No. 22A____

IN THE
Supreme Court of the United States

ATDOM MIKELS PATSALIS,
Petitioner,

vs.

DAVID SHINN, FORMER DIRECTOR OF THE
ARIZONA DEPARTMENT OF CORRECTIONS, ET AL.,
Respondents.

**ON APPLICATION FOR AN EXTENSION OF TIME
TO FILE A PETITION FOR A WRIT OF CERTIORARI**

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE ELENA KAGAN, CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to Rules 13.5 and 30, petitioner Atdom Patsalis respectfully asks the Court for a 60-day extension of time, to and including March 24, 2023, to file a petition for a writ of certiorari in this matter.

The court of appeals issued a published opinion affirming the district court's denial of habeas corpus relief on September 6, 2022. (App. A) *See Patsalis v. Shinn*, 47 F.4th 1092 (9th Cir. 2022). The court of appeals denied a timely filed petition for rehearing on October 25, 2022. (App. B) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

This extension is necessary to accommodate Mr. Patsalis's counsel's other workload. Since the court of appeals denied rehearing in this case, counsel has (1) filed petitions for writs of certiorari in *Michael Jessup v. David Shinn*, No. 22-5889, *Tonatihu Aguilar v. David Shinn*, No. 22-6023, and *Cedric Rue v. David Shinn*, No. 22-6027; (2) filed opening briefs and motions to withdraw in *Duane Lee v. United States*, No. 18-16965 (9th Cir.), and *Shawn Percy v. United States*, No. 17-16365 (9th Cir.); (3) presented oral argument in *Eulandas Flowers v. James Kimble*, No. 19-15116 (9th Cir.), and *Clinton*

Eldridge v. Catricia Howard, No. 21-15616 (9th Cir.); and (4) handled the detention appeal in *United States v. Stuart Newell*, No. 22-10297 (9th Cir.). Counsel is also scheduled for annual leave January 13, 2023, and to present at an out-of-state conference March 1–4, 2023.

Accordingly, Mr. Patsalis respectfully asks the Court to extend the time for filing a petition for certiorari to and including March 24, 2023.

Respectfully submitted: January 10, 2023.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ATDOM MIKELS PATSALIS, *Petitioner-Appellant*, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, *Respondents-Appellees.*	No. 20-16800 D.C. No. 3:18-cv-08101-JAT OPINION

Appeal from the United States District Court
for the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued and Submitted August 9, 2021
San Francisco, California

Filed September 6, 2022

Before: Eugene E. Siler,[*] Morgan Christen, and Danielle J. Forrest, Circuit Judges.

Opinion by Judge Forrest;
Dissent by Judge Christen

[*] The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

SUMMARY**

Habeas Corpus

The panel affirmed the district court's denial of habeas relief to Atdom Patsalis, who argued that his 292-year total sentence by an Arizona state court is grossly disproportionate to his crimes and therefore cruel and unusual in violation of the Federal and Arizona Constitutions.

Patsalis was convicted of 25 felonies (mostly residential burglaries) committed against multiple victims over a three-month period. The trial court imposed consecutive sentences on all but two of the 25 counts, resulting in an overall sentence of 292 years imprisonment.

Rejecting Patsalis's constitutional claim, the Arizona Court of Appeals concluded that proportionality should be assessed based on each individual conviction and sentence, not the cumulative effect of consecutive sentences, and that none of Patsalis's individual sentences were disproportionate.

Patsalis argued that the Anti-Terrorism and Effective Death Penalty Act's (AEDPA's) deferential standard of review does not apply to the Arizona Court of Appeals' decision because that court did not consider the cumulative impact of his sentence, and that he was entitled instead to de novo review on this claim. The panel concluded that the Arizona Court of Appeals made a merits determination, and

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

that AEDPA deference applies. The panel explained that while the Arizona Court of Appeals declined to analyze proportionality based on Patsalis's cumulative sentence, it did decide his Eighth Amendment claim on substantive grounds: it heard and evaluated the evidence and the parties' substantive arguments, rejected Patsalis's framing of the issue as a cumulative analysis, and concluded that Patsalis's individual sentences were not grossly disproportionate under the state and federal authorities that it discussed. Citing *Johnson v. Williams*, 568 U.S. 289 (2013), the panel wrote that this court must presume that the Arizona Court of Appeals' conclusion that "Patsalis's individual sentences are not grossly disproportionate as defined under the authorities discussed" was a merits determination under both Arizona and federal law. The panel wrote that there is no reason to think that the Arizona court overlooked or failed to resolve Patsalis's claim that his cumulative sentence was unconstitutional.

Applying AEDPA deference, the panel noted 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, and that other than the basic principle of proportionality, the only thing that the Supreme Court has established is that the rule against grossly disproportionate sentences is violated only in the exceedingly rare and extreme case. The panel wrote that Patsalis's cumulative sentence is undeniably harsh, and the trial court would have been reasonable in imposing a shorter sentence, but the Supreme Court has emphatically instructed that it is not enough that a federal habeas court is left with a firm conviction that the state court was erroneous. The panel wrote that to grant relief, it must conclude that there is no possibility fairminded jurists could disagree that the Arizona

Court of Appeals' decision conflicts with the Supreme Court's clearly established precedents. The panel explained that it cannot do that given the limited Supreme Court precedent regarding the prohibition against disproportionality of a sentence to a term of years, and concluded that it therefore cannot say that the Arizona Court of Appeals' decision was contrary to, or unreasonably applied, "clearly established federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

Dissenting, Judge Christen wrote that the state court's opinion is clear: it affirmed Patsalis's individual sentences while expressly declining to consider whether his 292-year sentence was grossly disproportionate. Because the state court did not reach the merits of the claim Patsalis actually presented, there is no state-court decision to which this court can defer, and de novo review is the proper standard. Reviewing Patsalis's claim de novo, Judge Christen concluded that Patsalis's cumulative sentence is grossly disproportionate to the offenses he committed, and violates the Eighth Amendment's ban on cruel and unusual punishment.

COUNSEL

Jordan Green (argued) and Karl Worsham, Perkins Coie LLP, Phoenix, Arizona; Mark Kokanovich and Ian Bucon, Ballard Spahr LLP, Phoenix, Arizona; Lindsay Herf, Arizona Justice Project, Phoenix, Arizona; for Plaintiff-Appellant.

Jillian B. Francis (argued), Assistant Attorney General; J.D. Nielsen, Habeas Unit Chief; Mark Brnovich, Attorney

General; Office of the Attorney General, Phoenix, Arizona; for Respondents-Appellees.

OPINION

FORREST, Circuit Judge:

Petitioner-Appellant Atdom Patsalis seeks federal habeas relief, arguing that his 292-year total sentence imposed by an Arizona state court is grossly disproportionate to his crimes and, therefore, cruel and unusual in violation of the Federal and Arizona Constitutions. Patsalis was convicted of 25 felonies (mostly residential burglaries) committed against multiple victims over a three-month period. These were not his first crimes. The trial court imposed consecutive sentences on all but two of the 25 counts, resulting in an overall sentence of 292 years imprisonment.

The Arizona Court of Appeals rejected Patsalis's constitutional claim concluding that proportionality should be assessed based on each individual conviction and sentence, not the cumulative effect of consecutive sentences, and that none of Patsalis's individual sentences were disproportionate. Patsalis sought habeas relief under 28 U.S.C. § 2254. He argued that the Anti-Terrorism and Effective Death Penalty Act's (AEDPA) deferential standard of review does not apply to the Arizona Court of Appeals' decision because that court did not consider the cumulative impact of his sentence. Instead, he argued that he was entitled to de novo review on this claim. The district court disagreed, afforded AEDPA deference to the Arizona court, and concluded that Patsalis is not entitled to relief. We affirm.

I. BACKGROUND

A. Patsalis's Crimes & Trial

When he was 21 years old, Patsalis committed 25 separate felonies in three months, mostly in the same residential neighborhood. Law enforcement identified Patsalis as a suspect and obtained a search warrant for the home where he was staying. Patsalis fled when officers arrived to execute the warrant, but soon after he returned to the home and confessed to his crimes.

Patsalis was offered two alternative plea deals, and the trial judge explained the terms of the deals and that Patsalis faced up to 490 years' imprisonment if he went to trial. Patsalis rejected the plea offers and went to trial, and a jury convicted him on 12 counts of burglary in the second degree, 10 counts of burglary in the third degree, theft of a credit card, unlawful means of transportation, and attempted unlawful means of transportation. The jury also found two or more aggravating circumstances on all but two counts of conviction.

