SNEED, Circuit Judge, Concurring in part and Dissenting in part:

I agree with the Majority's conclusion in Part II that Andrade filed the functional equivalent of a timely notice of appeal. I respectfully dissent, however, from the Majority's conclusion in Parts IV and V that Andrade's sentence violates the Eighth Amendment.

The sentence imposed in this case is not one of the "exceedingly rare" terms of imprisonment prohibited by the Eighth Amendment's proscription against cruel and unusual punishment. Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (quoting Solem v. Helm, 463 U.S. 277, 289-290 (1983) (quoting Rummel v. Estelle, 445 U.S. 263, 272 (1980) ("Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."))). Two consecutive sentences of 25 years to life--with parole eligibility only after the minimum 50 years is obviously severe. Nevertheless, it is the sentence mandated by the citizens of California through the democratic initiative process and, additionally, legislated by their elected representatives. Cal. Pen. Code § 667(e)(2)(A) ("three strikes" provision mandating minimum term of 25 years for recidivist felon); Cal. Pen. Code § 1170.12 (codifying state-wide initiative identical to "three strikes" legislation).

It has long been the law of this Circuit that, "[g]enerally, as long as the sentence imposed on a defendant does not exceed statutory limits, this court will not overturn it on Eighth Amendment grounds." U.S. v. Parker, 241 F.3d 1114, 1117 (9th Cir. 2001) (citing United States v. Zavala-Serra, 853 F.2d 1512, 1518 (9th Cir. 1988) (citing United States v. Washington, 578 F.2d 256, 258 (9th Cir.1978))). This case presents no opportunity to set aside, or qualify, this long established and sound precedent.

I

In reversing Appellant's sentence, the majority purports to rely on the opinion of Justice Kennedy in Harmelin v. Michigan, 501 U.S. at 996 (Kennedy, J., concurring in the judgment). That opinion (joined by two other members of the court) held that the Eighth Amendment "forbids extreme sentences that are `grossly disproportionate' to the crime." While recognizing that the Eighth Amendment includes a "proportionality principle," Justice Kennedy also acknowledged that "its precise contours are unclear." He attempted to "give content to the uses and limits of proportionality review" by identifying four principles that inform the Court's application of the Eighth Amendment to lengthy prison terms.

Each of the four principles underlying Harmelin 's "gross disproportionality" analysis favors the affirmance of Appellant's sentence. The first of these is that "as a general matter [it] is properly within the province of legislatures, not courts" to fix punishments for crimes. Thus,"reviewing courts . . . should grant substantial deference to the broad authority that legislatures possess in determining the types and limits of punishments for crimes."

The sentencing scheme in the instant case was the result of both popular vote (Proposition

184 was approved by 71.84 percent of the electorate) and legislative action. Our deference should be at its apex. We have before us the clearest indication possible that severe, mandatory sentences for recidivist offenders is the expressed penal philosophy of the citizens of California. The initiative process permits the electorate to speak for itself, and its voice should be heard, not ignored.

The second principle underlying proportionality review "is that the Eighth Amendment does not mandate adoption of any one penological theory." Id. at 999. The Eighth Amendment permits states to grant "different weights at different times to the penalogical goals of retribution, deterrence, incapacitation, and rehabilitation." Id. All are legitimate goals of sentencing, and the legislature has plenary power to prescribe sentencing accordingly.

Consequently, we must accord great deference to statemandated sentences. We should not employ our power to strike down a sentence as unduly harsh when its primary purpose is the incapacitation of an habitual criminal offender. Even were it our collective judgment that the defendant is capable of rehabilitation, that judgment should not trump the voice of the state legislature. California's "three strikes" sentencing regime reflects a judgment that society's interest is best served by imprisonment of repeat felony offenders and a correlative determination that more lenient treatment of such offenders is inappropriate. People v. Cooper, 43 Cal.App.4th 815, 824 (1996) ("By enacting the three strikes law, the Legislature acknowledged the will of Californians that the goals of retribution, deterrence, and incapacitation be given precedence in determining the appropriate punishment for crimes."). It is true that over time public attitudes change. However, it is not our duty to anticipate the future legislative conduct of the State of California.

The third principle cited by Justice Kennedy is that "marked divergences both in underlying theories of sentencing and the length of prescribed prison terms are the inevitable, [and] often beneficial, result of the federal structure." Harmelin, 501 U.S. at 999. It is not, to repeat, the role of the federal courts to establish the appropriate sentences that each state is obligated to follow in punishing those who violate its laws.

The fourth principle that guides our review of Appellant's sentence is that such review "should be informed by `objective factors to the maximum possible extent.' " Id. at 1000 (quoting Rummel, 445 U.S. at 274-275). Justice Kennedy noted that objective factors exist to permit review of a sentence of death. Id. at 1000 ("[T]he objective line between capital punishment and imprisonment for a term of years finds frequent mention in our Eighth Amendment jurisprudence."). He observed, however, "that we lack clear objective standards to distinguish between sentences for different terms of years." See also Solem, 463 U.S. at 294 ("It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not."); Rummel,

445 U.S. at 275 (the line between death and other punishments is "considerably clearer than would be any constitutional distinction between one term of years and a shorter or longer term of years").

