No. 06-349

IN THE SUPREME COURT OF THE UNITED STATES

MORTON ROBERT BERGER,

Petitioner,

VS.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari for the Arizona Supreme Court

BRIEF FOR THE STATE OF ARIZONA IN OPPOSITION

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QUESTION PRESENTED

Whether the Eighth Amendment's Cruel and Unusual Punishment Clause's threshold gross-disproportionality analysis mandates consideration of the aggregate length of a defendant's consecutive prison terms, when each component prison term imposed, standing alone, is constitutional?

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The Arizona Supreme Court's opinion (Pet. App. 1a-41a) is reported at 134 P.3d 378 (Ariz. 2006). The Arizona Court of Appeals' opinion (Pet. App. 42a-85a) is reported at 103 P.3d 298 (Ariz. App. 2004).

STATEMENT OF JURISDICTION

The Arizona Supreme Court entered its judgment on May 10, 2006. Pet. App. 1a. Petitioner did not file a petition for rehearing. The petition for a writ of certiorari was filed on September 7, 2006. This Court has jurisdiction pursuant to 28 U.S.C. ' 1257(a) and United States Constitution Article III, Section 2.

STATEMENT OF THE CASE

On June 6, 2002, law enforcement conducted a knock-and-talk at Petitioner's residence because a Dallas-based internet child-pornography website operator had identified him as someone who had provided his credit card number to purchase access to their website's contraband images. (P.I. at 13 [State's Response to Petitioner's Release Motion], page 4; R.T. 1/28/03, at 6-8; R.T. 1/29/03, at 26, 37-40, 46, 51-53, 55.) Ultimately, Petitioner admitted that he had downloaded images of child pornography on his web-site at home, resulting in the seizure of two computers, 150 floppy disks, 100 compact disks, and three photo-album binders that contained thousands of pornographic images of prepubescent children that Petitioner had printed onto high-quality, glossy paper, and which he carefully organized by age, sexual activity, and sexual partners. (P.I. at 28 [State's Response to Petitioner's Motion to Dismiss Allegation of A.R.S. § 13-604.01], page 8; R.T. 1/29/03, at 37-41, 55-66, 72-75, 77, 83-85, 89-100, 104-05, 112-13, 143-45;

Trial Exhibits 1, 2, 5-7.) While scanning the images on Petitioner's hard drive and disks, the State's forensic computer expert tabulated almost 41,000 "hits" for the words most commonly used to search child pornography on-line—"Lolita," "preteen," "young girls," and "underage"—a frequency rarely encountered during his investigations. (R.T. 1/29/03, at 162, 194.) Petitioner created his earliest images on April 23, 1996, more than 6 years before his arrest. (*Id.* at 177-80.) Petitioner admitted his awareness that possession of child pornography was illegal. (*Id*. at 72-75, 85-89, 166-67; Trial Exhibit 3.)

As reflected in the State's response to Petitioner's motion for release, Petitioner's child-pornography collection was extensive, graphic, and extremely disturbing:

> The images included bondage, torture, and young girls having intercourse with dogs. Children are blindfolded, hands tied, being urinated on, and wearing dog collars. There are numerous video files, most involving girls as young as 3 years old being forced to perform oral sex on adult men and being vaginally and anally raped by adults. There is a particularly disturbing video of a young (no more than 4 years old) girl struggling and crying and begging her abuser to stop as he holds her by the throat and ejaculates on her face and forces his penis into her mouth. . . .
>
> Almost all of his thousands of images were of children engaged in sexual acts, not just exploitative exhibition. On a more disturbing note, this defendant not only stored images of little children with blindfolds and hands tied, being raped, tortured, forced to have sexual intercourse with dogs and other animals, wearing dog collars and being urinated on—but he even printed them in high quality glossy paper and neatly stored

> them in binders so that he could look at them more easily. He has photos of children engaged in sexual acts with other young children as well as with adults sexually abusing them. The children in defendant's images are extremely young, including toddlers. Many of the videos contained on the defendant's hard drive and CD-ROMS are absolutely nauseating and too horrible to even describe. They are quite literally the worst images of child pornography/torture that the undersigned has seen in her career, an opinion also expressed by the State's very experienced expert pediatrician who determined the ages of the children and the experienced detective assigned to this case. One disturbing video actually has a loud audio file attached—a young girl no more than 4 years old, struggling and crying and begging her abuser to stop as he holds her by the throat and ejaculates on her face and forces his penis in her mouth.

(P.I. at 13 [State's Response to Petitioner's Release Motion], pages 3, 5.)

After charging Petitioner with thirty-five counts of sexual exploitation of a minor, the State dismissed fifteen counts before trial began because the prosecutor feared deluging the jury with these graphically disturbing images.[1] (R.T. 1/28/03, at 3-5; R.T. 3/7/03, at 4-6.) The jury subsequently convicted Petitioner of the remaining twenty counts and determined that the depicted children were less than fifteen years old. (R.T. 3/3/03, at 11-13.)

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[1] The State did not charge Petitioner with sexual exploitation of a child for every image in his collection, but selected only thirty-five representative images from the thousands available, for purposes of "judicial economy." (P.I. at 13 [State's Response to Petitioner's Release Motion], page 4.)

After rejecting Petitioner's post-conviction Eighth Amendment challenge, the trial court imposed twenty mitigated ten-year prison terms, and ordered them to run consecutive to each other, as mandated by A.R.S. §§ 13-604(K) and -3553. (R.T. 3/7/03, at 11-13; M.E. at 94, 97.) Although the trial court imposed mitigated prison terms, it agreed with the Legislature's determination that Petitioner's crimes were very serious offenses and did not enter any special order to invoke A.R.S. § 13-603(L)'s executive clemency provisions. (R.T. 3/7/03, at 11-14; M.E. at 97.)

