No. 22-

IN THE
Supreme Court of the United States

RYAN GALAL VAN DYCK, PETITIONER,

V.

STATE OF ARIZONA, RESPONDENT.

On Petition For A Writ Of Certiorari To
The Arizona Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Arizona's criminalization of possession of child pornography makes each image possessed as the unit of prosecution, and the sentence for each offense is ten to twenty-four years with no possibility of early release. When the child depicted in the image is under age 15, Arizona punishes the offense as a "dangerous crime against children," which requires the sentence for the offense to be run consecutively to all other sentences. In combination, this means that any person who possesses more than a handful of images will receive a mandatory cumulative sentence that far exceeds his life span, even though the person never took part in the abuse of any child.

The question presented is:

Does a mandatory *de facto* life sentence for mere possession of child pornography images, when the person has never directly abused or attempted to abuse a child, violate the Eighth Amendment's prohibition on cruel and unusual punishment?

PARTIES TO THE PROCEEDING

The petitioner in this Court is Ryan Galal Van Dyck. He was the defendant in the trial court, and the appellant in the Arizona Court of Appeals and Arizona Supreme Court.

RELATED PROCEEDINGS

State v. Van Dyck, No. CR-21-0330-PR (Ariz. filed Aug. 25, 2022).

State v. Van Dyck, No. 2 CA-CR 2019-0156 (Ariz. Ct. App. filed Sept. 2, 2021).

State v. Van Dyck, No. CR-20143891-001 (Pima Co. Super. Ct. filed June 3, 2019).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ryan Galal Van Dyck respectfully petitions for a writ of certiorari to review the judgment of the Arizona Court of Appeals in this case.

OPINIONS BELOW

The September 2, 2021, decision of the Arizona Court of Appeals is unreported and is reproduced as Petitioner's Appendix A. Pet. App. 1a-10a. The August 25, 2022, order of the Supreme Court of Arizona denying discretionary review is also unreported and reproduced as Petitioner's Appendix B. Id. at 11a.

JURISDICTION

The Supreme Court of Arizona denied review of Van Dyck's petition on August 25, 2022. On November 2, 2022, Justice Kagan granted an extension of time to file this Petition to and including January 20, 2023.

(No. 22A372.) This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE

Ryan Van Dyck was arrested for possessing child pornography and subsequently charged with twenty counts of sexual exploitation of a minor under Ariz. Rev. Stat. §13-3553(A)(2).[1] Van Dyck was not charged with creating the images or with abusing or attempting to abuse children; instead, the charges were based solely on the possession of distinct images on his computer and in his email account. Although the basis for his convictions was mere possession of child pornography and not its creation, the minimum cumulative sentence that the trial court was authorized to impose was 200 years. The trial judge imposed the minimum terms totaling 200 years.

Van Dyck appealed to the Arizona Court of Appeals and argued, among other things, that 200 years for the crime of simple possession of 20 images of child pornography violated the Eighth Amendment's ban on cruel and unusual punishment.

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[1] Although they are punished identically, A.R.S. §13-3553(A) criminalizes two separate offenses; subsection (A)(1) addresses those who create child pornography and (A)(2) those who possess it. *State v. Paredes-Solano*, 223 P.3d 900, 904-05 (Ariz. Ct. App. 2009).

In an unpublished memorandum decision, that court followed binding precedent of the Arizona Supreme Court, *State v. Berger*, 134 P.3d 378 (Ariz. 2006), which also involved a 200-year sentence for 20 child-pornography images. Van Dyck then petitioned the Arizona Supreme Court to review his case; that court denied review, with Justice Bolick voting to grant review.

REASONS FOR GRANTING THE WRIT

Ryan Van Dyck, and many similarly situated Arizonans, are sentenced to die in prison for the mere possession of child pornography. He did not receive that sentence because a judge believed he deserved it. Instead, he received it because the Arizona Legislature has required such draconian sentences be meted out. Arizona law provides no opportunity for judges to depart downward from mandatory sentences. *Cf. United States v. Booker*, 543 U.S. 220 (2005) (sentencing guidelines advisory and not mandatory).

This Court has never addressed "whether Eighth Amendment sentence proportionality must be analyzed on a cumulative or individual basis when a defendant is sentenced on multiple offenses." *Patsalis v. Shinn*, 47 F.4th 1092, 1101 (9th Cir. 2022). This case presents the Court with an opportunity to explain the extent to which the Eighth Amendment regulates non-capital consecutive sentences. State and federal courts are intractably split on this question. Moreover, Arizona punishes possession of child pornography more harshly than any other jurisdiction by an order of magnitude, and thus the sentencing scheme at issue here is an ideal vehicle for the question presented.

The "Eighth Amendment contains a narrow proportionality principle that does not require strict proportionality between crime and sentence but rather forbids only extreme sentences that are grossly disproportionate to the crime." *Graham v. Florida*, 560 U.S. 48, 59-60 (2010) (discussing *Harmelin v. Michigan*, 501 U.S. 957, 997, 1000-01 (1991) (opinion of Kennedy, J.)).[2] In order to determine whether a "sentence for a term of years is grossly disproportionate for a particular defendant's crime," courts engage in a two-step inquiry. *Id.* First, the court compares "the gravity of the offense and the severity of the sentence." *Id.* (citing *Harmelin*, 501 U.S. at 1005 (opinion of Kennedy, J.)). If this threshold comparison does not lead to an inference of gross disproportionality, then the sentence is not cruel and unusual. *See Ewing v. California*, 538 U.S. 11, 30 (2003) (opinion of O'Connor, J.) (citing *Harmelin*, 501 U.S. at 1005 (opinion of Kennedy, J.)).[3]

Second, in "the rare case in which this threshold comparison leads to an inference of gross proportionality the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Id.* (cleaned up) (citing *Harmelin*, 501 U.S. at 1005 (opinion of Kennedy, J.)). "If this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the

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[2] Justice Kennedy's opinion in *Harmelin* sets forth the holding of the Court under the rule of *Marks v. United States*, 430 U.S. 188, 193 (1977). *See Ewing v. California*, 538 U.S. 11, 23-24 (2003); *Berger*, 134 P.3d at 381 n.1.

