No. _____

In The
Supreme Court of the United States

MORTON R. BERGER,

Petitioner,

v.

THOMAS C. HORNE, Attorney General of the State of Arizona and CHARLES L. RYAN, Director, Arizona Department of Corrections,

Respondents.

On Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Solem v. Helm*, 463 U.S. 277 (1983), this Court held that a sentence of life in prison, with no possibility of parole, for passing a bad check worth approximately $100 was grossly disproportionate and thus cruel and unusual punishment in violation of the Eighth Amendment. In *Lockyer v. Andrade*, 538 U.S. 63 (2003), this Court distinguished *Solem v. Helm* and found that two sentences of 25 years to life, to run consecutively, for stealing $153 worth of videotapes were not "contrary to" clearly established law because there was the possibility of parole, albeit in 50 years.

Morton Berger was convicted of possessing 20 photographs of child pornography and received a mandatory minimum sentence of 10 years in prison for each, to run consecutively, with no possibility of parole. His sentence is thus 200 years in prison with no possibility of parole. This case thus poses the following issues:

1. Whether the Arizona Supreme Court erred in ruling, contrary to other state and federal courts, that the cumulative sentence is not to be considered in determining whether his sentence is cruel and unusual punishment in violation of the Eighth Amendment.

2. Whether in light of this Court's consistent holdings that grossly disproportionate punishments violate the Eighth Amendment, the Arizona Supreme

QUESTIONS PRESENTED – Continued

Court's decision upholding a 200-year mandatory sentence, with no possibility of parole, for the possession of 20 images of child pornography is "contrary to" or an "unreasonable" application of clearly established federal law.

LIST OF PARTIES

The name of the Petitioner is:

Morton R. Berger

The names of the Respondents are:

Tom Horne, Attorney General of the State of Arizona

Charles Ryan, Director, Arizona Department of Corrections

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PETITION FOR WRIT OF CERTIORARI

Morton Berger respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit's decision affirming the District Court is found at Appendix (App.) 1. The Ninth Circuit's denial of rehearing and rehearing *en banc* is found at App. 63.

The decision of the United States District Court for the District of Arizona is found at App. 5.

The en banc decision of the Arizona Supreme Court is found at App. 18.

STATEMENT OF JURISDICTION

The unpublished decision of the United States Court of Appeals for the Ninth Circuit was issued on May 2, 2013. (App. 1.) The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing en banc on June 17, 2013. (App. 63.) Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the decision of the United States Court of Appeals for the Ninth Circuit.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

On January 30, 2003, Morton Berger – an award-winning teacher and father of four – was convicted of the possession of 20 images of child pornography and received the minimum mandatory sentence of 200 years in prison. Arizona law mandates a 10-24 year sentence for each image of child pornography possessed and also requires that the sentences run consecutively. Ariz. Rev. Stat. §§ 13-604.01 (renumbered as Ariz. Rev. Stat. § 13-705), 13-3553 (2004). Under the same statutes, Berger is not eligible for any type of early release including pardon or parole. Ariz. Rev. Stat. §§ 13-604.01, 13-3553. Berger did not purchase, sell, trade, or distribute any pornography. He had no prior criminal history; nor had he ever been accused of any improper conduct with children. In fact, Berger had never previously been accused, charged with, or convicted of any crime whatsoever. A risk assessment conducted by a clinical and forensic psychologist concluded that Berger "posed no risk of repeating his conduct or acting out toward children." *See State v. Berger*, 209 Ariz. 386, 399, 103 P.3d 298, 311 (Ct. App. 2004) (Berch, J., dissenting). Nevertheless,

Berger received a 200-year sentence, with no possibility of parole, and he will die in prison unless this Court intervenes.

The procedural history of this case – including the trial, conviction, appeals, and attempts at post-conviction relief – is extensive and spans a period of more than a decade. Berger has repeatedly raised the argument that in determining whether his sentence is grossly disproportionate, courts must consider the entirety of the 200-year sentence and not just the individual 10-year sentence imposed for each conviction. The Arizona Court of Appeals, the Arizona Supreme Court, the United States District Court for the District of Arizona, and the Ninth Circuit Court of Appeals all have rejected this contention and held that the Eighth Amendment does not require consideration of the aggregate 200-year sentence in determining whether his sentence is grossly disproportionate and thus cruel and unusual punishment in violation of the Eighth Amendment.

A jury convicted Berger on twenty counts of possession of images depicting child pornography. Each image was charged as a single count and carried with it a minimum sentence of 10 years in prison and a maximum of 24 years under Arizona law. *See* Ariz. Rev. Stat. § 13-3553. Arizona law further requires that these sentences must be served consecutively, with no possibility of early release, probation, or parole. Ariz. Rev. Stat. § 13-604.01. The Maricopa County Superior Court judge imposed a sentence of 200 years – that is, 10 years for each image possessed

– which was the minimum sentence permitted by Ariz. Rev. Stat. §§ 13-3553 and 13-604.01. In a trial motion challenging the constitutionality of Ariz. Rev. Stat. § 13-3553, Berger contended that the sentencing scheme as applied to him, resulting in a cumulative sentence of 200 years in prison, constituted cruel and unusual punishment in violation of the Eighth Amendment. The trial court, following the subsequently overruled legal standard articulated in *State v. DiPiano*, 187 Ariz. 41, 926 P.2d 508 (Ct. App. 1995), *vacated in part*, 187 Ariz. 27, 926 P.2d 494 (1996), *overruled by State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003) (en banc), held that it could not consider any individual factors about Berger's case or about Berger himself to determine whether the mandatory 200-year sentence was cruel and unusual punishment. The trial court concluded that Berger's Eighth Amendment rights had not been violated.

Berger sought review in the Arizona Court of Appeals, arguing that the trial court should have considered the constitutionality of his 200-year mandatory minimum sentence in the aggregate and that the court should have considered the particular facts and circumstances of his case in determining whether his sentence amounted to cruel and unusual punishment. A divided panel of the Court of Appeals rejected Berger's arguments. *See State v. Berger*, 209 Ariz. 386, 103 P.3d 298 (Ct. App. 2004). In a dissenting opinion, presiding Judge Kessler disagreed with the majority's refusal to consider Berger's sentence as a whole, stating, "it is *exactly* the combination of

minimum mandatory sentences and mandatory consecutive sentencing which can create the inference of gross disproportionality." *Id.* at 401, 103 P.3d at 312-13. Judge Kessler further took issue with the refusal of the trial court to consider the circumstances of his case. *Id.* at 397, 103 P.3d at 309. Judge Kessler objected that Berger was not given a fair opportunity to develop that factual record and the trial court could not consider such evidence. *Id.* at 397-98, 103 P.3d at 308-09. Judge Kessler would have remanded the case for an evidentiary hearing to allow the court to consider "factors such as the number of images, the circumstances surrounding the crime including the motive, the absence of any evidence he ever purchased any of the images, the manner in which it was committed and the consequences of [] Berger's conduct as well as his age, prior record, risk to society, potential to contribute to society, and personal characteristics and state of mind." *Id.* at 400, 103 P.3d at 312.

Berger then sought review in the Arizona Supreme Court, which affirmed the conviction and the sentence and rejected the Eighth Amendment challenge. *See State v. Berger*, 212 Ariz. 473, 134 P.3d 378 (2006) (en banc). Justice Berch authored a dissenting opinion, in which she opined:

> In determining whether a total sentence is grossly disproportionate to the crime for which is 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.

Id. at 487, 134 P.3d at 392. Justice Berch addressed the issue of compounding "extraordinarily long" prison terms with mandatory stacked counts that must be served consecutively and without possible release. *Id.* This "triple whammy" impact, the dissent argued, should not escape scrutiny from a court asked to determine if a punishment violates the Eighth Amendment. *Id.*

Berger then filed with this Court a Petition for a Writ of Certiorari, which was denied on February 26, 2007. *Berger v. Arizona*, 549 U.S. 1252 (2007). Pursuant to 28 U.S.C. § 2254, Berger then submitted his Petition for a Writ of Habeas Corpus in the United States District Court for the District of Arizona, on December 28, 2009. On September 2, 2011, Judge David G. Campbell adopted a Report and Recommendation prepared by the United States Magistrate Judge and entered the Court's Order Denying Berger's Writ of Habeas Corpus. (App. 16).

The Ninth Circuit Court of Appeals affirmed, holding that the Arizona Supreme Court's decision to assess the constitutionality of each 10-year sentence individually "was not contrary to or an unreasonable application of clearly established Supreme Court precedent because there is no clearly established law on this point." (App. 4)

As of the filing of this brief, Berger has served approximately 11 years and 1 month of his sentence.

He will spend the rest of his life in prison with no possibility of parole for his convictions for possessing 20 photographs.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT AMONG THE LOWER COURTS, AND AN ISSUE OF NATIONAL IMPORTANCE, AS TO WHETHER THE AGGREGATE SENTENCE FOR MULTIPLE CONVICTIONS IS TO BE CONSIDERED IN DECIDING WHETHER THE PUNISHMENT IS GROSSLY DISPROPORTIONATE AND THUS CRUEL AND UNUSUAL PUNISHMENT.

Berger received a 10-year sentence for each of the 20 photographs that he was convicted of possessing. Under Arizona law, these sentences must be served consecutively and there is no possibility of parole. *See* Ariz. Rev. Stat. §§ 13-604.01, 13-3553. It is thus, for Morton Berger, a 200-year sentence of imprisonment with no possibility of parole. The Arizona courts refused to consider the aggregate sentence in assessing whether this is cruel and unusual punishment in violation of the Eighth Amendment. This refusal conflicts with the decisions of other courts around the country and raises an issue of national importance that arises with great frequency. As more jurisdictions are charging each photograph as a separate offense in child pornography cases and

requiring resulting sentences to be served consecutively, the question will arise with ever greater frequency as to whether the aggregate sentence must be considered in deciding if the punishment is grossly disproportionate in violation of the Eighth Amendment.

A. Grossly Disproportionate Sentences Violate The Cruel And Unusual Punishments Clause Of The Eighth Amendment.

For over a century, this Court has recognized that grossly disproportionate sentences are cruel and unusual punishment in violation of the Eighth Amendment. "[I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). This notion is embodied in the ban against cruel and unusual punishment. *See Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010) (citing *Weems*, 217 U.S. at 367). On countless occasions, this Court has recognized that the Eighth Amendment forbids grossly excessive sentences. *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) ("The Eighth Amendment succinctly prohibits 'excessive' sanctions."); *Solem v. Helm*, 463 U.S. 277, 284 (1983) ("The final clause [of the Eighth Amendment] prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.").

Although courts must defer to the legislature in setting sentencing ranges, this Court has recognized a "narrow proportionality principle" inherent in the Eighth Amendment that prohibits sentences that are "grossly disproportionate" to the crime. *Harmelin v. Michigan*, 501 U.S. 957, 997-98 (1991); *Solem*, 463 U.S. at 284. This Court has stated that reviewing courts must compare the "gravity of the offense" to the "harshness of the penalty." *Ewing v. California*, 538 U.S. 11, 22 (2003) (plurality opinion). Where this inquiry gives rise to an "inference" of gross disproportionality, the court must then examine the punishment for similar offenses in other jurisdictions (the inter-jurisdictional analysis) and the punishment for other offenses in the forum jurisdiction (the intra-jurisdictional analysis). *Solem*, 463 U.S. at 291-92. As shown below, the sentence imposed on Berger fails both of these analyses.

B. This Court Should Grant Review to Resolve a Split Among the Lower Courts and an Issue of National Importance as to Whether Gross Disproportionality is to Be Determined Based on the Aggregate Sentence Imposed.

The Arizona Supreme Court held that the issue of proportionality for Eighth Amendment purposes was to be decided entirely by looking to the punishment for each offense. *State v. Berger*, 212 Ariz. at 479, 134 P.3d at 384. In doing so, the Arizona

Supreme Court focused solely on the question of whether a 10-year sentence for possessing an image of child pornography was cruel and unusual punishment within the meaning of the Eighth Amendment. *Id.* The Arizona Supreme Court expressly refused to consider whether the total punishment – 200 years in prison for being convicted of possessing 20 images of child pornography – was cruel and unusual punishment. *Id.* The court stated:

> In comparing the gravity of Berger's crime and the severity of the punishment, we focus on whether a 10-year sentence is disproportionate for a conviction of possessing child pornography involving children younger than fifteen. A defendant has no constitutional right to concurrent sentences for two separate crimes involving separate acts. Accordingly, as a general rule, this court will not consider the imposition of consecutive sentences in a proportionality inquiry."

Id. (citations omitted).