On direct appeal, Petitioner challenged his convictions on First Amendment and Equal Protection grounds and also claimed that the aggregate length of his sentences violated the Eighth Amendment. The Arizona Court of Appeals rejected all of these arguments in a published opinion. Pet. App. at 42a-63a. Abandoning the aforementioned challenges to his convictions, Petitioner petitioned the Arizona Supreme Court solely to review the lower courts' rejection of his argument that the aggregate length of his twenty consecutive ten-year prison terms transgressed the Cruel and Unusual Punishment Clause of the Eighth Amendment. The Arizona Supreme Court granted review "to again consider the framework for reviewing Eighth Amendment challenges to lengthy prison sentences." Pet. App. at 4a. Writing for himself and all but one of the members of the Arizona Supreme Court, Justice Bales held that Petitioner's sentences did not raise an inference of gross disproportionality, affirmed his sentences, and vacated that portion of the Arizona Court of Appeals' opinion addressing Petitioner's Eighth Amendment claim. Pet. App. at 1a, 24a.

The Arizona Supreme Court commenced its analysis by observing that "[this Court] has noted that non-capital sentences are subject only to a 'narrow proportionality

principle' that prohibits sentences that are 'grossly disproportionate' to the crime." Pet. App. at 5a (quoting *Ewing v. California*, 538 U.S. 11, 20, 23 (2003) (O'Connor, J., concurring) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring)). The majority then identified its standard as "the framework outlined by Justice Kennedy in his concurring opinion in *Harmelin* and later employed by Justice O'Connor in announcing the judgment of the Court in *Ewing*." Pet. App. at 5a. Recognizing that "courts must accord substantial deference to the legislature and its policy judgments as reflected in statutorily mandated sentences," the Arizona Supreme Court enumerated "the primacy of the legislature in determining sentencing, the variety of legitimate penological schemes, the nature of the federal system, and the requirement that objective factors guide proportionality review" as the "several principles" that guide the threshold "gross-disproportionality" inquiry and inform "the broader notion that the Eighth Amendment 'does not require strict proportionality between crime and sentence' but instead forbids only extreme sentences that are 'grossly disproportionate to the crime.'" Pet. App. at 6a-7a (quoting *Ewing*, 538 U.S. at 23 (O'Connor, J., concurring) (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring)).

The Arizona Supreme Court observed that this Court had most recently rejected a recidivist's Eighth Amendment challenge to a prison term of 25 years to life under California's "three strikes statute" because: (1) "the State of California had a 'reasonable basis' for believing the law would substantially advance the goals of incapacitating repeat offenders and deterring crime"; and (2) the statute "reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated." Pet. App. at 7a (quoting *Ewing*, 538 U.S. at 28, 30). In similar vein, the

majority observed that this Court previously rejected a challenge to a mandatory sentence of life imprisonment without parole for a first-time offender convicted of possessing 672 grams of cocaine in *Harmelin*, with Justice Kennedy observing "that the Michigan legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine—in terms of violence, crime, and social displacement—is momentous enough to warrant the deterrence and retribution of a life sentence without parole." Pet. App. at 8a (quoting *Harmelin*, 501 U.S. at 1003-04 (Kennedy, J., concurring)). The Arizona Supreme Court thus concluded that its analysis of Petitioner's Eighth Amendment challenge would be "guided" by the following framework: "[a] prison sentence is not grossly disproportionate, and a court need not proceed beyond the threshold inquiry, if it arguably furthers the State's penological goals and thus reflects 'a rational legislative judgment, entitled to deference.'" Pet. App. at 9a (quoting *Ewing*, 538 U.S. at 30).

The Arizona Supreme Court recognized, "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling,'" and that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." Pet. App. at 9a (quoting *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (quoting *New York v. Ferber*, 458 U.S. 747, 756-58 (1982)). The majority likewise acknowledged that the victims of child pornography continue to suffer substantial harm long after the material's production. Pet. App. at 10a. The Arizona Supreme Court thus concluded that criminalizing the possession of child pornography is "tied directly to state efforts to deter its production and distribution 'at all levels in the distribution chain,'" encourages the destruction of these materials, and furthers the "goal of combating the sexual abuse and

exploitation inherent in child pornography." Pet. App. at 10a (quoting *Osborne*, 495 U.S. at 110).

Recounting the legislative history of Arizona's current child-pornography statutes, the Arizona Supreme Court observed that Arizona first banned child-pornography possession in 1983 with legislation that implicitly acknowledged "the fact that producers of child pornography exist due to the demand for such materials." Pet. App. at 11a. The court further noted that the Arizona Legislature subsequently included the offense of possession of child pornography among the "dangerous crimes against children" targeted in A.R.S. § 13-604.01—a statute which prescribes "lengthy periods of incarceration . . . intended to punish and deter" "those predators who pose a direct and continuing threat to the children of Arizona." Pet. App. at 11a-12a. The court thus concluded, "Given this history . . . the legislature had a 'reasonable basis for believing' that mandatory and lengthy prison sentences for the possession of child pornography would 'advance[] the goals of [Arizona's] criminal justice system in [a] substantial way.'" Pet. App. at 12a (quoting *Ewing*, 538 U.S. at 28; alterations in original).

The Arizona Supreme Court next compared the gravity of the offense against the severity of Petitioner's sentences. The majority observed that Petitioner did not dispute that child pornography, "a felony under federal and most state laws," is a "very serious" crime. Pet. App. at 13a. Rejecting Petitioner's contention that he had received a "200 year flat-time sentence upon his conviction of possession of child pornography," the Arizona Supreme Court concluded that Petitioner, like the defendant in *Ewing*, had "incorrectly frame[d] the issue at the threshold," observing that Petitioner had actually been "convicted of twenty separate counts of possession of child pornography involving minors under fifteen, and he was

sentenced to a ten-year term for each count . . . [to] be served consecutively." Pet. App. at 12a. The court reached this conclusion because each of Petitioner's twenty counts "was based on a different video or image, the images involved some fifteen different child victims, and [Petitioner] had accumulated the images over a 6-year period." Pet. App. at 13a.