[3] Justice O'Connor's opinion in *Ewing* sets forth the holding of the Court under the *Marks* rule. *Berger*, 134 P.3d at 381 n.1.

sentence is cruel and unusual." *Id.* (citing *Harmelin*, 501 U.S. at 1005 (opinion of Kennedy, J.)).

It is the substance, not the form, of the defendant's sentences that renders them unjustifiable for purposes of the Eighth Amendment. "[I]n passing upon constitutional questions the court has regard to substance and not to mere matters of form." *Near v. Minnesota*, 283 U.S. 697, 708 (1931). In substance, Van Dyck's cumulative sentences for his offense means that he will die in prison. The Court should hold that the cumulative effect of multiple sentences run consecutively must be considered when determining whether the aggregate sentence is grossly disproportionate.

1. There is a split of authority on whether the Eighth Amendment's prohibition on disproportionate punishments applies to aggregate sentences.

In *Lockyer v. Andrade*, 538 U.S. 63 (2003), this Court held that it had not clearly established in any prior case that courts must consider the effect of consecutive sentences when determining whether the aggregate term of incarceration is grossly disproportionate. Since the case came before this Court through habeas corpus, however, this Court did not review the legal issue de novo but rather through the deferential lens required by the Antiterrorism and Effective Death Penalty Act (AEDPA). Some courts have recognized this fact. *E.g.*, *Crosby v. State*, 824 A.2d 894, 910 n.83 (Del. 2003); *State v. Proctor*, 280 P.3d 839, 854 (Kan. App. 2012); *Clark v. State*, 981 A.2d 710, 725 (Md. App. 2009).

Throughout the nation, state courts of last resort are intractably split on whether the Eighth Amendment disproportionality analysis requires, or even allows, consideration of the cumulative effect of consecutive sentences. Many courts have explained their reasoning in the context of juvenile sentencing following this Court's decisions in *Graham*, *Miller v. Alabama*, 567 U.S. 460 (2012), and *Montgomery v. Louisiana*, 577 U.S. 190 (2016). Although Van Dyck was not a juvenile, these cases are helpful to show the various approaches to the Eighth Amendment; if a state refuses to extend constitutional protections to juveniles, adults could not expect greater protection. Likewise, other states that extend the benefit of the Eighth Amendment to juveniles use reasoning that is equally applicable to adults.

Some states view the Eighth Amendment's proportionality principle as applying only to single offenses, with no consideration for the length of the aggregate sentence. *See State v. August*, 589 N.W.2d 740, 744 (Iowa 1999); *State v. Ali*, 895 N.W.2d 237, 244-45 (Minn. 2017); *State v. Becker*, 936 N.W.2d 505 (Neb. 2019); *State v. Buchhold*, 727 N.W.2d 816, 823-24 (S.D. 2007); *Daniel v. State*, 78 P.3d 205, 215-16 (Wyo. 2003). Other states view the Eighth Amendment's prohibition on grossly disproportionate sentences as extending to the cumulative effect of consecutive sentences. *Carter v. State*, 192 A.3d 695, 734 (Md. 2018); *State v. Zuber*, 152 A.3d 197, 211-12 (N.J. 2017); *Ira v. Janecka*, 419 P.3d 161, 166 (N.M. 2018); *State v. Conner*, 873 S.E.2d 339, 341 (N.C. 2022). Finally, some states rely on their state constitution as providing greater protection against excessive punishment. *State v. Stanislaw*, 65 A.3d 1242, 1250 & n.5 (Me. 2013) (citing ten states that require proportionality either explicitly or through

interpretation of state constitution by case law); *Commonwealth v. Perez*, 80 N.E.3d 967, 976 (Mass. 2017) (juvenile defendant sentenced to 27 years for consecutive offenses entitled to *Miller* hearing under state constitution).

This substantial split of authority is indicative of the importance of the issue. Moreover, the stakes at issue – death in prison – warrant merits review. In light of the substantial split and large number of jurisdictions that have weighed in on the matter, waiting for further development is unnecessary and this Court should grant review.

2. The aggregate 200-year sentence imposed in this case amounts to cruel and unusual punishment.

A. For over a century, this Court has considered all aspects of a term-of-years sentence, including the aggregate length of the sentence, when applying the gross disproportionality principle.

This Court's "cases addressing the proportionality of" noncapital sentences consider "all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive." *Graham*, 560 U.S. at 59. A survey of the Court's principal cases in this area, beginning in 1910, confirms that "all of the circumstances of the case" under the Eighth Amendment proportionality inquiry encompasses the aggregate length of the sentence imposed for multiple crimes.

The first case, *Weems v. United States*, 217 U.S. 349 (1910), involved a defendant who was convicted of

falsifying an official public document, *id.* at 357, 362-63, and sentenced to serve 15 years in prison under *cadena temporal*, "a chain at the ankle and wrist of the offender, hard and painful labor," *id.* at 366. Even after released from imprisonment, he suffered a "perpetual limitation of his liberty" under the applicable law, which required perpetual surveillance by the government. *Id.* Because the applicable law required a sentence not only of imprisonment with hard labor but also of perpetual surveillance after release from prison, the Court held that the sentence violated the Eighth Amendment. *Id.* at 382.

In *Robinson v. California*, 370 U.S. 660 (1962), the Court held that a mandatory minimum sentence of 90 days in jail for the crime of being addicted to narcotics, without any proof of use of those narcotics, violated the Eighth Amendment. *Id.* at 660 n.1, 666. The Court conceded that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." *Id.* at 667. But, the Court emphasized, "the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* The Court thus emphasized that the Eighth Amendment's proportionality inquiry must take into account the full range of conduct for which the punishment is imposed.

Next, in *Rummel v. Estelle*, 445 U.S. 263 (1980), the Court held that a mandatory life sentence imposed upon conviction for a third felony did not violate the Eighth Amendment. Pointing to the reasoning in *Weems*, the Court said that, under the Eighth Amendment, the proportionality of a noncapital sentence depends on the "peculiar facts" of the case: in *Weems*, "the triviality of the charged offense, the

impressive length of the minimum term of imprisonment, and the extraordinary nature of the 'accessories' included within the punishment." *Id.* at 274. So too in *Rummel* did the Court point to "peculiar facts" relating to the life sentence imposed there. The sentence imposed was not "merely for obtaining $120.75 by false pretenses." *Id.* at 276. The sentence was also imposed upon a person who "already had committed and been imprisoned for two other felonies." *Id.* Emphasizing the procedural requirements for imposing the mandatory life sentence in that case, the Court explained that "a recidivist must twice demonstrate that conviction and actual imprisonment do not deter him from returning to crime once he is released." *Id.* at 278. And finally, the life sentence still allowed the defendant "to become eligible for parole in as little as 12 years." *Id.* at 280. That possibility meant that a "proper assessment" of the punishment "could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life." *Id.* at 280-81. In light of all of these features of the sentence, the Court held that it was not grossly disproportionate to the crime. *Id.* at 281-85.

