

No. \_\_\_\_\_

In the  
**SUPREME COURT OF THE UNITED STATES**  
FEBRUARY TERM, 2019

Michael Mathew, *Petitioner*

v.

State of Ohio, *Respondent*

On Petition for a Writ of Certiorari  
To the Ohio Supreme Court

---

**CORRECTED PETITION FOR A WRIT OF CERTIORARI**

---

**ERIC J. ALLEN (0073384)**

*Counsel of Record, Attorney for Petitioner*

Law Office of Eric J. Allen, LTD.  
4200 Regent Street, Suite 200  
Columbus, Ohio 42319  
Tele No. 614.443.4840  
Fax No. 614.573.2924  
Email: eric@eallenlaw.com

CERTIFICATE OF COMPLIANCE

No. \_\_\_\_\_

Michael Mathew, *Petitioner*

v.

State of Ohio, *Respondent*

As required by Supreme Court Rule 33.1(h), I certify the petition of a writ of certiorari contains 3,369 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 24, 2019.

  
Eric Allen (0073384)

### QUESTIONS PRESENTED

Whether the twenty-one-year sentence imposed by the state trial court violated the Eighth Amendment ban on cruel and unusual punishments?

### LIST OF PARTIES

1. Petitioner: Michael Mathew 736 855, Noble Correctional Facility, 15708 McConnelsville Road Caldwell, OH 43724. For Petitioner: Eric J. Allen, Law Office of Eric J. Allen, LTD. 4200 Regent Street, Suite 200, Columbus, Ohio 43219.
2. Respondent: State of Ohio, D. Michael Haddox, Muskingum County Prosecutor, 5 North Fifth Street, Zanesville, Ohio

## TABLE OF CONTENTS

|                                    |      |
|------------------------------------|------|
| TABLE OF AUTHORITIES .....         | iv   |
| OPINIONS BELOW .....               | 1    |
| JURISDICTIONAL STATEMENT .....     | 1    |
| CONSTITUTIONAL PROVISIONS .....    | 2    |
| STATEMENT OF CASE .....            | 2-3  |
| SUMMARY OF ARGUMENT .....          | 3-4  |
| STANDARD OF REVIEW .....           | 4-5  |
| REASON FOR GRANTING PETITION ..... | 5-13 |
| CONCLUSION .....                   | 14   |
| CERTIFICATE OF SERVICE .....       | 14   |

## INDEX TO APPENDICES

Appendix A: Entry denying jurisdiction by the Ohio Supreme Court A-1

Appendix B: Fifth District Court of Appeals decision B1-B11

## TABLE OF AUTHORITIES

|  |       |
|--|-------|
| Enmund v. Florida, 458 U.S. 782, 797.....  | 5-6   |
| <i>Harmelin v Michigan</i> , 591 U.S. 957, 1005.....                                       | 5     |
| <i>Solem v Helm</i> , 463 U.S. 277.....  | 3,5   |
| <br>   |       |
| <i>US v Bartoli</i> , 5:03-cr-00387.....   | 9     |
| USA v Eric Bloom, Northern District of Illinois, 1:12-cr-00409.....                        | 12    |
| <i>United States v Kenneth Jackson</i> , 1:15CR263.....                                    | 9-10  |
| U.S. v Krinos, 4:17-cr-00001 .....   | 10    |
| U.S. v Maison, 1:15-cr-00117 .....   | 10    |
| USA v Eric Merkle 1:08-cr-00242, Western District of Michigan.....                         | 11-12 |
| <i>U.S. v Larry M. Westby</i> , 1:16-cr-00160.....   | 11    |
| <i>State v Beck</i> , 2016-Ohio-8122 .....   | 6     |
| <i>State v. Castile</i> , 2015-Ohio-512.....   | 8     |
| State v Copeland, 2005-Ohio-5899 .....   | 9     |
| <i>State v. Edwards</i> , 2006-Ohio-353 .....  | 7     |
| <i>State v Fanaro</i> 2008 Ohio 841 .....  | 7     |
| <i>State v Schneider</i> 2011-Ohio-4097.....   | 8     |
| <i>State v Ulmer</i> , 182 Ohio App. 3d 96.....  | 7     |
| <i>State v. Walden</i> , 54 Ohio App. 3d 160.....  | 6-7   |
| <i>State v Willan</i> , 2011 Ohio 6603.....  | 8     |
| State of Indiana v Charles Blackwelder, Hamilton Superior Court, 29D02-1406-FB-005291..... | 10-11 |
| <i>People v Mulholland</i> , 2018 Mich. App. LEXIS 404.....                                | 11    |
| People v Raul Marrero, Dupage County, Illinois.....  | 12    |