Other courts, too, have taken this approach that the cumulative sentence imposed is not to be considered in deciding whether the punishment is grossly disproportionate to the crime. The United States Court of Appeals for the Second Circuit, for example, has held that "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); *see also Hawkins v. Hargett*, 200 F.3d 1279, 1285, n.5 (10th Cir. 1999)

("The Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes."); *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001) ("[I]t is wrong to treat stacked sanctions as a single sanction."); *see also 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."); *State v. Buchhold*, 727 N.W.2d 816 (S.D. 2007) (consecutive sentencing scheme is not subject to Eighth Amendment proportionality analysis).

But other courts have come to exactly the opposite conclusion and have considered consecutive sentences in their entirety and, in turn, weighed the cumulative effect in determining whether there is a violation of the Eighth Amendment. In *United States v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006), the defendant was convicted of four counts of robbery and four related counts of robbery. The court reviewed the cumulative sentence for the firearm charges and not simply the individual sentences. *Id.* at 1118. Similarly, in *United States v. Parker*, 241 F.3d 1114 (9th Cir. 2001), although the Ninth Circuit reviewed the individual sentence for each bank robbery, the court also found that the *total* sentence did not violate the Eighth Amendment because of the "extremely dangerous" nature of the crimes. *Id.* at 1117-18; *see also State v. Saxon,* 109 Ohio St. 3d 176, 177, 846 N.E.2d 824 (2006) (holding that "[a] sentence is the sanction

or combination of sanctions imposed for each separate, individual offense").

Moreover, the Arizona Supreme Court's decision conflicts with the reasoning of this Court. In *Solem v. Helm*, this Court recognized that recidivists can be punished more harshly and thus the sentence imposed must be compared to all of the crimes the defendant has committed. 463 U.S. at 296. It should make no difference whether the convictions for those crimes occurred over a period of time or happened all at once. Either way, proportionality analysis requires looking at the sentence the defendant received in comparison to all of the crimes committed. It makes no sense to say that the analysis is different if the trial court imposed one 200-year prison sentence for possessing 20 pictures as opposed to 10 sentences of 20 years each. Either way, the effect is that Morton Berger will spend the rest of his life in prison with no possibility of parole.

The lower courts, including the Arizona Supreme Court in this case, have not looked to the cumulative sentence based on their reading of this Court's decisions. *See State v. Berger*, 212 Ariz. at 484, 134 P.3d at 389 (Hurwitz, J., concurring) ("I thus conclude that the majority opinion faithfully applies the Supreme Court's Eighth Amendment disproportionality jurisprudence. I do so reluctantly, however."). But nothing in this Court's decisions has ever said that proportionality analysis is not to consider the aggregate punishment imposed. This Court should grant certiorari to resolve this split among the lower

courts and provide desperately needed clarity in this area of law.

Arizona's sentencing scheme couples extraordinarily long terms with mandatory stacking requirements and requires that each sentence be fully served, without possibility of early release. The compounding impact of this "triple whammy" should not escape scrutiny. Although great deference is owed to the legislature's choice to impose stringent sentences, the Constitution imposes on courts the obligation to determine whether the total resulting sentence is cruel and unusual in light of the circumstances of an individual case. This Court should grant review to clarify this aspect of Eighth Amendment jurisprudence which arises in so many cases.

II. THE COURT SHOULD GRANT REVIEW TO RESOLVE A CONFLICT BETWEEN THE ARIZONA SUPREME COURT DECISION AND THE RULINGS OF THIS COURT AS TO WHETHER A SENTENCE OF 200 YEARS IN PRISON, WITH NO POSSIBILITY OF PAROLE, FOR POSSESSING 20 PICTURES OF CHILD PORNOGRAPHY IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT.

This Court has drawn a clear distinction for purposes of Eighth Amendment analysis between sentences where there is no possibility of parole and sentences where parole is possible. For example, in

Solem v. Helm, 463 U.S. 277 (1983), this Court held that a sentence of life in prison, with no possibility of parole, for passing a bad check worth approximately $100 was grossly disproportionate and thus cruel and unusual punishment in violation of the Eighth Amendment. In *Lockyer v. Andrade*, 538 U.S. 63, 73-74 (2003), this Court expressly distinguished *Solem v. Helm* and found that two sentences of 25 years to life, to run consecutively, for stealing $153 worth of videotapes were not "contrary to" clearly established law because there was the possibility of parole, albeit in 50 years. The Court explained: "*Solem* involved a sentence of life in prison without the possibility of parole. . . . Here, Andrade retains the possibility of parole." *Id*. at 74. Berger has no possibility of parole and thus his case is like *Solem v. Helm*. The Arizona Supreme Court decision is therefore "contrary to" clearly established law as articulated by this Court and this Court should grant review to resolve this conflict.

A. Berger's 200-Year Sentence Leads To An Inference Of Gross Disproportionality.

In determining whether a sentence is grossly disproportionate, this Court requires a threshold analysis, comparing the gravity of the crimes for which the offender was convicted – here, possession of twenty graphic images of child pornography – against the severity of the sentence imposed. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). In weighing

the gravity of the offenses, the court may consider the defendant's criminal history, *see Ewing*, 538 U.S. at 29 (plurality opinion), as well as the "harm caused or threatened to the victim or society, and the culpability of the offender." *Solem*, 463 U.S. at 292. If this threshold showing is met, the court must then compare the sentences imposed on other individuals within the same jurisdiction and the sentences imposed for the same crime in other jurisdictions. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). The threshold question is met in this case.

It is significant for Eighth Amendment proportionality analysis that Berger has no prior criminal record. He was convicted of possessing 20 pictures of child pornography. He was not involved in making any of the photographs and the record contains no evidence that he purchased the items or intended to sell or distribute them. "Although purchase of such items undoubtedly drives the market for their production, it is unclear that mere possession does so." *State v. Berger*, 212 Ariz. at 488, 134 P.3d at 393 (Berch, J., dissenting).

Although the legislature may choose to punish severely those who support the child pornography industry because of pornography's extremely deleterious effect on those degraded and harmed in its making, due process notions of individualized and appropriate sentencing require consideration of the fact that Berger engaged in no force or violence, made no threats of force or violence, and did not physically injure anyone. *See Burns v. United States*, 287 U.S.

216, 220 (1932) (setting forth due process requirement of individualized sentencing). Indeed, there is no allegation, let alone evidence, that Berger has ever touched any child improperly. That absence of direct violence affects the assessment of society's interest in punishing his acts so severely. *See Rummel v. Estelle*, 445 U.S. 263, 275 (1980). Quite importantly, this Court recently concluded that a sentence of life in prison without parole for a non-homicide crime committed by a juvenile violates the Eighth Amendment. *See Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010). Other courts have drawn a distinction between the possession of child pornography and the distribution of it. *See, e.g.*, *United States v. Meiners*, 485 F.3d 1211 (9th Cir. 2007) (upholding a 15-year sentence for distribution and advertising of child pornography).

A sentence of 200 years in prison, with no possibility of parole, for possessing 20 photographs certainly is enough to raise an inference of disproportionality and justify considering punishments for this crime in other jurisdictions and other punishments in Arizona. Moreover, this Court should consider the context in which sentences for possessing child pornography have developed and are continuing to develop. Many commentators have noted that the societal and legislative concern over the problem of child pornography has produced sentences that are grossly disproportionate to the crimes committed. *See* Colin Moynihan, *Judge Defies Prosecutors on Pornography Sentence*, New York Times, May 21, 2010 (quoting federal Judge Jack Weinstein that mandatory sentences were

misapplied to people who viewed child pornography, as opposed to those who produced the images. "We're destroying lives unnecessarily."); Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 Stan. L. & Pol'y Rev. 545, 571, 584 (2011). Empirical evidence does not support such draconian sentences for the possession of child pornography. Instead, a review of empirical research to date "indicates [that] possession of child pornography, especially among defendants with no history of contact offenses, is not an accurate predictor of future incidents of child molestation." Jesse P. Basbaum, Note, *Inequitable Sentencing for Possession of Child Pornography: A Failure To Distinguish Voyeurs from Pederasts*, 61 Hastings L.J. 1281, 1298 (2010); *see also* Hamilton, *supra*, at 545, 564 ("Overall, empirical research fails to establish a correlation, much less a causative link, between viewing child pornography and contact offenses against children." As a result, "A growing number of federal judges instead view most offenders [of possession of child pornography] as mostly harmless to others.").

Further, sentencing in child pornography cases frequently does not take into account "evolving technology that permits defendants to download massive numbers of images with little effort or even intent." Basbaum, *supra*, at 1284. It is easy to download "hundreds of images" with just "a few clicks." *Id.* at 1305. It is therefore "quite possible that a defendant will download large numbers of child pornography

images not so much out of a specific desire to view each and every image, but simply because it is easy to do so or because of compulsive internet behavior." *Id.* at 1301.

Berger's 200-year sentence meets the required test of the gross disproportionality between the sentence imposed and the crime committed in both the state of Arizona and in other jurisdictions. The trial judge who imposed the minimum sentence was unable to sentence Berger to anything less than 200-years imprisonment and there is no possibility of early release. Ariz. Rev. Stat. §§ 13-604.01; 13-3553. Nor could the trial judge consider Berger's complete lack of criminal history or mental health assessment stating that he posed no risk of re-offending or to children. Had Berger actually molested a child, under Arizona law he likely would have been eligible for commutation, probation or parole. Not, however, in this case.

B. Berger's Sentence For This Crime Is By Far The Longest that Could be Imposed in the Nation.

Under clearly established law, analysis of whether a sentence is grossly disproportionate considers punishments for the crime that could be imposed elsewhere in the country. *See Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring) (requiring examination of sentences imposed in other jurisdictions for similar crimes to validate an inference of gross disproportionality). Arizona's mandatory minimum

200-year sentence exceeds that imposable in any other state. It is the unique combination of long mandatory minimum sentences, coupled with the requirements that each image be charged separately, and that the terms be served consecutively and fully – that is, without possibility of early release – that renders Arizona's sentences extraordinarily long. *See* Ariz. Rev. Stat. §§ 13-604.01; 13-3553. Indeed, the minimum 10-year sentence in Arizona for possession of one image is greater than the maximum sentence for possession of child pornography in 36 states and equal to the maximum sentence in nine other states.

The Arizona Court of Appeals' own independent review of the statutes in all 50 states showed that: (1) three states do not criminalize possession of child pornography;[1] (2) seven states treat it as a misdemeanor or have a maximum sentence of twelve months;[2] (3) 21 states have a maximum sentence of eight years with probation eligibility;[3] (4) eight states have a maximum sentence of 10 years with eight of those allowing for probation;[4] (5) two states have a

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[1] Hawaii, Nebraska, and Ohio.

[2] California, Colorado, Iowa, Kentucky, Maine, Maryland and North Dakota.

[3] Delaware, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Virginia, Vermont, Washington, West Virginia and Wisconsin.

[4] Alabama, Alaska, Arkansas, Louisiana, Montana, South Carolina, South Dakota and Texas.

maximum sentence of 15 years, but allow for probation;[5] (6) three states have a maximum sentence of 20 years but allow for probation;[6] and (7) one state has a maximum sentence of five years with the provision that possession of each image constitutes a separate offense.[7] *State v. Berger*, 209 Ariz. at 402-03, 103 P.3d at 314-15 (Kessler, J., dissenting).

Additionally, most other states permit concurrent sentences or grouping of charges. *E.g.*, *State v. Christensen*, 663 N.W.2d 691, 693 (S.D. 2003) (imposing two one-year sentences for possession of child pornography to run concurrently to each other, but consecutively with a five-year possession of marijuana conviction). Only Florida appears to require each image to be a separate count, but each charge there carries a five-year term and is probation eligible. *See State v. Berger*, 212 Ariz. at 486, 134 P.3d at 391 (Berch, J., dissenting) (citing Fla. Stat. Ann. §§ 827.071(5), 775.082(3)(d) (term), 948.01 (probation)). At least one state (Connecticut) breaks down the prison sentence by the number of images possessed, making it a class B felony for possession of 50 or more images, a class C felony for 25 images and a class D felony for less than 20 images. *State v. Berger*, 209 Ariz. at 402-03, 103 P.3d at 314-15 (Kessler, J., dissenting).

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[5] Idaho and Utah.

[6] Connecticut, Georgia and Mississippi.

[7] Florida.

While some states provide for enhanced penalties for "second or subsequent" offenses, that term is defined as later offenses not charged at the same time. *State v. Berger*, 212 Ariz. at 486, 134 P.3d at 391 (Berch, J., dissenting); *see, e.g., Miles v. State*, 51 So.2d 214, 215 (Miss. 1951); *McGervey v. State*, 114 Nev. 460, 958 P.2d 1203, 1207 (1998). Berger is a first-time offender. In most states, Berger's sentence would not exceed five years, and he would also have the possibility of probation or early release. *See State v. Berger*, 212 Ariz. at 486, 134 P.3d at 391 (Berch, J., dissenting); *see, e.g.*, Cal. Penal Code § 311.11(a) (up to 12 months); N.M. Stat. §§ 30-6A-3(A), 31-18-15(A)(9) (up to 18 months).

