NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

MORTON BERGER,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

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QUESTION PRESENTED

Petitioner Morton Berger is serving a 200-year prison sentence for possessing twenty images of child pornography, each image charged in a separate count. Arizona law mandates a prison sentence of 10 to 24 years for each image of child pornography possessed, and requires each sentence to run consecutively to every other sentence, with no possible probation, early release, or parole. The trial court did not conduct a proportionality inquiry to determine if this sentence was grossly disproportionate for a 52-year-old professional with no criminal history. A majority of the Arizona Supreme Court refused to consider the whole of Petitioner's 200-year sentence under Arizona's mandatory flat, consecutive sentencing scheme, as a factor in whether Petitioner's punishment violates the Eighth Amendment.

I.

Whether the Eighth Amendment forbids courts from considering the fact of a mandatory flat, consecutive sentencing scheme for multiple counts, rather than merely focusing on the sentence for a single count, when determining whether an entire sentence constitutes an excessive or cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

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Petition For A Writ Of Certiorari
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PETITION FOR A WRIT OF CERTIORARI

Petitioner Morton Berger respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Arizona Supreme Court entered on May 10, 2006.

OPINIONS BELOW

The Arizona Supreme Court *en banc* opinion (App. A 1a-41a), is reported as *State v. Morton Berger*, 212 Ariz. 473, 134 P.3d 378 (filed May 10, 2006) (Hurwitz, J., concurring), (Berch, V.C.J., concurring in part and dissenting in part). No request for rehearing was filed. The Arizona Court of Appeals, Division One opinion (App. B 42a-85a), is reported as *State v. Morton Berger*, 209 Ariz. 386, 103 P.3d 298 (Ct. App. 2004) (Kessler, J., concurring in part and dissenting in part).

JURISDICTION

The Arizona Supreme Court's judgment was entered on May 10, 2006. On July 21, 2006 Justice Kennedy extended the time for filing this petition for certiorari to and including September 7, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). Petitioner asserted below, and asserts here, that he has been deprived of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Eighth Amendment to the Constitution of the United States provides, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

Arizona Revised Statute §13-3553 " Sexual exploitation of a minor," provides in pertinent part:

> A. A person commits sexual exploitation of a minor by knowingly:
>
> > 1. Recording, filming, photographing, developing or duplicating any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.
> > 2. Distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.
>
> * * *
>
> C. Sexual exploitation of a minor is a class 2 felony and if the minor is under fifteen years of age it is punishable pursuant to section 13-604.01.

Ariz. Rev. Stat. Ann. §13-3553.

STATEMENT OF THE CASE AND FACTS

I. The Facts

In June 2002, Phoenix police officers found thousands of images of pornography, including some child pornography, in Petitioner Morton Berger's home. Berger had accumulated his collection over six years. App. A 13a.

Berger was initially indicted for thirty-five counts of sexual exploitation of a minor, charged as one count for each image, pursuant to Ariz. Rev. Stat. Ann. § 13-3553. Each count is a separate felony punishable by a mandatory sentence of ten to twenty-four years prison, with a presumptive term of seventeen years, without any possible probation, early release, or parole, and the sentence for each count must be served consecutively. *Id.* § 13-3553(C). *See also Id.* §13-604.01 (D), (G), (K). *See generally,* App. C 86a. Berger faced a mandatory minimum sentence of 350 years in prison without any possibility of release.

Berger first raised his Eighth Amendment challenge to Ariz. Rev. Stat. Ann. §13-3553, and the "dangerous crimes against children" sentencing law in a pretrial motion. App. B 44a. He argued that under *Solem v. Helm*, 463 U.S. 277 (1983), the mandatory sentence was grossly disproportionate as applied to him, a 52-year-old first-time offender, father, and award-winning teacher, and constituted cruel and unusual punishment under the Eighth Amendment. App. B 44a. Prior to trial, the prosecutor offered Berger a plea with a minimum possible prison sentence of seventeen years without parole; the prosecutor dismissed a risk assessment conducted by a clinical and forensic psychologist that concluded Berger "posed no risk of repeating his conduct or of acting out toward

children." App. B 75a.[1]

At trial, the prosecution dismissed fifteen counts of the indictment and Berger was convicted of the remaining twenty counts. Other than the twenty images he was convicted of possessing, there is no evidence of how many actual child pornography images (as opposed to adult pornography) he possessed. App. B 74a.