The Arizona Supreme Court provided two additional reasons for focusing its gross-disproportionality analysis "on whether a ten-year sentence is disproportionate for a conviction of possessing child pornography involving children under fifteen." *Id.* First, "[a] defendant has no constitutional right to concurrent sentences for two separate crimes involving separate acts." *Id.* Second, "Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence." Pet. App. at 14a (quoting *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988)). Consequently, the court concluded:

> Thus, if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in the aggregate. . . . This proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences.

Pet. App. at 14.

Based upon this Court's Eighth Amendment jurisprudence and its own precedent, the Arizona Supreme Court concluded that Petitioner's ten-year prison term per count was *not* grossly disproportionate to his crime of child-pornography possession:

> The Supreme Court has affirmed a sentence of twenty-five years to life for the grand theft of three golf clubs worth nearly $1200 by a recidivist felon, *Ewing*, 538 U.S. at 30-32, 123 S.Ct. 1179; upheld a sentence of life in prison without parole for a first-time offender possessing 672 grams of cocaine, *Harmelin*, 501 U.S. at 996, 111 S.Ct. 2680; and found no Eighth Amendment violation in two consecutive twenty-year prison terms for possession of nine ounces of marijuana with intent to distribute, *Hutto v. Davis*, 454 U.S. 370, 374, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) (per curiam). Similarly, this court has upheld a sentence of twenty-five years without parole for a twenty-one-year-old defendant convicted of selling a $1 marijuana cigarette to a fourteen-year-old, even though this sentence was consecutive to a twenty-one-year sentence for the defendant's trafficking in stolen property with the same juvenile.

Pet. App. at 15a.

The Arizona Supreme Court observed that "only once in the past quarter century has [this Court] sustained an Eighth Amendment challenge to the length of a prison sentence." *Id.* (citing *Solem v. Helm*, 463 U.S. 277 (1983)). The court distinguished *Solem* from the instant case on two grounds: (1) in *Solem*, the defendant was sentenced to life imprisonment without parole, "the most severe punishment the State could have imposed," for the "quite minor crime" of uttering a no-account check, "one of the most passive felonies a person could commit," Pet. App. at 15a (quoting *Solem*, 463 U.S. at 296-97); and (2) *Solem* "did not involve a mandatory sentence, but instead concerned a judge's discretionary decision to impose the maximum authorized sentence [and] [t]hus . . . did not implicate the 'traditional deference' that courts must afford to

legislative policy choices when reviewing statutorily mandated sentences," Pet. App. at 16a.

Based upon the overwhelming evidence of Petitioner's large-scale, deliberate, and long-term acquisition of child pornography, the Arizona Supreme Court concluded, "[I]n the terminology of *Ewing*, [Petitioner's] sentences are 'amply supported' by evidence indicating his 'long, serious' pursuit of illegal depictions and are 'justified by the State's public-safety interest' in deterring the production and possession of child pornography." Pet. App. at 17a (quoting *Ewing*, 538 U.S. at 29-30). The aforementioned evidence likewise prompted the court to conclude that Petitioner's proscribed conduct fell within "the core, not the periphery, of the prohibitions of A.R.S. § 13-3553(A)(2)—the knowing possession of visual depictions of sexual conduct involving minors." Pet. App. at 20a. The Arizona Supreme Court therefore declined Petitioner's invitation to consider the cumulative effect of consecutive sentences imposed on him. Pet. App. at 19a.

Thus, given "the legislature's intent to deter and punish those who participate in the child pornography industry, and [Petitioner's] commission of twenty separate offenses," the court affirmed Petitioner's sentences without conducting inter- and intra-jurisdictional analyses, based upon its conclusion that "the twenty consecutive ten-year sentences are not grossly disproportionate to his crimes." Pet. App. at 24a.

Concurring "fully . . . in the analysis and result reached by the majority in this case," Justice Hurwitz nonetheless wrote separately to respond to Justice Berch's concurring and dissenting opinion, which suggested that Eighth Amendment analysis "would be easier if courts were allowed to conduct an intra- and inter-jurisdictional analysis at the outset in order to find an inference of gross disproportionality." Pet. App. at 25a-

26a. After acknowledging that *Harmelin* foreclosed such an approach, Justice Hurwitz proceeded to consider the penalties imposed for other crimes in Arizona and for the same offense in other jurisdictions and nonetheless concluded that such extended analyses failed to raise an inference of gross disproportionality. Pet. App. at 26a-27a. Addressing Justice Berch's "real concern . . . that Arizona law *requires* that a court impose consecutive ten-year sentences for each offense," Justice Hurwitz observed that this Court's Eighth Amendment jurisprudence: (1) "rejected the notion that mandatory flat sentences violate the Constitution because they do not allow consideration of the particular situation of the offender"; and (2) does not "allow . . . find[ing] consecutive sentences for separate crimes unconstitutional if the individual sentences for each crime are not." Pet. App. at 28a (emphasis in original).

Disagreeing with the majority's focus upon the specific sentence imposed for each count, Justice Berch issued a concurring and dissenting opinion wherein she maintained, "[I]n determining whether a total sentence is grossly disproportionate to the crime for which it was meted out as punishment, we must deal with the sentence imposed as a whole and not shield ourselves from the full impact of the sentence by analyzing only one charge and sentence." Pet. App. at 36a-37a. Despite concurring with the majority's "statements of the rules emanating from the *Harmelin* line of cases," Justice Berch "would find that a minimum mandatory sentence of 200 years for possession of twenty pornographic images raises an inference of gross disproportionality that requires additional analysis before ultimately the court determines whether the sentence is unconstitutionally disproportionate." Pet. App. at 41a.