In the federal system, simple possession of child pornography does not carry a mandatory minimum sentence for first-time offenders. *See* 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1). Additionally, the federal sentencing guidelines recommend a sentence of approximately five years (57-71 months) based on the number and type of images Berger possessed. U.S. Sentencing Guidelines Manual § 2G2.2 (Supp.2005) & § 5A (1996); *see also* 18 U.S.C. §§ 2252(b)(1), 2252A(b)(1). According to a survey conducted by the U.S. Sentencing Commission in 2010, federal judges believe that child pornography sentences are too long – 70% of respondents believed that the guideline ranges for possession of child pornography were too high. U.S. Sentencing Commission, Results of Survey of United States District Judges, January 2010 Through March 2010 (June 2010). Accordingly, in 2010, less than 55%

of child pornography sentences fell within the guideline range or below it pursuant to a government-sponsored departure, while nearly 43% of offenders received non-government-sponsored below-range sentences. *See* U.S. Sentencing Commission, 2010 Sourcebook of Federal Sentencing Statistics, at Table 27 (2010); *see also* Charles Patrick Ewing, *Justice Perverted: Sex Offender Law, Psychology, & Public Policy*, 151-67 (2011) (discussing numerous judges who have expressed concerns about child pornography sentencing guidelines).

The growing consensus among the federal judges is reflected in recent decisions of the federal appellate courts. For instance, the United States Court of Appeals for the Sixth Circuit recently declared a maximum sentence of 720 months substantively unreasonable and an "enormous" upward variance from the federal sentencing guidelines. *United States v. Aleo*, 681 F.3d 290 (6th Cir. 2012). There, the defendant pled guilty to producing, possessing, and transporting a video of himself digitally penetrating his five-year-old granddaughter. *Id.* The sentencing judge was not only criticized for the sentence, but also for not adequately considering the sentences imposed on other defendants convicted of similar conduct, and for not acknowledging that the circuit had overturned sentences of 60 years imposed on defendants convicted of more grave offenses involving drugging of multiple victims. The Sixth Circuit noted, "the Court did not take into account why Aleo should receive the harshest possible sentence, even

though he had not committed the worst possible variation of the crime." *Id.* at 302.

By any measure, the punishment imposed on Berger is far greater than he could have received in any other jurisdiction.

C. Arizona's Sentence For This Crime Is More Severe Than Sentences Imposed In Arizona For Arguably More Serious And Violent Crimes.

Intra-jurisdictional analysis also supports an inference that Berger's sentence was grossly disproportionate. The sentence at issue is longer than that imposed in Arizona for many crimes involving serious violence and physical injury to the victim. Second degree murder, for example, like possession of child pornography, also carries a minimum sentence of 10 years, *see* Ariz. Rev. Stat. § 13-710(A), but a term imposed for a murder may be served concurrently with sentences imposed for other crimes.

Similarly, the minimum sentence for possession of an image of child pornography is longer than the presumptive sentence for rape or aggravated assault. *See* Ariz. Rev. Stat. §§ 13-1406(B) (seven years for rape), 13-1204(B), 13-701(C)(2) (3.5 years for aggravated assault). A presumptive sentence for possession of two images of child pornography (34 years) is harsher than the sentences for second degree murder or sexual assault of a child under twelve (20 years). *See* Ariz. Rev. Stat. §§ 13-604.01(B), (D). Even a

mitigated sentence for possession of five images (50 years) amounts as a practical matter to a life sentence without parole, more serious than the sentence imposed for virtually any crime in the state. *See State v. Berger*, 212 Ariz. at 487, 135 P.3d at 392 (Berch, J., dissenting). For molesting a child, a defendant could receive the same sentence that Berger has received for possessing one picture.

This Court has indicated that "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." *Solem*, 463 U.S. at 291. This factor as well indicates the extraordinary nature of the sentence in this case.

The Arizona Court decision is thus "contrary" to and also an unreasonable application of clearly established law as articulated by this Court. *See Bell v. Cone*, 535 U.S. 685, 694 (2002)

> ("A federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on set of materially indistinguishable facts. The Court may grant relief under the 'unreasonable application' clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case.").

This Court should grant review to resolve the conflict between the Arizona Supreme Court decision

and the Eighth Amendment principles articulated by this Court.

CONCLUSION

Morton Berger received a mandatory minimum sentence of 200 years in prison for being convicted of possessing 20 photographs of child pornography. The decision of the Arizona Supreme Court upholding this sentence conflicts with decisions of other states and circuits and also those of this Court. Such sentences are increasingly common in child pornography cases where each picture possessed leads to a separate sentence and they are required to run consecutively. This Court should grant review to resolve the conflict in the lower courts and to reaffirm that such grossly disproportionate sentences are cruel and unusual punishment in violation of the Eighth Amendment.

Respectfully submitted,

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APPENDIX A

Unpublished Disposition
2013 WL 1832180

United States Court of Appeals,
Ninth Circuit.

Morton BERGER, Petitioner-Appellant,
v.
Thomas C. HORNE, The Attorney General of the State of Arizona and Charles L. Ryan, Director, Arizona Department of Corrections, Respondents-Appellees.

No. 11-17316. | Argued and Submitted April 16, 2013. | Filed May 2, 2013.

Daymon Ely, Esquire, Law Office of Daymon B. Ely, Albuquerque, NM, Herb Ely, Esquire, Ely, Bettini, Ulman & Rosenblatt, Phoenix, AZ, for Petitioner-Appellant.

Robert Anthony Walsh, Assistant Attorney General, Arizona Attorney General's Office, Phoenix, AZ, for Respondent-Appellee.

Appeal from the United States District Court for the District of Arizona, David G. Campbell, District Judge, Presiding. D.C. No. 2:09-cv-02689-DGC.

Before SCHROEDER, THOMAS and SILVERMAN, Circuit Judges.

MEMORANDUM*

Petitioner Morton Berger appeals from the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. After being convicted of twenty counts of possession of child pornography, a class two felony and a dangerous crime against children in the first degree, in violation of Arizona Revised Statutes §§ 13-3551, 13-3553, and 13-604.01 (renumbered as A.R.S. § 13-705), Berger was sentenced to a ten-year sentence for each conviction, with the terms to run consecutively as mandated by Arizona Revised Statutes §§ 13-604.01 and 13-3553. Berger challenged the sentence on direct appeal, arguing that the total sentence of 200 years was unconstitutional under the Eighth Amendment of the United States Constitution. The Arizona Supreme Court rejected his argument and upheld the sentence.

Berger raises the same Eighth Amendment challenge in his federal habeas petition. The district court concluded that the Arizona Supreme Court's resolution of Berger's Eighth Amendment challenge was not contrary to or an unreasonable application of clearly established Supreme Court precedent. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253 and now affirm.

Berger contends that for the purposes of his Eighth Amendment challenge, the Arizona Supreme

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Court should have assessed whether his aggregate 200-year sentence raised an inference of gross disproportionality. The Arizona Supreme Court disagreed and assessed the constitutionality of each ten-year sentence individually. This decision was not contrary to or an unreasonable application of clearly established Supreme Court precedent because there is no clearly established law on this point. *See Stenson v. Lambert,* 504 F.3d 873, 881 (9th Cir.2007) ("Where the Supreme Court has not addressed an issue in its holding, a state court adjudication of the issue not addressed by the Supreme Court cannot be contrary to, or an unreasonable application of, clearly established federal law.").

We further hold that the Arizona Supreme Court's decision was not contrary to and did not unreasonably apply clearly established Supreme Court law when concluding that a ten-year sentence for the crime of possessing child pornography depicting a minor under the age of fifteen does not raise an inference of gross disproportionality. *Lockyer v. Andrade,* 538 U.S. 63, 73, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) ("[I]n this case, the only relevant clearly established law amenable to the 'contrary to' or 'unreasonable application of' framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case."). The Arizona Supreme Court was not objectively unreasonable in its comparison of the gravity of the offense to the harshness of the penalty, including its assessment of the Arizona

State Legislature's penological justifications for its sentencing scheme, Berger's mental state and motive in committing the crime, and the actual harm caused by his conduct, as well as the absolute magnitude of the crime. *See Ewing v. California,* 538 U.S. 11, 28-29, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003); *Solem v. Helm,* 463 U.S. 277, 292-93, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

AFFIRMED.

APPENDIX B

2011 WL 3875853

United States District Court,
D. Arizona.

Morton BERGER, Petitioner,
v.
Charles L. RYAN, Director, Arizona Department of Corrections; and Terry Goddard, Attorney General for the State of Arizona, Respondents.

No. CV-09-2689-PHX-DGC (MHB). |
Sept. 2, 2011.

Daymon B. Ely, Law Offices of Daymon B. Ely, Albuquerque, NM, Herbert L. Ely, Ely Bettini Ulman & Rosenblatt, Phoenix, AZ, for Petitioner.

Robert Anthony Walsh, Office of the Attorney General, Phoenix, AZ, for Respondents.

ORDER

DAVID G. CAMPBELL, District Judge.

Morton Berger was found to be in possession of child pornography in June 2002. On January 30, 2003, a state court jury convicted him on 20 counts of sexual exploitation of a minor in violation of A.R.S. § 13-3553. Because the victims were under 15 years of age, Berger's offenses constituted dangerous crimes against children and he was sentenced to 20 consecutive 10-year prison terms as mandated by A.R.S. § 13-604.01 (renumbered as A.R.S. § 13-705). The Arizona Supreme Court affirmed the sentences, finding that

they do not violate the Eighth Amendment's prohibition against cruel and unusual punishment. *State v. Berger,* 212 Ariz. 473, 134 P.3d 378 (Ariz.2006).

Berger, through counsel, has filed a petition for writ of habeas corpus pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. Doc. 1. His sole ground for relief is an alleged Eighth Amendment violation. *Id.* at 8, 134 P.3d 378. Respondents have filed an answer, arguing that Berger's sentence in no way constitutes cruel and unusual punishment and he otherwise has shown no right to habeas relief. Doc. 11. Berger has filed a reply to the answer. Doc. 20.

United States Magistrate Judge Michelle Burns has issued a report and recommendation ("R & R") that the petition be denied. Doc. 26. Berger has filed objections (Doc. 27), and Respondents have filed a response (Doc. 28). Oral argument has not been requested. For reasons stated below, the Court will accept the R & R and deny the petition.

I. Standard of Review.

A party may file specific written objections to the R & R's proposed findings and recommendations. The Court must undertake de novo review of those portions of the R & R to which specific objections are made. The Court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. Fed.R.Civ.P. 72(b); 28 U.S.C. § 636(b)(1).

II. Analysis.

The AEDPA requires federal courts to defer to the last reasoned state court decision, *Woods v. Sinclair,* 655 F.3d 886, 2011 WL 3487061, at *5 (9th Cir. Aug.10, 2011), which in this case is the decision of the Arizona Supreme Court affirming Berger's sentences. This Court may grant Berger's habeas petition only if he shows that the Arizona Supreme Court's decision (1) was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the United States Supreme Court, or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1)-(2). The AEDPA "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter,* ___ U.S. ___, 131 S.Ct. 770, 786, 178 L.Ed.2d 624 (2011) (quoting *Jackson v. Virginia,* 443 U.S. 307, 332 n. 5, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). The Court therefore must "avoid applying [the] AEDPA in a manner that displays 'a lack of deference to the state court's determination and an improper intervention in state criminal processes.'" *John-Charles v. California,* ___ F.3d ___, 2011 WL 2937945, at *9 (9th Cir. July 22, 2011) (quoting *Harrington,* 131 S.Ct. at 787).

Judge Burns concludes in her R & R that Berger has established no right to habeas relief under the AEDPA. Doc. 26. Specifically, Judge Burns found that

because the Eighth Amendment focuses not on the cumulative sentence, but the discrete sentence imposed for each separate offense, and because there otherwise is no constitutional right to receive concurrent sentences, Berger's consecutive sentences for multiple crimes of sexual exploitation of a minor do not run afoul of the Eighth Amendment. *Id.* at 14-18. Judge Burns further found that given the substantial harm child pornography causes child victims, and in light of the legitimate penological goals of punishment and deterrence, Berger's sentence of 10 years per count is not so grossly disproportionate to the dangerous crime against children he committed as to violate the Eighth Amendment. *Id.* at 18-24.

Berger raises a host of objections to the findings of fact and law made by Judge Burns. Doc. 27. The Court concludes that none has merit.

A. General Objections.

Berger first objects generally to the factual background set forth in the R & R on the ground that it is based on Respondents' view of the facts and references evidence not admitted at trial. Doc. 27 ¶¶ 2-3. He also asserts general objections to the R & R's legal analysis. *Id.* ¶¶ 16-17.

The Court will deem Berger's general objections ineffective. This ruling comports with the clear language of Rule 72(b). Under that rule, the district judge must determine de novo those portions of the R & R that have been "properly objected to." Fed.R.Civ.P.