Berger was never accused, charged, or convicted of any other crime. No evidence was presented at trial that Berger made, distributed, or purchased the images, or had any improper contact with a child. Without holding a proportionality hearing, and against the prosecutor's request for a 340 year sentence, the trial judge sentenced Berger to the mandatory minimum mitigated sentence: a 200-year prison term.

II. The Appellate Proceedings

Berger appealed his sentence to the Arizona Court of Appeals. He again argued that his 200-year punishment was grossly disproportionate to his crime as compared to sentences for violent Arizona crimes (referring to the intra-jurisdictional test in *Solem v. Helm*, 463 U.S. 277, 292 (1983)), and to sentences for the same crime in other states *(Solem's* inter-jurisdictional test). App. B 42- 43a. Berger provided the court with a survey of child pornography sentencing laws of all fifty states. The survey shows that Berger's mandatory minimum sentence "exceeds that imposable in any other state," App. A 32a; and that "Arizona has the highest possible sentencing range in the entire United States...." App. B 82a.

A divided panel of the appellate court rejected Berger's arguments under both the state and

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[1] In another Arizona child pornography possession case, the same prosecutor offered a police officer accused of possessing seventeen child pornography images a six-year sentence, which he accepted. *See State v. Shropshire*, Maricopa County case number CR2001-018097; www.courtminutes.maricopa.gov/docs/Criminal/072002/m0712802.pdf

federal Constitutions.[2] App. B 63a. The majority stated, "we usually do not consider the imposition of consecutive sentences when determining proportionality." App. B 59a. In an exhaustive dissent, Presiding Judge Kessler disagreed with the majority's refusal to consider Berger's sentence as a whole, "it is *exactly* the combination of minimum mandatory sentences and mandatory consecutive sentencing which can create the inference of gross disproportionality." (Emphasis in original). App. B 78a. Following this decision, Berger petitioned the Arizona Supreme Court for review.

A majority of the Arizona Supreme Court rejected Berger's argument that a reviewing court must consider the cumulative nature of his 200-year sentence to determine if the punishment is grossly disproportionate to the crime of possessing twenty child pornography images. App. A 24a. Instead, the court re-framed the issue, limiting its analysis to a sentence for one count, ("we focus on whether a ten-year sentence is disproportionate for a conviction of possessing child pornography involving children younger than fifteen."). Pet App. A 13a. The court refused to consider Berger's sentence as a whole, ("'Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence.'") (quoting *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988)). App. A 14a.

The court dismissed further consideration of Berger's mandatory cumulative sentence by relying on footnote one in *Lockyer v. Andrade*, 538 U.S. 63 (2003). "This proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences." App. A 14a. The court then held Berger's 200-year punishment constitutional by considering only one count of his total sentence. "Given the principles established

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[2] "In *State v. Davis*, 206 Ariz, 377, 380-81, 79 P.3d 64, 67-68 (2003) (cite omitted), the Arizona Supreme Court considered whether Arizona's constitutional prohibition against cruel and unusual punishment provided greater protection than its federal counterpart, but it found no compelling reason to so find and neither do we." App. B 44a nt.2.

by prior decisions, we cannot conclude that a ten-year sentence is grossly disproportionate to Berger's crime of knowingly possessing child pornography...." App. A 14a.

Justice Hurwitz, in a separate concurring opinion, stated, "there is much to commend Justice Berch's suggestion that the cumulative sentence imposed upon Mr. Berger was unnecessarily harsh, and my personal inclination would be to reach such a conclusion." App. A 25a. Justice Hurwitz further commented that he "reluctantly" agreed with the majority's conclusion that this Court's precedents in *Harmelin v. Michigan,* 501 U.S. 957 (1991), and *Lockyer*, prohibit lower courts from considering the offender's particular situation or the mandatory consecutive nature of a sentence when deciding if a sentence is grossly disproportionate. App. A 28a. While upholding Berger's sentence, Justice Hurwitz concluded, "I therefore find merit in Justice Berch's suggestion that objective 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." App. A 26a.