ARGUMENT

Petitioner contends that the Arizona Supreme Court's Eighth Amendment analysis was defective because the majority failed to consider the aggregate length of his twenty statutorily mandated consecutive ten-year prison terms when comparing the gravity of his crimes against the severity of his sentences. Petitioner further argues that had the Arizona Supreme Court not focused its analysis on the constitutionality of the ten-year prison terms imposed for each count of possession of child pornography, the majority would have been compelled to find an inference of gross disproportionality, conduct both intra- and inter-jurisdictional comparative analyses, and thus conclude that his sentences violated the Eighth Amendment. However, the Arizona Supreme Court properly found each ten-year prison term constitutional and employed the proper standard to consider Petitioner's constitutional attack on the cumulative length of his consecutive sentences. The Arizona Supreme Court's opinion not only is faithful to the decisions of this Court, but also comports with well-established lower-court precedent governing Eighth Amendment challenges to the aggregate length of multiple prison terms, none of which individually constitute cruel and unusual punishment. Thus, further review is not warranted.

A. PETITIONER'S TEN-YEAR PRISON TERM PER COUNT IS CONSTITUTIONAL.

The Arizona Supreme Court correctly held that Petitioner's ten-year prison term per count of possession of child pornography did not raise an inference of gross disproportionality, for two reasons. First, the ten-year sentence imposed for this crime is less severe than other prison terms that this Court upheld as punishment for far less serious offenses. *See Lockyer v. Andrade*, 538 U.S. 63, 77 (2003)

(upholding two statutorily-mandated consecutive prison terms of 25 years to life for two counts of petty theft under California's recidivist statute); *Ewing*, 538 U.S. at 30-31 (upholding mandatory prison term of 25 years to life for California recidivist convicted of felony grand theft); *Harmelin*, 501 U.S. at 1005 (upholding mandatory life imprisonment without parole for a first-time offender who stood convicted of simple possession of 672 grams of cocaine); *Hutto*, 454 U.S. at 375 (upholding two consecutive 20-year prison terms imposed for selling 3 ounces of marijuana and possessing 6 ounces of marijuana for distribution); *Rummel v. Estelle*, 445 U.S. 263, 285 (1980) (upholding life sentence, with parole eligibility, imposed upon a Texas recidivist whose three theft-related crimes involved money and property having an aggregate worth of $229.11).

Second, the Arizona Supreme Court properly held that the legislature "had a 'reasonable basis for believing' that mandatory and lengthy prison sentences for the possession of child pornography would 'advance[] the goals of [Arizona's] criminal justice system in [a] substantial way.'" Pet. App. at 12a (quoting *Ewing*, 538 U.S. at 28; alterations in original). Indeed, this Court previously found it "surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand." *Osborne*, 495 U.S. at 109-10. Thus, the Arizona Legislature had a reasonable basis to believe that mandating severe prison terms for this crime would reduce the sexual abuse of children by significantly deterring and incapacitating child-pornography consumers. "Notably, both of these penological theories [deterrence and incapacitation] have been held by the Supreme Court to be valid and subject to deference by the courts." *United States v. Angelos*, 433 F.3d 738, 751 (10th Cir. 2006) (citing *Ewing*, 538 U.S. at 24-28, and *Harmelin*, 501 U.S. at 998-99).

Although Petitioner contends that Arizona's mandatory minimum sentence ranks as the Nation's harshest for his crime, "the circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate." *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring); *see also Rummel*, 445 U.S. at 281 ("Even were we to assume that the statute employed against Rummel was the most stringent found in the 50 states, that severity would hardly render Rummel's punishment 'grossly disproportionate' to his offenses.").[2]

Because comparison of the gravity of Petitioner's crime to the severity of his ten-year prison term did not give rise to an inference of gross disproportionality, the Arizona Supreme Court properly rejected Petitioner's Eighth Amendment claim without conducting inter- and intra-jurisdictional analyses. *See Ewing*, 538 U.S. at 23-24, 30; *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

. . .
. . .

[2] As Justice Hurwitz made clear in his concurring opinion, other jurisdictions prescribe penalties for child pornography possession that are at least as long as the ten-year prison term that Petitioner received for obtaining images of children under 15. Pet. App. at 27a (Hurtwitz, J., concurring). *See, e.g.*, 18 U.S.C. § 2252(a)(1), (b)(1) (2000) (sentencing range of 5 to 20 years' imprisonment); Ga. Code Ann. § 16-12-100 (2003) (5 to 20 years' imprisonment); Miss. Code Ann. § 97-5-35 (2005) (5 to 40 years' imprisonment); Nev. Rev. Stat. Ann. § 200.750 (2005) (life imprisonment with parole eligibility after 10 years); Utah Code Ann. §§ 76–5a–3, 76–2–203(2) (1953) (sentencing range of 1 to 15 years' imprisonment).

B. THE AGGREGATE LENGTH OF PETITIONER'S TWENTY CONSECUTIVE PRISON TERMS DOES NOT VIOLATE THE EIGHTH AMENDMENT BECAUSE EACH COMPONENT TEN-YEAR PRISON TERM IS CONSTITUTIONAL.