The Court next built on the holding in *Rummel* to expressly hold that an aggregate sentence of 40 years was not grossly disproportionate to the crime of possession and distribution of less than nine ounces of marijuana. In *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam), the defendant had been sentenced to two consecutive 20-year terms of imprisonment, and he asserted that his "40-year sentence was so grossly disproportionate to the crime" that it violated the Eighth Amendment. *Id.* at 371; *see also id.* at 375 (describing the challenge as attacking "a prison term of 40 years") (Powell, J., concurring). State law

authorized sentences of 5 to 40 years for each offense. *Id.* Nevertheless, the Court held that *Rummel* controlled. "*Rummel* stands for the proposition that federal courts should be reluctant to review legislatively mandated terms of imprisonment, and that successful challenges to the proportionality of particular sentences should be exceedingly rare." *Id.* at 274 (quoting *Rummel*, 445 U.S. at 272, 274). The Court held that the aggregate 40-year sentence did not violate the Eighth Amendment. *Id.* at 275.

The following year, the Court held in *Solem v. Helm*, 463 U.S. 277 (1983), that a sentence of life without parole for a person's seventh conviction for a nonviolent felony violated the Eighth Amendment. It pointed to three factors that should guide the proportionality framework—the "gravity of the offense and the harshness of the penalty," what sentences are "imposed on other criminals in the same jurisdiction," and what sentences are "imposed for the commission of the same crime in other jurisdictions." *Id.* at 290-92.

Although the prisoner in *Helm* had been convicted of uttering a "no account" check as a habitual offender, he also had been sentenced to life without parole for those offenses. *Id.* at 296-97. The Court observed that his sentence was as harsh, if not harsher, than that imposed on "criminals who have committed far more serious crimes," and had been punished "more severely than he would have been in any other state." *Id.* at 299, 300. All of these features of the sentence imposed led the Court to conclude that it violated the Eighth Amendment. *Id.* at 303.

Eight years after *Helm*, the Court considered whether a mandatory sentence of life without parole,

imposed for a first-time offender convicted of possessing 650 grams or more of cocaine with intent to distribute, violated the Eighth Amendment. In *Harmelin*, Justice Kennedy wrote in his precedential opinion that the neither the "severe length" nor the "mandatory operation" of the sentence imposed in that case gave rise to an inference of gross disproportionality, and so the inter- and intrajurisdictional comparisons undertaken in *Helm* were not appropriate. *Id.* at 1001-08. Although the constitutional challenge in *Harmelin* did not prevail, the Court reiterated that the Eighth Amendment proportionality inquiry looks at all aspects of the sentence imposed.

Finally, in two decisions issued on the same day in 2003, the Court considered whether two sentences imposed under California's three-strikes law violated the Eighth Amendment. In *Ewing*, Justice O'Connor wrote in her precedential opinion that a sentence of 25 years to life in prison for a conviction of felony grand theft, where the defendant had two prior convictions for "violent" or "serious" felonies, was not grossly disproportionate and thus did not violate the Eighth Amendment. 538 U.S. at 30. And in *Lockyer*, when the Court considered the constitutionality of two consecutive 25-years-to-life terms imposed under the same California three-strikes law, *see* 538 U.S. at 70 (characterizing the prisoner's Eighth Amendment challenge), both the majority and dissenting opinions repeatedly described the challenge as encompassing the consecutive nature of the two sentences. *Id.* at 66, 77; *id.* at 79 (Breyer, J., dissenting).

In sum, for over a century the Eighth Amendment's proportionality requirement for noncapital sentences has taken into account all

aspects of the sentence imposed, including the consecutive nature of those sentences. A century after *Weems*, the Court characterized all such challenges as encompassing "all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive." *Graham*, 560 U.S. at 59.

B. The Arizona Supreme Court's rule in *State v. Berger* incorrectly applied this Court's Eighth Amendment precedent.

Despite these cases directing courts to consider all aspects of the sentence when reviewing a term-of-years sentence for Eighth Amendment proportionality, many courts have reached a contrary conclusion. The Arizona Supreme Court reasoned that "Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence." *Berger*, 134 P.3d at 384. The court in *Berger* quoted a Second Circuit decision, *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988), as authority for that proposition. *Aiello*, in turn, relied on this Court's opinion in *O'Neil v. Vermont*, 144 U.S. 323 (1892). *O'Neil*, however, was not decided on Eighth Amendment grounds.[4]

The defendant in *O'Neil* had been convicted of 307 counts of selling intoxicating liquors and sentenced to pay a fine of $20 for each count plus costs, or imprisonment for 19,914 days, earning $1 toward the fine for every 3 days of imprisonment. 144 U.S. at 330-31. The Vermont Supreme Court affirmed the sentence, holding that the "mere fact that cumulative

[4] The Supreme Courts of Nebraska and South Dakota have similarly relied on *Aiello* and *O'Neil*. *Becker*, 936 N.W.2d at 513-14; *Buchhold*, 727 N.W. at 823-24.

punishments may be imposed for distinct offence in the same prosecution is not material upon this question" whether the total sentence amounted to unconstitutional cruel and unusual punishment. *Id.* at 31 (quoting *State v. Four Jugs of Intoxicating Liquor*, 2 A. 586, 593 (Vt. 1886). The defendant then sought review in this Court, but the Court dismissed the petition for want of a federal question: "[A]s a Federal question, it has always been ruled that the 8th Amendment to the Constitution of the United States does not apply to the States." *Id.* at 332 (citing *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475 (1866)). Thus *O'Neil* does not support—and in fact cannot support—the proposition that an aggregate sentence cannot violate the Eighth Amendment. Some states recognize this point, *see Ira*, 419 P.3d at 166, while others do not, *see Ali*, 895 N.W.2d at 245.