Justice Berch, dissenting from the majority, wrote, the question "is how to determine whether the sentence at issue is grossly disproportionate." App. A 30a. Her dissent then challenged the majority's interpretation of *Lockyer* to Berger's case:

> But in 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.

App. A 36-37a.

By compounding "extraordinarily long" prison terms with mandatory stacked counts that must be served consecutively and without any possible release, this "triple whammy" impact, the dissent argued, should not escape scrutiny from a court asked to determine if a punishment violates the Eighth Amendment. App. A 37a. Justice Berch concluded that if the majority had considered Berger's entire sentence using *Solem's* intra- and inter-jurisdictional comparison, it would find an

inference of gross disproportionality in his punishment:

> My point in this opinion is merely to demonstrate that were we able to conduct such an objective inquiry as a part of our determination of whether a sentence gives rise to an inference of gross disproportionality, the analysis would demonstrate that Arizona's sentence for this crime is by far the longest in the nation and is more severe than sentences imposed in Arizona for arguably more serious and violent crimes. Such objective facts support finding an inference of gross disproportionality.

App. A 31a.

REASONS FOR GRANTING THE PETITION

The Arizona Supreme Court wrongly interpreted this Court's precedents by refusing to consider the impact of Arizona's mandatory flat, consecutive sentencing scheme. The Arizona Supreme Court majority misapplied *Lockyer* to the facts of this case and concluded it could not consider Berger's cumulative punishment. Berger's flat, consecutive, probation and parole ineligible sentence is required by Arizona's "dangerous crimes against children" sentencing scheme. Ariz. Rev. Stat. Ann. §13-604.01 (D)(G)(K)(L)(2002). App. C 86a.

This is a case of first impression. This Court has yet to decide if combining statutorily mandated long prison sentences, for multiple counts of the same offense, that must be served consecutively with no early release possible for first offenders, can result in a total punishment grossly disproportionate to the seriousness of the crime. If Petitioner's 200-year punishment for possessing twenty contraband images escapes scrutiny, then "it is difficult to envision when a court would ever find a term of years to be disproportionate to the gravity of the crime and the harm to the public." App. A 40-41a.

This Court should grant this Petition and declare Berger's punishment unconstitutional, or instruct the Arizona Supreme Court to examine Berger's punishment as a whole to determine whether, measuring the gravity of his conduct against sentences imposed in Arizona for violent offenses, and sentences imposed in every other jurisdiction for this crime, a 200-year, no release

prison sentence is grossly disproportionate to the crime of possessing twenty child pornography images.

ARGUMENT

I. THE ARIZONA SUPREME COURT'S REFUSAL TO CONSIDER PETITIONER'S 200-YEAR SENTENCE AS A WHOLE, INSTEAD TREATING HIS EIGHTH AMENDMENT CHALLENGE AS APPLYING TO ONLY ONE 10-YEAR SENTENCE FOR POSSESSING ONE CHILD PORNOGRAPHY IMAGE, INCORRECTLY INTERPRETS THIS COURT'S EIGHTH AMENDMENT PRECEDENT AS PRECLUDING COURTS FROM CONSIDERING AN ENTIRE SENTENCE WHEN DETERMINING IF THE PUNISHMENT VIOLATES THE EIGHTH AMENDMENT.

What is just in this sense, then, is what is proportional, and what is unjust is what violates the proportion.

Aristotle, The Nicomachean Ethics 113 (350 B.C.E.)