Despite the constitutionality of each ten-year prison term imposed, Petitioner maintains that this Court should issue a writ of certiorari because the Arizona Supreme Court refused "to consider the full impact of Arizona's mandatory flat, consecutive sentencing scheme." Petition, at 8. Although Petitioner contends that the correct yardstick for his Eighth Amendment claim is the aggregate length of his twenty prison terms, the Arizona Supreme Court correctly concluded, "[I]f the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence or because the consecutive sentences are lengthy in the aggregate." Pet. App. at 14a. In selecting this analytical framework for determining the constitutionality of the aggregate total of Petitioner's consecutive sentences, the court honored the well-established principle that "Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence." *Id.* (quoting *Aiello*, 864 F.2d at 265).[3] This principle's ultimate source is *O'Neil v. Vermont*, 144 U.S. 323 (1892), wherein this Court—albeit in *dicta*—approved the Vermont Supreme Court's rationale for rejecting a defendant's "cruel and unusual

[3] Numerous other federal and state courts follow this approach while reviewing Eighth Amendment challenges to consecutive prison sentences. *See United States v. Ming Hong*, 242 F.3d 528 532 (4th Cir. 2001); *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001); *Hawkins v. Hargett*, 200 F.3d 1279, 1285 (10th Cir. 1999); *People v. Hayes*, 923 P.2d 221, 229 (Colo. App. 1995); *People v. Elliott*, 112 N.E. 300, 304 (Ill. 1916); *Malee v. State*, 809 A.2d 1, 8-9 (Md. App. 2002); *People v. Kennebrew*, 560 N.W.2d 354, 358 (Mich. App. 1996); *State v. Venman*, 564 A.2d 574, 582 (Vt. 1989); *Wahleithner v. Thompson*, 143 P.3d 321, 323, ¶ 12 (Wash. App. 2006).

punishment" challenge to his cumulative sentences for 307 counts of selling intoxicating liquor—19,914 days of incarceration and fines totaling $6,638.72:

> If he has subjected himself to a severe penalty, it is simply because he has committed *a great many* such offenses. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offenses in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a *single* offense, the constitutional question might be urged; but here the unreasonableness is only in the number of offenses which the respondent has committed.

Id. at 331 (quoting *State v. O'Neil*, 2 A. 586, 593 (Vt. 1886)) (emphasis in original opinion).

Based upon the rationale set forth in *O'Neil*, numerous courts, including the Arizona Supreme Court in the instant case, have applied the following rule: "Consecutive sentences of imprisonment for conviction of separate offenses do not render a punishment cruel and unusual, where the penalty upon conviction of each offense is itself valid." *State v. Dillard*, 320 So.2d 116, 122 (La. 1975).[4] Moreover, this Court's

[4] *See also United States v. Beverly*, 369 F.3d 516, 537 (6th Cir. 2004) (upholding statutorily-mandated consecutive sentences totaling over 71 years where none of the individual sentences was "intrinsically 'grossly disproportionate' to the crime"); *Walton v. Scott*, 445 S.W.2d 97, 99 (Ark. 1969) ("We can find in the constitution no yardstick enabling us to announce
(Continued)

jurisprudence since *O'Neil* continues to reflect the view that a defendant should not be allowed to escape full punishment for multiple crimes, based upon the cumulative effect of otherwise constitutional sentences. *See Lockyer*, 538 U.S. at 74 n.1 (rejecting the dissent's characterization of Andrade's sentence "as punishment for the total amount he stole" because "California law specifically provides that *each* violation of Cal. Penal Code Ann. § 666 (West. Supp. 2002) triggers a separate

(Continued).

with confidence that the penalty is valid when one package is involved, that it is valid when 120 packages are involved, but that it is not valid when 894 packages are involved."); *Cole v. State*, 262 So.2d 902, 903 (Fla. App. 1972) ("The direction by the trial court for the sentences to be served consecutively did not operate to make the several lawful sentences constitute cruel or unusual punishment."); *Elliott*, 112 N.E. at 304 ("The statute prescribing a penalty for unlawful sales of liquor is valid, and the validity of the sentences is not affected by the fact that there were numerous violations and cumulative penalties."); *Kaylor v. State*, 400 A.2d 419, 422 (Md. App. 1979) ("However, it is settled law that consecutive sentences do not constitute cruel and unusual punishment where the length of each sentence is within the limits prescribed by statute."); *People v. Miles*, 559 N.W.2d 299, 301-02 (Mich. 1997) (approving the holding in *People v. Warner*, 476 N.W.2d 660 (Mich. App. 1991), that courts need not consider the cumulative length of consecutive sentences when each individual sentence is constitutional); *State v. Poole (Robert)*, 100 N.W. 647, 647-48 (Minn. 1904) (holding that the cumulative fines and incarceration imposed for multiple violations of game-protection statute would not constitute cruel and unusual punishment where each sentence was constitutional); *State v. Repp*, 603 S.W.2d 569, 571 (Mo. 1980) (holding that "where [a] defendant is convicted of separate offenses and the sentences imposed are within statutory limits, [the] consecutive effect of the sentences does not constitute cruel and unusual punishment"); *State v. Padilla*, 509 P.2d 1335, 1338 (N.M. 1973) ("[The defendant] also recognizes that the imposition of multiple valid sentences to run consecutively does not, as such, constitute cruel and unusual punishment as contemplated by the Eighth Amendment to the Constitution of the United States."); *Brinkley v. State*, 143 S.W. 1120, 1123 (Tenn. 1911) (upholding the imposition of additional fines and jail terms per each additional crime committed where the prescribed sentence for each violation was constitutional).

application of the three strikes law, if the different felony counts are 'not arising from the same set of operative facts'") (emphasis in original); *Badders v. United States*, 240 U.S. 391, 393-94 (1916) (holding that the imposition of seven $1,000 fines against a defendant convicted of seven counts of mail fraud presented "no ground for declaring the punishment unconstitutional").