At sentencing, the trial judge found that Patsalis was a category three repetitive offender because he had two prior felony convictions that impacted his sentencing calculation. The trial judge also considered Patsalis's lack of empathy for his victims; that his victims included elderly, retired people; that his crimes were premeditated; that he was not under the influence during the commission of any of his crimes; and that his prior incarcerations had not deterred him from continuing to engage in criminal conduct. The trial judge rejected Patsalis's argument that the 25 offenses were part of one continuous spree because Patsalis committed them over three months, giving him "plenty of time to reflect upon [his] conduct and not to continue."

The trial judge trial ordered Patsalis to serve all but two of his 25 sentences consecutively, resulting in a cumulative 292-year prison sentence. The trial judge stated that consecutive sentences were required[1] and discussed the deterrent effect of imposing consecutive sentences, stating that he could not "send the message to the community that you can burglarize multiple houses and victimize multiple people on multiple occasions, and you'll simply get one sentence for it. There has to be accountability and responsibility for each separate offense that you commit and have been convicted of." The trial judge declined to find that Patsalis's age or confession mitigated his conduct.

B. Direct Appeal

Patsalis appealed his sentence arguing, among other things, that the trial court violated the Eighth Amendment's prohibition against cruel and unusual punishment by sentencing him to a "total sentence of 292 years." *State v. Patsalis*, No. 1 CA-CR 15-0409, 2016 WL 3101786, at *4–5 (Ariz. Ct. App. June 2, 2016). Addressing this claim, the Arizona Court of Appeals cited Arizona's general rule against "consider[ing] the imposition of consecutive sentences in a proportionality inquiry[,]" and rejected Patsalis's federal and state constitutional claims challenging his consecutive sentences as grossly disproportionate to his crime. *Id.* at *5. The Arizona Court of Appeals focused its analysis "on the individual sentence imposed for each count and not the cumulative sentence of 292 years." *Id.* (internal

[1] On direct appeal, the Arizona Court of Appeals held not just that the trial court had the discretion to impose consecutive sentences, Dissent at 8, but that "the record reflects that the superior court understood it had discretion to impose concurrent sentences." *Patsalis*, 2016 WL 3101786, at *4.

quotation marks and citation omitted). With this legal framework, it concluded that Patsalis's individual sentences were not "grossly disproportionate" because he was a repeat offender and "there were separate victims with a separate harm" for most of his 25 convictions. *Id.* (internal quotation marks omitted).

Patsalis argued that his convictions warranted "an exception to the general rule . . . and the cruel and unusual punishment analysis [should be] applied to the total sentence of 292 years." *Id.* The Arizona Court of Appeals disagreed because "the jury convicted Patsalis for exactly the type of conduct that the statutes prohibit" and because the victims' testimonies belied Patsalis's claim that his offenses were not serious. *Id.* at *6. The Arizona Supreme Court denied review.

C. Post-Conviction Proceedings

Patsalis timely filed a notice of post-conviction relief in Arizona state court arguing, among other things, that his sentence violated the Eighth Amendment. The Arizona trial court denied Patsalis's petition for post-conviction relief. Patsalis did not appeal that decision.

Patsalis timely filed a Section 2254 habeas petition in federal court claiming that his cumulative sentence of 292 years in prison is cruel and unusual punishment. Arizona responded that Patsalis's claim failed on the merits because the Arizona Court of Appeals' decision—the last reasoned decision—was entitled to AEDPA deference and was not contrary to clearly established Supreme Court precedent.

The district court found that the Arizona Court of Appeals did not consider Patsalis's argument that his *cumulative* sentence was disproportionate. Nonetheless, the

district court concluded that the Arizona Court of Appeal's decision was entitled to AEDPA deference and denied the habeas petition because that court's decision "squarely addressed the merits of [Patsalis]'s legal theory of his case, and rejected it on grounds that are not contrary to or an unreasonable application of clearly established federal law." *Patsalis v. Att'y Gen. of Ariz.*, 480 F. Supp. 3d 937, 948, 952 (D. Ariz. 2020). Alternatively, the district court concluded that "even under de novo review, [Patsalis's] claim fail[ed] as a matter of law because a proportionality analysis is not applied to consecutive sentences as a whole, but only to each individual sentence; and none of [Patsalis's] individual sentences were disproportionate to his crime." *Id.* at 963. The district court granted Patsalis a certificate of appealability on his Eighth Amendment claim. *Id.* at 963–64.

On appeal, Patsalis argues that the Arizona Court of Appeals' decision is not entitled to AEDPA deference, and, even if it was, we should review its decision de novo because its holding that Patsalis's consecutive or cumulative sentences were not disproportionate in violation of the Eighth Amendment is contrary to clearly established Supreme Court precedent.

II. DISCUSSION

We review the denial of a Section 2254 habeas corpus petition de novo and any underlying factual findings for clear error. *See Martinez v. Cate*, 903 F.3d 982, 991 (9th Cir. 2018). "The district court's application of AEDPA to the last reasoned state court decision is a mixed question of law and fact which we review de novo." *Mann v. Ryan*, 828 F.3d 1143, 1151 (9th Cir. 2016).

A. AEDPA Deference

AEDPA "restricts the circumstances under which a federal habeas court may grant relief to a state prisoner whose claim has already been 'adjudicated on the merits in State court.'" *Johnson v. Williams*, 568 U.S. 289, 292 (2013) (quoting 28 U.S.C. § 2254(d)). Specifically, if AEDPA applies, habeas relief cannot be granted unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding." *Id*. (quoting 28 U.S.C. § 2254(d)); *see also Wetzel v. Lambert*, 565 U.S. 520, 525 (2012) (per curiam) (stating relief should be denied "unless each ground supporting the state court decision is examined and found to be unreasonable under AEDPA.").

A decision is not objectively unreasonable just because it is incorrect or even clearly erroneous. *See Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003). That is, "even a strong case for relief does not mean a state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). "[S]o long as 'fairminded jurists could disagree' on the correctness of the state court's decision," it is not unreasonable. *Id.* at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664, (2004)). "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102.

However, no deference to the state court is owed under AEDPA where the state court did not decide the petitioner's constitutional claim on the merits. *See Fox v. Johnson*, 832 F.3d 978, 985 (9th Cir. 2016); 28 U.S.C. § 2254(d). In that situation, federal courts review a habeas petitioner's

federal claims de novo. *See Fox*, 832 F.3d at 985. Because AEDPA review is so restrictive, our first task in this case is to determine whether it applies by analyzing whether the Arizona Court of Appeals decided Patsalis's Eighth Amendment claim on the merits. *See Johnson*, 568 U.S. at 292.

"[A]n adjudication on the merits is 'a decision finally resolving the parties' claims . . . that is based on the substance of the claim advanced, rather than on a procedural, or other, ground.'" *Kirkpatrick v. Chappell*, 950 F.3d 1118, 1131 (9th Cir. 2020) (citing *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004)). When a petitioner presents a federal claim "to a state court and the state court has denied relief," we presume that "the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington*, 562 U.S. at 99. This presumption applies even when the state court resolves the federal claim in a different manner or context than advanced by the petitioner so long as the state court "heard and *evaluated* the evidence and the parties' substantive arguments." *Johnson*, 568 U.S. at 302 (internal quotation marks and citation omitted); *see also Sturgeon v. Chandler*, 552 F.3d 604, 611–12 (7th Cir. 2009) (holding that constitutional claim was necessarily decided on the merits even though state court only referred to statutory claim).