The Arizona Supreme Court was wrong to interpret this Court's precedents as forbidding lower courts from considering a mandatory consecutive sentencing scheme that results in a minimum 200-year prison sentence for possessing twenty images of child pornography. Justice Bales, writing for the majority, states that "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." App. A 14a. The court concluded that lower courts cannot consider the consecutive nature of a sentence when determining if a total punishment is disproportionate to a crime, relying on a comment this Court made in a footnote in *Lockyer v. Andrade*, 538 U.S. 63, 74 n.1 (2003). Citing *Lockyer* as prohibiting courts from considering the consecutive nature of a sentence in an Eighth Amendment challenge misinterprets *Lockyer*.

Contrary to the Arizona Supreme Court's decision, this Court has not yet decided the

constitutionality of a combined mandatory, consecutive, long, no-release sentence like Berger's, in *Lockyer,* or in any other case. In *Lockyer,* this Court was asked to decide whether the California Court of Appeal's rejection of Andrade's Eighth Amendment challenge violated recent amendments to the federal habeas statute. This Court was not directly reviewing Andrade's constitutional Eighth Amendment claim *de novo*, ("we do not reach the question whether the state court erred and instead focus solely on whether § 2254(d) forecloses habeas relief on Andrade's Eighth Amendment claim."). 538 U.S. at 71. After Justice O'Connor conceded that this Court's opinions have "not been a model of clarity" and have "failed to establish a clear or consistent path for courts to follow," the Court concluded that, "it was not an unreasonable application of our clearly established law for the California Court of Appeal to affirm Andrade's sentence of two consecutive terms of 25 years to life in prison." *Id*. at 77.

The footnote referred to by the Arizona Supreme Court was in response to the *Lockyer* dissent's comparison of Andrade's sentence to other challenged sentences, and merely clarifies this Court's limited role when reviewing a lower court's decision in habeas proceedings. Since the issue before this Court in *Lockyer* was not whether Andrade's two 25-year consecutive sentences were unconstitutional, then the Arizona Supreme Court's reliance on *Lockyer* was misplaced. This Court has not precluded lower courts from considering an entire punishment that results from mandatory consecutive sentences when deciding whether the punishment imposed is cruel and unusual. Thus, the Arizona Supreme Court's refusal to consider the cumulative effect of Arizona's mandatory consecutive sentencing scheme on Berger wrongly applies this Court's precedents.

To the contrary, 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. The Cruel and Unusual Punishments Clause prohibits not only punishments inflicting torture, "but against all punishments

which by their excessive length or severity are greatly disproportioned to the offenses charged." *Weems v. United States*, 217 U.S. 349, 371 (1910).

Berger's cumulative punishment is analogous to a sentence Justice Scalia cited in *Harmelin* as an example of cruel and unusual punishment. *See Harmelin*, 501 U.S. at 985 n. 10. In *State ex rel. Garvey v. Whitaker*, defendant's six-year jail sentence for trespassing was found to be cruel and unusual punishment because it reduced a single continuous act into multiple counts resulting in an excessive aggregate sentence. 48 La. Ann. 527, 19 So. 457 (1896). The city ordinance authorized a sentence of 30 days, but defendant's one-hour and forty-minute trespass was charged as 72 separate counts, "each offence embracing only one and one-half minutes and one offence following after the other immediately and consecutively." *Garvey*, 48 La. Ann. at 533, 19 So. at 459. The Louisiana Supreme Court found the sentence cruel and unusual "considering the offence to have been a continuing one." *Id*.

Just as trespassing is a single continuous act that is temporally divisible into separate counts, possession of contraband can also be divided into separate counts. Just as trespassing for only ninety seconds is not likely to be charged, it is equally unlikely anyone will face charges of possessing only one child pornography image for only one day. If the Louisiana legislature enacted a law making trespassing for one second a chargeable offense requiring flat, consecutive 30-day jail sentences per count, than one hour of trespassing requires a sentence of 295 years. Such an extreme sentence, like Berger's, should not escape scrutiny merely because it is legislatively mandated. If this Court's deference to the primacy of the legislature is absolute, than the Eighth Amendment provides no limitations on a sentence like *Garvey's*.