Petitioner's challenge to the cumulative total of his individually constitutional prison terms is essentially a thinly-disguised claim that he is constitutionally entitled to concurrent sentences for multiple crimes—a right that would absurdly allow him to evade the full extent of punishment legislatively prescribed for his crimes. However, there exists "no constitutional right to receive concurrent sentences for two separate offenses." *Rosemond v. State*, 756 P.2d 1180, 1181 (Nev. 1988); *see also United States v. Candia*, 454 F.3d 468, 474 (5th Cir. 2006); *United States v. White*, 240 F.3d 127, 135 (2nd Cir. 2001); *State v. Jonas*, 792 P.2d 705, 712 (Ariz. 1990); *State v. Moliga*, 747 P.2d 81, 85 (Idaho App. 1987); *Bewley v. State*, 220 N.E.2d 612, 613 (Ind. 1966). Indeed, as the Connecticut Supreme Court observed, "It would be preposterous to hold that a person who commits a crime has a constitutional right to escape punishment for it." *State v. McNally*, 211 A.2d 162, 164 (Conn. 1965); *see also United States v. Schell*, 692 F.2d 672, 675 (10th Cir. 1982) ("The Eighth Amendment does not prohibit a state from punishing defendants for the crimes they commit; the amendment prohibits a sentence only if it is grossly disproportionate to the severity of the crime."); *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999) ("There is nothing cruel and unusual about punishing a person committing *two* crimes more severely than a person committing only one crime, which is the effect of consecutive sentencing.") (emphasis in original); *Malee*, 809 A.2d at 9 (upholding imposition of multiple consecutive

sentences as "preventing duly convicted offenders from escaping punishment of their criminal acts"); *State v. Murray*, 563 A.2d 488, 500 (N.J. App. 1990) (rejecting challenge to imposition of consecutive sentences because "there can be no free crimes in a system for which the punishment shall fit the crime.").

"Consecutive sentences are an appropriate mechanism for imposing a distinct punishment for each of two criminal acts." *United States v. Woods*, 440 F.3d 255, 260 (5th Cir. 2006); *see also United States v. Lustig*, 555 F.2d 751 753 (9th Cir. 1975); *Kaylor*, 400 A.2d at 423. "Mandating consecutive sentences is not an unreasonable method of attempting to deter a criminal, who has committed several offenses . . . from doing so again." *United States v. Beverly*, 369 F.3d 516, 537 (6th Cir. 2004); *see also United States v. Angelos*, 433 F.3d 738, 751 (10th Cir. 2006) (upholding mandatory consecutive sentences to deter and incapacitate those who repeatedly commit serious felonies with firearms); *People v. Preciado*, 116 Cal.App.3d 409, 412, 172 Cal. Rptr. 107, 108-09 (1981) (upholding the mandatory imposition of consecutive sentences for multiple violent rapes because the defendant's resulting punishment was "directly proportionate to the number and violence of his crimes").

The fact that Petitioner's twenty consecutive prison terms cumulatively exceed his life expectancy does not render them unconstitutional. As the Sixth Circuit correctly observed, "The Supreme Court has never held that a sentence to a specific term of years, even if it might turn out to be more than the reasonable life expectancy of the defendant, constitutes cruel and unusual punishment." *Beverly*, 369 F.3d at 537; *see also United States v. Khan*, 461 F.3d 477, 495 (4th Cir. 2006) (same); *Angelos*, 433 F.3d at 753 (same); *United States v. Yousef*, 327 F.3d 56, 163 (2d Cir. 2003) ("Lengthy prison sentences, even those that exceed any conceivable life

expectancy of a convicted defendant, do not violate the Eighth Amendment's prohibition against cruel and unusual punishment when based on a proper application of the Sentencing Guidelines or statutorily mandated prison terms.") (collecting cases); *Thompson v. State*, 658 S.W.2d 350, 270 (Ark. 1983) ("We have previously stated that the cumulative effect of consecutive sentences does not make punishment cruel and unusual."); *State v. Laffey*, 600 N.W.2d 57, 61 (Iowa 1999) ("The fact that these sentences mean that Laffey spends the remainder of his life in prison is not a factor in our analysis."); *State v. Nunn*, 802 P.2d 547, 551 (Kan. 1990) ("The fact that the minimum sentence imposed by a trial court exceeds the life expectancy of the defendant has never been grounds, *per se*, for a finding that the sentence is oppressive.").

The *mandatory* consecutive nature of Petitioner's twenty prison terms likewise causes no constitutional insult. "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Harmelin*, 501 U.S. at 994-95. The Eighth Amendment does not prohibit the imposition of *one mandatory* life sentence as punishment for *one* serious crime. *Id.* at 993-96, 1008-09. Likewise, the Eighth Amendment does not prohibit the imposition of *twenty mandatory* consecutive prison terms as punishment for *twenty* serious crimes, notwithstanding the fact that their cumulative length exceeds Petitioner's anticipated life expectancy. *See, e.g., Lockyer*, 538 U.S. at 68, 77 (upholding two statutorily-mandated consecutive prison terms of 25 years to life); *United States v. Hungerford*, 465 F.3d 1113, 1118 (9th Cir. 2006) (consecutive sentences totaling 159 years); *Angelos*, 433 F.3d at 750-53 (consecutive sentences totaling 80 years); *Beverly*, 369 F.3d at 536-37 (consecutive sentences totaling 71.5 years); *United States v. Arrington*, 159 F.3d 1069, 1073 (7th Cir. 1998)

(total of 65 years); *State v. Taylor*, 773 P.2d 974, 981 (Ariz. 1989) (85 consecutive sentences totaling 2,975 years).[5]

Petitioner offers several alternative arguments to circumvent the effect of the aforementioned authorities. Seeking to recast his *twenty* prison terms as a *single* 200-year sentence, Petitioner cites *Weems v. United States*, 217 U.S. 349 (1910), for the proposition that "this Court has held that it is appropriate for courts to review an entire sentence to determine if it is grossly disproportionate to the crime." Petition, at 11. However, *Weems* is inapposite, for three reasons. First, whereas the defendant in *Weems* challenged the constitutionality of the *one* sentence he received for *one* count of falsification of an official document, Petitioner attacks *twenty* separate sentences