IN THE  
SUPREME COURT OF THE UNITED STATES

---

PETITION FOR WRIT OF CERTIORARI

---

Petitioner Michael Mathew respectfully prays that a writ of certiorari issue to review the judgement below.

OPINION BELOW

The Opinion of the Ohio State Supreme Court appears as Appendix A to this petition. The court's opinion is published at 2019 Lexis 245 (February 6, 2019).

JURISDICTION

The Ohio Supreme Court issued its decision on February 6, 2019. A copy is attached as Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS

### **U.S. Const. Amend. VIII:**

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

## STATEMENT OF THE CASE

On December 21, 2016, Appellant was indicted for sixty-five counts and a warrant was issued. Once he found out a warrant was active, Appellant turned himself into the Muskingum County Sheriff. An arraignment was held on January 13, 2017, bond was set in the amount of \$1,000,000.00. Keith Edwards was appointed by the court to assist in the defense.

A demand for discovery and motion for bond reduction was filed by defense counsel in this matter. The record does not indicate any other substantive motions filed by the defense. Discovery was completed, and the matter was moving towards trial. A plea agreement was reached between the State of Ohio and the Defendant. The matter was set for a rule eleven hearing.

On May 8, 2017, Appellant entered a plea to thirty-four counts in the indictment and sentencing was set for July 10, 2017. During the plea hearing, the prosecutor set forth the facts that supported the plea.

Sentencing was held on July 10, 2017, in the Muskingum County Common Pleas Court in front of the Honorable Judge Cottrill. Appellant was sentenced to a

total of twenty-one years in prison. The judge relied heavily upon the statement of a relative of the Appellant whose loss made up the lion share of the total loss.

A notice of appeal was timely filed with the Clerk of Court of Muskingum County, the record was filed. Three extensions of time to file the brief were sought and granted. The Fifth District Court of Appeals heard and decided this matter on August 23, 2018. A timely appeal was filed with the Ohio Supreme Court. They declined jurisdiction on February 5, 2019.

Petitioner now seeks a writ of certiorari from this Court on the important question raised in this case.

#### SUMMARY OF THE ARGUMENT

The Eighth Amendment prohibition against cruel and unusual punishments are generally applied in the context of capital punishment. Normally, this Court reviews this Amendment in terms of the method of execution. There is, however, the *Hamerlin/Solem* cases which discuss the Eighth Amendment in the context of sentencing. The holding is narrow, however, Petitioner believes that it would apply in this case. He believes the sentence applied to him for these crimes was disproportionate to the harm caused.

Petitioner believes that this is a case where this Court should apply the Eighth Amendment. This is wholly a financial crime, a crime that was not premeditated; one that when losses began to mount, Petitioner panicked; he made very bad choices and things went south, quickly spiraling out of control.

Because of the serious nature of the question before this honorable Court, it is imperative that this Court review the constitutional claim and grant relief to the Petitioner.

If the Court looks at the cases cited by the Petitioner with far worse loss and far more widespread economic ruin it is clear there is an eighth amendment violation in this case. Individuals with tens of millions of dollars in loss serve far less time than the petitioner. Individuals with far more widespread "schemes" or plans to defraud suffer far shorter prison terms than the Petitioner.