In some cases, the Arizona Supreme Court does consider the aggregate sentence when deciding whether it gives rise to an inference of gross disproportionality. In *State v. Davis*, 79 P.3d 64 (Ariz. 2003), the court considered "whether sentencing a twenty-year-old defendant to a mandatory minimum sentence of fifty-two years without the possibility of parole for having voluntary sex with two post-pubescent teenage girls is so grossly disproportionate to the crime as to violate the Eighth Amendment's prohibition against cruel and unusual punishment." *Id.* at 66. The 52-year aggregate sentence in that case consisted of four consecutive terms of 13 years each. *See id.* at 75. The court said that while it "normally will not consider the imposition of consecutive sentences in a proportionality inquiry," there were situations in which it would "depart[] from that general rule." *Id.* at 74. In holding the aggregate sentence to violate the Eighth Amendment, the court

in *Davis* stressed its "duty to examine a sentence claimed to be cruel and unusual in light of the specific facts and circumstances under which it was imposed." *Id.* at 75. Those facts and circumstances, the court said, included the fact that the "sentences are mandatorily lengthy, flat, and consecutive." *Id.*

Under the Arizona Supreme Court's view of the Eighth Amendment, there is an exception to the general rule against considering sentences in the aggregate for statutory rape cases, but not for child pornography cases. In *Berger*, the court said that the "general rule, rather than the exception recognized in *Davis*, applies" to mandatory, consecutive sentences imposed for child pornography offenses in Arizona. 134 P.3d at 384 n.3. This was so because "knowing possession of visual depictions of sexual conduct involving minors" was at the "core, not the periphery," of the statute of conviction, and those who possess child pornography are not "merely 'caught up' in a statute's broad sweep." *Id.* at 386 (paraphrasing *Davis*, 79 P.3d at 72). "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." *Id.* According to the *Berger* court, only those "specific facts and circumstances" that "go to the defendant's degree of culpability for the offense," can weigh in favor of considering the aggregate sentence imposed to be grossly disproportionate in the manner that the court in *Davis* did. 134 P.3d at 387.

C. The 200-year aggregate sentence imposed here for the simple possession of 20 images of child pornography raises an inference of gross disproportionality.

To determine whether a sentence supports an inference of gross disproportionality, the court must consider "the gravity of the offense compared to the harshness of the penalty." *Ewing*, 538 U.S. at 28 (opinion of O'Connor, J.). For purposes of this inquiry, Van Dyck does not question the harm caused by the crime of possession of child pornography. "The demand for child pornography harms children in part because it drives production, which involves child abuse. The harms caused by child pornography, however, are still more extensive because child pornography is a permanent record of the depicted child's abuse, and the harm to the child is exacerbated by its circulation." *Paroline v. United States*, 572 U.S. 434, 439-40 (2014) (quoting *New York v. Ferber*, 458 U.S. 747, 759 (1982)).

But Van Dyck was convicted of mere possession of the images. Presumably, then, he was a mere "anonymous possessor of images in wide circulation on the Internet," and so it "cannot be shown that" the depicted children's trauma and other harms "would have been any different but for" his offense. *Id.* at 450-51. Treating Van Dyck, one of "thousands of independent actors" in the exchange and viewing of these illicit images, as responsible for the entire harm caused to the children depicted in those images could be "excessive and disproportionate" under related Eighth Amendment metrics. *Paroline*, 572 U.S. at 456. Van Dyck's role in causing the harm to the depicted children, mere possession of 20 images of child pornography, is relatively small when taking

into account the total harms caused by the trade in the same images that he possessed, which may involve thousands of people scattered throughout the world. *See id.* at 458-59.

Moreover, it is generally understood that those who possess child pornography tend to collect images rather than dispose of them. *See* U.S. Sentencing Commission, *2012 Report to the Congress: Federal Child Pornography Offenses* 141 (Dec. 2012), at https://bit.ly/34LTx6U (in fiscal year ending September 30, 2010, nearly 70% of federal child-pornography defendants received maximum upward adjustment under U.S.S.G. §2G2.2(b)(7)(D) because their offenses involved 600 or more "images" of child pornography).[5] In her *Berger* partial dissent, Justice Berch explained the flaw in considering possession of twenty images of child pornography as twenty separate crimes for Eighth Amendment purposes:

> 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.

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[5] The Guidelines treat each "video, video-clip, movie, or similar visual depiction" as equivalent to 75 still images. U.S.S.G. §2G2.2 application note 6(B)(ii).

Berger, 134 P.3d at 390-91 (Berch, J., dissenting in part).

When it comes to the harshness of the penalty, there can be no doubt that it is extremely harsh. For one thing, Arizona's child pornography sentences are meant to be so. *See Berger*, 134 P.3d at 379 ("Arizona severely punishes the distribution or possession of child pornography."). These facts raise an inference of gross disproportionality. Possession of 20 images of child pornography, without evidence of production, does not justify a mandatory, centuries-long sentence.

D. Intra- and interjurisdictional comparison confirms that the 200-year sentence imposed here violates the Eighth Amendment.

Once an inference of gross disproportionality is raised, then the court engages in an intra- and interjurisdictional comparison in order to "validate an initial judgment that a sentence is grossly disproportionate to a crime." *Harmelin*, 501 U.S. at 1005 (opinion of Kennedy, J.). The intrajurisdictional comparison looks to whether, within the sentencing jurisdiction, "more serious crimes are subject to the same penalty, or to less serious penalties," such that the punishment imposed here "may be excessive." *Solem*, 463 U.S. at 291. The interjurisdictional comparison focuses on "the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 291-92. Here, both of these comparisons confirm that Van Dyck's 200-year sentence for simply possessing 20 images of child pornography is grossly disproportionate, and thus violates the Eighth Amendment.