72(b)(2). A proper objection under Rule 72(b) requires the petitioner to make "*specific written objections* to the proposed findings and recommendations." *Id.* (emphasis added); *see* 28 U.S.C. § 636(b)(1). An obvious purpose of these provisions is judicial economy – to permit magistrate judges to hear and resolve matters not objectionable to the parties. *See Thomas v. Arn,* 474 U.S. 140, 147-152, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *United States v. ReynaTapia,* 328 F.3d 1114, 1121 (9th Cir.2003). Because complete de novo review defeats the efficiencies intended by Congress, a general objection "has the same effect as would a failure to object." *Howard v. Sec'y of HHS,* 932 F.2d 505, 509 (6th Cir.1991); *Haley v. Stewart,* No. CV-02-1087-PHX-DGC (CRP), 2006 WL 1980649 at *2 (D.Ariz. July 11, 2006). In short, the Court is relieved of any obligation to review Berger's general objections to the R & R. *See Thomas,* 474 U.S. at 149 (1985) (no review at all is required for "any issue that is not the subject of an objection"); *Haley,* 2006 WL 1980649 at *2.

B. Immaterial Objections.

Many of Berger's objections are not material to his Eighth Amendment claim, and some are irrelevant to any material issue in the case. For example, Berger objects on the ground that the trial began on January 28, 2003 and lasted three days (Doc. 27 ¶ 4), but fails to explain why this fact is material to his habeas claim or any legal finding made by Judge Burns. To the extent the objections find fault with the

background section of the R & R, "or quibble baselessly with its wording," the Court will not address them as they have no bearing on the outcome of the case. *Andrews v. Whitman,* No. 06-2447-LAB (NLS), 2009 WL 857604, at *5 (S.D.Cal. Mar.27 2009); *see Cohen v. United States,* No. CV-08-1888-PHX-JAT, 2010 WL 1252550, at *7 (D.Ariz. Mar.25, 2010) (overruling objection that "factual discrepancies exist" where the petitioner failed to describe how the distinctions were material).

C. Specific Objections to Legal Findings.

Having carefully considered Berger's specific objections to Judge Burns' legal analysis (Doc. 27 ¶¶ 18-30), the Court finds them to be without merit. Berger first asserts that Judge Burns erroneously applied the holding in *United States v. Meiners,* 485 F.3d 1211 (9th Cir.2007), which, according to Berger, supports the conclusion that his sentence is unconstitutional. Doc. 27 ¶¶ 18, 28. *Meiners* affirmed a 15-year sentence for advertisement and distribution of child pornography, finding that such conduct "threatens to cause grave harm to society" and "feeds an industry that causes physiological, emotional and mental trauma to the child victims." 485 F.3d at 1213. Judge Burns found, correctly, that there is an interconnected relationship between the producers, distributors, and consumers of child pornography, and that the harm to the child victims caused by consumers of child pornography is well established. Doc. 26 at 22-23; *see New York v. Ferber,* 458 U.S. 747, 758,

102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (recognizing that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child"); *Osborne v. Ohio,* 495 U.S. 103, 109-10, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) (noting that "it is 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"). Contrary to Berger's contention, *Meiners* does not support his Eighth Amendment claim.

There is no evidence in the record, Berger asserts, to support the implication that possessors of child pornography will also molest children. Doc. 27 ¶ 19. But the fact that Berger may have no proclivity to molest children does not render his sentences unconstitutional. Consumers of child pornography "'instigate[ ] the original production of child pornography by providing an economic motive for creating and distributing the materials.'" Doc. 26 at 22 (quoting *United States v. Planck,* 493 F.3d 501, 505 (5th Cir.2007)). Contrary to Berger's assertion (Doc. 27 ¶¶ 25-26), Judge Burns did not fail to consider his specific conduct in addressing the length and proportionality of his sentences. *See* Doc. 26 at 15-16, 21.

Claiming that his sentences would have been significantly lower under federal law, Berger objects to the R & R for not having discussed the federal sentencing guidelines. Doc. 27 ¶ 20. But Berger was convicted under Arizona law, not federal law, and an Eighth Amendment violation cannot rightly be

predicated solely on inter-jurisdiction comparisons. The fact that "a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate." *Harmelin v. Michigan,* 501 U.S. 957, 1000, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring). Moreover, the Court concludes that reference to the federal sentencing guidelines is not necessary to decide the relevant question in this case – whether the Arizona Supreme Court's adjudication of Berger's Eighth Amendment claim was contrary to or an unreasonable application of clearly established precedent of the United States Supreme Court. 28 U.S.C. § 2254(d)(1). The Arizona court's majority opinion by Justice Bales engaged in a careful analysis of relevant cases from the United States Supreme Court and reached a conclusion that clearly was not contrary to or an unreasonable application of those cases. *See Berger,* 134 P.3d at 380-85.

Berger objects to Judge Burns' reliance on certain Ninth Circuit cases in discussing the standard of review under the AEDPA (Doc. 26 at 13-14), arguing that other Ninth Circuit cases provide a more complete analysis of the Supreme Court's Eighth Amendment jurisprudence. Doc. 27 ¶¶ 22-23. Berger recognizes (*id.* ¶ 22, 134 P.3d 378) that Eighth Amendment challenges to the length of sentences are reviewed under the framework outlined by Justice Kennedy in his concurring opinion in *Harmelin,* 501 U.S. at 996-1001, and later employed by Justice O'Connor in announcing the judgment of the Court in

Ewing v. California, 538 U.S. 11, 20-24, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003). Judge Burns applied those proportionality principles in the R & R (Doc. 26 at 18-24), as did the Arizona Supreme Court, *Berger,* 134 P.3d at 380-88. To the extent Berger contends that his Eighth Amendment habeas claim is not governed by the AEDPA (Doc. 27 ¶ 23), he is incorrect. *See, e.g., Rios v. Garcia,* 390 F.3d 1082, 1084-86 (9th Cir.2004); *Reyes v. Brown,* 399 F.3d 964, 966-67 (9th Cir.2005); *Taylor v. Lewis,* 460 F.3d 1093, 1101 (9th Cir.2006).

Judge Burns erred, Berger claims (Doc. 27 ¶ 24), in finding that the state court's decision to consider only the 10-year sentence for each count in the proportionality inquiry to be reasonable (Doc. 26 at 16). Berger cites various Court of Appeals decisions, but makes no argument that the Arizona court's decision was contrary to or an unreasonable application of clearly established Supreme Court precedent. To the contrary, the Arizona Supreme Court specifically considered Supreme Court precedent in its decision to consider single-count sentences. *See Berger,* 134 P.3d at 384 (citing *Lockyer v. Andrade,* 538 U.S. 63, 74 n. 1, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (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)).

Nor has Berger shown that the state court's decision was based on an unreasonable determination of the facts, or that his "mere possession of 20 images on one day" (Doc. 27 ¶ 27) renders his sentences grossly disproportionate. The images for which Berger was convicted graphically depict sordid and perverse sexual conduct involving pre-pubescent minors. Berger's objection cites no basis for disagreeing with this conclusion of the Arizona Supreme Court:

> Nor did Berger come into possession of these images fleetingly or inadvertently. Berger had obtained at least two images in 1996, some six years before his arrest. The websites Berger flagged as "favorites" included graphic titles indicating that they provide underage, and illegal, pornographic depictions. His computer contained "cookie" files and text fragments indicating he had searched for or visited websites providing contraband material. Berger also had recordable CDs indicating he had specifically set up a "kiddy porn" directory, which included other subfolders with titles indicating a collection of contraband images.

Berger, 134 P.3d at 385.

With respect to Berger's complaint that Arizona's sentencing scheme unwisely mandates a separate prison term for each image, Judge Burns cited *Ewing,* 538 U.S. at 28, for the proposition that " 'this criticism is appropriately directed at the legislature, which has primary responsibility for making the difficult policy

choices that underlie any criminal sentencing scheme.'" Doc. 26 at 18 n. 8. Judge Burns did not, as Berger suggests, conclude that the courts are without authority to consider an Eighth Amendment challenge where the state legislature "decrees life imprisonment for 20 clicks of a mouse [.]" Doc. 27 ¶ 29. Instead, Judge Burns noted, consistently with Supreme Court precedent, that "fixing the number or contraband images that may be punished within a single prison term is a subjective policy determination that the Supreme Court has found to rest 'properly within the province of legislatures, not courts.'" Doc. 26 at 18 n. 8 (quoting *Rummel v. Estelle,* 445 U.S. 263, 275-76, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)). Berger has not shown that the Arizona Supreme Court's affirmance of the consecutive nature of his sentences was contrary to or involved an unreasonable application of Supreme Court precedent.

Finally, Berger objects (Doc. 27 ¶¶ 21, 30) to Judge Burns' decision to not conduct a comparative intra-and inter-jurisdictional analysis (Doc. 26 at 19-21). The Court cannot conclude that such a comparison would provide a basis for finding the Arizona Supreme Court's decision to be contrary to or an unreasonable application of clearly established Supreme Court case law. As noted above, the fact 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). Moreover, as Justice Hurwitz noted in voting to affirm Berger's sentence,

"[t]here will always be one state with the longest penalty, and if that were enough to establish an Eighth Amendment violation, the result would be a revolving door under which the penalty for the next state in line would then be automatically unconstitutional." *Berger,* 134 P.3d at 388-89 (Hurwitz, J., concurring). "In light of the gravity of [Berger's] offense, a comparison of his crime with his sentence does not give rise to an inference of gross disproportionality, and comparative analysis of his sentence with others in [Arizona] and across the Nation need not be performed." *Harmelin,* 501 U.S. at 1005; *see Meiners,* 485 F.3d at 1213.

III. Conclusion.

Having reviewed the R & R and Berger's objections, the Court concludes that Berger has not shown the state court's ruling on his Eighth Amendment claim to be "'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.'" *Sessoms v. Runnels,* 650 F.3d 1276, 2011 WL 2163970, at *1 (9th Cir. June 3, 2011) (quoting *Harrington v. Richter,* ___ U.S. ___, 131 S.Ct. 770, 786-87, 178 L.Ed.2d 624 (2011)). The Court will accept the R & R and deny the petition for writ of habeas corpus.

IT IS ORDERED:

1. The Magistrate Judge's report and recommendation that the petition be denied (Doc. 26) is **accepted**.

2. Morton Berger's petition for writ of habeas corpus (Doc. 1) is **denied**.

3. A certificate of appealability is **denied** because Berger has made no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

APPENDIX C

212 Ariz. 473
Supreme Court of Arizona,
En Banc.

STATE of Arizona, Appellee,
v.
Morton Robert BERGER, Appellant.

No. CR-05-0101-PR. | May 10, 2006.

Terry Goddard, Arizona Attorney General By Randall M. Howe, Chief Counsel, Criminal Appeals Section, Robert A. Walsh, Assistant Attorney General, Phoenix, Attorneys for the State of Arizona.

Law Offices of Laurie A. Herman By Laurie A. Herman, Scottsdale, and Law Offices of Ballecer & Segal By Natalee Segal, Phoenix, Attorneys for Morton Robert Berger.

Miller, Lasota & Peters PLC By Donald M. Peters, Phoenix, Attorneys for Amicus Curiae American Civil Liberties Union of Arizona.

OPINION

BALES, Justice.

¶ 1 Based on his possession of child pornography, Morton Robert Berger was convicted of twenty separate counts of sexual exploitation of a minor under the age of fifteen and sentenced to twenty consecutive ten-year prison terms. We hold that these sentences do not violate the Eighth Amendment's prohibition on cruel and unusual punishment.

I.

¶ 2 Arizona severely punishes the distribution or possession of child pornography. Under Arizona law, a person commits sexual exploitation of a minor, a class two felony, by knowingly "[d]istributing, 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." Ariz.Rev.Stat. ("A.R.S.") § 13-3553(A)(2) (2002). A "visual depiction," for purposes of this statute, "includes each visual image that is contained in an undeveloped film, videotape or photograph or data stored in any form and that is capable of conversion into a visual image." A.R.S. § 13-3551(11). If a depiction involves a minor under the age of fifteen, the offense is characterized as a dangerous crime against children. A.R.S. § 13-3553(C).

¶ 3 Under this statutory scheme, the possession of each image of child pornography is a separate offense. A.R.S. §§ 13-3551(11), -3553(A)(2); *see also State v. Taylor,* 160 Ariz. 415, 420, 773 P.2d 974, 979 (1989) (affirming fifty consecutive sentences for possession of fifty contraband images obtained over time). Consecutive sentences must be imposed for each conviction involving children under fifteen, and each such sentence carries a minimum term of ten years, a presumptive term of seventeen years, and a maximum term of twenty-four years. A.R.S. § 13-604.01(D), (F), (G), (K). Such sentences must be served without the possibility of probation, early

release, or pardon. A.R.S. § 13-3553(C) (prescribing sentencing under § 13-604.01).

