NO. 06-349

IN THE

SUPREME COURT OF THE UNITED STATES

MORTON BERGER,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Petitioner, who has no prior criminal record, has been convicted and sentenced to imprisonment for 200 years, with no possibility of parole or early release, for possessing twenty child pornographic images. No evidence was presented that petitioner made, distributed or purchased the images, nor was there any suggestion that he had ever had improper contact with a child.[1] The trial judge was required to impose this extraordinary 200-year sentence on a first offender because Arizona statutes (1) make possession of each pornographic image a separate felony offense; (2) require a minimum sentence of imprisonment for 10 years, without possibility of parole or early release for each of those possession offenses; and (3) require all of those 10-year mandatory minimum prison sentences be served consecutively.[2]

Petitioner challenges his sentence as a violation of the Eighth Amendment under the gross-disproportionality analysis employed by this Court in *Harmelin v. Michigan*, 501 U.S. at 1005 (Kennedy, J., concurring), and *Ewing v. California*, 538 U.S. 11 (2003). The Petition does not challenge Arizona's 10-year mandatory minimum sentence for possession of child pornography. It does challenge the mandatory 200-year sentence that results from the combination of the Arizona legislative requirements that possession of each image be treated as a separate offense and that sentences for each of these offenses be served consecutively. The Arizona Supreme Court has held those two legislative requirements to be completely irrelevant for Eighth Amendment purposes. It has held instead, that *Harmelin's* disproportionality analysis applies only to each of the separate 10-year sentences that comprise Petitioners' 200-year

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[1] While the evidence showed Petitioner had thousands of images of pornography, the record does not show how many images were of child pornography. App. B 74a

[2] In addition to producing grossly disproportionate punishments, this legislative scheme invites abuses of prosecutorial discretion, or, at minimum, wildly disparate sentences.

punishment, as if one 10-year sentence were the only punishment that has been imposed upon him. This Petition asks the Court to review this bizarre interpretation of the Eighth Amendment.

The Brief in Opposition misstates the question presented by the Petition. Petitioner does not, as respondent asserts, claim "that he is constitutionally entitled to concurrent sentences for multiple crimes." Brief in Opp., p. 18. Petitioner specifically does *not* question a State's ability to impose consecutive sentences for separate – even closely related separate – multiple crimes. Petitioner's contention is that when consecutive sentences *are* imposed as punishment for multiple, but closely-related offenses, the Eighth Amendment is to be applied to the punishment actually imposed, not to one-twentieth of that punishment. This contention is supported by common sense, as well as the plain text of the Amendment.

The Petition also does not, as the State suggests, advocate an Eighth Amendment approach that could permit multiple-crime defendants to "evade the full extent of punishment legislatively prescribed" for their crimes, Brief in Opp., p. 18. On the contrary, Petitioner contends only that the entire legislatively prescribed punishment be subjected to Eighth Amendment analysis. To uphold the decision below would make the legislature's determination to require each image be treated as a separate crime, and its determination that consecutive mandatory minimum sentences be imposed for each of these crimes, completely immune from Eighth Amendment scrutiny, both on its face and as applied. That result obviously conflicts with the Eighth Amendment's command that grossly disproportionate punishments not be inflicted.

The genesis of this Court's proportionality principle was, like the present case, a case

concerning consecutive sentences for multiple closely-related crimes. *See O'Neil v. Vermont*, 144 U.S. 323 (1892).[3] Justice Kennedy's opinion in *Harmelin*, 501 U.S. at 997, adopted the proportionality principle first described in the dissent in *O'Neil,* (and later adopted by the Court in *Weems v. United States),* that the Eighth Amendment prohibition of cruel and unusual punishments is a prohibition of "all punishments which by their excessive length or severity are greatly disproportioned to the *offenses* charged." 217 U.S. 349, 371 (1910), quoting *O'Neil*, 144 U.S. at 340 (Field, J., dissenting) (emphasis added). In language that bears directly on the issue in this case, Justice Field then added:

> It is no matter that by cumulative offenses, for each of which imprisonment may be lawfully imposed for a short time, the period prescribed by the sentence was reached, the punishment was greatly beyond anything required by any humane law for the offenses. The state may, indeed, make the drinking of one drop of liquor an offense to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass, and make thereby a thousand offenses, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration.

Id. at 340.[4]

The legal question raised by the Petition is an important one that requires this Court's resolution. The Court's Eighth Amendment opinions have never expressly considered how the Amendment is to be applied when mandatory minimum sentences are required to be served consecutively, and lower court decisions are in substantial disarray.[5] Review at this time is

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[3] O'Neil was found guilty of 307 offenses of illegally selling liquor and sentenced to pay a combined fine of $6,638.72, and if not paid, to serve three days for each dollar owed, for a total of 19,914 days (54 years) in jail. 144 U.S at 330-31.

[4] *See also*, Justice Berch's dissent below, noting that child pornography crimes are typically committed by possessing multiple images: "Unlike other crimes, which tend to occur in relative isolation, those who possess pornography tend to possess more than one image." Pet. App. 39a.

[5] Compare, e.g., the opinion below with *State v. Ballard,* 699 A.2d 14 (R.I. 1997), ("Where a criminal defendant commits multiple criminal endeavors concurrently, thereby giving

especially appropriate in view of the sharply increasing use by Congress and the State legislatures of mandatory minimum sentences, coupled with consecutive sentence requirements. *See* Justin Brooks, *Prisons and Corrections: The Politics of Prisons*, 77 Mich. B.J. 154, 155 (Feb. 1998).

The purpose of the Eighth Amendment is to prohibit greatly disproportionate punishments from being inflicted. That purpose can be satisfied only if the *Harmelin* threshold inquiry into gross disproportionality is addressed to the punishments that legislatures require to be inflicted, and that are actually inflicted. If that inquiry were made in this case, there is no question that a substantial Eighth Amendment issue would be presented. That issue should be resolved.

CONCLUSION

The Petition for a writ of certiorari should be granted.

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rise to multiple convictions, that defendant generally ought to be committed to serve sentences for those convictions concurrently, absent the presence of extraordinary aggravating circumstances."; *United States v. Beverly*, 369 F.3d 516, 537 (6th Cir. 2004), ("In this case, although the length of time to be served by Turns, as required by 18 U.S.C. § 924(c), is severe, it would appear to serve the twin goals of retribution and deterrence, without being grossly disproportionate to the several *offenses* committed."(emphasis added)).