The Eighth Amendment proportionality rules draw "a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even including child rape, on the other." *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008). But Arizona flouts this distinction when it comes to child-pornography offenses. Second-degree murder of a child under 12, for instance, carries a sentencing range of 13 years to life, with a presumptive sentence of 20 years.[6] *See* Ariz. Rev. Stat. §13-705(B) (2009). Sexual assault of a child under 12 likewise carries a sentencing range of 13 years to life, with a presumptive sentence of 20 years. *See id.*, §13-705(C). Sex trafficking of a child under the age of 15 likewise carries a sentencing range of 13 years to life, with a presumptive sentence of 20 years. *See id.*, §13-705(C). All of these crimes entail physical harm to a child, and yet are punished far less harshly than with a mandatory, centuries-long sentence. *See id.*, §13-705(M) (concurrent sentences allowed "if the offense involved only one victim"). Arizona simply does not punish crimes that involve more serious harms to children as harshly as it punishes possession of 20 images of child pornography that depict children under the age of 15. The "most severe sanction available for a nonhomicide offense," *Graham*, 560 U.S. at 92 (Roberts, C.J., concurring), is grossly disproportionate to the offense here.

An interjurisdictional comparison of the sentences imposed for simple possession of 20 images of child pornography reveals that Arizona's mandatory

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[6] In Arizona, the presumptive sentence is the maximum sentence available without proof of any aggravating factors. *State v. Brown*, 99 P.3d 15, 18 (Ariz. 2004) (applying *Blakely v Washington*, 542 U.S. 296 (2004)).

minimum sentence of 200 years is by far the harshest in the nation. The appendix lists the sentences available in each state and under federal law for Van Dyck's offenses. Fifteen states and the federal government avoid the possibility of such a harsh sentence by defining the unit of prosecution to be the act of possession rather than each image. *See, e.g.*, *United States v. Chilaca*, 909 F.3d 289, 295 (9th Cir. 2018); *People v. Hertzig*, 67 Cal. Rptr. 3d 312, 315-16 (App. 2007); *Commonwealth v. Rollins*, 18 N.E.3d 670, 675-77 (Mass. 2014). The appellate courts in six states have not specified the unit of prosecution under their respective child-pornography statutes. And of those 29 states that set the unit of prosecution at each image, all but 3 permit (but do not require) consecutive sentencing, or they cap the length of the aggregate sentence at some upper limit that is less than life in prison. *See, e.g.*, *Wesson v. State*, -- So.3d --, 2020 WL 7382047, at *15-*16 (Ala. Crim. App. 2020) (consecutive sentences must be partly suspended under state sentencing law); *Stephens v. State*, 305 So.3d 687, 691 (Fla. App. 2020) (trial court imposed 150-year aggregate sentence, but defendant was eligible for aggregate sentence of less than 10 years); *Helton v. Commonwealth*, 559 S.W.3d 128, 141-42 (Ky. 2020) (20-year cap); *State v. Whited*, 506 S.W.3d 416, 424 (Tenn. 2016) (consecutive sentences not required).

This leaves three jurisdictions in which consecutive sentences are potentially required: Alaska, Arkansas, and Arizona. But in Alaska only "some additional time" must be consecutive, and that can be as little as one day. *Williams v. State*, 418 P.3d 870, 882 (Alaska Ct. App. 2018). And under Arkansas law, for a first-time offender the sentencing range for possession of one image of child pornography is 3-10

years. *See* Ark. Code §5-27-602(a) (possession of child pornography is a Class C felony); Ark. Code §5-4-401(a)(4) (sentencing range for a Class C felony is 3-10 years). Even if Arkansas requires consecutive sentencing for possession of multiple images of child pornography, *but see Rea v. State*, 474 S.W.3d 493, 495 (Ark. 2015) (noting that "some of the counts" ran consecutively and "others" concurrently), the mandatory minimum sentence in Arkansas for Van Dyck's offense is 60 years, not 200 years. Arizona's mandatory minimum sentence is over three times longer. Thus Van Dyck was treated more harshly in Arizona than he would have been in any other state.

Without discounting the harms that child pornography possession offenses cause, the 200-year mandatory minimum sentence imposed in this case is so utterly disproportionate to the gravity of those harms that it violates the Eighth Amendment.

3. This case presents an optimal opportunity to address the merits of the question presented.

This case is an excellent vehicle for addressing the question presented because Arizona's sentencing scheme for possession of child pornography is not only uniquely draconian nationwide but it also affects all Arizona defendants who take their cases to trial.

In a recent habeas corpus case, the Ninth Circuit noted its inability to grant relief under the strictures of AEDPA because this Court has never addressed the issue. *Meyer v. Att'y Gen.*, No. 21-15374, 2022 WL 4963631 (9th Cir. 2022). Two of the three judges separately concurred and wrote:

> But if a case like Meyer's were to come before the Supreme Court on direct review, I would hope

> that the Court would consider it one of the exceedingly rare non-capital sentences that violate the Eighth Amendment. Because the Arizona Supreme Court has already upheld a similar sentence in a precedential opinion, *State v. Berger*, 134 P.3d 378 (Ariz. 2006), and because our court will nearly always review such cases under AEDPA deference, the only court that is likely to be in a position to hold that a sentence like Meyer's is unconstitutional is the United States Supreme Court. I hope that future defendants sentenced under this framework will file petitions for certiorari to the Supreme Court on direct review, giving the Court the opportunity to evaluate the constitutionality of their sentences de novo.

Id. (Friedland, J., concurring) (citations omitted). Although the concurrence also "encourage[d] the Arizona Legislature to reconsider the sentencing laws that dictated Meyer's sentence," the state legislature has explicitly refused to do so. When one state legislator proposed the precise reform suggested by the Ninth Circuit, the chairman of the state senate's judiciary committee announced to the press his refusal to allow any such bills to get a hearing and claimed that the sponsoring legislator "seems to have a warm and fuzzy spot for sex offenders."[7] Van Dyck's case thus presents a compelling opportunity to address whether the Eighth Amendment permits a sentencing judge to consider the effect of consecutive sentences when determining gross disproportionality.

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[7] Howard Fischer, "Lawmakers Oppose Relaxing of Prison Sentences," *East Valley Tribune* (Nov. 17, 2010), available at https://www.eastvalleytribune.com/arizona/politics/article_9373b88e-f2a6-11df-b1ee-001cc4c03286.html.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RYAN GALAL VAN DYCK,
Appellant.