¶ 4 A grand jury indicted Berger on thirty-five separate counts of sexual exploitation of a minor based on his possession of printed photographs, computer photo files, and computer video files depicting children in sexual acts. On the State's motion, the trial court dismissed fifteen counts, and trial proceeded on the twenty remaining counts.

¶ 5 The trial evidence established that Berger possessed numerous videos and photo images of children, some younger than ten years old, being subjected to sexual acts with adults and other children, including images of sexual intercourse and bestiality. The jury also heard testimony indicating that, from 1996 to 2002, Berger had downloaded computer files containing child pornography; he had identified several "favorite" websites with titles indicating they provided child pornography; he had recently viewed contraband material; and he had created both computer and hard copy filing systems to maintain his collection. The jury convicted Berger of twenty counts of sexual exploitation of a minor and found that each depiction involved a child under the age of fifteen.

¶ 6 The trial judge sentenced Berger to a ten-year sentence – the minimum mitigated sentence allowed – for each of his crimes and, as required by statute, ordered the sentences to be served consecutively. A.R.S. §§ 13-604.01, -3553(C). The court rejected

Berger's argument that his sentences violated the Eighth Amendment's prohibition on cruel and unusual punishment. Berger appealed, and a divided panel of the court of appeals affirmed his convictions and sentences. *State v. Berger,* 209 Ariz. 386, 103 P.3d 298 (App.2004). He petitioned for review, arguing that the rulings below conflict with this court's opinion in *State v. Davis,* 206 Ariz. 377, 79 P.3d 64 (2003).

¶ 7 We granted Berger's petition to again consider the framework for reviewing Eighth Amendment challenges to lengthy prison sentences. We have jurisdiction pursuant to Article 6, Section 5(3), of the Arizona Constitution and A.R.S. section 12-120.24 (2003).

II.

¶ 8 The Eighth Amendment to the United States Constitution bars the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. This provision "guarantees individuals the right not to be subjected to excessive sanctions." *Roper v. Simmons,* 543 U.S. 551, 560, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). "The right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense." *Id.* (internal quotation marks and citation omitted).

¶ 9 The Supreme Court has long recognized that the Eighth Amendment limits permissible sanctions in various contexts. For example, the Court has held that the death penalty cannot be imposed for the rape

of an adult woman, on mentally retarded defendants, or on those who commit their crimes as juveniles. *See id.* at 568-69, 125 S.Ct. 1183 (collecting cases). Likewise, the Court has held that a sentence to "12 years jailed in irons at hard and painful labor for the crime of falsifying records was excessive." *Atkins v. Virginia,* 536 U.S. 304, 311, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (citing *Weems v. United States,* 217 U.S. 349, 367, 30 S.Ct. 544, 54 L.Ed. 793 (1910)). The Court has also observed that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Robinson v. California,* 370 U.S. 660, 667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

¶ 10 Although "the Eighth Amendment has been applied to lengthy sentences of incarceration," *Davis,* 206 Ariz. at 381, ¶ 13, 79 P.3d at 68 (citation omitted), courts are extremely circumspect in their Eighth Amendment review of prison terms. The Supreme Court has noted that noncapital sentences are subject only to a "narrow proportionality principle" that prohibits sentences that are "grossly disproportionate" to the crime. *Ewing v. California,* 538 U.S. 11, 20, 23, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (O'Connor, J., concurring in the judgment) (quoting *Harmelin v. Michigan,* 501 U.S. 957, 996-97, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

¶ 11 This court reviews Eighth Amendment challenges to the length of prison sentences under 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*. *Davis,* 206 Ariz. at 383,¶ 30, 79 P.3d at 70.[1]

¶ 12 Under this analysis, a court first determines if there is a threshold showing of gross disproportionality by comparing "the gravity of the offense [and] the harshness of the penalty." *Ewing,* 538 U.S. at 28, 123 S.Ct. 1179; *accord Harmelin,* 501 U.S. at 1005, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in the judgment) (same). If this comparison leads to an inference of gross disproportionality, the court then tests that inference by considering the sentences the state imposes on other crimes and the sentences other states impose for the same crime. *Ewing,* 538 U.S. at 23-24, 123 S.Ct. 1179; *Harmelin,*

[1] The Supreme Court's Eighth Amendment proportionality decisions "have not established a clear or consistent path for courts to follow." *Lockyer v. Andrade,* 538 U.S. 63, 72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). In rejecting challenges to prison sentences in *Harmelin* and *Ewing,* a majority of the Court did not agree in any one opinion. In each case, two justices concluded that prison sentences cannot be challenged on proportionality grounds under the Eighth Amendment and stated they would overrule contrary precedent. *Ewing,* 538 U.S. at 31, 123 S.Ct. 1179 (Scalia, J., concurring); *id.* at 32, 123 S.Ct. 1179 (Thomas, J., concurring); *Harmelin,* 501 U.S. at 994, 111 S.Ct. 2680 (Scalia, J., joined by Rehnquist, C.J., concurring). Justice Kennedy's opinion in *Harmelin* and Justice O'Connor's opinion in *Ewing* are the controlling opinions in those cases because they reflect the views of the justices concurring in the judgments on the narrowest grounds. *See Marks v. United States,* 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977).

501 U.S. at 1004-05, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in the judgment).

¶ 13 In comparing the gravity of the offense to the harshness of the penalty, courts must accord substantial deference to the legislature and its policy judgments as reflected in statutorily mandated sentences. The threshold inquiry is guided by several principles that include 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. *Ewing,* 538 U.S. at 23, 123 S.Ct. 1179 (citing *Harmelin,* 501 U.S. at 997, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in the judgment)). These principles 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." *Id.* at 23, 123 S.Ct. 1179 (quoting *Harmelin,* 501 U.S. at 1001, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in the judgment)) (internal quotation omitted).

¶ 14 In *Ewing,* the Court rejected an Eighth Amendment challenge to a prison term of twenty-five years to life under California's "three strikes law" for a recidivist offender convicted of stealing three golf clubs worth nearly $1200. Justice O'Connor's plurality opinion first considered the three strikes law in its general application. While recognizing that the law had been criticized for its lack of wisdom and lack of

effectiveness, she noted that the State of California had a "reasonable basis" for believing the law would substantially advance the goals of incapacitating repeat offenders and deterring crime. *Id.* at 24-28, 123 S.Ct. 1179. Against this backdrop, Justice O'Connor considered and rejected Ewing's argument that his sentence was unconstitutionally disproportionate. Acknowledging that his sentence was long, she concluded that "it 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." *Id.* at 30, 123 S.Ct. 1179.

¶ 15 Similarly, in *Harmelin,* the Court rejected an Eighth Amendment challenge to a mandatory sentence of life imprisonment without parole for a first-time offender convicted of possessing 672 grams of cocaine. 501 U.S. at 994-95, 111 S.Ct. 2680. In his plurality opinion, Justice Kennedy noted "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." *Id.* at 1003-04, 111 S.Ct. 2680 (noting Michigan legislature had a "rational basis" for determining to impose mandatory life sentence).

¶ 16 Recognizing that the penalty imposed on Harmelin was "severe and unforgiving" and that the deterrent effect of Michigan's law was still uncertain,

Justice Kennedy nonetheless concluded that "we cannot say the law before us has no chance of success and is on that account so disproportionate as to be cruel and unusual punishment." *Id.* at 1008, 111 S.Ct. 2680. Because there was no threshold showing of gross disproportionality, it was unnecessary to compare the sentence with others in Michigan or in other states. *Id.* at 1005, 111 S.Ct. 2680.

¶ 17 *Harmelin* and *Ewing* reaffirm that only in "exceedingly rare" cases will a sentence to a term of years violate the Eighth Amendment's prohibition on cruel and unusual punishment. *Ewing,* 538 U.S. at 22, 123 S.Ct. 1179 (citation omitted). A court must first determine whether the legislature "has a reasonable basis for believing that [a sentencing scheme] 'advance[s] the goals of [its] criminal justice system in any substantial way.'" *Id.* at 28, 123 S.Ct. 1179 (quoting *Solem v. Helm,* 463 U.S. 277, 297 n. 22, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)) (second and third alteration in original). In light of that conclusion, the court then considers if the sentence of the particular defendant is grossly disproportionate to the crime he committed. *Id.* 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." *Id.* at 30, 123 S.Ct. 1179. This framework guides our review of Berger's Eighth Amendment challenge to his sentence.

III.

¶ 18 States may criminalize the possession of child pornography to advance the compelling interest of protecting children from sexual exploitation. As the Supreme Court has 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." . . . The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.

Osborne v. Ohio, 495 U.S. 103, 109, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) (quoting *New York v. Ferber,* 458 U.S. 747, 756-58, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (citations omitted)) (affirming Ohio's criminal ban on possession of child pornography). Child pornography not only harms children in its production, but also "causes the child victims continuing harm by haunting the children in years to come." *Id.* at 111, 110 S.Ct. 1691 (citation omitted); *see also United States v. Sherman,* 268 F.3d 539, 547 (7th Cir.2001) ("The possession, receipt and shipping of child pornography directly victimizes the children portrayed by violating their right to privacy, and in particular violating their individual interest in avoiding the disclosure of personal matters.").

¶ 19 Criminalizing the possession of child pornography is tied directly to state efforts to deter its production

and distribution. Given that the distribution and production of this material occurs "underground," the legislature must be permitted to "stamp out this vice at all levels in the distribution chain." *Osborne,* 495 U.S. at 110, 110 S.Ct. 1691. Moreover, criminalization encourages the destruction of such materials. *Id.* at 111, 110 S.Ct. 1691. The goal of combating the sexual abuse and exploitation inherent in child pornography animates Arizona's severe penalties for the possession of such material.[2]

¶ 20 In 1978, the Arizona legislature determined that existing state laws were inadequate and enacted legislation specifically aimed at the child pornography industry. The new law, the predecessor to A.R.S. sections 13-3551 to -3553, declared its purposes to include protecting children from sexual exploitation and to "prevent any person from benefiting financially or otherwise from the sexual exploitation of children." 1978 Ariz. Sess. Laws, ch. 200, § 2(B)(1), (3). The legislature specifically identified a series of harms to child victims, including the use of

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[2] The importance of the state's interest justifies prohibiting the mere possession of child pornography, even though the Supreme Court held in *Stanley v. Georgia,* 394 U.S. 557, 565-66, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), that the First and Fourteenth Amendments prevent states from criminalizing the in-home possession of adult obscenity. The Court in *Osborne* noted that child pornography has "de minimis" First Amendment value and "the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley.*" 495 U.S. at 108, 110 S.Ct. 1691.

the material by defendants in luring new victims and the fact that such materials cause continuing harm to the children depicted. *Id.* § 2(A)(5)-(6).

¶ 21 In 1983, lawmakers extended this criminal ban to include possession itself, an amendment that prosecutors claimed would aid in prosecuting child molesters. 1983 Ariz. Sess. Laws, ch. 93; *Hearing on H.B. 2127 Before the H. Comm. on Judiciary,* 36th Legis., 1st Reg. Sess. 2 (Ariz.1983) (comments of Elizabeth Peasley, Pima County Attorney's Office). Such legislation also recognizes the fact that producers of child pornography exist due to the demand for such materials. "The consumers of child pornography therefore victimize the children depicted . . . by enabling and supporting the continued production of child pornography, which entails continuous direct abuse and victimization of child subjects." *United States v. Norris,* 159 F.3d 926, 930 (5th Cir.1998) (applying federal sentencing guidelines).

¶ 22 Correspondingly, the legislature soon thereafter included the possession of child pornography among crimes targeted in § 13-604.01 for enhanced sentencing as "dangerous crimes against children." 1985 Ariz. Sess. Laws, ch. 364, § 6. This legislation provides "lengthy periods of incarceration . . . intended to punish and deter" "those predators who pose a direct and continuing threat to the children of Arizona." *State v. Williams,* 175 Ariz. 98, 102, 854 P.2d 131, 135 (1993) (reviewing the legislative history of § 13-604.01).

¶ 23 Given this history, we conclude 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." *Ewing,* 538 U.S. at 28, 123 S.Ct. 1179 (internal citation omitted).

IV.

¶ 24 It is "[a]gainst this backdrop," *id.,* 538 U.S. at 28, 123 S.Ct. 1179 that we consider Berger's claim that his sentences are grossly disproportionate to his offenses. Berger, as did Ewing, incorrectly frames the issue at the threshold. Ewing argued that his three strikes sentence of twenty-five years to life was based on his "shoplifting three golf clubs"; the Supreme Court noted that in fact Ewing had been sentenced for felony grand theft of nearly $1200 after having already been convicted of at least two violent or serious felonies. *Id.*

¶ 25 Berger contends that he has received a "200 year flat-time sentence . . . upon his conviction of possession of child pornography. . . ." But Berger in fact was 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. Each ten-year sentence must, by statute, be served consecutively. A.R.S. § 13-604.01(K).

