are regarded as one predicate crime, Ewing has been separately convicted and sentenced for at least one other crime for which at least a 6-month sentence was authorized, §2C:44–3(a); §2C:44–4(c) (1995).

New Mexico: 30 months. N. M. Stat. Ann. §30–16–20(B)(3) (1994); §31–18–15(A)(6) (2000); §31–18–17(B) (2000) (amended 2002).

New York: three to four years. N. Y. Penal Law §§70.06(3)(e) (West 1998), 155.30 (West 1999).

North Carolina: 4 to 25 months (with exact sentencing range dependent on details of offender's criminal history). N. C. Gen. Stat. §§15A–1340.14, 15A–1340.17(c), (d), 14–72(a) (2001). Recidivist offender penalty not applicable. See §§14–7.1, 14–7.6.

North Dakota: not more than 10 years. N. D. Cent. Code §12.1–23–05(2)(a) (1997); §§12.1–32–09(1), (2)(c) (1997) (amended 2001).

Ohio: 6 to 12 months. Ohio Rev. Code Ann. §§2913.02(B)(2), 2929.14(A)(5) (West Supp. 2002). No general recidivist statute.

Oregon: not more than five years. Ore. Rev. Stat. §161.605 (1997); Ore. Rev. Stat. Ann. §§164.055(1)(a), (3) (Supp. 1998). No general recidivist statute.

Pennsylvania: not more than five years (if no more than one prior theft was "retail theft"); otherwise, not more than seven years. Pa. Stat. Ann., Tit. 18, §§1103(3), 1104(1) (Purdon 1998); §§3903(b), 3929(b)(1)(iii)–(iv) (Purdon Supp. 2002); §3921 (Purdon 1983). Recidivist offender penalty not applicable. See 42 Pa. Cons. Stat. §9714(a)(1) (1998).

Rhode Island: not more than 10 years. R. I. Gen. Laws §11–41–5(a) (2002). Recidivist offender penalty not applicable. See §12–19–21(a).

South Carolina: not more than five years. S. C. Code

Ann. §§16–13–30, 16–13–110(B)(2) (West 2001 Cum. Supp.). Recidivist offender penalty not applicable. See §17–25–45.

Tennessee: four to eight years. Tenn. Code Ann. §§39–14–105(3), 40–35–106(a)(1), (c), 40–35–112(b)(4) (1997).

Utah: not more than five years. Utah Code Ann. §76–3–203(3) (1999) (amended 2000); §76–6–412(1)(b)(i) (1999). Recidivist offender penalty not applicable. See §76–3–203.5 (Supp. 2002).

Washington: not more than 14 months (with exact sentencing range dependent on details of offender score), Wash. Rev. Code §§9A.56.040(1)(a), (2) (2000); §§9.94A.510(1), 9.94A.515, 9.94A.525 (2003 Supplementary Pamphlet); maximum sentence of five years, §§9A.56.040(1)(a), (2), 9A.20.021(1)(c) (2000). Recidivist offender penalty not applicable. See §§9.94A.030(27), (31) (2000); §9.94A.570 (2003 Supplementary Pamphlet).

Wyoming: not more than 10 years. Wyo. Stat. Ann. §6–3–404(a)(i) (Michie 2001). Recidivist offender penalty not applicable. See §6–10–201(a).

B

In four other States, a Ewing-type offender could not have received a sentence of more than 15 years in prison:

Colorado: 4 to 12 years for "extraordinary aggravating circumstances" (*e.g.*, defendant on parole for another felony at the time of commission of the triggering offense). Colo. Rev. Stat. §§18–1–105(1)(a)(V)(A), 18–1–105(9)(a)(II), 18–4–401(2)(c) (2002). Recidivist offender penalty not applicable. See §§16–13–101(f)(1.5), (2) (2001).

Maryland: not more than 15 years. Md. Ann. Code, Art. 27, §342(f)(1) (1996) (repealed 2002). Recidivist offender penalty not applicable. See Art. 27, §643B.

New Hampshire: not more than 15 years. N. H. Rev. Stat. Ann. §§637:11(I)(a), 651:2(II)(a) (Supp. 2002). Re-

cidivist offender penalty not applicable. See §651:6(I)(c).

