No. 22-

IN THE

Supreme Court of the United States

WILLIAM MICHAEL MEYER,

Petitioner,

vs.

RYAN THORNELL, Director of the Arizona Department of Corrections, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2015, Mr. Meyer was sentenced to a total of 230 years in prison after a jury convicted him of 23 counts of possession of child pornography. This was the mandatory minimum sentence under Arizona law. On direct appeal, Mr. Meyer argued that the total sentence violated the Eighth Amendment's ban on cruel and unusual punishment. The Arizona Court of Appeals refused to adjudicate this claim, relying on Arizona's general rule that state courts "will not consider the imposition of consecutive sentences in a proportionality inquiry." *State v. Berger*, 134 P.3d 378, 384 (Ariz. 2006).

Mr. Meyer filed a federal habeas petition, and again pressed his Eighth Amendment challenge. The district court denied the petition, and the court of appeals affirmed. The court of appeals first held that the state court had adjudicated Mr. Meyer's claim on the merits, despite the Arizona Court of Appeals's express reliance on Arizona's general rule. It then held that the state-court decision was not an unreasonable application of clearly established law. *See* 28 U.S.C. § 2254(d)(1).

This case presents the following questions:

1. When a state court expressly refuses to consider a petitioner's constitutional claim, has that court nevertheless adjudicated that claim "on the merits" for purposes of § 2254(d)?

2. Has this Court clearly established, through over a century of Eighth Amendment proportionality cases, that "challenges to the length of term-of-years sentences given all the circumstances in a particular case," *Graham v. Florida*, 560 U.S. 48, 59 (2010), extend to the aggregate length of multiple sentences?

PARTIES TO THE PROCEEDING

The petitioner in this Court is William Michael Meyer. He was the appellant in the court below and the petitioner in the district court.

The respondents in this Court are Ryan Thornell, Director of the Arizona Department of Corrections, and the Attorney General of the State of Arizona. They were the appellees in the court below and the respondents in the district court. Pursuant to this Court's Rule 35.3, Ryan Thornell has been substituted for his predecessor, David Shinn, as Director of the Arizona Department of Corrections.

RELATED PROCEEDINGS

- *William Meyer v. Attorney General of Arizona*, No. 21-15374 (9th Cir. filed Mar. 4, 2021)
- *William Meyer v. Charles Ryan*, No. 3:19-cv-8112-PCT-JAT (9th Cir. filed Apr. 12, 2019)
- *State of Arizona v. William Meyer*, No. CR-16-0309-PR (Ariz. filed Aug. 11, 2016)
- *State of Arizona v. William Meyer*, No. 1 CA-CR 18-0654 PRPC (Ariz. Ct. App. filed Sept. 13, 2018)
- *State of Arizona v. William Meyer*, No. 1 CA-CR 18-0209 PRPC (Ariz. Ct. App. filed Apr. 4, 2018)
- *State of Arizona v. William Meyer*, No. 1 CA-CR 15-0290 (Ariz. Ct. App. filed Apr. 23, 2015)
- *State of Arizona v. William Meyer*, No. CR-2014-00555 (Mohave Co. Super. Ct. filed Apr. 24, 2014)

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

William Michael Meyer 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 court of appeals's opinion affirming the denial of Mr. Meyer's Eighth Amendment claim is unreported, but included in the appendix at App. 1a. The district court's order denying Mr. Meyer's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is also unreported, but is included in the appendix at App. 7a. The magistrate judge's report and recommendation is also unreported, but included in the appendix at App. 30a.

JURISDICTION

The court of appeals issued its memorandum decision on October 4, 2022. (App. 1a) The court of appeals denied a timely petition for rehearing en banc on October 27, 2022. (App. 89a) By order of January 12, 2023, Justice Kagan extended the time for filing this petition to and including March 26, 2023. (22A629) This petition is timely. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment to the U.S. Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

1. A grand jury in Mohave County, Arizona, indicted Mr. Meyer on 23 counts of sexual exploitation of a minor, in violation of Ariz. Rev. Stat. § 13-3553(A)(2), after he was found in possession of 23 images of child pornography depicting children under the age of 15. Before trial, Mr. Meyer was offered a plea agreement under which he would plead guilty to 1 of the counts in exchange for dismissal of the remaining 22 counts and a stipulated sentence of 10 years, the mandatory minimum. *See* Ariz. Rev. Stat. § 13-705(D). During a discussion that was meant to satisfy *State v. Donald*, 10 P.3d 1193 (Ariz. Ct. App. 2000), the prosecutor explained that Mr. Meyer had rejected the offer.