¶ 26 Berger has not argued that the State's charging him in twenty separate counts was improper. Nor

could he, as each count was based on a different video or photo image, the images involved some fifteen different child victims, and Berger had accumulated the images over a six-year period. *Cf. Taylor,* 160 Ariz. at 420, 773 P.2d at 979 (declining to decide if individual could be prosecuted or sentenced on separate counts for multiple images acquired simultaneously). Nor does Berger dispute that possession of child pornography is a serious crime punishable as a felony under federal law and most state laws. *Cf. Ewing,* 538 U.S. at 28, 123 S.Ct. 1179 (noting theft of $1200 is a felony under federal and most state laws). For purposes of our analysis, Berger committed twenty separate, and very serious, felonies.

¶ 27 In comparing the gravity of Berger's crime and the severity of the punishment, we focus on whether a ten-year sentence is disproportionate for a conviction of possessing child pornography involving children younger than fifteen. "A defendant has no constitutional right to concurrent sentences for two separate crimes involving separate acts." *State v. Jonas,* 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990). Accordingly, as a general rule, this court "will not consider the imposition of consecutive sentences in a proportionality inquiry. . . ." *Davis,* 206 Ariz. at 387, ¶ 47, 79 P.3d at 74.[3]

[3] The court in *Davis* concluded that a departure from the general rule was appropriate in light of the specific facts and circumstances of that case. 206 Ariz. at 387, ¶ 47, 79 P.3d at 74.

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¶ 28 "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.

¶ 29 Given the principles established by prior decisions, we cannot conclude that a ten-year sentence is grossly disproportionate to Berger's crime of knowingly possessing child pornography depicting children younger than fifteen. *Cf. Harmelin,* 501 U.S. at 1004, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in the judgment) (noting severity of Harmelin's drug possession crime brought life

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The general rule, rather than the exception recognized in *Davis,* applies here, for reasons explained *infra.*

sentence "within the constitutional boundaries established by our prior decisions").

¶ 30 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. *Jonas,* 164 Ariz. at 249, 792 P.2d at 712.

¶ 31 In fact, only once in the past quarter-century has the Supreme Court sustained an Eighth Amendment challenge to the length of a prison sentence. In that case, *Solem v. Helm,* a judge sentenced a nonviolent repeat offender to life imprisonment without parole for the crime of writing a "no account" check for $100. 463 U.S. at 279-82, 103 S.Ct. 3001. In concluding that this life sentence, "the most severe punishment that the State could have imposed," *id.* at 297, 103 S.Ct. 3001 was grossly disproportionate,

the Court noted that Solem's crime was quite minor, *Solem, id.* at 296, 103 S.Ct. 3001. Indeed, the Court stated that the crime of uttering a no account check was "one of the most passive felonies a person could commit." *Id.* (internal quotation omitted).

¶ 32 *Solem* also did not involve a mandatory sentence, but instead concerned a judge's discretionary decision to impose the maximum authorized sentence. Thus, *Solem* did not implicate the "traditional deference" that courts must afford to legislative policy choices when reviewing statutorily mandated sentences. *See Ewing,* 538 U.S. at 25, 123 S.Ct. 1179 (O'Connor, J., announcing judgment of the Court); *Harmelin,* 501 U.S. at 1006-07, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in the judgment); *Solem,* 463 U.S. at 299 n. 26, 103 S.Ct. 3001 (noting that Court's decision "d[id] not question the legislature's judgment").

¶ 33 Berger is in a fundamentally different situation than was the defendant in *Solem.* Berger received a statutorily mandated minimum sentence for each of his separate, serious offenses. The ten-year sentence imposed for each offense is consistent with the State's penological goal of deterring the production and possession of child pornography.

¶ 34 The evidence showed that Berger knowingly gathered, preserved, and collected multiple images of child pornography. When confronted by the police, he acknowledged that he had "downloaded some things that he was not proud of, and was not sure if he

should have downloaded them or not." Additionally, in response to police questions, Berger admitted he had downloaded images of people under eighteen and that he believed these people were involved in sexual conduct. He also possessed a news article describing a recent arrest of another person in Arizona for possession of child pornography.

¶ 35 The images for which Berger was convicted, graphically depicting sordid and perverse sexual conduct with pre-pubescent minors, were well within the statutory definition of contraband. Nor did Berger come into possession of these images fleetingly or inadvertently. Berger had obtained at least two images in 1996, some six years before his arrest. The websites Berger flagged as "favorites" included graphic titles indicating that they provide underage, and illegal, pornographic depictions. His computer contained "cookie" files and text fragments indicating he had searched for or visited websites providing contraband material. Berger also had recordable CDs indicating he had specifically set up a "kiddy porn" directory, which included other subfolders with titles indicating a collection of contraband images.

¶ 36 Taken together, this evidence indicates that, in the terminology of *Ewing,* Berger'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. *Ewing,* 538 U.S. at 29-30, 123 S.Ct. 1179.

V.

¶ 37 Berger nonetheless argues that our holding in *Davis* compels the vacating of his sentence. In *Davis,* this court vacated four consecutive thirteen-year sentences imposed on a twenty-year-old man of below average intelligence convicted of having uncoerced sex at different times with two fourteen-year-old girls. 206 Ariz. at 380, ¶¶ 7-10, 79 P.3d at 68.

¶ 38 *Davis* represents an "extremely rare case" in which the court concluded prison sentences were grossly disproportionate. In so holding, the court observed that a sentence violates the Eighth Amendment if it is "so severe as to shock the conscience of society." *Id.* at 388, ¶ 49, 79 P.3d at 75 (quotation omitted). This language, however, must be understood as a restatement of the court's conclusion that the sentences were "grossly disproportionate" under the standard set forth in the plurality opinions in *Harmelin* and *Ewing,* which *Davis* expressly followed. *Davis* was not suggesting a different standard by its use of the phrase "shock the conscience of society."[4]

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[4] In *State v. Davis,* 108 Ariz. 335, 337, 498 P.2d 202, 204 (1972), this court rejected an Eighth Amendment challenge to a mandatory ten-year sentence for a recidivist offender, but noted that "in a proper case and at a proper time we may find that a particular penalty is so severe as to shock the conscience of society" and thus violate the Eighth Amendment. Prior to *Ewing* and *Harmelin,* this court said that it would judge whether a sentence "shocks the conscience of the community" for Eighth Amendment purposes by whether it is "overly severe or disproportionate to the crime." *State v. Bartlett,* 164 Ariz. 229, 233, 792

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¶ 39 *Davis* acknowledged, and we here reaffirm, that a sentencing scheme that does not violate the Eighth Amendment in its general application may still, in its application to "the specific facts and circumstances" of a defendant's offense, result in an unconstitutionally disproportionate sentence. *Id.* at 384, ¶ 34, 79 P.3d at 71. Berger, however, misunderstands how the "specific facts and circumstances of the offenses" enter into the Eighth Amendment analysis under *Davis*.

¶ 40 The court in *Davis* effectively concluded that it could not reconcile the particular sentences imposed with any reasonable sentencing policy it could attribute to the legislature. Most significantly, the defendant in *Davis,* who had no prior criminal record, was caught up in the "broad sweep" of a statute that made no distinction between the perpetrators of incest, serial pedophiles, and an eighteen-year-old man engaging in sex initiated by a fifteen-year-old girlfriend. *Id.* at 384-85, ¶¶ 36-37, 79 P.3d at 71-72. The statute's breadth in terms of imposing liability was coupled with a sentencing scheme mandating lengthy consecutive sentences for each offense. *Id.* at 385, ¶ 37, 79 P.3d at 72.

P.2d 692, 696 (1990), *vacated,* 501 U.S. 1246, 111 S.Ct. 2880, 115 L.Ed.2d 1046 (1991). The Supreme Court itself has not used the "shocks the conscience" language in its Eighth Amendment review of prison sentences, although it has used such language with respect to the different issue of whether state action is so arbitrary as to violate substantive due process. *See Rochin v. California,* 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952).

¶ 41 In *Davis,* objective facts about the offenses indicated that the defendant's conduct was at the edge of the statute's broad sweep of criminal liability. Davis was twenty years old and his maturity and intelligence fell far below that of a normal adult. *Id.* at 384-85, ¶ 36, 79 P.3d at 71-72. The girls involved not only participated willingly, but they had sought Davis out and gone voluntarily to his home. *Id.* If the girls had been fifteen or older and Davis within two years of their age, he would not have been criminally liable at all. A.R.S. § 13-1407(F). But because his conduct was "swept up in the broad statutory terms," *Davis,* 206 Ariz. at 385, ¶ 37, 79 P.3d at 72, Davis was subject to four consecutive thirteen-year sentences.

¶ 42 Only after concluding that objective factors about Davis's offense showed he had been caught up in the expansive reach of the statute did the court determine that the consecutive nature of his sentences was relevant to the Eighth Amendment analysis. *Id.* at 387, ¶ 47, 79 P.3d at 74. In so doing, however, the court noted that its conclusion rested on the "specific facts and circumstances of Davis's offenses," and reaffirmed that the court "normally will not consider the imposition of consecutive sentences in a proportionality inquiry. . . ." *Id.* at 387-88, ¶¶ 47-48, 79 P.3d at 74-75.

¶ 43 Berger argues that, in light of *Davis,* the court must consider the consecutive nature of his sentences in the Eighth Amendment analysis, along with the "victimless" nature of his crime, and that this court

must, at the least, order a re-sentencing hearing so he can present "mitigation evidence."

¶ 44 Berger's conduct is at 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 – and he, unlike Davis, cannot be characterized as someone merely "caught up" in a statute's broad sweep. Thus, there is no basis here to depart from the general rule that the consecutive nature of sentences does not enter into the proportionality analysis.[5]

¶ 45 Nor do we accept Berger's assertion that his crimes were "victimless" merely because he did not touch or even photograph any children himself. The defendant in *Harmelin* similarly argued that his

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[5] Berger has no prior criminal record, and *Davis* noted that the defendant there had no prior adult criminal record. 206 Ariz. at 385, ¶ 36, 79 P.3d at 72. This fact is not in itself a basis for challenging a mandatory prison sentence as grossly disproportionate. *See Harmelin,* 501 U.S. at 994-95, 111 S.Ct. 2680 (rejecting defendant's contention that mandatory life sentence for first time offender was "cruel and unusual"). An offender's lack of prior convictions also does not alter the general rule that proportionality review focuses on the particular sentence for each offense rather than the cumulative sentences. For purposes of proportionality review, a prior criminal record may, however, increase the gravity of the offense that underlies a challenged prison sentence. *See Ewing,* 538 U.S. at 29, 123 S.Ct. 1179 ("In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of criminal recidivism."). For example, this court may well have reached a different result in *Davis* if the defendant had prior adult criminal convictions.

sentence to life without parole was unconstitutional because his possession of 672 grams of cocaine was a victimless and non-violent offense. In rejecting this argument, Justice Kennedy noted the pernicious effects of the drug trade, including drug-related violence. 501 U.S. at 1002-03, 111 S.Ct. 2680. Here, the link between possession of the contraband images and the abuse of children is at least as direct. Production of the images Berger possessed required the abuse of children, and Berger's consumption of such material cannot be disassociated from that abuse for purposes of the Eighth Amendment proportionality analysis. *Cf. Norris,* 159 F.3d at 930 (noting, for purposes of federal sentencing guidelines, that "the victimization of a child depicted in pornographic materials flows just as directly from the crime of knowingly receiving child pornography as it does from the arguably more culpable offenses of producing or distributing child pornography").

¶ 46 Alternatively, Berger asks this court to remand his case for an evidentiary hearing in light of *Davis.* He notes that, when he was sentenced, our court's Eighth Amendment case law did not allow a judge to consider the individual facts and circumstances of the crime committed, *see State v. DePiano,* 187 Ariz. 27, 29-30, 926 P.2d 494, 496-97, and *Davis* overruled that holding, 206 Ariz. at 384, ¶ 34, 79 P.3d at 71.

¶ 47 *Davis,* however, does not interpret the Eighth Amendment to generally require evidentiary hearings to allow defendants to offer "mitigation evidence" to show that a particular sentence is disproportionate.

The specific facts and circumstances considered relevant in *Davis* are those that go to the defendant's degree of culpability for the offense, not to a showing that the defendant is, apart from the crime at issue, a good person or a promising prospect for rehabilitation. *Cf. Davis,* 206 Ariz. at 384, ¶ 32, 79 P.3d at 71 (citing cases from other jurisdictions that consider defendant's culpability and harm caused by offense as part of proportionality analysis).