Here, Patsalis presented an Eighth Amendment claim and a state constitutional claim to the Arizona courts asserting that the cumulative impact of his sentences was cruel and unusual because they violated the prohibition against "sentences that are disproportionate to the crime committed." *Solem v. Helm*, 436 U.S. 277, 284 (1983). The Arizona Court of Appeals' decision addressing this claim on

direct appeal is the last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803–04, (1991) (directing federal courts to apply AEDPA's standards to the state court's "last reasoned decision"). The Arizona Court of Appeals addressed Patsalis's constitutional claims in a subsection of its decision titled: "Cruel and Unusual Punishment." *Patsalis*, 2016 WL 3101786, at *4. It discussed Supreme Court precedent addressing sentence proportionality and recognized that Patsalis challenged the cumulative impact of his sentences. *Id.* at *5. But the Arizona Court of Appeals declined to assess the proportionality of Patsalis's sentence on a cumulative basis because of Arizona's prohibition against "consider[ing] the imposition of consecutive sentences in a proportionality inquiry." *Id.* (internal quotation marks and citation omitted). It also rejected Patsalis's argument that the circumstances of his case warranted an exception to Arizona's general rule because he was convicted for "exactly the type of conduct" prohibited by the relevant criminal statutes and because his "offenses were serious" where he broke into victims' homes when they were inside, causing them significant fear. *Id.* at *5–6. Thus, applying Arizona's rule against considering the imposition of consecutive sentences in a proportionality inquiry and considering the facts relevant to sentencing, including the number of victims and Patsalis's criminal history, the Arizona Court of Appeals rejected his constitutional claims (both state and federal) challenging his sentence as grossly disproportionate to his crimes. *See id.* at *6 ("Patasalis' individual sentences are not grossly disproportionate as defined under the authorities discussed above.").

While the Arizona Court of Appeals declined to analyze proportionality based on Patsalis's cumulative sentence, it did decide his Eighth Amendment claim on substantive

grounds. *Id.* at *4. It "heard and *evaluated* the evidence and the parties' substantive arguments," *Johnson*, 568 U.S. at 302 (internal quotation marks and citation omitted), rejected Patsalis's framing of the issue as a cumulative analysis, and concluded that Patsalis's "individual sentences [we]re not grossly disproportionate" under the state and federal authorities that it discussed. *Patsalis*, 2016 WL 3101786 at *6.

Our dissenting colleague asserts that whether proportionality is assessed based on individual sentences or the cumulative sentence is a "threshold issue" to Patsalis's claim and that the Arizona Court of Appeals did not "make a merits ruling on the actual claim Patsalis presented." Dissent at 30–31, 32. This assertion ignores the Supreme Court's direction about what a merits decision is: a determination of "*[t]he intrinsic rights and wrongs of a case* as determined by *matters of substance*." *Johnson*, 568 U.S. at 302 (alterations in original). *Johnson* is instructive. There the petitioner seeking federal habeas relief had raised a state law and Sixth Amendment challenge regarding discharge of a juror to the California Court of Appeal. *Id.* at 295. The California court provided an "extended discussion" of the petitioner's challenge and cited Supreme Court law, but it rejected the petitioner's challenge without "expressly acknowledg[ing] that it was deciding a Sixth Amendment issue." *Id.* at 296. After a remand from the California Supreme Court to address new state law authority, the California Court of Appeal again quoted Supreme Court authority but "did not expressly acknowledge that [the petitioner] had invoked a federal basis for her argument." *Id.* The petitioner did not seek review of the California Court of Appeal's decision or assert that her federal claim was overlooked. *Id.*

On federal habeas review, the district court concluded that the California appellate court had addressed the Sixth Amendment claim on the merits and applied AEDPA deference. *Id.* at 297. We reversed, concluding that it was "'obvious' that the State Court of Appeal had 'overlooked or disregarded' [petitioner's] Sixth Amendment claim." *Id.* Specifically, we reasoned that the California court relied on state law in reaching its decision and had "attributed no significance" to the Supreme Court precedent that it cited. *Id.* The Supreme Court reversed, concluding that AEDPA deference applied. It instructed that "[w]hen a state court rejects a federal claim without expressly addressing that claim, a federal habeas court must presume that the federal claim was adjudicated on the merits." *Id.* at 300. This is a rebuttable presumption, however. Because AEDPA deference applies only if there is a merits decision by a state court, the presumption is overcome and deference does not apply where a petitioner shows that the "federal claim [wa]s rejected as a result of sheer inadvertence." *Id.* at 302–03.

Applying this presumption rule in *Johnson*, the Supreme Court concluded that regardless of whether the petitioner's state law and Sixth Amendment claims were "perfectly coextensive, the fact that these claims are so similar makes it unlikely that the California Court of Appeal decided one while overlooking the other." *Id.* at 305. The Court noted that the California court's citation to Supreme Court precedent "confirm[s] that the state court was well aware that the [juror challenge] implicated both state and federal law." *Id.* at 306. It also noted that the petitioner had "treated her state and federal claims as interchangeable." *Id.*

Johnson provides a clear roadmap for this case. Patsalis presented his state and federal constitutional proportionality challenges together and discussed them interchangeably.

The Arizona Court of Appeals expressly recognized that Patsalis was presenting both a state and federal constitutional challenge, discussed authority from both forums, and stated that "[i]n a non-capital case, whether a punishment is cruel and unusual under the Eighth Amendment and the Arizona constitution is measured according to a 'narrow proportionality principle that prohibits sentences that are grossly disproportionate.'" *Patsalis*, 2016 WL 3101786, at *5 (citations omitted); *see also Ewing v. California*, 538 U.S. 11, 20–21, 23 (Noncapital sentences are subject to a "narrow proportionality principle" that prohibits sentences that are grossly disproportionate to the crime."). Thus, we must presume that its conclusion that "Patsalis's individual sentences are not grossly disproportionate as defined under the authorities discussed" was a merits determination under both Arizona and federal law. *Id.*; *see Johnson*, 568 U.S. at 301, 302–03; *cf. Echavarria v. Filson*, 869 F.3d 1118, 1129 (9th Cir. 2018) ("the Nevada Supreme Court's explanation of its decision on state habeas shows that it adjudicated only Echavarria's claim of actual bias. It did not adjudicate his distinct claim of risk of bias.").

Moreover, Patsalis cannot rebut the presumption that his federal claim was decided on the merits. Arizona's standard for evaluating sentence proportionality is at least as protective as the federal standard. *State v. Davis*, 79 P.3d 64, 67–68 (Ariz. 2003) (holding there was no "compelling reason" in a sentence proportionality challenge to "interpret Arizona's cruel and unusual punishment provision differently from the related provision in the federal constitution"). The Arizona Court of Appeals cited *Davis* and expressly referenced the relevant federal standard. *Patsalis*, 2016 WL 3101786, at *5; *Johnson*, 568 U.S. at 304–06. There is no reason to think that the Arizona court overlooked or failed to resolve Patsalis's claim that his

cumulative sentence was unconstitutional. *See Harrington*, 562 U.S. at 99–100. While the Arizona could have been more express in rejecting Patsalis's framing of his claim, "federal courts have no authority to impose mandatory opinion-writing standards on state courts." *Johnson*, 568 U.S. at 300 (internal quotation marks and citation omitted). The Arizona court recognized Patsalis's attack on his cumulative sentence, cited relevant federal law, and denied his Eighth Amendment claim.[2] On this record, we conclude that the Arizona Court of Appeals made a merits determination and that AEDPA deference applies. 28 U.S.C. § 2254(d).

B. Sentence Proportionality

As explained, Patsalis argues that his cumulative 292-year sentence is grossly disproportionate to his crimes in violation of the Eighth Amendment. Because AEDPA

[2] Notably, federal courts and state courts outside of Arizona have rejected the assertion that an Eighth Amendment proportionality analysis *requires* cumulative consideration of consecutive sentences. *See, e.g., United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988) ("Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence."); *State v. Becker,* 936 N.W.2d 505, 514 (Neb. 2019) (collecting state cases and noting that "[f]ederal courts have said that the focus of the disproportionality inquiry should be on the individual sentence rather than the aggregate of sentences."). The dissent correctly states that some Supreme Court cases have addressed the proportionality of cumulative sentences, dissent at 19, but that does not change our analysis. *Lockyer* considered petitioner's cumulative-sentence argument because that is the argument that the California Court of Appeal addressed. *See* 538 U.S. at 68–69. *Lockyer* does not hold or even imply that state courts do not reach the merits of an Eighth Amendment claim if they consider such challenges individually, not cumulatively. Similarly, the Supreme Court's decision in *Hutto v. Davis* does not support such a conclusion. *See* 454 U.S. at 371.

applies, we can grant relief on this claim only if the Arizona Court of Appeals' decision rejecting Patsalis's cumulative-impact argument and analyzing proportionality based on each individual sentence was "contrary to, or an unreasonable application of, clearly established" Supreme Court precedent. 28 U.S.C. § 2254(d). It was not.