This crime can only be measured in terms of dollars. When you measure these crimes in that manner, it is clear the loss does not fit the twenty-one year sentence. Petitioner would ask this Court to review this claim and grant relief.

#### STANDARD OF REVIEW

Judgments of a state court, in order to be reviewed in the Supreme Court of United States, must be judgments from the highest court in the state in which the decision could be had. See *Fisher v Perkins* (1887) 122 US 522, 30 L Ed 1192, 7 S Ct 1227.

It is not the function of United States Supreme Court, in reviewing judgments of a state court, to decide local questions, but rather the United States Supreme Court is concerned solely with asserted Federal rights. See *United Gas Public Service Co. v Texas* (1938) 303 US 123, 82 L Ed 702, 58 S Ct 483. On certiorari from a state court,

the Supreme Court of United States can consider only Federal questions passed upon by state court. *Wilson v Cook* (1946) 327 US 474, 90 L Ed 793, 66 S Ct 663.

### REASON FOR GRANTING THE PETITION

#### **THE COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER PETITIONER'S STATE COURT SENTENCE OF TWENTY-ONE YEARS VIOLATED THE EIGHTH AMENDMENT**

The Eighth Amendment's proscription of cruel and unusual punishments applies not only to barbaric punishments, but also sentences that are disproportionate to the crime. *Solem v Helm*, 463 U.S. 277. Criteria that have been recognized in this Court's prior cases include (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction, that is, whether more serious crimes are subject to the same penalty or to less serious penalties; and (iii) the sentences imposed for commission of the same crime in other jurisdictions. *Id* at 290-292. It is clear that the Petitioner must first clear the initial hurdle of the gravity of the offense and the penalties harshness.

Justice Kennedy said in a concurrence, “[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality” 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 jurisdiction. *Harmelin v Michigan*, 591 U.S. 957, 1005.

If this comparative analysis “validate[s] an initial judgment that [the] sentence is grossly disproportionate,” the sentence is cruel and unusual. *Harmelin id.* It is said that a crime involving violence is, “a serious crime deserving serious

punishment." *Enmund v. Florida*, 458 U.S. 782, 797, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982). Violent crimes include those offenses where an individual has been injured or killed by the violent actions of a defendant.

The behavior in this case was the Petitioner making untrue statements regarding his licensure, the health of his investment accounts and whether he was insured for losses incurred during trading. Of particular interest to the trial court judge in the state court was the loss by a single individual. The person impacted by this loss was a relative of the Petitioner. Her loss was significant, but this only accounted for one of the counts for which the Petitioner was sentenced. The total loss complained by the state of Ohio was roughly four hundred thousand dollars. The sentence imposed on this first-time offender was twenty-one years.

Petitioner would argue that this sentence is grossly disproportionate to the harm caused by his unfortunate behavior. Petitioner believes that this disproportion allows him to discuss other similar individuals and their sentence.

#### A. IN THE STATE COURTS OF APPEAL

- i. First District Court of Appeals *State v Peter Beck*, 2016-Ohio-8122. Hamilton County, Ohio

There were numerous counts of securities fraud, theft and perjury revolving around a \$200,000.00 scheme. Mr. Beck was a state senator sentenced to 4 years in prison for his role in a scheme to defraud his prior constituents. This sentence is 17 years shorter than the Petitioner's sentence for the same offense behavior.

- ii. Second District Court of Appeals *State v. Walden*, 54 Ohio App. 3d 160.

Defendant received probation for a \$185,000.00 securities fraud case.

iii. Third District Court of Appeals *State v. Edwards*, 2006-Ohio-353, Marion County

This case involved 27 counts of securities violations and engaging in a pattern of corrupt activity with losses totaling \$400,00.00. He was sentenced to 4 years in prison. This is roughly the same loss as in the instant case.

iv. Fourth District Court of Appeals

Counsel cannot find a reported case similar to the one on appeal here.

v. Fifth District Court of Appeals *State v Fanaro* 2008 Ohio 841. Licking County, Ohio.