¶ 48 In *Harmelin,* the Court held that the Eighth Amendment does not require courts to consider mitigation evidence before imposing mandatory prison sentences, even when a mandatory life term results. 501 U.S. at 996, 111 S.Ct. 2680 (Scalia, J., announcing judgment of the Court); *id.* at 1006, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy noted that the Court's Eighth Amendment decisions "reject any requirement of individualized sentencing in noncapital cases," and that the Court had "never invalidated a penalty mandated by a legislature based only on the length of a sentence, and especially with a crime as severe as this one, [a court] should do so only in the most extreme circumstance." *Id.* at 1006-07, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in the judgment). *Davis* does not question these propositions.

¶ 49 Further, Berger has not identified any fact that he might offer on remand that would alter our conclusion that his sentences are not grossly disproportionate. At the time of his arrest, Berger was a

fifty-two-year-old high school teacher, was married, and had no prior criminal record. These facts, which are in the record, do not reduce his culpability. The trial evidence showed that Berger knowingly sought and possessed numerous items of contraband child pornography over an extended period of time. Accordingly, considering "the specific facts and circumstances" of Berger's crimes only amplifies the conclusion that he consciously sought to do exactly that which the legislature sought to deter and punish. *See Seritt v. Alabama,* 731 F.2d 728, 737 (11th Cir.1984) (rejecting habeas claimant's argument for an evidentiary hearing when circumstances of the crime were demonstrated in the record).

VI.

¶ 50 Penalties as severe and unforgiving as those imposed here, as Justice Kennedy noted in *Harmelin,* present "a most difficult and troubling case for any judicial officer." 501 U.S. at 1008, 111 S.Ct. 2680 (Kennedy, J., concurring in part and concurring in the judgment). But "the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is properly within the province of legislatures, not courts." *Id.* at 998, 111 S.Ct. 2680 (internal quotations omitted). Moreover, subject to constitutional limits, "[w]e recognize society's strong interest in protecting children and understand and appreciate that it is the legislature's province to assess the appropriate punishment for

crimes against children." *Davis,* 206 Ariz. at 385, ¶ 37, 79 P.3d at 72.

¶ 51 In light of the legislature's intent to deter and punish those who participate in the child pornography industry, and Berger's commission of twenty separate offenses, we hold that the twenty consecutive ten-year sentences are not grossly disproportionate to his crimes. We vacate the part of the opinion of the court of appeals that addresses the Eighth Amendment issue, and we affirm the sentences.

CONCURRING: RUTH V. McGREGOR, Chief Justice and MICHAEL D. RYAN and ANDREW D. HURWITZ, Justices.

HURWITZ, Justice, concurring.

¶ 52 I fully concur in the analysis and result reached by the majority in this case. I write briefly in response to Justice Berch's eloquent concurring and dissenting opinion. As a policy matter, 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. As a judge, however, I cannot conclude under the Supreme Court precedent or even under the alternative test that Justice Berch proposes that Berger's sentences violate the United States Constitution.

A.

¶ 53 The issue in this case is whether the twenty consecutive sentences that Berger received for twenty separate crimes violate the cruel and unusual punishment clause of the Eighth Amendment.[6] In my view, proof of an Eighth Amendment violation can only be premised on (a) a conclusion that a ten-year sentence for one count of sexual exploitation of a minor through knowing possession of child pornography itself is so disproportionate to the crime as to be cruel and unusual, or (b) that even if a ten-year sentence for one count is constitutional, twenty such consecutive sentences are not.

¶ 54 As Justice Berch quite correctly suggests, and as the Supreme Court itself has admitted, the Court's "proportionality decisions have not been clear or consistent in all respects." *Harmelin v. Michigan,* 501 U.S. 957, 996, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring). 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

[6] This case does not require us to confront the question of whether the Eighth Amendment can in some circumstances be violated by consecutive sentences for crimes essentially constituting one occurrence. Thus, for example, we need not today decide whether similar sentences would be appropriate if Berger downloaded the images at one sitting, or possessed a book with twenty illegal photographs inside.

disproportionality. However, as Justice Berch candidly admits, the Court has expressly eschewed this very approach. *Id.* at 1005, 111 S.Ct. 2680.

¶ 55 But even if we were free to follow Justice Berch's suggested approach, I would not conclude that an inference of gross disproportionality can be drawn here. The initial question is whether a ten-year sentence for one count of this kind of sexual exploitation of a minor is itself unconstitutional. That the Arizona penalty is purportedly the longest in the nation does not of course, establish disproportionality. *See Rummel v. Estelle,* 445 U.S. 263, 281, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). There will always be one state with the longest penalty, and if that were enough to establish an Eighth Amendment violation, the result would be a revolving door under which the penalty for the next state in line would then be automatically unconstitutional. *See id.* at 282, 100 S.Ct. 1133.

¶ 56 Nor can I conclude that inter-jurisdictional comparisons demonstrate that the penalty Berger received for a single count is disproportionate to the penalty that could be imposed elsewhere for a single such offense. The federal sentencing guidelines in effect when Berger was sentenced recommended a sentence of fifty-seven to seventy-one months for possession of one (or more) proscribed depictions, but the governing statute allowed a sentence of up to

fifteen years for one offense.[7] As Justice Berch notes, at least nine other states allow (but do not require) a ten-year penalty, and four states permit a greater penalty. Such is not the stuff of gross disproportionality.

¶ 57 Nor does an intra-jurisdictional comparison lead to a different result. It is tempting to compare Berger's accumulated consecutive sentences to the maximum sentence for second degree murder or sexual assault. But the question, of course, is not what a defendant who commits one murder or one sexual assault faces as a potential sentence, but rather what one who commits twenty such offenses faces. It cannot be suggested that a 200-year sentence for twenty murders or twenty rapes would be disproportionate.

¶ 58 As Justice Berch suggests, her real concern is not that a defendant *can* receive a ten-year sentence for each offense, or that a court *can* impose consecutive sentences for multiple offenses, but rather that Arizona law *requires* that a court impose consecutive ten-year sentences for each offense. Yet, as Justice

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[7] This range is based on an assumed violation of 18 U.S.C. § 2252(a)(2) (2000), an assumed offense conduct level of twenty-five, U.S. Sentencing Guidelines ("USSG") § 2G2.2 (2002), and a criminal history category for a first-time offender, USSG Ch. 5, pt. A, Sentencing Table. The federal guidelines today recommend a sentence of seventy-eight to ninety-seven months for one such offense, USSG § 2G2.2 (West, Westlaw through 2006), but the governing statute allows a sentence of up to twenty years, 18 U.S.C. §§ 2252(b)(1) (West, Westlaw through 2006).

Berch correctly notes, the Supreme Court – whose Eighth Amendment interpretations bind us – has rejected the notion that mandatory flat sentences violate the Constitution because they do not allow consideration of the particular situation of the offender. *Harmelin,* 501 U.S. at 1006-07, 111 S.Ct. 2680 (Kennedy, J., concurring). Nor does Supreme Court precedent allow us to find consecutive sentences for separate crimes unconstitutional if the individual sentences for each crime are not. *See Lockyer v. Andrade,* 538 U.S. 63, 74 n. 1, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

B.

¶ 59 I thus conclude that the majority opinion faithfully applies the Supreme Court's Eighth Amendment disproportionality jurisprudence. I do so reluctantly, however. What is troublesome here – as Justice Berch points out – is that the punishment for Berger's admittedly serious offenses intuitively *seems* too long. If I were a legislator, I would be free to find such a long sentence shocking to my conscience and vote for a less draconian sentencing scheme. But the test for violation of the Constitution is not my personal conscience nor whether a sentence subjectively is bothersome to me. The Supreme Court has held that a defendant may receive a life sentence for the commission of three felonies, none of which in and of themselves could result in a long term of imprisonment. *Ewing v. California,* 538 U.S. 11, 30-31, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003). If this is the case,

I cannot conclude that consecutive sentences for separate felonies turns an otherwise legal sentence into one that violates the Constitution.

¶ 60 Benjamin Cardozo long ago noted the correct role of the judge in difficult areas such as this:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

B. Cardozo, *The Nature of the Judicial Process* 141 (1921).

¶ 61 This is the kind of case that tests the limits of Cardozo's wisdom and our discipline as judges. But unless and until the Supreme Court changes its interpretation of the Eighth Amendment, I am constrained to conclude that the legislature is empowered to require the sentences that Berger received.

BERCH, Vice Chief Justice, concurring in part and dissenting in part.

¶ 62 A mitigated sentence of 200 years for possession of twenty images of child pornography, without the possibility of pardon or early release, is extraordinarily long. While courts must defer to the legislature in setting sentencing ranges, the Supreme Court has recognized a "narrow proportionality principle" inherent in the Eighth Amendment that prohibits sentences that are "grossly disproportionate" to the crime. *Harmelin v. Michigan,* 501 U.S. 957, 996-97, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring).[8]

¶ 63 The question is how to determine whether the sentence at issue is grossly disproportionate. The Court has stated that reviewing courts must compare the "gravity of the offense" to the "harshness of the penalty." *Ewing v. California,* 538 U.S. 11, 28, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (plurality opinion). If this inquiry gives rise to an "inference" of gross disproportionality, the court must then examine the punishment for similar offenses in other jurisdictions (the inter-jurisdictional analysis) and the punishment

[8] Although substantial deference is due to legislative judgments regarding sentencing, the notion that the legislature may set any non-capital sentence without regard to proportionality has garnered only two votes. *See Harmelin,* 501 U.S. at 994, 111 S.Ct. 2680 (Scalia, J., joined by Rehnquist, C.J.); *Ewing v. California,* 538 U.S. 11, 31, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (Scalia, J., concurring), 32 (Thomas, J., concurring).

for other offenses in the forum jurisdiction (the intra-jurisdictional analysis). *Solem v. Helm,* 463 U.S. 277, 291, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). The inquiry is not supposed to be subjective, yet courts are directed not to conduct an inter- and intra-jurisdictional analysis to assist in ascertaining whether a sentence is too long unless they first find an "inference of gross disproportionality," *see Harmelin,* 501 U.S. at 1005, 111 S.Ct. 2680 (Kennedy, J., concurring), which the courts reviewing this case have not found. 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.

¶ 64 For example, in the federal system, the sentencing guidelines recommend a sentence of approximately five years (57-71 months) based on the number and type of images Berger possessed. U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 2G2.2 (Supp.2005) & § 5A (1996).[9] While the Arizona Legislature is free to

[9] This sentence is based on an offense level of 25, which both Justice Hurwitz and I agree is the appropriate level under the 2002 sentencing guidelines for one possessing multiple pornographic computer images of children under 12. *See supra*

(Continued on following page)

set its own sentencing ranges, of course, the federal sentences are set by a professional Sentencing Commission, whose opinions the federal courts have deemed entitled to "great weight" because of the Commission's expertise in matters of sentencing. *United States v. Hill,* 48 F.3d 228, 231 (7th Cir.1995); *see also Mistretta v. United States,* 488 U.S. 361, 379, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (stating that Sentencing Commission is an "expert body"). In setting sentence ranges, this congressionally established Commission examines abundant data and consults experts in each field. That this Commission recommends approximately five years as an appropriate sentence for possession of twenty images suggests that a minimum term of 200 years probably is not merely disproportionate, but grossly disproportionate to the crime.

¶ 65 Arizona's mandatory minimum 200-year sentence also exceeds that imposable in any other state. *See Harmelin,* 501 U.S. at 1005, 111 S.Ct. 2680

¶ 56 and n. 7. Two recent amendments have increased the offense level, resulting in a recommended sentence for twenty images of about nine years (97-121 months), or, if a defendant is charged with possessing more than 600 images, a range of eleven to fourteen years (135-168 months). U.S.S.G. §§ 2G2.2 & 5A. Although the federal maximum statutory sentence is, as Justice Hurwitz correctly notes, fifteen years, Berger's conduct would not warrant a maximum sentence. *See* 18 U.S.C. § 2252 (2000). Even if it did, fifteen years would be the total sentence for possession of all twenty images. While the ranges and maximum sentence have been increased to twenty years, Berger's crimes would fall under the 2002 version of the statute.