A jury convicted Mr. Meyer on all 23 counts. At sentencing, the judge lamented that, because of Mr. Meyer's litigation strategy, state law required him to impose a harsh sentence.

> THE COURT: You're 31 years of age and you're now going to spend the rest of your life in prison, and it's kind of sad because that didn't have to happen.
>
> Number one, you didn't have to download 23 images of child pornography and keep them; number two, you didn't have to go to trial. You had other options not to put yourself in this position. I don't know exactly what the plea offers that were made to you were, but I have a pretty good idea, just based on my experience in these types of cases, and you rejected the offers, which was certainly your right, but you were also advised not only by myself, I believe, but also your attorneys, I'm sure on numerous occasions, this sentence I was going to have to impose if you went to trial and were convicted.

The judge then imposed the minimum sentence authorized by state law—10 years on each count, to run consecutively, for a total sentence of 230 years in prison. *See* Ariz. Rev. Stat. § 13-705(M).

2. The Arizona Court of Appeals affirmed Mr. Meyer's convictions and 230-year aggregate sentence. In his appeal, he contended that his aggregate sentence amounted to cruel and unusual punishment in violation of the Eighth Amendment. Before that court, Mr. Meyer acknowledged that the Arizona Supreme Court had held, in *State v. Berger*, 134 P.3d 378 (Ariz. 2006), that the Eighth Amendment did not apply to the aggregate length of mandatory sentences imposed for sexual exploitation of a minor, but urged the court to depart from *Berger*. (App. 98a) The Arizona Court of Appeals held that it was bound by *Berger* to affirm the sentence imposed. (App. 99a)

The Arizona Supreme Court denied a timely filed petition for discretionary review. Mr. Meyer did not file a petition for certiorari to this Court. His conviction became final on June 12, 2017, when the time expired for him to do so. *See Clay v. United States*, 537 U.S. 522, 527 (2003).

3. After exhausting state postconviction remedies, Mr. Meyer filed a *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254. Again he contended that the 230-year aggregate sentence for possessing 23 images of child pornography amounted to cruel and unusual punishment in violation of the Eighth Amendment.

a. A magistrate judge recommended denying Mr. Meyer's Eighth Amendment claim but certifying the denial for appeal. She found that requiring consecutive sentences for possession of each image of child pornography was "within the prerogative of the legislature." (App. 63a) Accordingly, she did not rule that "a ten-year sentence for each count of possession of child

pornography is grossly disproportionate." (App. 65a) Although she noted that Mr. Meyer's challenge went to the aggregate length of the sentence for possessing 23 images of child pornography (App. 62a), she did not directly address this aspect of his claim.

b. The district judge accepted the magistrate judge's recommendation that Mr. Meyer's Eighth Amendment claim be denied, but declined to issue a certificate of appealability. The district judge "agree[d] with the R&R that the state court's decision (applying *Berger*) was not contrary to nor an unreasonable application of clearly established federal law nor an unreasonable determination of the facts." (App. 13a) He read the report and recommendation "to have addressed both ten-year sentence for any one count, and the 230-year cumulative sentence for all 23 counts, and found both to have no inference of gross disproportionality." (App. 21a) Resting on his previous decision in *Patsalis v. Attorney General of Arizona*, 480 F. Supp. 3d 937 (D. Ariz. 2020), the judge ruled that "the state court's rejection of Petitioner's argument that his 230-year consecutive sentence was not proportional could not be contrary to clearly established federal law." (App. 27a) The district judge thus declined to certify the denial of Mr. Meyer's Eighth Amendment claim for appeal. (App. 28a)

c. The court of appeals certified Mr. Meyer's Eighth Amendment claim for appeal and appointed counsel to assist him. After briefing and argument, however, the court of appeals affirmed the district court's denial of relief.