This case involved a similar fraud scheme totaling \$750,000.00 in losses. Following a jury trial, the Defendant received a sentence of 19 years. Petitioner's loss is nearly half of Fanaro's and Fanaro still received a shorter prison term.

vi. State v Adam Siddle Muskingum County, 2015 CR-0147

Siddle was sentenced to 7 years in prison in 2015 for embezzling more than \$900,000.00 from the Washington Township Volunteer Fire Department. This case involved twice the amount of loss to the victims, however, the Defendant in Siddle received a third of the prison term to which Petitioner was sentenced.

vii. Sixth District Court of Appeals -*State v Ulmer*, 182 Ohio App. 3d 96 Lucas County Common Pleas Court,

Ulmer was the president of an investment firm, Westhaven, who bilked investors out of more than \$15,000.000.00. He was sentenced to 10 years in prison. In the business of buying, fixing, and selling properties, Westhaven attracted investors with the promise of a secured investment and high returns. Specifically,

Westhaven promised that investor money was backed by the mortgage on real property. Only when the company dissolved did many investors discover that property on which they believed they held a mortgage was in fact in someone else's name or in some cases did not exist. He was released after serving 5 years

viii.      Seventh District

Counsel cannot find a reported case similar to the one here on appeal.

ix.      Eighth District Court of Appeals *State v Schneider*, 2011-Ohio-4097, Cuyahoga County.

Schneider Received a 10-year sentence for assisting her husband in a \$60,000,000.00 scheme that defrauded numerous investors across the United States. The sentence was originally 3 years, however, her sentence for engaging in corrupt activity was a mandatory 10-year sentence.

Schneider received 11 years less than the Petitioner, yet her economic loss was exponentially greater.

x.      Ninth District Court of Appeals *State v Willan*, 2011 Ohio 6603, Summit County.

Willan received a 10-year sentence, like Mrs. Schendier, because he had plead guilty to a rico violation in addition to the securities fraud counts. The loss in his case was \$2,500,000.00.

xi.      Tenth District Court of Appeals, *State v. Castile*, 2015-Ohio-512

Castile was charged with numerous securities violations causing a \$275,000.00 loss and was sentenced to 13.5 years in prison.

xii. Eleventh District Court of Appeals

Counsel cannot find reported cases similar to the one here on appeal.

xiii. Twelfth District Court of Appeals *State v Copeland*, 2005-Ohio-5899

Copeland was a person with numerous securities and theft violations and was sentenced to 23 years in prison. The loss was estimated at \$3,000,000.00.

B. IN FEDERAL COURT IN OHIO

i. Northern District of: *US v Bartoli*, 5:03-cr-00387

Bartoli, 62, fled the country after being charged for a massive Ponzi scheme that involved the sale of certificates of deposit and unregistered mutual funds, raising more than \$65,000,000.00 from an estimated 800 investors. He settled in Peru, where federal prosecutors say he worked as an investment adviser using three aliases. He was eventually arrested and extradited. Bartoli pleaded guilty in July 2016 to eight counts, including conspiracy, securities fraud, sale of unregistered securities, wire fraud, mail fraud and attempted income tax evasion. Federal prosecutors dropped other charges. His agreement suggested a sentence of up to 10 years. He was sentenced to 20 years, one year less than the Petitioner.

ii. Northern District of Ohio *United States v Kenneth Jackson*, 1:15CR263

Four Ohio men, including Jackson, were sentenced to prison for defrauding investors out of more than \$10,000,000.00 by selling unregistered securities and making several misrepresentations to investors about the product they purported to develop, law enforcement officials said.