No. 2 CA-CR 2019-0156
Filed September 2, 2021

Appeal from the Superior Court in Pima County
No. CR20143891001
The Honorable Javier Chon-Lopez, Judge
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Karen Moody, Assistant Attorney General, Tucson
Counsel for Appellee

The Moss Law Firm
By Vanessa C. Moss, Tucson

and

Law Office of Emily Danies
By Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

E P P I C H, Presiding Judge:

¶1 Ryan Van Dyck appeals from his convictions and sentences for twenty counts of sexual exploitation of a minor under fifteen. He contends the trial court erred in denying his motions to suppress evidence because (1) officers, without a warrant, opened an image attached to an email forwarded to them; (2) officers obtained his subscriber information without a warrant; and (3) the warrant used to search his home was based on stale probable cause, obtained with false information, and executed past the permissible statutory period. He also contends that his twenty consecutive ten-year prison terms totaling 200 years' imprisonment violate his constitutional right to be free from cruel and unusual punishment. For the following reasons, we affirm Van Dyck's convictions and sentences.

Factual and Procedural Background

¶2 "In reviewing a trial court's decision on a motion to suppress, we view the facts in the light most favorable to upholding the trial court's ruling and consider only the evidence presented at the suppression hearing." *State v. Fristoe*, 251 Ariz. 255, ¶ 2 (App. 2021) (quoting *State v. Teagle*, 217 Ariz. 17, ¶ 2 (App. 2007)). In March 2014, AOL Inc. reported to the National Center for Missing and Exploited Children (NCMEC) that it had discovered an email with the subject line "Re: trade" with an image attached that "appear[ed] to contain child pornography." After determining the general location of the IP address, NCMEC subsequently forwarded the information to the Arizona Internet Crimes Against Children's task force in April.

¶3 Officers viewed the image attached to the email, confirmed it was child pornography, and, in May, subpoenaed the internet service provider (ISP), which provided subscriber information for a business

located at Van Dyck's home address. On September 3, officers obtained a search warrant for Van Dyck's home. On September 8, an officer applied for, and was granted, an extension to execute the warrant. As a result of executing the search warrant on September 9, officers discovered "at least hundreds of images that were child porn." Additionally, during the execution of the warrant, Van Dyck admitted to possessing and distributing child pornography over several years.

¶4 In July 2015, Van Dyck filed a motion to suppress the evidence obtained as a result of a search warrant of his home, asserting, among other things, that the information supporting probable cause for the warrant was stale. He also asserted that the affidavit contained false information to support the warrant extension because despite representations that Van Dyck would be out of town during the original deadline to execute the warrant, he was, in fact, in town. At the suppression hearing, the trial court denied the motion, concluding there was probable cause to support the warrant even if certain information was removed from the affidavit, but not specifically addressing the allegations of false information related to the extension.

¶5 In January 2017, Van Dyck and similarly situated defendants collectively asserted that the state's violation of the grand jury subpoena statute required suppression of evidence. The trial court rejected that argument, concluding, in part, that the defendants did not have a reasonable expectation of privacy in their IP addresses or subscriber information under either the United States or Arizona Constitutions.

¶6 In March 2019, relying, in part, on a hearing transcript from a related federal proceeding in which the warrant executed on September 9 was discussed, Van Dyck filed a supplemental motion to suppress. He contended that since his July 2015 motion "significant facts regarding the conduct of the [officers had] been discovered and clarified and new case law ha[d] emerged" requiring suppression. He asserted that he had a reasonable expectation of privacy in his subscriber information held by his ISP and in his email communications and that the opening of the image unconstitutionally violated his reasonable expectation of privacy or alternatively was a trespass on a constitutionally protected thing. The trial court held a suppression hearing on the motion and subsequently denied the motion to suppress because Van Dyck "did not maintain a reasonable expectation of privacy on the internet after he violated the AOL Terms of Service."

¶7 After a bench trial, Van Dyck was convicted and sentenced as described above. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Warrantless Search of Subscriber Information and Image

Subscriber Information

¶8 Relying on our prior opinion in *State v. Mixton*, 247 Ariz. 212, ¶¶ 27, 38-39 (App. 2019), Van Dyck asserts on appeal that the trial court should have granted his motions to suppress because he had a reasonable expectation of privacy in his IP address and subscriber information, officers did not have a search warrant to obtain his subscriber information from his ISP, and the good-faith exception did not apply here, as it did in *Mixton*.

¶9 However, while this appeal was pending, our supreme court vacated our opinion in *Mixton* and concluded that under both the United States and Arizona constitutions, a search warrant is not required to obtain this information. *State v. Mixton*, 250 Ariz. 282, ¶¶ 53, 75, 77 (2021) (no reasonable expectation of privacy in an IP address and ISP subscriber information). Accordingly, Van Dyck has not established error, and we need not consider the good-faith exception because it only applies when there is error. *See id.* ¶¶ 75-77.

Image

¶10 On appeal, Van Dyck appears to again assert that a warrant was legally required for the officers to view the image sent to them by NCMEC, and thus the trial court erred in denying his 2019 motion to suppress. The state argues Van Dyck has waived review of this issue because he has not adequately developed his argument on appeal. We agree.

¶11 "In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim." *State v. Moody*, 208 Ariz. 424, n.9 (2004) (quoting *State v. Carver*, 160 Ariz. 167, 175 (1989)). In his opening brief, Van Dyck does not challenge the trial court's conclusion that he had no reasonable expectation of privacy in the image, but instead assumes, without explanation, that a warrant was required. *See State v. Blakely*, 226 Ariz. 25,

¶ 6 (App. 2010) (subject to exceptions, a warrant is required if there is a reasonable expectation of privacy in the thing to be searched).

¶12 Moreover, Van Dyck cites no legal authority supporting his position. *See* Ariz. R. Crim. P. 31.10(a)(7) (appellant's opening brief must provide "supporting reasons for each contention" and "citations of legal authorities"). He only cites the general principle that "[a]ny incriminating material seized as a result of an illegal search must be suppressed." *Wong Sun v. United States*, 371 U.S. 471, 491-92 (1963). Although he further develops this argument in his reply brief, we do not consider it. *Cf. State v. Brown*, 233 Ariz. 153, ¶ 28 (App. 2013) (waiving arguments raised for the first time in reply); *see also* 5 Am. Jur. 2d *Appellate Review* § 481 (2021) ("[W]hen the appellant merely mentions an issue in the initial brief without arguing it, the claim has been abandoned, and discussion in the reply brief will not resuscitate it."). Accordingly, his argument that the court erred in denying his motion to suppress due to the warrantless viewing of the image is waived on appeal. *See State v. Johnson*, 247 Ariz. 166, ¶ 13 (2019) (waiving argument not developed on appeal).