Wisconsin: not more than 11 years (at the time of Ewing's offense). Wis. Stat. Ann. §939.50(3)(e) (West Supp. 2002); §§939.62(1)(b), (2), 943.20(3)(b) (West 1996) (amended 2001). Wisconsin subsequently amended the relevant statutes so that a Ewing-type offender would only be eligible for a sentence of up to three years. See §§939.51(3)(a), 943.20(3)(a), 939.62(1)(a) (West Supp. 2003). And effective February 1, 2003, such an offender is eligible for a sentence of only up to two years. See §§939.51(3)(a), 943.20(3)(a), 939.62(1)(a).

C

In four additional States, a Ewing-type offender could not have been sentenced to more than 20 years in prison:

Arkansas: 3 to 20 years. Ark. Code Ann. §5–36–103(b)(2)(A) (1997); §5–4–501(a)(2)(D), (e)(1) (1997) (amended 2001). Eligible for parole after serving one-third of the sentence. §5–4–501 (1997); §16–93–608 (1987).

Missouri: not more than 20 years. Mo. Rev. Stat. §558.016(7)(3) (West 1999); §570.030(3)(1) (West 1999) (amended 2002). Eligible for parole after 15 years at the latest. §558.011(4)(1)(c).

Texas: 2 to 20 years. Tex. Penal Code Ann. §§12.33(a), 12.35(c)(2)(A) (1994); §§12.42(a)(3), 31.03(e)(4)(D) (Supp. 2003). Eligible for parole after serving one-fourth of sentence. Tex. Govt. Code Ann. §508.145(f) (Supp. 2003).

Virginia: statutory range of 1 to 20 years (or less than 12 months at the discretion of the jury or court following bench trial), Va. Code Ann. §18.2–95 (Supp. 2002), but discretionary sentencing guideline ranges established by the Virginia Sentencing Commission, §§17.1–805, 19.2–298.01 (2000), with a maximum of 6 years, 3 months, to 15 years, 7 months, see Virginia Criminal Sentencing Commission, Virginia Sentencing Guidelines Manual, Lar-

ceny—Section C Recommendation Table (6th ed. 2002) (with petitioner likely falling within the discretionary guideline range of 2 years, 1 month, to 5 years, 3 months, see Brief for Petitioner 33, n. 25). Recidivist offender penalty not applicable. See §19.2–297.1 (2000).

D

In nine other States, the law *might* make it legally possible to impose a sentence of 25 years or more upon a Ewing-type offender. But in five of those nine States,[2] the offender would be parole-eligible before 25 years:

Alabama: "life or any term of not less than 20 years." Ala. Code §13A–5–9(c)(2) (Lexis Supp. 2002); §§13A–8–3(a), (c) (Michie 1994). Eligible for parole after the lesser of one-third of the sentence or 10 years. §15–22–28(e) (Michie 1995).

Louisiana: Louisiana courts could have imposed a sentence of life without the possibility of parole at the time of Ewing's offense. La. Stat. Ann. §14:67.10(B)(1) (West Supp. 2003); §§15:529.1(A)(1)(b)(ii) and (c)(i)–(ii) (West 1992) (amended 2001); §§14:2(4), and (13)(y) (West Supp. 2003). Petitioner argues that, despite the statutory authority to impose such a sentence, Louisiana courts would have carefully scrutinized his life sentence, as they had in other cases involving recidivists charged with a nonviolent crime. Brief for Petitioner 35–36, n. 29; see Brief for Families Against Mandatory Minimums as *Amicus Curiae* 24–25, and n. 21; *State* v. *Hayes*, 97–1526, p. 4 (La. App. 6/25/99), 739 So. 2d 301, 303–304 (holding that a life sentence was impermissibly excessive for a defendant convicted of theft of over $1000, who had a prior robbery conviction). But see Brief for Respondent 45–46, n. 12

[2] But see discussion of relevant sentencing and parole-eligibility provisions in Louisiana, Michigan, Oklahoma, and South Dakota, *infra* this page and 27–28.

(contesting petitioner's argument). Louisiana has amended its recidivist statute to require that the triggering offense be a violent felony, and that the offender have at least two prior violent felony convictions to be eligible for a life sentence. La. Stat. Ann. §15:529.1(A)(1)(b)(ii) (West Supp. 2003). Under current law, a Ewing-type offender would face a sentence of 6⅔ to 20 years. §§14:67.10(B)(1), 15:529.1(A)(b)(i) (West Supp. 2003).