Jackson and Schureck transferred the money to cover other expenses, and Jackson gambled more than \$3.3 million at Mountaineer Casino between 2009 and 2013, according to the court documents.

Kenneth Jackson, William Schureck, Dennis Deciancio, and Daryl Dane Donohue, were convicted on counts including conspiracy to commit mail and wire fraud, conspiracy to launder money, mail fraud, wire fraud, money laundering, making false statements and other charges.

Jackson was sentenced to more than 15 years in prison. Schureck was sentenced to 9 years in prison. Deciancio was sentenced to nearly 6 years in prison. Donahue was sentenced to more than 4 years in prison.

iii. Northern District of Ohio: *U.S. v Krinos*, 4:17-cr-00001

The former mayor of Campbell, Ohio, was sentenced to almost 5 years in prison for securities fraud and failure to pay and collect taxes. The total fraud in that case was \$1,200,000.00.

iv. Northern District of Ohio : *U.S. v Maison*, 1:15-cr-00117

The mastermind of a penny stock scheme that cost investors \$39,000,000.00 was sentenced to 12 years in prison.

C. IN OTHER JURISDICTIONS

1. Indiana

i. *State of Indiana v Charles Blackwelder*, Hamilton Superior Court, 29D02-1406-FB-005291

Defendant was sentenced to 15 years in prison for a \$19,000,000.00 Ponzi scheme fraud that included some 300 victims. He was arrested in 2014 for running a Ponzi scheme that sold investment opportunities through rental properties to elderly investors. The pair sold investments through their company CFS to help the elderly avoid the Medicaid spend-down requirements. He would serve only 4 years in prison.

ii. Federal: *U.S. v Larry M. Westby, 1:16-cr-00160*

Westby was sentenced to 90 months (7.5 years) imprisonment by Chief U.S. District Judge Jane Magnus-Stinson after pleading guilty to wire fraud, securities fraud and fraud in the offer or sale of securities.

Westby took in more than \$985,000.00 from his investors, then used the funds to purchase two vehicles, repay a personal loan, pay personal credit card bills, and buy a vintage basketball court for his home.

2. Michigan

i. *People v Mulholland, 2018 Mich. App. LEXIS 404*

Twin brothers James and Thomas Mulholland were sentenced to 10 - 20 years in prison on eight felony convictions by District Judge William Collette for running an \$18,000,000.00 Ponzi scheme.

They were later resentenced to 3.75 to 20 years, citing restitution as being the primary focus of the reduction.

ii. Federal: *USA v Eric Merkle, 1:08-cr-00242, Western District of Michigan*

Eric Riley Merkle was sentenced to 10 years in prison as a result of a guilty plea entered to charges of conspiracy, securities fraud, mail fraud and wire fraud. Along with his brother, Eric Merkle was ordered to pay restitution in the amount of \$21,583,148.44.

3. Illinois

i. *State v Raul Marrero*, DuPage County, Illinois

Raul Marrero was sentenced to 13 years for his role in operating an investment fraud scheme that targeted mainly those in the Chicago-area Hispanic community and bilked investors out of more than \$10,000,000.00.

ii. *Federal – USA v Eric Bloom*, Northern District of Illinois, 1:12-cr-00409

Eric Bloom was sentenced to 14 years in federal prison for a \$665,000,000.00 scheme. Eric Bloom was accused of misappropriating customers' securities by using them as collateral for a loan received from the Bank of New York Mellon Corp. Prosecutors alleged Bloom used part of the bank loan to purchase millions of dollars of high-risk, illiquid securities - not for customers, but for a trading portfolio that benefited himself, co-defendant Charles Mosely, some of Bloom's relatives and corporations controlled by his family.

ANALYSIS

*Hamerlin* and its progeny have created an overly subjective standard that makes any appellate lawyer look as if he is questioning the suffering of the victims, that he or she is making light of losing everything to a person you trusted. It is impossible to make this argument without having some cognition of that fact. The

breadth and gravity of taking money from people who trust you, and losing it, is undeniable. However, a sentence must be proportional to the actual damage caused. This is not a violent crime. This is not even a well thought out crime. It was a crime borne out of fear and inexperience.