The court of appeals first ruled that the state court had adjudicated Mr. Meyer's claim on the merits when it said that his "sentences do not violate the Eighth Amendment." (App. 3a) Then, based on the holding in

Patsalis v. Shinn, 47 F.4th 1092 (9th Cir. 2022), the court held that "there is no clearly established law from the Supreme Court on whether Eighth Amendment sentence proportionality must be analyzed on a cumulative or individual basis when a defendant is sentenced on multiple offenses." (App. 3a) Thus, the court ruled, the Arizona Court of Appeals's decision was neither contrary to nor an unreasonable application of clearly established federal law. (App. 4a)

Judge Friedland, joined by Judge Sung, concurred in this disposition because the panel was bound by *Patsalis*. (App. 5a) She observed that "the Arizona Supreme Court has already upheld a similar sentence in a precedential opinion, *State v. Berger*, 134 P.3d 378 (Ariz. 2006)," and posited that "our court will nearly always review such cases under AEDPA deference." (App. 5a) For these reasons, she opined that the "only court that is likely to be in a position to hold that a sentence like Meyer's is unconstitutional is" this Court. (App. 5a) She implored others sentenced like Mr. Meyer to bring the challenge to this Court in a direct-appeal posture. (App. 5a) She also urged the Arizona legislature to abolish the mandatory consecutive sentencing requirement for child pornography cases. (App. 6a)

This timely petition followed.

REASONS FOR GRANTING THE WRIT

This case presents two important questions that frequently arise against the backdrop of Arizona law. Under Arizona law, the aggregate length of a criminal sentence is immune from Eighth Amendment review for gross disproportionality. The Arizona courts ordinarily "will not consider the imposition of consecutive sentences in a proportionality inquiry" under the Eighth

Amendment. *State v. Berger*, 134 P.3d 378, 384 (Ariz. 2006). The Arizona courts have applied this general rule dozens of times since *Berger* was decided, and that general rule was well in force when *Berger* solidified it as a matter of state law.

This general rule gives rise to two questions that bear on the application of 28 U.S.C. § 2254(d). First, does a state court's reliance on this general rule of nonconsideration nevertheless amount to an adjudication "on the merits" of an Eighth Amendment claim? Second, is it clearly established in this Court's Eighth Amendment jurisprudence that review for gross disproportionality extends to *all aspects* of the sentence, including the aggregate length of it?

1. The decision of the court below not to review Mr. Meyer's claim *de novo* conflicts with other courts of appeals's applications of § 2254(d).

Under § 104(3) of the Antiterrorism and Effective Death Penalty Act of 1996, a federal habeas court may only grant relief on any claim that was "adjudicated on the merits in State court proceedings" in two limited circumstances. 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2254(d)). "A judgment is normally said to have been rendered 'on the merits' only if it was delivered after the court heard and evaluated the evidence and the parties' substantive arguments." *Johnson v. Williams*, 568 U.S. 289, 302 (2013).

Thus one threshold task that a federal habeas court must carry out is determining whether a state court has, in fact, adjudicated a petitioner's claim *on the merits*. This assessment "does not require that there be an opinion from the state court explaining the state court's reasoning." *Harrington v. Richter*, 562 U.S. 86, 98 (2011).

Indeed, "a state court need not cite or even be aware of [this Court's] cases under § 2254(d)." *Id.* (citing *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam)). If a "state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id.* "When a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was addressed on the merits—but that presumption can in some limited circumstances be rebutted." *Williams*, 568 U.S. at 301.

But when the state court *has* given reasons for addressing (or not addressing) a petitioner's claim, a federal habeas court should take the state court at its word that it either has (or has not) adjudicated the petitioner's claim. "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits *in the absence of any indication* or state-law procedural principles *to the contrary*." *Richter*, 562 U.S. at 99 (emphasis added). In other words, if the state court's treatment of the claim (or lack thereof) is plain from the face of the state-court opinion, *Richter*'s presumption of merits adjudication has no role to play.