Propriety of Search Warrant for the Home

Stale Probable Cause

¶13 On appeal, Van Dyck renews his argument that the probable cause supporting the warrant to search his home was stale. He asserts that because officers waited until September to obtain the search warrant and there was "no evidence of continuous activity; the tip from AOL was based on a single email containing a single item of suspected contraband," the trial court should have granted his motion to suppress. The state responds that despite the five-month gap, the warrant was not stale because the affidavit detailed "why additional images may have been found despite the delay." We review the denial of a motion to suppress for an abuse of discretion, but review the legal determination of probable cause de novo. *State v. Goudeau*, 239 Ariz. 421, ¶ 26 (2016).

¶14 "No search warrant shall be issued except on probable cause." *State v. Adamson*, 136 Ariz. 250, 257 (1983); *see also* A.R.S. § 13-3913. Probable cause exists if "a reasonably prudent person, based upon the facts known by the officer, would be justified in concluding that the items sought are connected with the criminal activity and that they would be found at the place to be searched." *State v. Buccini*, 167 Ariz. 550, 556 (1991) (quoting *State v. Carter*, 145 Ariz. 101, 110 (1985)); *see Illinois v. Gates*, 462 U.S. 213, 238 (1983) (probable cause is evaluated under the "totality-of-the-

circumstances"). "[A]n affidavit used to support a search warrant 'must speak as of the time of the issue of that warrant'. There is, however, no arbitrary time limit on how old the information contained in an affidavit may be." *State v. Kasold*, 110 Ariz. 563, 566 (1974) (citations omitted) (quoting *United States v. Guinn*, 454 F.2d 29, 36 (5th Cir. 1972)). The question of staleness is more dependent on the nature of the illegal activity rather than the time specified. *See State v. Smith*, 122 Ariz. 58, 60 (1979).

¶15 Van Dyck does not contest that probable cause initially existed, only that it had gone stale by the time the officers sought the warrant. Even though the warrant was sought approximately five months after officers received the information from NCMEC, the trial court did not err because a reasonable, prudent person would be justified in concluding child pornography would still be found in Van Dyck's residence despite the passage of time. *See Buccini*, 167 Ariz. at 556.

¶16 In the affidavit supporting the warrant, the officer avowed that he had been an officer for fourteen years, working as a detective in the Internet Crimes Against Children unit since 2011. He noted that he had "received over 300 hours of training relating to investigation of internet crimes against children." The officer stated that the email message forwarded from NCMEC had the subject "'Re' please trade,'" and he provided a detailed description of the image attached to the message which was "of a male child that was sexually exploitive in nature." He described the process in which officers had connected the email message to the IP address at Van Dyck's residence. The officer stated that based on his own knowledge, training, and experience, "[c]hild pornography collectors typically retain [child pornography material] for many years" and may maintain the material "in the privacy and security of their home or some other secure location, such as a private office," and with technology advancement, many collectors have "turned to storing digital media in online locations." He further avowed that "[c]ollectors of child pornography prefer not to be *without their child pornography for any prolonged time period*."[1]

[1]The affidavit supporting the warrant also stated that Van Dyck had "previously been investigated for having an inappropriate relationship with a 13 year-old girl in 2011," and, in 2005, officers had found "erotic photos of prepubescent children" under his bed. Van Dyck challenged below whether these instances were appropriate for the magistrate to consider. The trial court observed that even if this information had been

¶17 A court can consider an officer's experience in determining probable cause. *See State v. Olson*, 134 Ariz. 114, 117 (App. 1982). And consistent with the officer's assertions in this case that child pornography collectors "typically retain [child pornography material] for many years" and "prefer not to be *without their child pornography for any prolonged time period*," caselaw supports that child pornography is not the type of evidence "which would likely be consumed or thrown away in . . . five months." *Kasold*, 110 Ariz. at 565-66 (probable cause information not stale where more than five months had elapsed where allegations were that defendant was in possession of "pictures, books, and written stories" of sexual activities with minors); *see also United States v. Seiver*, 692 F.3d 774, 777 (7th Cir. 2012) (describing staleness as "rarely relevant" with computer file because such evidence does not rapidly dissipate or degrade and also concluding that seven months is too short to reduce probability that computer search will be fruitful to level at which probable cause has evaporated); *United States v. Elbe*, 774 F.3d 885, 890-91 (6th Cir. 2014) (concluding time limitations on warrants do not control in child pornography because it "is not a fleeting crime" and citing federal cases where the probable cause information was not stale, the longest being sixteen months (quoting *United States v. Frechette*, 583 F.3d 374, 378 (6th Cir. 2009)). Accordingly, because a reasonable, prudent person would be justified in concluding child pornography would still be found in Van Dyck's residence despite the lapse of time, *see Buccini*, 167 Ariz. at 556, the court did not err in denying Van Dyck's 2015 motion to suppress due to stale probable cause.[2]

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removed from the affidavit, probable cause still existed. Because we conclude probable cause existed absent that information, we need not reach whether it was proper for the court to consider, or excise, that information in addressing the motion to suppress.

[2] Although it does not affect our analysis, as explained above, Van Dyck was also charged with child pornography in federal court, and challenged the same search warrant. As to that warrant, he raised this same argument in federal court and the district court found it without merit. *See United States v. VanDyck*, No. CR 15-742-TUC-CKJ, *2-5, 2016 WL 2909870 (D. Ariz. May 19, 2016). It does not appear Van Dyck reasserted an argument of staleness on appeal of that decision, but the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision and the United States Supreme Court denied certiorari. *See United States v. VanDyck*, 776 Fed. App'x 495, 495-98 (9th Cir. 2019), *cert. denied*, ___ U.S. ___, 141 S. Ct. 295 (2020).