Informed by these four principles, the Harmelin court concluded that a sentence of life imprisonment without possibility of parole for possession of cocaine was not cruel and unusual. "A rational basis exists for [the state] to conclude that petitioner's crime is as serious and violent as the crime of felony murder without specific intent to kill, a crime for which no sentence of imprisonment would be disproportionate." There is an equally rational basis for the sentence imposed on Appellant in this case:

> The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time.

Rummel, 445 U.S. at 284. The "uses and limits" of proportionality review, as defined in Harmelin, demand that we respect this explanation if it is rational. Harmelin, 501 U.S. at 998. With respect to Appellant's sentence, I believe that it is.

The majority, however, has attempted to apply Harmelin's narrow holding -- the prohibition on grossly disproportionate sentences -- without thoughtful consideration of the principles underlying its holding. The result of this approach is predictable and, in fact, was predicted by two members of the Harmelin majority: "the proportionality principle becomes an invitation to imposition of [the] subjective values" of federal judges. (Scalia, J.).

In short, for all its reliance on Harmelin, that case does not compel the outcome reached by the majority today. In fact, just the opposite is true. Harmelin counsels that judicial review of legislatively determined sentences should reflect both deference to the elected branches of government and deference to the varied, but rational, determinations of the 50 states. Therefore, we should affirm the sentence in this case.

II

The principles articulated by Justice Kennedy, restated above, and employed in a manner consistent with their purpose, are sufficient to restrain any federal judicial tendency to employ "cruel and unusual punishment" as a justification for expansive

constitutionalization of permissible sentencing by the states. This fact is borne out by numerous cases from our sister circuits. In the wake of Harmelin, not a single court has struck down the sentence of an habitual offender on Eighth Amendment grounds.[1]

> Likewise, in McGruder v. Puckett, 954 F.2d 313 (5th Cir. 1992), the court affirmed a life sentence without possibility of parole imposed on an habitual offender where the infraction that triggered the life sentence was the offense of auto burglary. Applying the Harmelin analysis, as articulated by Justice Kennedy, the court dismissed the defendant's argument that life in prison without possibility of parole was grossly disproportionate to the crime of auto burglary."We think that the argument ignores the essence of the statute under which he was sentenced . . . . Under the statute, his sentence is imposed to reflect the seriousness of his most recent offense, not as it stands alone, but in the light of his prior offenses." McGruder, 954 F.2d at 316.

> These two opinions also reflect what has been, until today, the consensus of the federal courts with regard to the scope of proportionality review under Harmelin. [2] These cases underscore the fact that judicial deference toward legislative determinations of suitable sentences is particularly appropriate with regard to treatment of recidivist offenders.[3] Adding the role of prosecutorial discretion to the mix of relevant sentencing factors makes the "gross disproportionality" analysis of questionable value when applied to recidivist offenders. See Rummel, 445 U.S. at 281 ("Another variable complicating the calculus is the role of prosecutorial discretion in any recidivist scheme."). In sum, "gross disproportionality," as applied in the recidivism context, requires adherence to the principles underlying the Kennedy opinion.

> Bringing all of these factors to bear on the "gross disproportionality" inquiry, no other circuit has overturned a sentence imposed pursuant to a recidivist sentencing statute. Justice Scalia in Harmelin had it right."Disproportionality" is influenced by the prevailing attitude toward the seriousness of particular crimes and the appropriateness of harsh punishments. These judgments can be altered either within years, decades or centuries. "Neither Congress nor any state legislature has ever set out with the objective of crafting a penalty that is disproportionate; yet . . . many enacted dispositions seem to be so -- because they were made for other times or other places, with different social attitudes, different criminal epidemics, different public fears, and different prevailing theories of penology." Harmelin, 501 U.S. at 985 (Scalia, J.).

III

To repeat, our review of state mandated sentences is circumspect and deferential. Nevertheless, Harmelin does require us to assess Appellant's sentence for gross disproportionality; this inquiry is limited to an examination of the gravity of the offenses and the harshness of the sentence. While petty theft offenses are admittedly not grave, Appellant's recidivist nature makes his current activity much more serious.

Appellant's criminal history commenced in 1982 with a misdemeanor theft. While on probation for this theft, he burglarized three separate residences in 1983, felonies resulting in Appellant's first and second strikes. In 1990 Appellant was convicted for a second misdemeanor theft. Then in 1995, Appellant was arrested for two separate shoplifting offenses each elevated to felonies due to his prior theft convictions.