[5] Petitioner complains that his mandatory consecutive sentences violate the Eighth Amendment because they exceed his life span and fail to offer him an opportunity to rehabilitate. Petition, at 18. This argument is of no moment because this Court previously upheld a sentence of life imprisonment without parole imposed upon a defendant who also had no prior convictions. *See Harmelin*, 501 U.S. at 994, 1002-09. Moreover, "the Eighth Amendment does not mandate adoption of any one penological theory." *Id.* at 999 (Kennedy J., concurring); *see also Ewing*, 538 U.S. at 25 ("A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. . . . Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts."); *cf. Deal v. United States*, 508 U.S. 129, 137 (1993) (refusing to apply rule of lenity to defendant who received six prison sentences totaling 105 years, based upon six armed robberies, where the defendant "managed to evade detection, prosecution, and conviction for the first five offenses and was ultimately tried for all six in a single proceeding"). Moreover, Petitioner's claim that he had no opportunity to rehabilitate is rebutted by the fact that he had amassed a large collection of child pornography over the 6-year period preceding his arrest. "He could have realized he had made a gross mistake and have reformed himself after committing his first offense." *People v. Poole (Terry)*, 555 N.W.2d 485, 492 (Mich. App. 1996).

that were imposed for *twenty* counts of sexual exploitation of a child. Second, while Petitioner is merely challenging the *length* of his prison terms, Weems challenged his "entire sentence," which included incarceration for fifteen years *and* non-severable statutory "accessories," such as "hard and painful labor," permanent shackling of the wrists and ankles, and lifetime surveillance. 217 U.S. at 357-59, 381-82; *see also Harmelin*, 501 U.S. at 990 (describing Weems' sentence). Third, the misplaced nature of Petitioner's reliance on *Weems* is manifested by the refusal of numerous courts to treat as one sentence the multiple sanctions that a defendant received as punishment for multiple offenses. *See, e.g.*, *Ming Hong*, 242 F.3d at 532; *Pearson*, 237 F.3d at 886; *Malee*, 809 A.2d at 8-10; *Warner*, 476 N.W.2d at 660.

Petitioner further suggests that his prison terms should be viewed as a single 200-year sentence because his twenty counts of conviction allegedly arose from the same continuing act. (Petition, at 11-12.) Petitioner analogizes his case to *State ex rel. Garvey v. Whitaker*, 19 So. 457 (La. 1896),[6] wherein the

[6] Petitioner claims that Justice Scalia cited the sentence in *Garvey* as an example of cruel and unusual punishment in *Harmelin*. (Petition, at 11, citing *Harmelin*, 501 U.S. at 985, n.10.) This assertion is false. Justice Scalia cited to *Garvey* in a footnote to his observation, "In the 19th century, judicial agreement that a 'cruel and unusual' (or 'cruel or unusual') provision did not constitute a proportionality requirement appears to have been universal." 501 U.S. at 984. Justice Scalia's footnote asserted that neither *Garvey* nor *State v. Driver*, 78 N.C. 423 (1878), "is to the contrary," because these two cases were "examples of applying, not a proportionality principle, but rather the principle . . . that a punishment is 'cruel and unusual' if it is illegal because not sanctioned by common law or statute." *Id*. at 984 n.10. Justice Scalia's "fair reading" of *Garvey* was "that the sentence was cruel and unusual because it was illegal." *Id.* In contrast to *Garvey*, the Arizona Supreme Court did *not* find the imposition of consecutive sentences in Petitioner's case to be illegal because Petitioner had acquired the visual images constituting the (Continued)

Louisiana Supreme Court invalidated multiple sentences of confinement for 2,160 days, based upon 72 consecutive thirty-day prison terms imposed for 72 distinct violations of a trespassing ordinance occurring over a temporally contiguous period of 1 hour and 40 minutes, with "each offense embracing only one and one-half minutes and one offense following after the other immediately and consecutively." Petition, at 12 (quoting *Garvey*, 19 So. at 459). *Garvey* does not apply to this case because Petitioner's crimes were *not* one continuous offense. The Arizona Supreme Court specifically found that: (1) Petitioner "had accumulated the images over a six-year period," Pet. App. at 13a; (2) Petitioner "had obtained at least two images in 1996, some six years before his arrest," Pet. App. at 17a; and (3) the evidence indicated that "from 1996 to 2002, [Petitioner] had downloaded computer files containing child pornography" and "created both computer and hard copy filing systems to maintain his collection," Pet. App. at 3a. The Arizona Supreme Court's factual findings effectively rendered moot the question whether a person could be convicted and sentenced for multiple images acquired simultaneously. Pet. App. at 13a, 25a n.6.

Finally, Petitioner adopts Justice Berch's dissenting view that the Arizona Supreme Court imprudently ignored "the nature of this offense, that possessors of child pornography possess more than one image and for more than one day," when it resolved his challenge to the cumulative length of his twenty ten-year prison terms by focusing on the sentence imposed for each count. Petition, at 12-13, 18. The essence of both Justice Berch and Petitioner's complaint is that the Arizona Legislature unwisely enacted a sentencing scheme that mandates a separate

_____(Continued).

basis for his twenty counts and consecutive sentences at different times during the course of six years. Pet. App. at 13a, 17a, 25a n.6.

prison term for each individual visual image possessed, and that "the nature of the offense" should have instead prompted the legislature to impose a single prison term for possession of some unspecified number of *multiple* images. However, fixing the number of contraband images that may be punished within a single prison term is a subjective, policy determination that this Court has found to rest "properly within the province of legislatures, not courts." *Rummel*, 445 U.S. at 275-76 (rejecting defendant's challenge to the small amount of stolen money required to trigger application of Texas' recidivist statute); *see also Jonas*, 792 P.2d at 711 ("However, it is not the function of this court to engage in determining what minimum amount of marijuana need be involved in a 'serious' offense; that line-drawing function is properly one for the legislature."). As this Court previously observed, "This criticism is appropriately directed at the legislature, which has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme." *Ewing*, 538 U.S. at 28.