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. *See Carey v. Musladin*, 549 U.S. 70, 77 (2006) ("Given the lack of holdings from this Court [on this issue], it cannot be said that the state court "'unreasonabl[y] appli[ed] clearly established Federal law.'" (quoting 28 U.S.C. § 2254(d)(1)); *Stenson v. Lambert*, 504 F. 3d 873, 881 (9th Cir. 2007) ("Where the Supreme Court has not addressed an issue in its holding, a state court adjudication of the issue not addressed by the Supreme Court cannot be contrary to, or an unreasonable application of, clearly established federal law."). As the Supreme Court itself has instructed, the only thing that is clearly established in this area is that "[a] gross disproportionality principle is applicable to sentences for terms of years." *Lockyer*, 538 U.S. at 72.

Lockyer is instructive. There, the petitioner was sentenced to "two consecutive terms of 25 years to life for stealing approximately $150 in videotapes" under California's three-strikes law. *Id.* at 70. The Supreme Court reversed our decision granting habeas relief under the Eighth Amendment, holding that the state court's rejection of the petitioner's proportionality challenge must be upheld under AEDPA. *Id.* at 73–77.

The Court noted that its sentence-proportionality precedents "have not been a model of clarity." *Id.* at 72. It further recognized that it has "not established a clear or consistent path for courts to follow" in analyzing proportionality of a sentence to a term of years. *Id.* Nor has it been clear about "what factors may indicate gross disproportionality" or provided "clear objective standards to distinguish between sentences for different terms of years." *Id.* (cleaned up). Other than the basic principle of proportionality, the only thing that the Court has established is that the rule against grossly disproportionate sentences is violated "only in the exceedingly rare and extreme case." *Id.* at 73 (cleaned up). Thus, the Court concluded that the proportionality principle "gives legislatures broad discretion to fashion a sentence," and that it was not objectively unreasonable for the California court to conclude that the petitioner's sentence did not violate the contours of such principle. *Id.* at 76.

Turning to this case, Patsalis's cumulative sentence is undeniably harsh, and the trial court would have been reasonable in imposing a shorter sentence. But the Supreme Court has emphatically instructed that "[i]t is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous." *Id.* at 75 (cleaned up); *see also*, *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam) (holding that "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was "objectively unreasonable" (citation omitted)); *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (stating that "[t]he question under AEDPA is not whether a federal court

believes that the state court's determination was incorrect but whether that determination was unreasonable").

To grant Patsalis's habeas petition, we must conclude that "there is no possibility fairminded jurists could disagree" that the Arizona Court of Appeals' decision conflicts with the Supreme Court's clearly established precedents. *Harrington*, 562 U.S. at 102. This we cannot do given the limited Supreme Court precedent regarding the prohibition against disproportionality of a sentence to a term of years. *See Lockyer*, 538 at 72; *Knowles v. Mirzayance*, 556 U.S. 111, 112 (2009) (stating that "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme Court]" (internal quotation marks omitted)).

Patsalis also argues that his cumulative sentence is grossly disproportionate to the non-violent property offenses that he committed and grossly disproportionate when compared to sentences for other crimes committed in Arizona and in other jurisdictions. At bottom, this assertion is virtually identical to his first argument—that considered consecutively, his sentences are grossly disproportionate in violation of the Eighth Amendment—and it fails for the same reason. The Supreme Court has never *required* consideration of a cumulative sentence when considering an Eighth Amendment proportionality claim. *See Carey*, 549 U.S. at 654; *cf. e.g., Lockyer*, 538 U.S. at 72–74 (considering the consecutive nature of sentences in a proportionality review but not holding that such consideration is required). Therefore, we cannot say that the Arizona Court of Appeals' decision was contrary to or

unreasonably applied "clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d).

AFFIRMED.

CHRISTEN, Circuit Judge, dissenting:

I

Atdom Patsalis was convicted of various non-violent theft-related crimes committed over a three-month period when he was twenty-one years old. The total value of the property was about $5,000. Pre-trial, the State of Arizona made two plea offers of twenty years or less. Patsalis rejected both offers and was convicted of the charged offenses after a jury trial. The longest sentence imposed for any of his crimes was 15 years, but the court specified that his multiple sentences would run consecutively. The net result was a cumulative sentence of 292 years.

Patsalis argued in state appellate-court proceedings that his cumulative sentence was disproportionate to his non-violent, theft-related crimes and that it violated the Eighth Amendment's bar against cruel and unusual punishment. The state appellate court declined to address the claim Patsalis presented, instead ruling only on the proportionality of the individual sentences imposed for each count of conviction. Patsalis sought habeas relief in federal district court pursuant to 28 U.S.C. § 2254. The district court concluded that the last reasoned state-court decision was entitled to deference pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and denied relief.

On appeal, my colleagues agree that AEDPA deference applies and they affirm on that basis. The majority acknowledges that the state court did not address Patsalis's cumulative sentence—yet it asserts that the state court rejected Patsalis's federal claim on the merits. The state court's opinion is clear: it affirmed Patsalis's individual sentences while expressly declining to consider whether his 292-year sentence was grossly disproportionate. Because the state court did not reach the merits of the claim Patsalis actually presented, there is no state-court decision to which we can defer and de novo review is the proper standard. Reviewing Patsalis's claim de novo, I conclude that his cumulative sentence violates the Eighth Amendment. Accordingly, I respectfully dissent.

II

A. Patsalis's Crimes

Over a three-month period beginning in November 2013, Patsalis committed twenty-two burglaries in Bullhead City, Arizona. He was twenty-one years old. Four of the burglaries involved entries into personal residences; the rest were non-residential, such as entry into "a garage, a yard, a vehicle, or a detached structure." None of the burglaries involved violence and there is no indication Patsalis encountered any homeowners. In total, Patsalis stole about $5000 worth of random items (e.g., a drill, a flashlight, and a telescope). He also stole a credit card, and in one incident he drove off in a car that he later abandoned.

Police discovered the house where Patsalis was staying and they obtained a warrant to search it. Patsalis returned to the house during the search and confessed to the crimes.

Patsalis was indicted on twenty-five theft-related counts: twelve counts of second-degree burglary in violation of Ariz. Rev. Stat. § 13-1507; ten counts of third-degree burglary in violation of Ariz. Rev. Stat. § 13-1506; one count of credit card theft in violation of Ariz. Rev. Stat. § 13-2102; one count of unlawful means of transportation in violation of Ariz. Rev. Stat. § 13-1803; and one count of attempted unlawful means of transportation in violation of Ariz. Rev. Stat. §§ 13-1001 and 13-1803. Patsalis turned down two plea offers from the State: a seventeen-and-a-half-year prison sentence, and an offer of a sentence between ten and twenty years, leaving the exact jail time to be determined by the sentencing court. A jury convicted Patsalis on all counts and found four aggravating circumstances.[1]

B. Patsalis's Sentence

At sentencing, the state trial court found that Patsalis had two previous felony convictions as an adult for criminal trespass and criminal damage (sixth-degree felonies the court treated as a single conviction because they were committed at the same time), and one conviction for third-degree burglary.

Patsalis qualified as a category-three repeat offender under Arizona law. *See* Ariz. Rev. Stat. § 13-703(J). In mitigation, his attorney argued that Patsalis cooperated with the investigation; that his crimes constituted a "spree" rather

[1] The jury found: (1) the offenses involved the taking of or damage to property of value; (2) the defendant committed the offenses as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value; (3) victims or their immediate family suffered physical, emotional or financial harm; and (4) a victim was at least sixty-five years of age. *See* Ariz. Rev. Stat. § 13-701(D)(3), (6), (9), (13).

than separate offenses; and that he was only twenty-two years old at the time of sentencing. The State urged the court to impose the maximum sentence for all but two of Patsalis's convictions and argued that the sentences should run consecutively because Patsalis's crimes either had separate victims or separate harms or were committed in different locations or at different times. The State represented that it would understand if the trial court imposed a concurrent sentence for three of the charges because they related to the same victim.

Before imposing the sentence, the trial court made three observations. First, the court expressed concern that Patsalis's criminal history and previous prison sentences had not deterred his criminal behavior. Second, the court observed that Patsalis's crimes "were clearly premeditated." Finally, the court expressed its view that Patsalis had no empathy or sympathy for any of his victims because he had said that he felt bad about having inadvertently robbed someone he knew but did not express the same regret regarding other victims.