> Under California's sentencing scheme, these 1995 shoplifting convictions amounted to Appellant's third and fourth strikes, which yielded two consecutive sentences of twenty five years to life, totaling fifty years to life.[4] This is not a lenient sentence; however, it is equally clear that the Appellant is a recidivist. His probation report sets forth, in addition to the above enumerated offenses, two separate federal convictions for transporting marijuana, dismissal of seven state residential burglary charges, and a parole violation for escape from federal prison. The probation report refers to Appellant's acknowledged heroin addiction and that Appellant admits to stealing to support his drug habit. The probation report also states that Appellant is unemployed and does not help care for his three children. Before his most recent conviction, Appellant had been in and out of state or federal prison a total of six times. Under such circumstances, it is rational for a sentencing court to determine that a term of twenty-five years to life is not a grossly disproportionate sentence for each of Appellant's current crimes.

One should neither exaggerate nor minimize Appellant's culpability.

His guilt is not in dispute. Nor is the fact of his recidivism, nor the applicability of the three strikes sentencing law. The simple statement of his history of criminal activity is enough to show that the state court's determination of the proper punishment - even if found to be erroneous - was not clearly erroneous as this Court has defined it. See Van Tran v. Lindsey, 212 F.3d 1143, 1153-54 (9th Cir. 2000) ("we hold that under AEDPA we must reverse a state court's decision as involving an `unreasonable application' of clearly established federal law . . . when our independent review . . . does not merely allow us ultimately to conclude that the petitioner has the better of two reasonable legal arguments, but rather leaves us with a 'firm conviction' that one answer, the one rejected by the court, was correct and the other, the application of the federal law that the court adopted, was erroneous"). Therefore, to repeat, a "rational basis" exists for the state of California to conclude that the interests of society are best served by Appellant's incarceration for a minimum of fifty years. Harmelin, 501 U.S. at 1004 ("rational basis exists" to justify life in prison without possibility of parole for drug possession offense); Van Tran v. Lindsey, 212 F.3d at 1159 ("some erroneous applications may nonetheless be reasonable") (citing Williams v. Taylor, 529 U.S. 362, 410 (2000). Defendant's sentence is thus not an unreasonable application of clearly established federal law.

I respectfully concur in part and dissent in part.

[1]In fact, in the decade since Harmelin was decided, only one sentence has been struck down as proscribed by the Eighth Amendment to the U.S. Constitution. That case, Henderson v. Norris, 258 F.3d 706 (8th Cir. 2001), involved a first time drug offender, not an habitual offender as is the case here.

[2]See, e.g., United States v. Cardoza, 129 F.3d 6, 19 (1st Cir. 1997) (affirming sentence of 20 years imprisonment for possession of a single bullet when defendant had a prior felony history); United States v. Prior, 107 F.3d 654, 659 (8th Cir. 1997) (affirming life sentence for drug offender who, though he had three prior felony drug convictions, had never before served a prison term).

[3]Even assuming a court is competent to determine an offender's culpability (on a relative scale) by comparing him to others who have committed the same or more serious crimes, See Henderson v. Norris, 258 F.3d 706 (8th Cir. 2001), the complexity of this comparison is

magnified when the offender in question has a lengthy criminal history. "If nothing else, the three-time offender's conduct supports inferences about his ability to conform with social norms that are quite different from possible inferences about first or second-time offenders." Rummel , 445 U.S. at 282 n.27.

[4]It should be emphasized that Andrade's sentence is not one fifty-year sentence for thefts totaling $153.54. Appellant, in fact, is facing two consecutive twenty-five year sentences for two separate felony offenses. The Majority's comparison of Andrade's sentence to other"Three Strikes" defendants misses this point. (Majority Opinion 15286). Appellant's sentence is "twice as long" as the sentences of these other defendants because he as committed twice the number of offenses. See People v. Cline, 71 Cal. Rptr. 2d 41 (affirming sentence of 25 years to life for theft of clothing); People v. Goodwin, 69 Cal. Rptr. 2d 576 (affirming sentence of 25 years to life for stealing a pair of pants); People v. Terry, 54 Cal. Rptr. 2d 769 (affirming sentence of 25 years to life for stealing handbag left in open car). See also Pearson v. Ramos, 237 F.3d 881, 886 (7th Cir. 2001) ("in any rate it is wrong to treat stacked sanctions as a single sanction. To do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim."); Hawkins v. Hargett, 200 F.3d 1279, 1285 (10th Cir. 1999) (finding no Eighth Amendment violation in sentences totaling 100 years when these sentences were for combined separate offenses of rape and robbery); United States v. Aiello, 864 F.2d 257, 265 (2d Cir. 1988) ("Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence."); State v. Four Jugs of Intoxicating Liquor, 58 Vt. 140, 2 Atl. 586, 593 (1886), quoted in O'Neil at 331 ("It would scarcely be competent for a person to assail the constitutionality of the statute prescribing punishment for burglary on the ground that he had committed so many burglaries that, if punishment for each were inflicted upon him, he might be kept in prison for life.").