When the Court looks at the other similar offenses as above delineated, this cannot be seen as a proportional sentence to the damage caused.

[remainder of page intentionally left blank]

## CONCLUSION

Across the Midwest there are individuals who have swindled people out of millions of dollars. In some cases, tens of millions of dollars. They received less time in prison for the same conduct as the Petitioner, providing false information regarding the performance of an investment causing the financial discomfort of numerous individuals. The method of fraud may differ, but the end result is the same: human frailty which led to economic disaster.

In comparing the harm to the sentence, it is inconceivable to think a man could serve more than twenty years in prison for a financial crime and a person could kill another in the state of Ohio and receive less time; a rapist would receive less time; an aggravated robber would receive less time.

Respectfully submitted,



Eric Allen (0073384)  
4200 Regent Street, Suite 200  
Columbus, Ohio 43219  
Ph: 614 443 4840  
Fax: 614 573 2924  
Email: [eric@eallenlaw.com](mailto:eric@eallenlaw.com)

## CERTIFICATE OF SERVICE

I hereby swear and affirm that on the 24 day of June , 2019, a copy of the foregoing was sent to D Michael Haddox, Muskingum County Prosecutor, 27 N Fifth Street, Zanesville, Ohio.



Eric Allen (0073384)

## APPENDIX A

The Supreme Court of Ohio **FILED**

FEB -6 2019

CLERK OF COURT  
SUPREME COURT OF OHIO

State of Ohio

v.

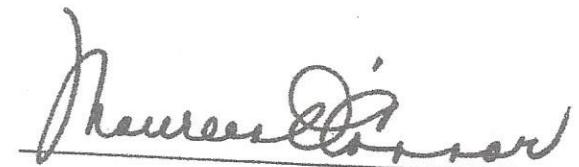
Michael D. Mathew

Case No. 2018-1428

E N T R Y

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Muskingum County Court of Appeals; No. CT2017-0051)



Maureen O'Connor  
Maureen O'Connor  
Chief Justice

## APPENDIX B

COURT OF APPEALS  
MUSKINGUM COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MICHAEL D. MATHEW

Defendant-Appellant

JUDGES:

Hon. John W. Wise, P. J.  
Hon. Patricia A. Delaney, J.  
Hon. Earle E. Wise, Jr., J.

Case No. CT2017-0051

O P I N I O N

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common  
Pleas, Case No. CR2016-0415

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

August 23, 2018

APPEARANCES:

For Plaintiff-Appellee

D. MICHAEL HADDOX  
PROSECUTING ATTORNEY  
GERALD V. ANDERSON II  
ASSISTANT PROSECUTOR  
27 North Fifth Street  
P.O. Box 189  
Zanesville, Ohio 43702-0189

For Defendant-Appellant

ERIC J. ALLEN  
THE ERIC J. ALLEN LAW OFFICE  
4605 Morse Road  
Suite 201  
Gahanna, Ohio 43240

*Wise, John, P. J.*

{¶1} Defendant-Appellant Michael D. Mathew appeals from his convictions, in the Muskingum County Court of Common Pleas, on thirty-six felony counts connected to the fraudulent sale of securities. Appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} Between the dates of August 8, 2014 and September 8, 2015, appellant took responsibility for nearly \$500,000.00 in investment funds provided by fifteen persons, two of them elderly, in a company known as Mathew Investments, LLC, located in Dresden, Ohio.

{¶3} Despite telling his investors he would hold their deposits in trust and make investments for them in the stock market, appellant commingled the money, spent some of it on himself, and transferred some to a personal E\*Trade account for use in options trading. By June 2016, appellant had sustained losses in the E\*Trade account totaling more than \$266,000.00. At some point, appellant began issuing false account statements to some of the investors. He also used incoming deposits to pay purported returns on some of the accounts as a means of maintaining his investment scheme.