The trial court then remarked to twenty-two-year-old Patsalis:

> I think to myself . . . what has horribly gone wrong in your life that has [led] you to this, or are you simply a criminal.
>
> Are you just simply somebody who has a criminal mindset, you're a sociopath and you're going to simply prey on people for as long as you can . . . .
>
> You know, Mr. Patsalis, you may very well fit into that category, as, again, someone who

> is just going to be a criminal—a career criminal no matter what.

Next, the court explained its reasons for imposing consecutive sentences, rather than concurrent sentences, for each of the charges:

> If I order . . . consecutive[sentences], you'll spend the rest of your life in prison, which seems . . . fairly harsh, if not incomprehensible . . . for these . . . offenses; but I'm going to follow the law as I believe [it] dictates.
>
> . . .
>
> And I believe . . . that [it] dictates that I impose consecutive sentences when, again, you burglarized one home in one location and [another] home in another location, regardless [of] whether it's the same day or not.
>
> . . .
>
> I cannot send the message . . . that you can burglarize multiple houses and victimize multiple people on multiple occasions and you'll simply get one sentence for it. There has to be accountability and responsibility for each separate offense that you commit and have been convicted of.
>
> . . .

> [A]gain, I believe the law dictates me to [run] all but two of these sentences . . . consectutive[ly].

The trial court found no mitigating factors and sentenced Patsalis to a total of 292 years in prison. In doing so, the court specifically noted that all twenty-five counts were non-dangerous. It also acknowledged, once more, that the cumulative sentence was "very harsh," even "*incomprehensible*." (emphasis added). But the court concluded the sentence was "mandated by law" based on the crimes of conviction, the aggravating circumstances, and "on the fact that all but two of the[] offenses [were] required to be served consecutively."

C. Patsalis's Direct Appeal and Post-Conviction Proceedings

On direct appeal, Patsalis's appointed counsel argued that his sentence violated the prohibition on cruel and unusual punishments contained in the Arizona Constitution and in the United States Constitution. More specifically, he argued that the trial court mistakenly believed it was required to impose consecutive sentences, and that the state appellate court should consider his cumulative sentence in its proportionality analysis, despite Arizona's general rule to consider only the proportionality of the sentence imposed on each count of conviction.

The Arizona intermediate appeals court issued the last reasoned state-court decision and it affirmed the trial court's ruling. The appellate court agreed with Patsalis that the trial court was not required to impose consecutive sentences, but also ruled that the court had the discretion to do so. The appellate court declined to deviate from Arizona's general rule that courts need "not consider the imposition of

consecutive sentences in a proportionality inquiry," and held that Patsalis's individual sentences were not grossly disproportionate and did not violate the Eighth Amendment or the Arizona Constitution.[2] The longest sentence imposed for any of Patsalis's crimes of conviction was 15 years. The Arizona court considered the proportionality of the sentences imposed for each count and found they were not disproportionate. The state court did not consider whether Patsalis's cumulative 292-year sentence was disproportionate.

Patsalis filed a pro se petition for state post-conviction relief. In it, he again argued that his *cumulative* sentence amounted to cruel and unusual punishment. The state court ruled that Patsalis's post-conviction claim was not

[2] The appellate court's decision that the facts of Patsalis's case did not warrant deviating from this general rule was based on its comparison of the facts in Patsalis's case with the facts in *State v. Davis*, 79 P.3d 64 (Ariz. 2003). In *Davis*, the Arizona Supreme Court *did* consider a cumulative sentence. *Davis* involved a young defendant convicted of sexual misconduct with a minor after engaging in consensual sex with two teenage girls. *Id.* at 67. The defendant was sentenced to four consecutive thirteen-year sentences. *Id.* at 74. The Arizona Supreme Court explained that it considered the cumulative sentence, in part, because of the mandatory nature of the sentence and because of the court's conclusion that Davis had been "caught in the very broad sweep of the governing statute." *Id.* at 72. The appeals court reasoned that Patsalis's case was distinguishable from *Davis* because: (1) "unlike the situation in *Davis*, the jury convicted Patsalis [of] exactly the type of conduct the statutes prohibit"; and (2) although Patsalis argued his actions were "nonviolent property offenses," the trial court deemed the offenses serious and some victims were traumatized after learning Patsalis had entered their homes. The Arizona Supreme Court does not appear to have departed from its general rule in any other cases.

cognizable because it had been resolved on direct appeal.[3] Patsalis did not appeal the denial of his petition for post-conviction relief.

D. Patsalis's Federal Habeas Proceedings

Patsalis filed a pro se petition for writ of habeas corpus under 28 U.S.C § 2254 in the United States District Court for the District of Arizona. He argued that his sentence was cruel and unusual punishment and grossly disproportionate to his crimes. The State argued that the Arizona appeals court's decision was a merits ruling, that the ruling was entitled to AEDPA deference, and that it was not an unreasonable application of Supreme Court precedent.[4]

A magistrate judge recommended that the district court grant Patsalis's petition. In the magistrate judge's view, the state court erred by not considering whether Patsalis's consecutive sentences violated the Eighth Amendment and by not reaching the merits of the claim Patsalis actually presented. The court reviewed de novo Patsalis's proportionality challenge, and concluded the 292-year sentence "leads to an inference of disproportionality" and is "disproportionate to other[] comparable" offenses in Arizona and elsewhere. The State objected only to the magistrate judge's first recommendation, that the district court should decide that Patsalis's cumulative sentence gave rise to an inference of disproportionality. The State notably

[3] The judge who presided over Patsalis's trial and imposed his sentence also ruled on Patsalis's post-conviction claim.

[4] Patsalis filed his federal petition pro se but pro bono counsel entered an appearance on his behalf after the government opposed his federal habeas petition, so Patsalis had counsel for the reply he filed in the district court.

offered no objection or response to the magistrate judge's finding that the 292-year sentence was "longer than other comparable sentences in Arizona" and "disproportionate" to sentences imposed for comparable crimes in Arizona and elsewhere.

The district court agreed that the state court did not rule on the merits of Patsalis's claim that his cumulative sentence was disproportionate, but reasoned "there is no clearly established law requiring that consecutive sentences be considered as a whole, rather than individually, for . . . a proportionality analysis," and went on to decide that because the state appeals court's decision "resolved [Patsalis's] claim on the merits . . . as a matter of law, but not as a matter of fact," it was entitled to AEDPA deference. In other words, the district court recognized that the state court did not actually undertake a disproportionality analysis of Patsalis's cumulative sentence, and this accounts for the district court's observation that the state court did not decide the issue as "a matter of fact." But after deciding that Patsalis's appeal impliedly contended that the state court was required to consider his cumulative sentence when assessing his Eighth Amendment claim, the district court rejected that premise. This accounts for the district court's conclusion that the state court ruled on Patsalis's claim "as a matter of law." The district court went on to rule alternatively that if "a reviewing court determines [that the state appeals court's decision] is not due AEDPA deference," then the "proportionality review encompasses only the individual sentence for each crime committed," and Patsalis's cumulative sentence was "not grossly disproportionate" to his crimes. The court denied Patsalis's habeas petition but granted a certificate of appealability on his Eighth Amendment claim.

III

Patsalis filed his § 2254 petition after AEDPA's effective date, so AEDPA applies to his petition. *Williams v. Taylor*, 529 U.S. 420, 429 (2000). Under the pertinent portion of the familiar AEDPA standard, federal courts may not grant habeas relief on "*any claim that was adjudicated on the merits* in State Court proceedings unless the adjudication" resulted in either "a decision that was contrary to, or involved an unreasonable application of," clearly established Supreme Court precedent. 28 U.S.C. § 2254(d) (emphasis added); *see also (Terry) Williams v. Taylor*, 529 U.S. 362, 412 (2000).

For purposes of AEDPA, an adjudication "on the merits" is a "decision finally resolving [a party's claim] . . . that is based on *the substance of the claim advanced*[] *rather than on a procedural, or other, ground*." *Lambert v. Blodgett*, 393 F.3d 943, 969 (9th Cir. 2004) (emphasis added) (quoting *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001)). If a state court denies "a federal claim *without giving any explanation*, we presume that the decision was an adjudication on the merits." *Echavarria v. Filson*, 896 F.3d 1118, 1129 (9th Cir. 2018) (emphasis added). "But if a state court gives an 'explicit explanation of its own decision,' we take the state court at its word." *Id.* (quoting *James v. Ryan*, 733 F.3d 911, 916 (9th Cir. 2013)). "[W]hen it is clear that a state court has not reached the merits of a properly raised issue, we must review it de novo." *Id.* (alteration in original) (quoting *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002)).