The courts of appeals agree that a state court's express statements regarding merits adjudication are to be taken at face value. As the Ninth Circuit has said in a different case, the presumption of merits adjudication under *Richter* and *Johnson* requires a federal habeas court "to give state courts the benefit of the doubt when the basis for their holdings is unclear. It does not require us to ignore a state court's explicit explanation of its own decision." *James v. Ryan*, 733 F.3d 911, 916 (9th Cir. 2013).

The other courts of appeals have made similar statements.

First Circuit: A state court adjudicates a claim on the merits when it "expressly describe[s] and reject[s] petitioner's contention" that "go[es] to the heart of" a federal claim. *Hodge v. Mendonsa*, 739 F.3d 34, 42 (1st Cir. 2013).

Third Circuit: When a state court gives its own "explicit statements" about how it treated a petitioner's claim, the federal court takes the state court at its word. *Bennett v. Superintendent*, 886 F.3d 268, 283 (3d Cir. 2018) (no adjudication on the merits when the state court expressly said it was deciding the claim based on state law alone).

Fifth Circuit: Addressing a petitioner's claims "in the same terms as the prisoner present[s] them" counts as an adjudication on the merits. *Lucio v. Lumpkin*, 987 F.3d 451, 465 (5th Cir. 2021).

Sixth Circuit: A state-court opinion that, on its face, "fails to reach the merits of" the petitioner's claim does not adjudicate that claim on the merits. *English v. Berghuis*, 900 F.3d 804, 812 (6th Cir. 2018).

Seventh Circuit: An "explicit[] recogni[tion] that [a petitioner's] evidentiary argument had federal constitutional dimensions" counts as an adjudication on the merits. *Sarfraz v. Smith*, 885 F.3d 1029, 1036 (7th Cir. 2018).

Eighth Circuit: A state court that expressly "consider[s] the precise limitations that [a petitioner] challenge[s] as unconstitutional" adjudicates that challenge on the merits. *Dansby v. Payne*, 47 F.4th 647, 655 (8th Cir. 2022).

Eleventh Circuit: When the face of the state court's opinion reflects "a point that [its] circular reasoning miss[es]," the state court has not adjudicated the claim on the merits. *Bester v. Warden*, 836 F.3d 1331, 1336–37 (11th Cir. 2016).

In sum, the courts of appeals agree that there is no need to resort to *Richter*'s rebuttable presumption of merits adjudication when the face of the state court's opinion makes plain that the state court has (or has not) adjudicated the petitioner's claim. The plain text of the state court's decision is conclusive on this score.

In his direct appeal, Mr. Meyer contended that his aggregate 230-year sentence for possessing 23 images of child pornography amounted to cruel and unusual punishment, in violation of the Eighth Amendment. Under Arizona's interpretation of the Eighth Amendment, this was not a cognizable ground for relief.

It is well established that the Eighth Amendment analysis begins with assessing "gross[] disproportiona[lity]" by comparing "the gravity of the offense compared to the harshness of the penalty." *Ewing v. California*, 538 U.S. 11, 23, 28 (2003). Yet as a "general rule," an Arizona court "will not consider the imposition of consecutive sentences in a proportionality inquiry." *State v. Berger*, 134 P.3d 378, 384 (Ariz. 2006) (quoting *State v. Davis*, 79 P.3d 64, 74 (Ariz. 2003)). Even so, when a defendant's conduct is "swept up in the broad statutory terms" that define an offense, and thereby triggers mandatory consecutive sentences for multiple counts, the Arizona courts *will* deem the aggregate sentence to trigger an inference of gross disproportionality. *Davis*, 79 P.3d at 72. However, the Arizona Supreme Court has held that this exception is categorically unavailable in cases

involving possession of child pornography. *Berger*, 134 P.3d at 481.

The Arizona Court of Appeals rejected Mr. Meyer's claim because, it said, it was bound by *Berger* to do so. Under *Berger*, "the consecutive nature of sentences does not enter into the proportionality analysis" when reviewing child-pornography sentences. *Id.* By relying on *Berger* as binding precedent, the state court expressly indicated that it did not adjudicate Mr. Meyer's Eighth Amendment claim on the merits (or otherwise). Rather, it applied binding precedent holding that the claim is not cognizable in child-pornography cases. Here, then, the court below thus diverged from the national consensus that when a state court expressly says that it is not adjudicating a petitioner's claim, the *Richter* presumption of merits adjudication is unwarranted. This Court should grant review to solidify the national consensus.