(Kennedy, J., concurring) (requiring examination of sentences imposed in other jurisdictions for similar crimes to validate an inference of gross disproportionality). It is the unique combination of long mandatory minimum sentences, coupled with the requirements that each image be charged separately and that the terms be served consecutively and fully – that is, without possibility of early release – that renders Arizona's sentences extraordinarily long. *See* A.R.S. §§ 13-3553, -604.01 (Supp.2005). Indeed, the *minimum* ten-year sentence in Arizona for possession of one image is greater than the *maximum* sentence for possession of child pornography in thirty-six states and equal to the maximum sentence in nine other states.[10] Additionally, most other states permit concurrent sentences or grouping of charges. *E.g., State v. Christensen,* 663 N.W.2d 691, 693 (S.D.2003) (imposing two one-year sentences, to be served

[10] These figures are based on possession of one image, and are based primarily on the copies of all fifty states' child pornography possession and sentencing statutes provided to the court by the parties in January and February, 2006. The states that allow maximum sentences greater than ten years for one image – Georgia, Mississippi, Tennessee, and Utah – all have minimum sentences of less than ten years. In those states, moreover, sentences may be served concurrently, they need not be served day-for-day, and probation is available. Ga.Code Ann. §§ 16-12-100(b)(8), 42-8-34(a) (West, Westlaw through 2005 Spec. Sess.); Miss.Code Ann. §§ 97-5-33(5), 97-5-35, 47-7-33(1) (West, Westlaw through 2005 5th Extraordinary Sess.); Tenn.Code Ann. §§ 39-17-1003, 40-35-111, 40-35-303(a) (West, Westlaw through 2005 Sess.); Utah Code Ann. §§ 76-5a-3(1), 76-3-203, 77-18-1 (West, Westlaw through 2005 2d Spec. Sess.).

concurrently). Only Florida appears to require each image to be a separate count, but each charge there carries a five-year term and is probation eligible.[11] Fla. Stat. Ann. §§ 827.071(5), 775.082(3)(d) (term), 948.01 (probation) (West, Westlaw through 2005 'B' Sess.). In Arkansas, Berger would have been eligible for a sentence of three to ten years, and in Connecticut, possession of twenty images requires a sentence of one to ten years. Ark.Code Ann. §§ 5-27-304(b), 5-4-401(a) (West, Westlaw through 2005 Sess.); Conn. Gen.Stat. Ann. §§ 53a-196e, -35a (West, Westlaw through 2006 Supp.).

¶ 66 While some states provide for enhanced penalties for "second or subsequent" offenses, that term is defined as later offenses not charged at the same time. *See, e.g., Miles v. State,* 51 So.2d 214, 215 (Miss.1951); *McGervey v. State,* 114 Nev. 460, 958 P.2d 1203, 1207 (1998). By that definition, Berger is a first-time offender. In most states, Berger's sentence would not exceed five years, and he would also have the possibility of probation or early release. *See, e.g.,* Cal.Penal Code § 311.11(a) (West, Westlaw through 2006 Sess.) (up to twelve months); N.M. Stat. Ann. §§ 30-6A-3(A), 31-18-15(A)(9) (West, Westlaw through 2006 Sess.) (up to eighteen months). Thus, if the Supreme Court's jurisprudence permitted the court to

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[11] Tennessee allows each image to be charged separately if there are fewer than fifty. Tenn.Code Ann. § 39-17-1003(b). In Utah, each minor depicted gives rise to a separate charge. Utah Code Ann. § 76-5a-3(3).

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.

¶ 67 Moreover, the sentence at issue is longer than that imposed in Arizona for many crimes involving serious violence and physical injury to the victim. Second degree murder, for example, like possession of child pornography, also carries a minimum sentence of ten years, *see* A.R.S. § 13-710(A) (2001), but a term imposed for a murder may be served concurrently with sentences imposed for other crimes. Similarly, the *minimum* sentence for possession of an image of child pornography is longer than the *presumptive* sentence for rape or aggravated assault. *See* A.R.S. §§ 13-1406(B) (2001) (seven years for rape), 13-1204(B), -701(C)(2) (2001) (3.5 years for aggravated assault). A presumptive sentence for possession of two images of child pornography (thirty-four years) is harsher than the sentences for second degree murder or sexual assault of a child under twelve (twenty years). *See* A.R.S. § 13-604.01(B), (D) (Supp.2005). Even a mitigated sentence for possession of five images (fifty years) amounts as a practical matter to a life sentence without parole, more serious than the sentence imposed for virtually any crime in the state. For molesting a child, one might receive the same sentence that Berger has received for possessing one

picture.[12] *See* A.R.S. § 13-604.01(D). Indeed, sexual exploitation of a minor, the offense with which Berger was charged, is the only "dangerous crime against children" that by definition does not involve contact with any children. Yet a defendant may easily accrue a very lengthy sentence. The Supreme Court has said that "[i]f more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." *Solem,* 463 U.S. at 291, 103 S.Ct. 3001. This factor as well indicates the extraordinary nature of the sentence in this case. *See id.* at 299, 103 S.Ct. 3001.[13]

¶ 68 The majority correctly observes, however, that Berger was convicted of not one, but twenty serious felonies. Op. ¶ 25. Moreover, my colleagues note, we must look at the sentences for the individual crimes, Op. ¶ 27, and defer to the legislature's requirement of mandatory sentences. Op. ¶ 32. From this, my

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[12] These facts might lead victims of violent crime to think that the legislature and justice system care less about their injuries and losses than it does about punishing those who possess pornographic images. *See United States v. Angelos,* 345 F.Supp.2d 1227, 1251 (D.Utah 2004) ("[C]rime victims expect that the penalties the court imposes will fairly reflect the harms that they have suffered."), *aff'd by* 433 F.3d 738 (10th Cir.2006).

[13] Terrorist co-conspirator Zacarias Moussaoui was recently sentenced to two life sentences in prison – the equivalent of the sentence Berger received – for Moussaoui's involvement in the terrorist acts that led to the deaths of nearly 3000 people on September 11, 2001. *United States v. Moussaoui,* Crim. No. 01-455-A (E.D.Va. May 4, 2006).

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, Op. ¶ 27, nor may we consider the mandatory flat nature of the sentences.

¶ 69 I agree that the Supreme Court has implied as much when dealing with statutes different from those now before us. *Lockyer v. Andrade,* 538 U.S. 63, 74 n. 1, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003) (consecutive sentences); *Harmelin,* 501 U.S. at 1006-07, 111 S.Ct. 2680 (Kennedy, J., concurring) (mandatory sentences). 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. Arizona's sentencing scheme requires very long, mandatory sentences that must be served consecutively and fully, with no possibility of probation, pardon, or early release. These combined features affect the real-world sentences defendants must serve, and we should not allow these unique features and the resulting sentences to escape review by focusing only on the sentence for one charge. We suggested as much in *State v. Davis,* 206 Ariz. 377, 387-88, ¶ 47, 79 P.3d 64, 74-75 (2003).

¶ 70 Arizona's sentencing scheme is unique in coupling extraordinarily long terms with mandatory stacking requirements, and in requiring that each sentence be fully served, without possibility of early

release. The compounding impact of this triple whammy should not escape scrutiny. While great deference is owed to the legislature's choice to impose stringent sentences, the constitution imposes on this court the obligation to determine whether the resulting sentence is cruel and unusual in light of the circumstances of an individual case.

¶ 71 The Supreme Court requires the court to measure the gravity of the crimes for which Berger was convicted – possession of twenty graphic images of child pornography – against the severity of the sentence imposed. *Harmelin,* 501 U.S. at 1005, 111 S.Ct. 2680 (Kennedy, J., concurring). In weighing the gravity of the offenses, the court may consider the defendant's criminal history, *see Ewing,* 538 U.S. at 29, 123 S.Ct. 1179 (plurality opinion), as well as the "harm caused or threatened to the victim or society, and the culpability of the offender." *Solem,* 463 U.S. at 292, 103 S.Ct. 3001.

¶ 72 Berger has no prior criminal record. He was convicted of possessing twenty grossly obscene images depicting young children engaged in lewd acts. He was not involved in making any of the photographs and the record contains no evidence that he purchased the items or intended to sell them. They appear to be images he downloaded from the Internet. Although purchase of such items undoubtedly drives the market for their production, it is unclear that mere possession does so.

¶ 73 While the legislature may choose to punish severely those who support the child pornography industry because of pornography's extremely deleterious effect on those degraded and harmed in its making, due process notions of individualized and appropriate sentencing require consideration of the fact that Berger engaged in no force or violence, made no threats of force or violence, and did not physically injure anyone. *See Burns v. United States,* 287 U.S. 216, 220, 53 S.Ct. 154, 77 L.Ed. 266 (1932) (setting forth due process requirement of individualized sentencing). Indeed, there is no evidence that Berger has ever touched any child improperly. That absence of direct violence affects the assessment of society's interest in punishing his acts so severely. *See Rummel v. Estelle,* 445 U.S. 263, 275, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980).

¶ 74 Although the Supreme Court has confirmed that a limited proportionality principle inheres in the Eighth Amendment to prevent sentences that are "grossly disproportionate" to the crime committed, *Ewing,* 538 U.S. at 23, 123 S.Ct. 1179 (plurality opinion), that Court has only twice struck a sentence as being so grossly disproportionate to the crime as to violate the Eighth Amendment. *See Solem,* 463 U.S. at 303, 103 S.Ct. 3001; *Weems v. United States,* 217 U.S. 349, 382, 30 S.Ct. 544, 54 L.Ed. 793 (1910). In *Solem,* the Court held that imposing a life sentence for passing an "insufficient funds" check violated the Eighth Amendment's requirement that sentences not be grossly disproportionate to the crime committed.

463 U.S. at 303, 103 S.Ct. 3001. In the case before us, Berger was sentenced to 200 years – more than two and one-half lifetimes, from birth to death – for possessing twenty lewd and obscene photographs.

¶ 75 While one can rationalize that the defendant here was convicted of twenty felonies rather than one, other considerations mitigate the importance of that factor. Unlike other crimes, which tend to occur in relative isolation, those who possess pornography tend to possess more than one image. Because possession of each image constitutes a separate crime and the minimum sentence for each crime is ten years, the sentences quickly mount up. Moreover, in this case, Berger had no chance to rehabilitate between convictions because he was convicted on all twenty counts on one occasion.

¶ 76 I do not condone Berger's crimes. Child pornography is a serious offense. *See* 1978 Ariz. Sess. Laws, ch. 200, § 2; *see also State v. Taylor,* 160 Ariz. 415, 422, 773 P.2d 974, 981 (1989). I concur in the majority's analysis of the crime itself and of the legislature's right to impose severe penalties for it. *See* Op. ¶¶ 18-23. I further agree that Berger's crimes, unlike the crimes at issue in *Davis,* were precisely the type of criminal acts the legislature intended to punish. 206 Ariz. at 385, ¶ 37, 79 P.3d at 72. Berger was not "swept up" in an overly broad categorization, as was the defendant in *Davis. Id.*

¶ 77 Nonetheless, sentences must not only reflect the seriousness of the offense and deter the defendant

and others from committing future crimes, they should also promote respect for law. We are not asked to determine in this case whether a sentence of ten years would ever be appropriate for possession of a pornographic image. It might be. We are asked instead to determine whether in this case, 200 years is just punishment for a defendant who possessed child pornography, but directly harmed no one. An objective examination of the 200-year sentence reveals that it far exceeds the sentence imposed for similar crimes in any jurisdiction and exceeds the penalties regularly imposed in Arizona for crimes that result in serious bodily injury or even death to victims. The sentence provides no opportunity for rehabilitation and provides no second chance. Instead, it imposes on the taxpayers the burden of supporting the defendant for the rest of his life. Such a sentence seems incompatible with "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958).

¶ 78 The foregoing analysis would support an inference of gross disproportionality, if the court had drawn such an inference. But it didn't. Given that result, it is difficult to envision when the court would ever find a term of years to be disproportionate to the gravity of the crime and the harm to the public.[14]

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[14] The governor generally has the power to grant pardons or commute sentences. A.R.S. § 31-443 (2002). In this case, however, the statute setting forth the sentence purports to preclude that remedy. A.R.S. § 13-604.01(G) (providing that defendant is

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¶ 79 In conclusion, I concur in the court's statements of the rules emanating from the *Harmelin* line of Supreme Court cases and its interpretation of *Davis*. I also agree that exploitation of children is a serious crime and that the legislature has responsibility for defining crimes and setting the sentencing ranges for those crimes. I disagree only in that I 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.

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not subject to pardon or early release). Moreover, it would be a brave politician who ventured to reduce the sentence of a sex offender. For those reasons, among others, courts have a role, although a limited one, in determining the constitutionality of sentences of terms of years.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MORTON BERGER, Petitioner-Appellant, v. THOMAS C HORNE, The Attorney General of the State of Arizona and CHARLES L. RYAN, Director, Arizona Department of Corrections, Respondents-Appellees.	No. 11-17316 D.C. No. 2:09-cv-02689-DGC U.S. District Court for Arizona, Phoenix **MANDATE** (Filed Jun. 26, 2013)

The judgment of this Court, entered May 02, 2013, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:
Molly C. Dwyer
Clerk of Court

Margoth Turcios
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MORTON BERGER, Petitioner-Appellant, v. THOMAS C HORNE, The Attorney General of the State of Arizona and CHARLES L. RYAN, Director, Arizona Department of Corrections, Respondents-Appellees.	No. 11-17316 D.C. No. 2:09-cv-02689-DGC District of Arizona, Phoenix ORDER (Filed Jun. 17, 2013)

Before: SCHROEDER, THOMAS, and SILVERMAN, Circuit Judges.

Judges Thomas and Silverman vote to reject the petition for rehearing en banc, and Judge Schroeder so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing en banc is rejected.