The Supreme Court has explained that a "claim" is "an asserted federal basis for relief" from a state court judgment or sentence. *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005); *see Kirkpatrick v. Chappell*, 950 F.3d 1118, 1131 (9th Cir.

2020) (citation omitted). To illustrate this definition, two examples of issues that are not "claims" for purposes of AEDPA are whether a petitioner exhausted state remedies, and whether a petitioner procedurally defaulted on an asserted basis for relief. *See Gonzalez*, 545 U.S. at 532 n.4; *see also Kirkpatrick*, 950 F.3d at 1131 (holding that a waiver argument was not a claim). The critical principle under this controlling precedent is that an issue is not a "claim" if a favorable ruling only allows a petitioner to continue litigating the merits of an asserted federal basis for relief from a state court judgment or sentence. *Kirkpatrick*, 950 F.3d at 1131.

The district court recognized that the state appellate court did not decide a claim when it declined to address the cumulative nature of Patsalis's sentence in its Eighth Amendment proportionality analysis. The threshold issue was whether Patsalis's sentences would be evaluated individually or cumulatively, but the outcome of that question was not a merits ruling on Patsalis's Eighth Amendment claim because even if the appellate court had decided the issue in Patsalis's favor, he still would have had to litigate whether his cumulative sentence violated the Eighth Amendment by showing that it was grossly disproportionate to the offenses he committed. I see no room for debate that the state court's decision—that the trial court could have reviewed Patsalis's cumulative sentence but was not required to do so—did not decide Patsalis's "claim." *See id.* No matter the state court's ruling on that issue, Patsalis's Eighth Amendment claim would have remained unresolved.

Nor did the state appellate court make a merits ruling on the actual claim Patsalis presented, that his *cumulative* sentence violated the Eighth Amendment. As the magistrate judge and district court judge both recognized, the state

appellate court did not reach the merits of that asserted basis for relief. The majority asserts that the Arizona appellate court rejected Patsalis's federal claim. But the state court expressly told us that it declined to consider the proportionality of Patsalis's cumulative sentence and ruled only on the proportionality of the sentences imposed on each count of conviction: "[O]ur analysis focuses on the individual sentence imposed for each count and not the cumulative sentence of 292 years." This distinction makes a profound difference. The only question that the Arizona court answered was whether Patsalis's individual sentences were disproportionate on a count-by-count basis. The longest sentence Patsalis received on any count was 15 years. The Arizona court never considered whether Patsalis's 292-year sentence for non-violent theft related offenses of property with a total value of $5,000 was disproportionate.

This point is not disputed. My colleagues acknowledge that the appeals court "declined to analyze proportionality based on Patsalis's cumulative sentence" but they conclude that AEDPA deference still applies to the last reasoned state-court decision. They reach the latter conclusion in two steps. First, the majority relies on the rule that when a petitioner presents a federal claim to a state court and the state court denies relief, we presume "the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011). From there, my colleagues reason that *Harrington* binds them to apply AEDPA's deferential standard where a state court addresses the federal claim "in a different manner or context" because the state court "heard and *evaluated* the evidence and the parties' substantive arguments." *Johnson v. Williams*, 568 U.S. 289, 302 (2013) (internal quotation marks and citation omitted).

But there is no context in which the state court's decision resolved the claim Patsalis actually presented, and the majority overlooks that when a state court gives an "explicit explanation of its own decision," as the Arizona intermediate court of appeals did here, we take the state court "at its word." *Echavarria*, 896 F.3d at 1129 (quoting *James*, 733 F.3d at 916). Our court's failure to acknowledge that the state court unambiguously chose not to address Patsalis's claim accounts for the majority's erroneous application of AEDPA to deny Patsalis's appeal. On this record, the strong presumption that the state court decided Patsalis's claim on the merits is decisively rebutted because the state appellate court expressly articulated its decision *not* to evaluate Patsalis's cumulative sentence based on the Arizona court's general rule that state courts are not required to do so. Because the appellate court did not rule on the claim Patsalis presented, there is no state-court decision to which we may defer, and we are obliged to review Patsalis's Eighth Amendment claim de novo. *Id.* ("[W]hen it is clear that a state court has not reached the merits of a properly raised issue, we must review it de novo." (quoting *Pirtle*, 313 F.3d at 1167)).

The majority decides the presumption of merits adjudication applies, citing *Johnson v. Williams* as support. *See* 568 U.S. at 306. The majority's reliance on *Johnson* is misplaced. In *Johnson*, the Supreme Court addressed whether a state court makes an adjudication "on the merits" of a federal claim when it "rules against the defendant and issues an opinion that addresses some issues *but does not expressly address the federal claim in question*." *Id.* at 292 (emphasis added). The defendant in *Johnson* challenged the trial court's decision to discharge a juror on state law and Sixth Amendment grounds. *Id.* at 295. The last reasoned state-court decision cited the Supreme Court's definition of

juror "impartiality," signaling that the federal claim may have been reached, but the state court did not "expressly acknowledge" that it was deciding a Sixth Amendment claim. *Id.* at 296. The Supreme Court held that the presumption of merits adjudication applied, reasoning that even if the state's courts would not consider the defendant's state and federal claims to be "perfectly coextensive," the claims were so similar that it was unlikely the state court decided one and overlooked the other. *Id.* at 305.

What the majority misses is that *Johnson* only addressed the rule to be applied where it is unclear whether the state court reached the merits of the petitioner's claim. *Id.* at 292. *Johnson* had nothing at all to say about cases like Patsalis's, in which a state court specifies that it decided not to reach a claim. Where a state court tells us that it has not reached a claim, we take the state court at its word. *See Echavarria*, 896 F.3d at 1129 (quoting *James*, 733 F.3d at 916). The Arizona Court of Appeals identified Patsalis's claim that his cumulative 292-year sentence violated the Eighth Amendment and memorialized its decision to not address his cumulative sentence. The court left no doubt on this score.

The majority goes on to assert that "Arizona's standard for evaluating sentence proportionality is at least as protective as the federal standard." But this is plainly not so. Arizona has repeatedly articulated a general rule that courts need not consider the imposition of consecutive sentences in a proportionality inquiry, *see, e.g.*, *Davis*, 79 P.3d at 74, but the United States Supreme Court has not adopted that general rule, and while there are only a few Supreme Court cases addressing disproportionality challenges, some of them have indeed addressed the proportionality of cumulative sentences, *see, e.g., Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (considering the proportionality of

consecutive sentences); *Hutto v. Davis*, 454 U.S. 370, 371 (1982) (same). It was Patsalis's *cumulative* 292-year sentence that was grossly disproportionate to the crimes he committed, and that was the sentence that the Arizona Court of Appeals declined to consider. Because the Arizona Court of Appeals did not rule on Patsalis's Eighth Amendment challenge to his cumulative sentence, we should review this claim de novo.

IV

The Supreme Court has held that one governing principle is clearly established in determining whether a sentence violates the Eighth Amendment: a "gross disproportionality principle" applies to "sentences for terms of years." *Andrade*, 538 U.S. at 72. To determine whether a sentence is grossly disproportionate, a court must compare the gravity of the offense with the severity of the sentence. *See Ramirez v. Castro*, 365 F.3d 755, 768 (9th Cir. 2004) (citations omitted). If the inference of gross disproportionality arises, the court compares the sentence with other relevant sentences in the same jurisdiction, and also with sentences imposed for the same crime elsewhere. *Id.* at 770–72; *see also Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

A. Inference of Gross Disproportionality

The inference of gross disproportionality arises only in the "exceedingly rare" or "extreme" case. *Ramirez*, 365 F.3d at 763 (quoting *Andrade*, 538 U.S. at 72–73). The Supreme Court's Eighth Amendment case law is sparse, but the Court's reported opinions identify the considerations for determining whether the inference of disproportionality arises.