Arizona law prohibits concurrent sentences for child pornography possession, yet the Arizona court dismissed as irrelevant to Eighth Amendment analysis, Arizona's consecutive

sentencing scheme. The court's analysis essentially treated Berger's consecutive sentence the same as if it were concurrent for twenty total images. To do this, the court had to ignore the nature of this offense, that possessors of child pornography possess more than one image and for more than one day. Many crimes, such as continuous sexual abuse of a child or mail fraud, have, by definition, multiple separate occurrences yet are either charged as one crime or are eligible for concurrent sentences.[3] As a result of its refusal to decide whether Arizona's consecutive sentencing requirement is unconstitutional, the Arizona Supreme Court did not resolve the question whether Berger's 200-year total sentence, required by Arizona's "dangerous crimes against children" sentencing statute, is unconstitutional as applied to Berger.

A. IF THE ARIZONA SUPREME COURT HAD CORRECTLY INTERPRETED THIS COURT'S EIGHTH AMENDMENT PRECEDENTS, AND CONSIDERED PETITIONER'S 200-YEAR PUNISHMENT AS A WHOLE, IT WOULD HAVE CONCLUDED THAT PETITIONER'S PUNISHMENT VIOLATES THE EIGHTH AMENDMENT.

Punishments I know are necessary, and I would provide them, strict and inflexible, but proportioned to the crime.

Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), in 1 The Papers of Thomas Jefferson, 1760-1776, at 505.

Arizona's mandatory sentence for possessing child pornography results in a sentence "longer than that imposed in Arizona for many crimes involving serious violence and physical injury to the victim." App. A 34a. Furthermore, Arizona's sentence is "by far the longest in the nation" for this crime. App. A 31a. In most states Berger's crime would have resulted in a

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[3] *See* Ariz. Rev. Stat. Ann. § 13-1417, "A person who over a period of three months or more in duration engages in three or more acts in violation of section 13-1405 (sexual intercourse), 13-1406 (sexual assault) or 13-1410 (child molest) with a child under fourteen years of age is guilty of continuous sexual abuse of a child.... Continuous sexual abuse of a child is a class 2 felony and is punishable pursuant to section 13-604.01." *See also* 18 U.S.C. § 1341(mail fraud);18 USCS Appx § 2B1.1 (sentence range for mass-marketing).

sentence of no more than five years, and he would also have the possibility of probation or early release. App. A 34a; *See also* e.g., Cal. Penal Code § 311.11(a) (West, Westlaw through 2006 Sess.) (up to twelve months). As the dissent below noted, "if the Supreme Court's jurisprudence permitted the court to examine the sentences imposed in other jurisdictions for similar crimes - the inter-jurisdictional analysis mentioned in *Solem*, *Harmelin*, and *Ewing* - the analysis would support the inference that Berger's 200-year sentence is grossly disproportionate." App. A 34a.

Had the Arizona Supreme Court majority considered Petitioner's sentence as a whole, it would have found it grossly disproportionate. *See Solem v. Helm*, 463 U.S. 277 (1983), *Harmelin v. Michigan*, 501 U.S. 957 (1991). In *Solem*, this Court adopted a three-part proportionality test to determine whether a sentence violates the Eighth Amendment by being disproportionate to the crime. 463 U.S. at 292. First, courts compare "the gravity of the offense and the harshness of the penalty;" then compare "sentences [for serious crimes] imposed on other criminals in the same jurisdiction" (intra-jurisdictional analysis); and "sentences imposed for the commission of the same crime in other jurisdictions" (inter-jurisdictional analysis). Id. at 290-94.

This Court has since narrowed *Solem's* proportionality analysis and held that courts must first find a "threshold inference" of gross disproportionality before engaging in *Solem's* inter- and intra- jurisdictional comparison of other sentences. *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

Had the trial court held a proportionality hearing to compare the circumstances of Berger's crime to the gravity of his offense, and to "explore both Berger's risk and potential of contributing to society," the court would have weighed Berger's risk, as assessed by a clinical and forensic psychologist that concluded he poses little or no risk to re-offend, against his punishment, and found Berger's sentence grossly disproportionate. App. B 75a. But that

comparison was only done by the dissenting appellate judges below. *See* App. B 75-76a.