The court below myopically focused on one statement in the state court's opinion: "Meyer's sentences do not violate the Eighth Amendment." (App. 3a) The court below read statement in isolation and said that the state court had "rejected Meyer's Eighth Amendment claim on the merits," such that the limitation on relief set forth in 28 U.S.C. § 2254(d) applies. (App. 3a) It cited as support for this conclusion *Cullen v. Pinholster*, 563 U.S. 170, 187 (2011), in which this Court said, "Section 2254(d) applies even where there has been a summary denial." (App. 3a) But this myopic focus suffers from two serious flaws.

First, the court below plainly misread this one sentence to address Mr. Meyer's challenge to his aggregate sentence. That is not the Eighth Amendment violation the state court addressed. It said that Mr. Meyer's sentences—plural—do not violate the Eighth Amendment. In light of *Berger*, this was the only Eighth

Amendment claim that the state court was permitted to adjudicate—that each component 10-year sentence did not violate the Eighth Amendment. That was decidedly *not* the claim that Mr. Meyer raised.

Second, there is no plausible reason to treat the state court's opinion as amounting to a summary denial of the claim Mr. Meyer actually *did* raise. The *Richter* presumption applies to a summary adjudication of a claim, an adjudication that "is unaccompanied by an explanation." *Richter*, 562 U.S. at 98 (cited in *Pinholster*, 563 U.S. at 187). The state court's opinion here is *not* unaccompanied by an explanation for denying Mr. Meyer's claim. The opinion expressly says that it was bound by a decision of the state supreme court not to adjudicate Mr. Meyer's claim. Treating the state court's opinion here as a summary adjudication in order to take advantage of the § 2254(d) limitation on relief flies in the face of *Richter* and the uniform consensus of the courts of appeals that state courts must be taken at their word when they offer an explanation for denying a petitioner's claim.

2. This Court's Eighth Amendment jurisprudence has consistently looked at *all aspects* of a prisoner's sentence, and thus Arizona's general rule cannot stand whether or not § 2254(d)(1) limits relief.

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.)).[1] 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.)).[2]

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

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[1] 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); *United States v. Farley*, 607 F.3d 1294, 1339–40 (11th Cir. 2010); *Berger*, 134 P.3d at 381 n.1.

[2] Justice O'Connor's opinion in *Ewing* sets forth the holding of the Court under the *Marks* rule. *See State v. Althouse*, 375 P.3d 475, 489 n.14 (Or. 2016); *Berger*, 134 P.3d at 381 n.1.

A. Reviewing over a century of this Court's Eighth Amendment decisions confirms that review for gross disproportionality extends to the aggregate length of multiple sentences.

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.

In 1983 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 v. Michigan*, 501 U.S. 957 (1991), 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 v. California*, 538 U.S. 11 (2003), 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. *Id.* at 30. And in *Lockyer v. Andrade*, 538 U.S. 63 (2003), when the Court considered the constitutionality of two consecutive 25-years-to-life terms imposed under the same California three-strikes law, *see id.* 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 v. Florida*, 560 U.S. 48, 59 (2010).

B. Arizona's general rule that exempts the aggregate length of multiple sentences from Eighth Amendment scrutiny allows egregious and absurd sentences to avoid even the minimal scrutiny that gross-disproportionality review entails.

Arizona follows the "common-law tradition" of imparting to sentencing judges "unfettered discretion [to decide] whether sentences for discrete offenses shall be served consecutively or concurrently." *Oregon v. Ice*, 555 U.S. 160, 163 (2009). State law makes consecutive sentences the default, but allows concurrent sentences if the judge explains the reason for making them concurrent. *See* Ariz. Rev. Stat. § 13-711(A). This statute "does not constrict to any degree the trial court's discretion to impose concurrent sentences for the defendant's crimes." *State v. Cota*, 272 P.3d 1027, 1043 (Ariz. 2012) (quoting *State v. Garza*, 962 P.2d 898, 902 (Ariz. 1998)).