Warrant Expiration and False Information to Obtain Extension

¶18 For the first time on appeal, Van Dyck contends the warrant to search his home had expired at the time the officer sought the extension, and thus it was void. *See* A.R.S. § 13-3918(A) ("A search warrant shall be executed within five calendar days from its issuance . . . [u]pon expiration of the five day period, the warrant is void unless the time is extended by a magistrate."). Additionally, citing *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), he also argues, for the first time, the trial court should have granted his motion to suppress because the officers submitted false information in obtaining the warrant extension as demonstrated by a hearing transcript from his prosecution in federal court referencing the same search warrant.[3]

¶19 Van Dyck did not raise these arguments to the trial court, and therefore we would review for fundamental, prejudicial error only. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20 (2005). However, Van Dyck has not asserted that fundamental, prejudicial error occurred, and, accordingly, these issues are waived. *See State v. Vargas*, 249 Ariz. 186, ¶¶ 21-22 (2020); *State v. Starks*, No. 2 CA-CR 2019-0288, ¶ 6, n.1, 2021 WL 2154043 (Ariz. App. May 27, 2021); *see also Henderson*, 210 Ariz. 561, ¶ 19 (defendant's burden to show fundamental error).

[3] Although Van Dyck argued in his first motion to suppress that police provided false information to obtain an extension because he was not out of town as the officer claimed—his argument on appeal is different. He now asserts the transcript of a hearing from his prosecution in federal court, which took place after the trial court denied his first motion to suppress, proved that the officers *knew* Van Dyck was in town when they requested the extension. Although Van Dyck attached the federal court hearing transcript to his 2019 supplemental motion to suppress, in that motion, he did not raise concerns about the federal court testimony as it related to the warrant extension, only as it related to officers opening of the image. Therefore, he has not preserved the issue. *See Moody*, 208 Ariz. 424, ¶ 39 ("The motion or objection must state specific grounds in order to preserve the issue for appeal."); *see also State v. Granados*, 235 Ariz. 321, ¶ 19 (App. 2014) (grounds for objections generally must be specific to permit the adverse party's response and allow the court the opportunity to rule and avoid error).

Sentencing

¶20 Van Dyck also argues that his twenty consecutive ten-year prison terms totaling 200 years violate his constitutional right to be free from cruel and unusual punishment. *See* U.S. Const. amend. VIII; Ariz. Const. art. II, § 15.[4] We review this issue de novo. *See State v. Soto-Fong*, 250 Ariz. 1, ¶ 6 (2020) (constitutional interpretation of sentencing matters reviewed de novo).

¶21 As explained above, Van Dyck was convicted of twenty counts of sexual exploitation of a minor under fifteen. His convictions qualified for the dangerous crimes against children sentence enhancement. *See* A.R.S. §§ 13-705(Q)(1)(g), 13-3553(A), (C). The trial court was required by statute to impose consecutive sentences for each offense, and each sentence carries a minimum prison term of ten years. § 13-705(D), (M); *see also State v. Berger*, 212 Ariz. 473, ¶¶ 3, 6, 51 (2006). Thus, Van Dyck's twenty consecutive sentences of ten years each was the minimum available to the court.

¶22 Van Dyck contends his sentence is disproportionate under the United States Supreme Court's framework in *Solem v. Helm*, 463 U.S. 277, 292 (1983), and its modification in *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J. concurring), because he is serving a "much longer term than he would as compared to second-degree murder." However, as the state correctly points out, in 2006, in *State v. Berger*, the Arizona Supreme Court considered this proportionality argument and rejected it. 212 Ariz. 473, ¶¶ 8-36. *Berger* compels our conclusion here.

¶23 In *Berger*, the defendant was convicted and sentenced just as Van Dyck, and he challenged his sentences under the Eighth Amendment's prohibition against cruel and unusual punishment. *See id.* ¶ 1 (twenty

[4]Although Van Dyck asserts his sentences violate both the United States and Arizona Constitutions, the caselaw he cites only interprets the Eighth Amendment. Because he has developed no argument why the Arizona Constitution would permit him relief, any argument regarding its protections is waived. *See State v. Sanchez*, 200 Ariz. 163, ¶ 8 (App. 2001) (failure to develop argument waives issue on appeal); *see also* Ariz. R. Crim. P. 31.10(a)(7). And, in any event, our supreme court has not interpreted article II, § 15 of the Arizona Constitution to "afford broader protection than its federal counterpart." *State v. Soto-Fong*, 250 Ariz. 1, ¶ 43 (2020); *see State v. Davis*, 206 Ariz. 377, ¶ 12 (2003).

separate convictions of sexual exploitation of a minor under fifteen, sentenced to twenty consecutive ten-year prison terms). Our supreme court applied the framework from the concurrence in *Harmelin* and determined Berger's sentences were not grossly disproportionate to his crimes, distinguishing *Solem*. *Id.* ¶¶ 11-17, 24-33. It reasoned that, in *Solem*, the conviction did not involve a mandatory sentence, and thus that case "did not implicate the 'traditional deference' that courts must afford to legislative policy choices when reviewing statutorily mandated sentences." *Id.* ¶ 32 (quoting *Ewing v. California*, 538 U.S. 11, 25 (2003)). "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," the court held that "[Berger's] twenty consecutive ten-year sentences are not grossly disproportionate to his crimes." *Id.* ¶ 51.

¶24 Van Dyck makes no argument as to why his case should be afforded different treatment from *Berger* despite the same sentences being imposed. He did not discuss *Berger* in his opening brief, and he did not respond in his reply brief to the state's assertion that it controls here. Accordingly, we apply *Berger* and conclude Van Dyck's sentences do not violate the Eighth Amendment's prohibition against cruel and unusual punishment. *See id.* ¶¶ 50-51; *see also State v. Smyers*, 207 Ariz. 314, ¶ 5 (court of appeals cannot disregard established Arizona Supreme Court precedent).

Disposition

¶25 For the foregoing reasons, we affirm Van Dyck's convictions and sentences.

Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

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TRACIE K. LINDEMAN
Clerk of the Court

August 25, 2022

RE: STATE OF ARIZONA v RYAN GALAL VAN DYCK
Arizona Supreme Court No. CR-21-0330-PR
Court of Appeals, Division Two No. 2 CA-CR 19-0156
Pima County Superior Court No. CR20143891-001

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 23, 2022, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Justice Bolick voted to grant review on issues D and E.

Tracie K. Lindeman, Clerk

TO:
Linley Wilson
Karen Moody
Emily L Danies
Beth C Beckmann
ar