{¶4} The largest losses were sustained by the following investors: Marjorie D. – \$126,835.16; Jeffrey B. – \$75,000.00; Stephen M. – \$75,000.00; M.M. – \$55,000.00; J.P. – \$40,000.00; Clarence S. – \$33,849.47; David M. – \$28,451.24; Jeffrey B. – \$27,760.00.

{¶5} The remaining investors suffered losses ranging from \$2,000.00 to \$12,000.00.

{¶6} On December 14, 2016, Appellant Mathew was indicted by the Muskingum County Grand Jury on one count of theft (in the amount \$150,000 - \$750,000), a felony

of the third degree; one count of acting as an unlicensed securities dealer (in an amount of more than \$150,000), a felony of the first degree; six counts of misrepresentation in the sale of a security (in the amount of \$37,500 - \$150,000), felonies of the second degree; ten counts of misrepresentation in the sale of a security (in the amount of \$1,000 - \$37,500), felonies of the fourth degree; six counts of securities fraud (in the amount of \$37,500 - \$150,000), felonies of the second degree; eleven counts of securities fraud (\$1,000 - \$7,500), felonies of the fourth degree; two counts of theft (in the amount of \$37,500 - \$150,000, elderly victim), felonies of the second degree; five counts of publishing a false statement (\$1,000 - \$7,500), each a felony of the fourth degree; ten counts of misrepresentation in the sale of a security (\$7,500 - \$37,500), each a felony of the third degree; ten counts of securities fraud (\$7,500 - \$37,500), each a felony of the third degree; and four counts of publishing a false statement (\$7,500 - \$37,500), felonies of the fourth degree.

{¶7} A plea deal was thereafter negotiated wherein appellant pled guilty to thirty-six of the counts, with numerous other counts amended, dismissed or merged with other counts. Via a judgment entry issued on July 17, 2017, prison sentences were ordered on all of the post-merger counts, with terms ranging from eleven months to four years. A number of the counts were further ordered to be served consecutively, with an aggregate sentence of twenty-one and one-half years in prison.

{¶8} On August 3, 2017, appellant filed a notice of appeal. He herein raises the following three Assignments of Error:

{¶9} "I. THE RECORD IN THIS MATTER DOES NOT SUPPORT THE IMPOSITION OF CONSECUTIVE SENTENCES PURSUANT TO STATE LAW R.C. 2929.14.

{¶10} "II. THE IMPOSITION OF CONSECUTIVE SENTENCES VIOLATES THE APPELLANT'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT APPLICABLE TO THE STATE OF OHIO BY THE FOURTEENTH AMENDMENT.

{¶11} "III. THE TRIAL COURT ERRED IN SENTENCING THE APPELLANT TO A CONSECUTIVE THIRTY MONTH PRISON TERM FOR A CRIME COMMITTED AGAINST CLARENCE S."

I.

{¶12} In his First Assignment of Error, appellant contends the trial court erred in ordering consecutive sentences for certain of his offenses. We disagree.

{¶13} 2011 Am.Sub.H.B. No. 86 revived the language provided in former R.C. 2929.14(E) and moved it to R.C. 2929.14(C)(4). The General Assembly has thus expressed its intent to revive the statutory fact-finding provisions pertaining to the imposition of consecutive sentences that were effective in the pre-*Foster* era. See *State v. Wells*, 8th Dist. Cuyahoga No. 98428, 2013-Ohio-1179, ¶ 11. The Ohio Supreme Court has clearly held: "In order to impose consecutive terms of imprisonment, a trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings." *State v. Bonnell*, 140 Ohio St.3d 209, 16 N.E.3d 659, 2014-Ohio-3177, syllabus.