In *Solem v. Helm*, 463 U.S. 277 (1983), the Supreme Court concluded a sentence of life in prison without the possibility of parole was unconstitutional. *Id.* at 296–97, 303. The defendant in that case had accumulated a criminal history over the span of eleven years that included six nonviolent felonies: third-degree burglary (thrice), obtaining money by false pretenses, grand larceny, and driving while intoxicated. *Id.* at 279–80. The conviction that triggered the defendant's three-strikes sentence was for writing a bad check for $100. *Id.* at 281. The Court held that the resulting life-in-prison sentence, without the possibility of parole, was unconstitutional because writing a bad check "is one of the most passive felonies a person could commit" and Solem's criminal history was nonviolent. *Id.* at 296.

In *Graham v. Florida*, 560 U.S. 48 (2010), the Court considered the proportionality of another sentence and held that life without the possibility of parole for a juvenile defendant convicted of armed burglary violated the Eighth Amendment. *See id.* at 82. In a concurrence, Chief Justice Roberts declined to apply a special rule for juveniles but found an inference of gross disproportionality for the sentence of life without parole imposed upon the juvenile defendant. *Id.* at 86 (Roberts, C.J., concurring in the judgment). The Chief Justice looked to: (1) Graham's diminished culpability due to his age; (2) the fact that Graham was less dangerous than "murderers or rapists for whom the sentence of life without parole is typically reserved"; and (3) the fact that vastly less severe sentences were proposed by the prosecution. *Id.* at 91–93.

The facts and circumstances in the Supreme Court's *Solem* and *Graham* opinions inescapably point to the conclusion that Patsalis's 292-year sentence is one of the extremely rare cases that gives rise to an inference of

disproportionality at the first step of the Eighth Amendment analysis. Patsalis was just 21 years old when he committed his offenses so he did not have a track record that had accumulated over the course of even the eleven years at issue in *Solem*. (Indeed, he had only been an adult for three years.) His offenses were non-violent and theft-related, and he stole random items (e.g., a drill, a flashlight, a telescope) with a total value of roughly $5,000. While four of his offenses involved entering private residences—admittedly serious conduct—eighteen of the twenty-two burglaries for which Patsalis received consecutive sentences did not involve entry into a home, but into a garage, a vehicle, and a detached shed. All of them were deemed "non-dangerous" by the trial court. As was the case in *Graham*, the sentence Patsalis received was multiples of the sentences imposed for murderers or rapists, yet Patsalis did not injure anyone and there is no indication that any violence or weapons were involved in any of his offenses. As in *Graham*, the State proposed vastly less severe sentences pre-trial: a seventeen-and-a-half-year prison sentence, and an offer of ten to twenty years to be determined by the sentencing court. In a drastic departure from the State's assessment of an appropriate punishment, the trial court imposed sentences for each of his crimes ranging up to just 15 years, but specified that the sentences would run consecutively. The resulting sentence was 292 years in prison without the possibility of parole. The sentencing court aptly noted several times that the sentence was "incomprehensible" but articulated its impression that it was required to impose the sentences consecutively because Patsalis stole the property on different days and the crimes had different victims. Patsalis's 292-year sentence compels the conclusion that an inference of disproportionality arises.

The cases in which the Supreme Court found no Eighth Amendment disproportionality provide a comparison that is as instructive as the cases in which the Court found the Eighth Amendment's protection had been denied. In *Rummel v. Estelle*, 445 U.S. 263 (1980), the Court considered a sentence arising from minor theft offenses and found no Eighth Amendment violation where the defendant was sentenced under a three-strikes statute. *Id.* at 265. Rummel's crimes were: fraudulent use of a credit card (for $80 worth of goods), forging a check (for under $30), and obtaining money by false pretenses (less than $125). *Id.* at 265–67. The Court upheld Rummel's sentence, of life in prison *with the possibility of parole after 12 years*, because previous punishments had not deterred the defendant and the Court reasoned that Texas was entitled to sentence recidivists more harshly. *See id.* at 265, 284.

In *Harmelin v. Michigan*, 501 U.S. 957 (1991), the defendant was a first-time offender convicted of possessing 672 grams of cocaine and the trial court imposed a sentence of life without the possibility of parole. *Id.* at 961. In a concurring opinion, Justice Kennedy found no inference of gross disproportionality, reasoning that Harmelin's crime fell in a "different category from the relatively minor, nonviolent crime" at issue in *Solem*, presumably because it involved a vast amount of cocaine and Harmelin's crime "threatened to cause grave harm to society." *Id.* at 1002 (Kennedy, J., concurring in part and concurring in the judgment).

The defendant in *Ewing v. California*, 538 U.S. 11 (2003), was sentenced under a three-strikes statute and had a "long criminal history" including robbery and three residential burglary convictions. *Id.* at 14, 29–30. Ewing had served nine previous prison terms and committed most

of his crimes while on probation or parole. *Id.* The offense that triggered the three-strikes sentence was for grand theft (of golf clubs valued at $1200). *Id.* at 19. The Court upheld Ewing's sentence of 25 years to life in prison because of his violent criminal history and because grand theft is not a "passive felony." *Id.* at 28–29.

The defendant in *Lockyer v. Andrade*, 538 U.S. 63 (2003) was also sentenced under a three-strikes statute after committing a theft-related offense. *Id.* at 67–68, 77. But Andrade's criminal history had accumulated over the course of twenty years and it included offenses for escaping from prison, transportation of marijuana (twice), first-degree residential burglary (thrice), misdemeanor theft, and misdemeanor petty theft. *See id.* at 66–67. The Court held that Andrade's criminal history was not materially indistinguishable from *Rummel* or *Solem* and that Andrade's sentence, two consecutive terms of 25 years to life *with* the chance of parole after 50 years, was not unreasonable given his extensive criminal history. *Id.* at 73–74, 76–77.

Even looking across all fifty states, there are only a handful of cases that can fairly serve as comparators to Patsalis's because the magnitude of the sentence Patsalis received is typically reserved for violent crimes resulting in death or serious bodily injury to others. The fact that the parties are able to point to just a handful of comparator cases establishes that Patsalis's 292-year sentence is a true outlier, and leaves no doubt that it gives rise to an inference of disproportionality.

In *Ramirez v. Castro*, the defendant was sentenced under a three-strikes statute. 365 F.3d 755, 756 (9th Cir. 2004). Ramirez had two prior felonies for second-degree robbery (nonviolent shoplifting offenses), and the offense that triggered Ramirez's three-strikes sentence was a wobbler

petty-theft offense for shoplifting a $199 VCR from a retail store.[5] *Id.* The court found that Ramirez's sentence of 25 years to life, with a chance of parole after 25 years, gave rise to an inference of disproportionality because the sentence-triggering offense did not threaten to cause great harm to society and because, like Patsalis, Ramirez's criminal history was minor and nonviolent. *See id.* at 770.

We have denied habeas relief to petitioners sentenced under three-strikes statutes where the triggering offenses involved serious crimes against life or property and the defendants had compiled long or serious criminal histories. *See, e.g., Nunes v. Ramirez-Palmer,* 485 F.3d 432, 435–36, 439 (9th Cir. 2008) (denying habeas relief to petitioner who received twenty-five years to life in prison on a theft-related offense, and had a criminal history that included convictions for rape (twice), burglary (twice), robbery, and other thefts); *Taylor v. Lewis*, 460 F.3d 1093, 1095, 1100–01 (9th Cir. 2006) (denying habeas relief to petitioner who received twenty-five years to life in prison for possession of 36 milligrams of cocaine and had a lengthy criminal history that included voluntary manslaughter, second-degree burglary, armed robbery, vehicle theft, and ten misdemeanors); *Rios v. Garcia*, 390 F.3d 1082, 1083, 1086 (9th Cir. 2004) (denying habeas relief to a petitioner who received twenty-five years to life in prison for stealing $80 worth of watches from a department store and had a long criminal history that including two robbery convictions).

None of the above cases are perfectly analogous to Patsalis's, but a clear pattern emerges from them: the

[5] A wobbler is an offense that may be treated as a qualifying felony or as a non-qualifying misdemeanor when calculating the defendant's strikes. *See Ramirez*, 365 F.3d at 758.