It is obvious that "a concurrent sentence is traditionally imposed as a *less* severe sanction than a consecutive sentence." *Ralston v. Robinson*, 454 U.S. 201,

216 n.9 (1981). "The decision to impose consecutive sentences alters the single consequence most important to convicted noncapital defendants: their date of release from prison." *Ice*, 555 U.S. at 174 (Scalia, J., dissenting). Thus the fact that a judge has discretion to run multiple sentences concurrently or consecutively means that the judge has discretion to impose either lenient or serious punishment.

"The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances." *Graham*, 560 U.S. at 59 (citing *Hope v. Pelzer*, 536 U.S. 730 (2002)). "Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense." *Id.* (quoting *Weems*, 217 U.S. at 367). This precept implies that the Eighth Amendment imposes *some* limitation on a judge's traditional sentencing discretion. And because that traditional sentencing discretion extends to imposing concurrent or consecutive sentences for multiple crimes, the Eighth Amendment also must constrain the exercise of that particular discretion.

Arizona's general rule against considering the aggregate length of criminal punishment when reviewing a sentence for gross disproportionality fails to implement the core protection of the Eighth Amendment. Under Arizona's general rule, a patently barbaric sentence of 230 years in prison for possession of illicit images of children is immune from constitutional scrutiny simply because none of the component sentences is individually disproportionate to the conduct underlying each such sentence. Yet an unbroken line of cases from this Court extending back to 1910 makes plain that *all aspects* of criminal sentencing fall under the Eighth Amendment's protection

against cruel and unusual punishment. Arizona's general rule flies in the face of that longstanding jurisprudence.

Whether or not the limitation on relief set forth in § 2254(d) applies, the court of appeals's decision to deny relief cannot stand. If this Court should conclude that the Arizona Court of Appeals did not adjudicate Mr. Meyer's claim on the merits, then this Court "can determine the principles necessary to grant relief" unfettered by § 2254(d). *Lafler v. Cooper*, 566 U.S. 156, 173 (2012) (citing *Panetti v. Quarterman*, 551 U.S. 930, 948 (2007)). Surely a 230-year sentence for possession of 23 illicit images of children raises at least an inference of gross disproportionality.

And if the limitation on relief does apply, the Arizona Court of Appeals's decision—based on Arizona's general rule—exceeds that limit. Under § 2254(d)(1), the "lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since a general standard from this Court's cases can supply such law." *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013) (per curiam) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). There is no doubt that Arizona's rule exempting the aggregate length of a sentence from Eighth Amendment scrutiny is contrary to this Court's general rule that the gross-disproportionality inquiry encompasses *all aspects* of a criminal sentence. *See Williams v. Taylor*, 529 U.S. 362, 405 (2000) ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases.").

3. So long as Arizona adheres to its general rule, the questions presented here will continue to arise; thus this case is a good vehicle to address them.

As long as Arizona adheres to its general rule that the aggregate length of multiple sentences is exempt from Eighth Amendment scrutiny, the questions presented by this case will recur. The substantive Eighth Amendment question can arise in both the direct-review and collateral-review postures. And the antecedent question whether, by following *Berger*, the state court has adjudicated an Eighth Amendment challenge to the aggregate length of a sentence on the merits for purposes of applying § 2254(d)'s limitation on relief will arise whenever the substantive question arises in a federal habeas proceeding.

The opportunities for this Court's review will continue to arise. The state appellate courts in Arizona have, as of the time of filing this petition, relied on the general rule as articulated in *Berger* to avoid deciding Eighth Amendment challenges to lengthy consecutive sentences in 64 cases. Seven of these cases are published opinions.[3] Three of these cases, including this one, involve sentences imposed by the same superior court judge.[4] This Court

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[3] *State v. Soto-Fong*, 474 P.3d 34 (Ariz. 2020); *State v. Helm*, 431 P.3d 1213 (Ariz. Ct. App. 2018); *State v. Gulli*, 391 P.3d 1210 (Ariz. 2017); *State v. Florez*, 384 P.3d 335 (Ariz. Ct. App. 2016); *State v. Welch*, 340 P.3d 387 (Ariz. Ct. App. 2014); *State v. McPherson*, 269 P.3d 1181 (Ariz. Ct. App. 2012); *State v. Kasic*, 265 P.3d 410 (Ariz. Ct. App. 2011).