The majority decided they could not review Berger's total sentence, they could only analyze one count, ("my colleagues derive the proposition that the court may not consider the consecutive nature of Berger's sentences in determining whether the total is grossly disproportionate to the seriousness of Berger's crimes.") App. A 36a. Had the court considered Berger's total sentence, it would have concluded, as both dissenting judges did, that Berger's sentence raises an inference of gross disproportionality. Had the court applied *Solem's* objective comparisons, it would have found Berger's 200-year sentence unconstitutional.

Using *Solem's* intra-jurisdictional analysis, Berger's sentence far exceeds sentences imposed in Arizona for violent crimes. The sentence for sexually assaulting a child under twelve is the same as for possessing a single image of that assault. Yet sexual assault can be reduced to countless separate images, and possessing five of those images can result in a life sentence. Meanwhile, the perpetrator of the assault will be released. *See* Ariz. Rev. Stat. Ann. § 13-604.01(D) (2002 Supp.). Possessing two images carries a more severe presumptive sentence (34 years) than second degree murder of a child, or forcible rape of a child under twelve (Ariz. Rev. Stat. Ann. § 13- 604.01 (B), (D) (2001)), and is *26 years longer* than forcible rape of an adult ((Ariz. Rev. Stat. Ann. §13-1406(B)(2001)(seven year presumptive for rape)). Arizona's presumptive sentence for four counts of possessing four child pornography images is 68 years flat. A mitigated sentence for possessing five pictures (fifty years) amounts to a life sentence without parole, "more serious than the sentence imposed for virtually any crime in the state." App. A 35a**.**

Berger's crime, "sexual exploitation of a minor" for possessing child pornography is the only "dangerous crime against children" that does not involve contact with children. App. A

35a. The "absence of direct violence affects the assessment of society's interest in punishing his acts so severely." *Rummel v. Estelle*, 445 U.S. 263, 275 (1980). So it is unreasonable to compare possessing a child pornography picture with second degree murder, rape, or actual sexual assault of a child, although all of these acts receive the same severe punishment. But unlike murder and rape, a sentence for possessing one child pornography picture cannot be reduced or paroled. *See* Ariz. Rev. Stat. Ann. § 13-604.01(G)(K)(L); App. C.

The next stage of the *Solem* test is the *inter*-jurisdictional analysis, a review of other state's sentences for the same crime. The dissenting Arizona Supreme Court justice and the dissenting Court of Appeals judge both agreed that Berger would have received a considerably shorter sentence in every other state. App. A 32-34a; App. B 82-84a.

When federal law is included in the inter-jurisdictional analysis, it shows that Berger's federal sentence would have been nearly *195 years less* than the mandatory minimum required under Arizona law. *See* U.S. Sentencing Guidelines ("Guidelines") (18 USCS Appx § 5A; § 2G2.2 (Supp. 2005) & § 5A (1996)). Two of the *Berger* court justices noted that the Guidelines recommend a sentence of approximately five years (57-71 months) based on the number and type of images Berger possessed. App. A 27a, 31a. The Guidelines structure its sentencing recommendation based on the total number of pictures possessed (e.g.,"at least 10 images, but fewer than 150"), regardless of how long they were possessed. Had Berger been charged in federal court instead of Arizona state court, his sentence would have been based on the total amount found in his possession, not a separate sentence for each image possessed. *See* U.S.S.G § 3D1.2 (Nov. 2002) ("All counts involving substantially the same harm shall be grouped together into a single Group.").

To justify Berger's 200-year sentence, the majority compared it to sentences for

committing twenty murders or twenty rapes. The court ignores the monumental differences in terms of direct damage to society, the victims, and the moral culpability of the offender, between committing twenty murders or twenty rapes and possessing twenty pictures. "Nonviolent crimes are less serious than crimes marked by violence or the threat of violence." *Solem*, 463 U.S. at 292-293.

The majority then considered one mitigated count in isolation while ignoring the mandatory consecutive requirement and the likelihood that only one count would be charged. Petitioner could not find any case in which a defendant was charged with possessing a single image of child pornography. The State has never argued that such a case exists. As the dissent noted, "those who possess pornography tend to possess more than one image." App. A 39a.