Supreme Court and the Ninth Circuit have considered the following circumstances relevant in determining whether an inference of gross disproportionality arises from the sentence imposed for particular offenses: (1) the magnitude of the offense and conduct resulting in the sentence; (2) the nature and length of the petitioner's criminal history; (3) the severity of the sentence and the offenses for which it is typically reserved; and (4) whether lesser sentences were proposed by the prosecution. Applied to Patsalis's case, these factors point to the conclusion that the circumstances of his offenses and his 292-year sentence make this one of the "exceedingly rare" cases that gives rise to an inference of gross disproportionality.

1. Magnitude of Patsalis's Offenses and Conduct. Patsalis was convicted of twenty-five theft-related felonies. Four of his offences were residential burglaries for which the jury found four aggravating circumstances. The trial court also found that Patsalis's offenses were premeditated and that he lacked empathy for his victims, and despite the fact that they were all committed over a 3-month period, the trial court found that Patsalis's offenses were not part of a "spree." Finally, the court considered that some of Patsalis's victims testified that they felt unsafe in their homes after they had been burgled. Patsalis's crimes were non-violent, and he stole, in total, only about $5000 worth of items. He was an adult when he committed his crimes, unlike the defendant in *Graham*, but he was still very young and thus his prospects for rehabilitation were much better than older offenders. Some of Patsalis's crimes and conduct were undoubtedly serious, but it is telling that the most the trial court saw fit to impose on any of his individual crimes was a 15-year sentence.

2. Patsalis's Criminal History. This consideration weighs in favor of finding an inference of gross disproportionality. Patsalis, as a 21-year-old at the time of his offenses, had a relatively minor and nonviolent criminal history. He had only two previous felonies as an adult and both of them were nonviolent. One was for criminal trespass and criminal damage, sixth-degree felonies that the trial court treated as a single conviction, and one was for third-degree burglary. This nonviolent criminal history ranks low when compared to the defendants in the Supreme Court and Ninth Circuit cases discussed above.

3. Severity of Patsalis's Sentence. This consideration weighs heavily in favor of finding an inference of gross disproportionality. Unlike most of the above-noted Supreme Court and Ninth Circuit cases, Patsalis was not sentenced under a mandatory three-strikes statute. By ordering consecutive sentences for Patsalis's twenty-five theft-related offenses, the trial court imposed a cumulative 292-year prison sentence without the possibility of parole. Only a death sentence could have been more severe than the one Patsalis received. The magistrate judge was right that, in Arizona, a sentence of life in prison without parole is typically reserved for offenses far more violent or harmful to society than Patsalis's minor theft-related crimes (e.g., first-degree murder, violent sexual assault, and terrorism).[6]

4. Proposed Lesser Sentences. This consideration weighs strongly in favor of finding an inference of gross

[6] The maximum possible sentence for Patsalis's most serious offense was 25 years, but the longest single sentence he received was 15 years, and the state trial court commented during sentencing that the cumulative sentence was "incomprehensible" for the type of offenses Patsalis committed.

disproportionality. Pre-trial, the State offered Patsalis two plea deals that would have resulted in a sentence of 20 years, at most. To be sure, plea deals are an imperfect measure of what a proportionate sentence might be, but it is undeniable that the prosecutor's pre-trial offers provide a strong indication of what the State considered to be a reasonable sentence, and Patsalis's 292-year cumulative sentence is nearly fifteen times as long as the longest plea deal the State proposed. In his petition, Patsalis argues the disparity between his cumulative sentence and the plea deals he was offered is about twenty times what is typical between plea offers and sentences.

There can be no serious question that the sentence Patsalis received for the crimes he committed gives rise to an inference of gross disproportionality. The next step is a comparison with other relevant sentences in Arizona and sentences imposed for the same crimes elsewhere. *See Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in judgment).

B. Other Relevant Sentences in Arizona

When an inference of disproportionality arises, we "compare the sentences imposed on other criminals in the same jurisdiction." *Solem*, 463 U.S. at 291. The State has not disputed that Patsalis's 292-year sentence is an outlier compared to other sentences imposed in Arizona for similar crimes. The magistrate judge concluded, without objection by the State, that Patsalis's sentence "is disproportionate to other[] comparable Arizona crimes." The district court agreed: "Because Respondents did not raise an objection to this specific finding . . . , the Court accepts . . . that Patsalis's sentence is longer than other comparable sentences in Arizona." The State continues to concede this point in its briefing to our court.

C. Other Relevant Sentences Outside of Arizona

The next comparison is between Patsalis's sentence and the sentences imposed for "the commission of the same crime in other jurisdictions." *Solem*, 463 U.S. at 291. Even looking nationwide, it is notable that there are few comparators available. But four sentences outside of Arizona validate the conclusion that Patsalis's sentence is grossly disproportionate:[7]

1. *State v. Dioneff*, No. 2006-A-0063, 2007 WL 1884584, (Ohio Ct. App. June 29, 2007). Dioneff was indicted on thirty-one counts for engaging in a pattern of corrupt activity, second-degree burglary (eight counts), grand theft (thirteen counts), theft (four counts), breaking and entering (four counts), and conspiracy to commit burglary. *Id.* at *1–2. Dioneff had "an extensive criminal record" (that is not detailed). *Id.* at *12. He was convicted on all but three of the counts (though two of the counts were reduced) and was sentenced to twenty-seven years of prison. *Id.* at *2–3.

2. *State v. Snow*, 144 P.3d 729 (Kan. 2006). Snow was convicted of nineteen counts, including nonresidential burglary (six counts), theft (seven counts), felony criminal damage to property (two counts), and misdemeanor criminal damage to property (four counts). *Id.* at 734–35. Snow had at least three previous felonies. *See id.* at 735. He was

[7] *See Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in judgment) ("The proper role for comparative analysis of sentences . . . is to validate an initial judgment that a sentence is grossly disproportionate to a crime.").

sentenced to fifteen-and-a-half years in prison. *See id* at 743. On remand, Snow's potential maximum consecutive sentence was seven-and-a-half years in prison. *Id.*

3. *Wright v. Crawford*, 294 F. App'x 274 (9th Cir. 2008). Wright was convicted of six felony counts for residential burglaries. *Id.* at 274. He had six previous felonies—one of which was assault with a deadly weapon. *Id.* at 275. He was sentenced to six life sentences with a chance of parole after ten to thirty years. *Id.* at 275–76.

4. *State v. Ciresi*, 151 A.3d 750 (R.I. 2017). Ciresi, a decorated police sergeant, was convicted of nine counts including burglary, conspiracy to commit burglary, use of a firearm when committing a crime of violence, attempted larceny, receiving stolen goods, harboring a criminal, and obstructing justice. *Id.* at 752. Ciresi was sentenced to a total of thirty-five years, "with twenty years to serve and fifteen years suspended with probation, to run concurrently, and a ten year suspended sentence to run consecutively." *Id.* at 752.

For three reasons, these cases starkly illustrate that Patsalis's sentence was grossly disproportionate. First, the relatively minor nature of Patsalis's non-violent theft-related offenses is drastically less serious than the offenses in the closest available comparator cases. Second, aside from the defendant in *Ciresi*, who was unique because he was a former police officer and his crime represented a particular betrayal of the public trust, the defendants in the four comparator cases had much more extensive criminal histories. Last, Patsalis's sentence is more than three times the length of the *combined* sentences in *Dioneff*, *Snow*, and

Ciresi, and unlike the sentence in *Wright,* which included the possibility of parole after ten to thirty years, Patsalis was sentenced to a lifetime of imprisonment.

Comparing Patsalis's sentence to sentences imposed in Arizona and other jurisdictions confirms that Patsalis's 292-year sentence presents an exceedingly rare and extreme case that violates the Eighth Amendment.

V

The state court did not reach the merits of the claim Patsalis presented. On de novo review, Patsalis's cumulative sentence is grossly disproportionate to the offenses he committed. Because there can be no doubt that Patsalis's cumulative sentence violates the Eighth Amendment's ban on cruel and unusual punishment, I respectfully dissent.

APPENDIX B

FILED

OCT 25 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ATDOM MIKELS PATSALIS, Petitioner-Appellant, v. DAVID SHINN, Director; ATTORNEY GENERAL FOR THE STATE OF ARIZONA, Respondents-Appellees.	No. 20-16800 D.C. No. 3:18-cv-08101-JAT District of Arizona, Prescott ORDER

Before: SILER,* CHRISTEN, and FORREST, Circuit Judges.

Judge Forrest has voted to deny the petition for rehearing en banc, and Judge Siler so recommends. Judge Christen voted to grant the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.