[4] The other two are *State v. Barrett*, No. 1 CA-CR 19-0330, 2020 WL 3249338 (Ariz. Ct. App. Jun. 6, 2020), and *State v. Patsalis*, No. 1 CA-CR 15-0409, 2016 WL 3101786 (Ariz. Ct. App. Jun. 2, 2016). The sentencing judge in this case remains a judge *pro tempore* on the Mohave County Superior Court. The defendant in *Patsalis* has also

should intervene now to correct a widespread and persistent misapplication of the Eighth Amendment in Arizona, and to resolve an important question about how to apply the § 2254(d) limitation on relief when state law deems a constitutional challenge to be categorically unavailable.

Moreover, Arizona has a well-documented history of flouting this Court's constitutional jurisprudence, especially its Eighth Amendment jurisprudence. Earlier this Term the Court forced Arizona to fully implement the decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994), seven years after it admonished the Arizona court that *Simmons* applies in Arizona. *See Cruz v. Arizona*, 143 S. Ct. 650 (2023); *Lynch v. Arizona*, 578 U.S. 613 (2016) (per curiam). In 2015, the Ninth Circuit held that in "capital cases from the late 1980s to the mid-2000s, the Arizona Supreme Court repeatedly articulated [a] causal nexus test for nonstatutory mitigation" that ran "contrary to" this Court's decision in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *See McKinney v. Ryan*, 813 F.3d 798, 813 (9th Cir. 2015) (en banc); *see also McKinney v. Arizona*, 140 S. Ct. 702, 706 (2020) (noting that the Arizona Supreme Court's decision to affirm the death sentence had "run afoul of this Court's decision in *Eddings*"). And in 2016, this Court summarily reversed five decisions of the Arizona Court of Appeals—that had escaped discretionary review by the Arizona Supreme Court—in which the Arizona court had refused to apply *Miller v. Alabama*, 567 U.S. 460 (2012). *See Tatum v. Arizona*, 580 U.S. 952 (2016); *see also State v. Valencia*, 386 P.3d 392, 395 (Ariz. 2016) (relying on *Tatum* to conclude that, contrary to previous Arizona cases, *Miller* applied

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filed a petition for certiorari with this Court seeking review of the Ninth Circuit's decision to affirm the denial of his habeas petition.

retroactively in Arizona). This case is yet another example of how this Court's intervention is necessary to realign Arizona with the constitutional mainstream.

Finally, this case also presents an opportunity for the Court to weigh in on the trial penalty, the phenomenon where a judge imposes a "harsher sentence because a defendant asserted his right to trial by jury or to testify at that trial." Memorandum Opinion and Order on Sentencing at 14, *United States v. Bakhitiyor Jumaev*, No. 1:12-cr-33-JLK-2 (D. Colo. Jul. 18, 2018) (Dkt. #1920). In the words of Judge John Kane of the District of Colorado, "I consider any trial 'tax' or penalty to be contrary to the ages-long values and standards of our legal system. It is more closely associated with the jurisprudence of Russia, as described by Dostoyevsky, than our own tradition as described by Benjamin Cardozo." *Id.* Former judge John Gleeson of the Eastern District of New York has explained that "under the guideline and mandatory minimum sentencing regime, federal prosecutors are rarely challenged in court. One reason for this is defendants who decline the prosecutor's plea offers and then lose at trial, often facing sentences that are seen as so excessively severe they 'simply take your breath away.'" Frederick P. Hafetz, *The "Virtual Extinction" of Criminal Trials: A View from the Well of the Court*, 31 Fed. Sent. Rptr. 248, 251 (Apr./Jun. 2019).

Before trial, the prosecution believed that a sentence of 10 years for Mr. Meyer would be reasonable. At sentencing, the judge expressly blamed Mr. Meyer for the 230-year sentence he had to impose, telling him that he "didn't have to" go to trial. By the judge's own admission, the sentence here is a centuries-long trial tax. The fact that, after trial, Mr. Meyer received a sentence *twenty-three times as long* surely contributes to an inference of gross disproportionality under the Eighth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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