Michigan: "imprisonment for life or for a lesser term," Mich. Comp. Laws Ann. §769.12(1)(a) (West 2000) (instead of "not more than 15 years," §769.12(1)(b), as petitioner contends, see Brief for Petitioner 34, n. 26; Brief for Families Against Mandatory Minimums as *Amicus Curiae* 16–17, n. 15, 22–23, n. 20), because the triggering offense is "punishable upon a first conviction by imprisonment for a maximum term of 5 years or more," §769.12(1)(a) (West 2000). The larceny for which Ewing was convicted was, under Michigan law, "a felony punishable by imprisonment for not more than 5 years." §750.356(3)(a) (West Supp. 2002). Eligible for parole following minimum term set by sentencing judge. §769.12(4) (West 2000).

Montana: 5 to 100 years. Mont. Code Ann. §45–6–301(7)(b) (1999); §§46–18–501, 46–18–502(1) (2001). A Ewing-type offender would not have been subject to a minimum term of 10 years in prison (as the State suggests, Brief for Respondent 44) because Ewing does not meet the requirements of §46–18–502(2) (must be a "persistent felony offender, as defined in §46–18–501, at the time of the offender's previous felony conviction). See Reply Brief for Petitioner 18, n. 14. Eligible for parole after one-fourth of the term. Mont. Code Ann. §46–23–201(2).

Nevada: "life without the possibility of parole," or "life with the possibility of parole [after serving] 10 years," or "a definite term of 25 years, with eligibility for parole [after serving] 10 years." Nev. Rev. Stat. Ann.

§§207.010(1)(b)(1)–(3) (Lexis 2001).

Oklahoma: not less than 20 years (at the time of Ewing's offense). Okla. Stat., Tit. 21, §51.1(B) (West Supp. 2000) (amended in 2001 to four years to life, §51.1(C) (West 2001)); §1704 (West 1991) (amended 2001). Eligible for parole after serving one-third of sentence. Tit. 57, §332.7(B) (West 2001). Thus, assuming a sentence to a term of years of up to 100 years (as in Montana, see *supra,* at 27), parole eligibility arise as late as after 33 years.

South Dakota: maximum penalty of life imprisonment, with no minimum term. S. D. Codified Laws §22–7–8 (1998); §22–30A–17(1) (Supp. 2002). Eligible for parole after serving one-half of sentence. §24–15–5(3) (1998). Thus, assuming a sentence to a term of years of up to 100 years (as in Montana, see *supra,* at 27), parole eligibility could arise as late as after 50 years.

Vermont: "up to and including life," Vt. Stat. Ann., Tit. 13, §11 (1998), or not more than 10 years, Tit. 13, §2501; *State* v. *Angelucci*, 137 Vt. 272, 289–290, 405 A. 2d 33, 42 (1979) (court has discretion to sentence habitual offender to the sentence that is specified for grand larceny alone). Eligible for parole after six months. Vt. Stat. Ann., Tit. 28, §501 (2000) (amended 2001).

West Virginia: Petitioner contends that he would only have been subject to a misdemeanor sentence of not more than 60 days for shoplifting, W. Va. Code §§61–3A–1, 61–3A–3(a)(2) (2000); Brief for Petitioner 31, n. 19, 33–34, n. 25. However, a Ewing-type offender could have been charged with grand larceny, see *State ex rel. Chadwell* v. *Duncil*, 196 W. Va. 643, 647–648, 474 S. E. 2d 573, 577–578 (1996) (prosecutor has discretion to charge defendant with either shoplfting or grand larceny), a felony punishable by imprisonment in the state penitentiary for 1 to 10 years (or, at the discretion of the trial court, not more than 1 year in jail). W. Va. Code §61–3–13(a) (2000). Under West Virginia's habitual offender statute, a felon "twice before con-

victed . . . of a crime punishable by confinement in a penitentiary . . . shall be sentenced to . . . life [imprisonment]," §61–11–18(c), with parole eligibility after 15 years, §62–12–13(c). *Amicus curiae* on behalf of petitioner notes that, in light of existing state-law precedents, West Virginia courts "would not countenance a sentence of life without the possibility of parole for 25 years for shoplifting golf clubs." Brief for Families Against Mandatory Minimums as *Amicus Curiae* 25–26 (citing *State* v. *Barker*, 186 W. Va. 73, 74–75, 410 S. E. 2d 712, 713–714 (1991) (per curiam); and *State* v. *Deal*, 178 W. Va. 142, 146–147, 358 S. E. 2d 226, 230–231 (1987)). But see Brief for Respondent 45, n. 11 (contesting that argument).