The Arizona Supreme Court majority analyzes each separate count as if it were a separate prior felony *conviction* to justify Berger's lengthy sentence, just as prior convictions justified extraordinarily long sentences in *Solem*, *Rummel*, *Lockyer*, and *Ewing*. However, each count is obviously not a separate prior conviction. Berger's possession occurred simultaneously; he had no opportunity to reform. Recidivists Ewing and Andrade whose multiple felony convictions finally resulted in life without parole sentences, had multiple opportunities to rehabilitate and return to society as productive citizens after their first, second, or subsequent convictions. (Ewing had four prior felony convictions, including residential burglary and armed robbery, and was sentenced to 25 years to life for stealing golf clubs under California's "three strikes" statute, *Ewing v. California*, 538 U.S. 11 (2003); Andrade had prior theft convictions and was also sentenced under California's "three strikes" law to two consecutive terms of twenty-five years to life. *Lockyer v. Andrade*, 538 U.S. 63 (2003)). Berger never had the opportunity to rehabilitate. Unlike Ewing, Andrade, Solem, and Harmelin, Berger had otherwise been a contributing

member of society.

Courts are confused about how to apply *Solem* and *Harmelin* to determine if a sentence is unconstitutional.[4] But Arizona's "dangerous crimes against children" sentencing statute should not survive either analysis. Whether the court initially conducts a *Solem* intra- and inter-jurisdiction review, or whether it first looks for the *Harmelin* inference of gross disproportionality, the statute is unconstitutional. If this Court reviews Berger's entire punishment, instead of examining the sentence for a single count, it would find Berger's punishment cruel, unusual, and unconstitutional.

When Hammurabi, King of Babylon, said in 1792-1750 B.C.E., "*Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth,*" he described the proportionality guarantee preserved in the Eighth Amendment. "Even Hammurabi limited the penalty for an eye to an eye." *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004)(Kleinfeld, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] "It may be somewhat unclear, in light of the Supreme Court's decision in *Harmelin*, whether *Solem's* three-part proportionality test is still relevant in noncapital cases. *See United States v. Johnson*, 944 F.2d 396, 408 (8th Cir. 1991) ("The effect of *Harmelin* on the *Solem* proportionality factors is not entirely clear."); *United States v. Angulo-Lopez*, 7 F.3d 1506, 1509 (10th Cir. 1993) ("*Harmelin* provides no guidance in articulating the proper approach for an Eighth Amendment review.")." *United States v. Kratsas*, 45 F.3d 63, 67 (4th Cir. 1995).

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APPENDIX C

Arizona Revised Statute § 13-604.01, "Dangerous crimes against children," provides:

> **A.** A person who is at least eighteen years of age and who stands convicted of a dangerous crime against children in the first degree involving sexual assault of a minor who is twelve years of age or younger or sexual conduct with a minor who is twelve years of age or younger shall be sentenced to life imprisonment and is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by section 31-233, subsection A or B until the person has served thirty-five years or the sentence is commuted. This subsection does not apply to masturbatory contact.
>
> **B.** Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving attempted first degree murder of a minor who is under twelve years of age or second degree murder of a minor who is under twelve years of age or sexual assault of a minor who is under twelve years of age or sexual conduct with a minor who is under twelve years of age may be sentenced to life imprisonment and is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the person has served thirty-five years or the sentence is commuted. If a life sentence is not imposed pursuant to this subsection, the person shall be sentenced to a presumptive term of imprisonment for twenty years.
>
> **C.** Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving attempted first degree murder of a minor who is twelve,

thirteen or fourteen years of age, second degree murder of a minor who is twelve, thirteen or fourteen years of age, sexual assault of a minor who is twelve, thirteen or fourteen years of age, taking a child for the purpose of prostitution, child prostitution, sexual conduct with a minor who is twelve, thirteen or fourteen years of age, continuous sexual abuse of a child or, involving or using minors in drug offenses shall be sentenced to a presumptive term of imprisonment for twenty years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for thirty years.

D. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving aggravated assault, molestation of a child, commercial sexual exploitation of a minor, sexual exploitation of a minor, child abuse or kidnapping (sic) shall be sentenced to a presumptive term of imprisonment for seventeen years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for twenty-eight years.

E. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children involving sexual abuse under § 13-1404 is guilty of a class 3 felony and shall be sentenced to a presumptive term of imprisonment for five years, and unless the person has previously been convicted of a predicate felony, the presumptive term may be increased or decreased by up to two and one-half years pursuant to § 13-702, subsections C, D and E. If the person is sentenced to a term of imprisonment the person is not eligible for release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B

until the sentence imposed by the court has been served, the person is eligible for release pursuant to § 41-1604.07 or the sentence is commuted. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for fifteen years and is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to § 41-1604.07 or the sentence is commuted.

F. The presumptive sentences prescribed in subsections B, C and D of this section or subsection E of this section if the person has previously been convicted of a predicate felony may be increased or decreased by up to seven years pursuant to the provisions of § 13-702, subsections B, C and D.

G. Except as provided in subsection E of this section, a person sentenced for a dangerous crime against children in the first degree pursuant to this section is not eligible for suspension of sentence, probation, pardon, or release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served or commuted.

H. A person who stands convicted of any dangerous crime against children in the first degree pursuant to subsection C or D of this section having been previously convicted of two or more predicate felonies shall be sentenced to life imprisonment and is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the person has served not fewer than thirty-five years or the sentence is commuted.

I. Notwithstanding chapter 10 of this title,[5] a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the second degree pursuant to subsection C or D of this section or luring a minor for sexual exploitation pursuant to § 13-3554 is guilty of a class 3 felony and shall be sentenced to a presumptive term of imprisonment for ten years. The presumptive term may be increased or decreased by up to five years pursuant to § 13-702, subsections B, C and D. If the person is sentenced to a term of imprisonment the person is not eligible for release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the person has served the sentence imposed by the court, the person is eligible for release pursuant to § 41-1604.07 or the sentence is commuted. A person who is convicted of any dangerous crime against children in the second degree having been previously convicted of one or more predicate felonies is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by § 31-233, subsection A or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to § 41-1604.07 or the sentence is commuted.

J. Section 13-604, subsections M and O apply to the determination of prior convictions.

K. The sentence imposed on a person by the court for a dangerous crime against children under subsection D of this section involving child molestation or sexual abuse pursuant to subsection E of this section may be served concurrently with other sentences if the offense involved only one victim. The sentence imposed on a person for any other dangerous crime against children in the first or second degree shall be consecutive to any other sentence imposed on the person at any time, including child molestation and sexual abuse of the same

[5] Section 13-1001 et seq.

victim.

L. In this section:

1. "Dangerous crime against children" means any of the following that is committed against a minor who is under fifteen years of age:

(a) Second degree murder.

(b) Aggravated assault resulting in serious physical injury or involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.

(c) Sexual assault.

(d) Molestation of a child.

(e) Sexual conduct with a minor.

(f) Commercial sexual exploitation of a minor.

(g) Sexual exploitation of a minor.

(h) Child abuse as prescribed in § 13-3623, subsection A, paragraph 1.

(I) Kidnapping.

(j) Sexual abuse.

(k) Taking a child for the purpose of prostitution as defined in § 13-3206.

(l) Child prostitution as defined in § 13-3212.

(m) Involving or using minors in drug offenses.

(n) Continuous sexual abuse of a child.

(o) Attempted first degree murder.

A dangerous crime against children is in the first degree if it is a completed offense and is in the second degree if it is a preparatory offense, except

attempted first degree murder is a dangerous crime against children in the first degree.

2. "Predicate felony" means any felony involving child abuse pursuant to § 13-3623, subsection A, paragraph 1, a sexual offense, conduct involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument, or a dangerous crime against children in the first or second degree.

Ariz. Rev. Stat. Ann. § 13-604.01 (2002 Supp.)