Petitioner's criticism of Arizona's sentencing scheme also erroneously overlooks the three goals that motivated the Arizona Legislature to impose a separate penalty for each visual image: (1) decreasing the number of children sexually abused during the production of these materials by reducing demand through deterrence; (2) depriving molesters of a tool of seduction by encouraging destruction of their child-pornography collections; and (3) punishing violators for the separate injury inflicted by each image's existence. Pet. App. at 11a-12a (citing 1978 Ariz. Sess. Laws 1978, Ch. 200, § 2(A)(5)-(6)); *see also Osborne*, 495 U.S. at 110-11; *Ferber*, 458 U.S. at 759; *United States v. Hersh*, 297 F.3d 1233, 1242 (11th Cir. 2002); *United States v. Sherman*, 268 F.3d 539, 545 (7th Cir. 2001); *United States v. Norris*, 159 F.3d 926, 931 (5th Cir. 1998); *State v. Emond*, 786 P.2d 989, 990-93 (Ariz. App. 1990); *Perry v. Commonwealth*, 780 N.E.2d 53, 57 n.5 (Mass.

2002). Moreover, the Arizona Legislature's policy decision to mandate a consecutive prison term for each one of a defendant's contraband images is constitutional because this sentencing scheme rationally advances the legitimate objective of punishing more harshly those persons whose demand for child pornography most fueled the industry of sexually exploiting children. *See, e.g.*, *Beverly*, 369 F.3d at 537 (upholding the mandatory imposition of consecutive prison terms as serving "the twin goals of retribution and deterrence"); *Preciado*, 116 Cal.App.3d at 412, 172 Cal.Rptr. at 108 ("By requiring a full, separate, and consecutive term for each rape, [the penal statute] attempts to provide increased punishment in cases of greater culpability based upon injury to the victims and society.") (citation omitted); *August*, 740 N.W.2d at 744 (upholding the imposition of consecutive sentences as a proper method of graduating punishment according to number of crimes committed); *Poole (Robert)*, 100 N.W. at 648 ("This method of fitting the punishment to the crime by graduating the penalty according to the number of animals, birds, or fish unlawfully killed, taken, or possessed has been adopted by the statutes of many of our sister states, and sustained as a proper exercise of legislative discretion.").[7]

[7] Petitioner argues that the Arizona Supreme Court improperly rejected his request for an evidentiary hearing, at which he intended to present mitigating evidence to establish the disproportionate nature of his mandatory consecutive sentences. Pet. App. at 22a-23a. However, this Court has consistently rejected the notion of "individualized sentencing" in non-capital cases. *See Harmelin*, 501 U.S. at 996 ("We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further."); *id.* at 1006 ("The Court demonstrates that our Eighth Amendment capital decisions reject any requirement of individualized sentencing in non-capital cases.") (Kennedy, J., concurring).

C. THE ARIZONA SUPREME COURT PROPERLY CONSTRUED *LOCKYER*.

Finally, Petitioner contends that this Court should grant further review because the Arizona Supreme Court allegedly misconstrued *Lockyer* "as prohibiting courts from considering the consecutive nature of a sentence in an Eighth Amendment challenge." Petition, at 10. However, Petitioner misreads the import of the Arizona Supreme Court's majority opinion's citations to *Lockyer* in the instant case. The challenged passage, in its entirety, reads as follows:

> "Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence." *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988). Thus, if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate. *See Jonas*, 164 Ariz. at 249, 792 P.2d at 712. This proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences. *See, e.g., Lockyer*, 538 U.S. at 74 n. 1, 123 S.Ct. 1166 (rejecting, in context of federal habeas review, dissent's argument that two consecutive sentences of twenty-five years to life for separate offenses were equivalent, for purposes of Eighth Amendment analysis, to one sentence of life without parole for thirty-seven-year-old defendant); *United States v. Beverly*, 369 F.3d 516, 537 (6th Cir. 2004); *Taylor*, 160 Ariz. at 422, 773 P.2d at 981.

Pet. App. at 14a.

Nowhere in this passage does the majority state its belief that *Lockyer* absolutely *precludes* consideration of the aggregate length of Petitioner's prison terms. Instead, the court merely cited *Lockyer*, *Beverly*, and *Taylor* as three illustrative cases demonstrating that consecutive sentences do not become unconstitutional "merely because" "a defendant faces a total sentence exceeding a normal life expectancy as a result." Pet. App. at 14a.

The paragraph and footnote immediately preceding the passage quoted above further demonstrate Petitioner's misconstruction of the majority's citation to *Lockyer.* Therein, the Arizona Supreme Court explicitly reaffirmed *State v. Davis*, 79 P.3d 64 (2003), which held that the specific facts and circumstances of an extraordinary case *could* call for a proportionality analysis that includes consideration of the cumulative length of a defendant's consecutive prison terms. Pet. App. at 13a n.3, 18a-20a. Simply stated, the Arizona Supreme Court would have been forced to *overrule Davis* if—as Petitioner mistakenly contends—the majority had actually construed *Lockyer* as absolutely prohibiting consideration of the aggregate length of his consecutive sentences in its proportionality analysis.[8]

Consequently, the Arizona Supreme Court did not misconstrue *Lockyer* when it rejected Petitioner's Eighth Amendment challenge to his consecutive prison sentences.

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[8] Indeed, the Arizona Supreme Court repeatedly cited *Lockyer* in *Davis.* 79 P.3d at 68, 70, 74, ¶¶ 13, 29-31, 47 n.10. This fact constitutes additional proof that the majority in the instant case did *not* construe *Lockyer* in the manner Petitioner now contends.

CONCLUSION

For these reasons, the State respectfully requests that this Court deny Petitioner's petition for writ of certiorari.

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