{¶14} Furthermore, we no longer review sentences pursuant to the standard set forth in *State v. Kalish*, 120 Ohio St. 3d 23, 2008–Ohio–4912, 896 N.E.2d 124. See *State v. Cox*, 5th Dist. Licking No. 16–CA–80, 2017–Ohio–5550, ¶ 9. We now review felony sentences using the standard of review set forth in R.C. 2953.08. See *State v. Marcum*, 146 Ohio St.3d 516, 2016–Ohio–1002, 59 N.E.3d 1231, ¶ 22. Thus, under R.C. 2953.08(G)(2)(a), we will in this instance consider on appeal whether there is clear and convincing evidence that the record in the case *sub judice* does not support the sentencing court's findings under R.C. 2929.14(C)(4) to impose consecutive sentences. See *State v. Deeb*, 6th Dist. Erie No. E–14–117, 2015–Ohio–2442, ¶ 27.

{¶15} We direct our attention to R.C. 2929.14(C)(4), which provides as follows:

If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:

(a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of

the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶16} In a nutshell, "R.C. 2929.14(C)(4) provides that a trial court may require the offender to serve multiple prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any one of three facts specified in subdivisions (a), (b), and (c)." *State v. Leet*, 2nd Dist. Montgomery No. 25966, 2015-Ohio-1668, ¶ 15 (internal quotations and brackets omitted).

{¶17} In the case *sub judice*, the trial court made the following written findings in accordance with the language of R.C. 2929.14(C)(4), *supra*:

\*\*\* [T]he Court further found that the imposition of consecutive sentences are necessary to protect the public from future crime or to punish the Defendant, and that consecutive sentences are not disproportionate to the seriousness of the Defendant's conduct, and to the danger the Defendant poses to the public.

At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the

multiple offenses committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the Defendant's conduct.

The Defendant's criminal conduct in this case demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender and to punish the Defendant.

{¶18} Judgment Entry, July 17, 2017, at 5.

{¶19} The court also made oral findings under R.C. 2929.14(C)(4) on the record at the end of the sentencing hearing. See Sentencing Tr. at 55-56.

{¶20} The record in this matter reveals that appellant's acts of theft, misrepresentation, and securities fraud cost some of his victims their entire life savings, causing some to postpone their retirement plans indefinitely and remain in the workforce. One of the victims and her husband were hoping to grow their investment for use in funding their daughter's education. Appellant falsely told his investors he held a valid securities license in Florida and repeatedly produced fictionalized investment statements to avoid inquiry into his activities. He also falsely assured his victims that he had purchased a policy through Goldman Sachs to limit principal losses. Appellant presently argues that the trial court failed to consider that he was a first-time offender, an honorably discharged veteran, a former foster parent, and the married father of two adopted children. He also points out that there was no indication of a substance abuse or gambling issue in his life. However, a presumption of regularity attaches to all trial court proceedings. See, e.g., *Black v. Chiropractic Assocs. of Zanesville, L.L.C.*, 5th Dist. Muskingum No. CT2013-0012, 2014-Ohio-192, ¶ 20, citing *Chari v. Vore* (2001), 91

Ohio St.3d 323, 325, 744 N.E.2d 763. Upon review, we hold the trial court adequately reviewed the matter of consecutive sentences, and we find no clear and convincing evidence that the record does not support the trial court's findings under R.C. 2929.14(C)(4) for purposes of imposing consecutive sentences. *Deeb, supra*.

{¶21} Appellant's First Assignment of Error is therefore overruled.

II.

{¶22} In his Second Assignment of Error, appellant contends his consecutive sentences are a form of cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. We disagree.

{¶23} The Eighth Amendment to the United States Constitution prohibits excessive sanctions by the government. It provides as follows: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." See, also, Section 9, Article I of the Ohio Constitution. It is well-established that sentences do not violate these constitutional provisions against cruel and unusual punishment unless the sentences are so grossly disproportionate to the offenses as to shock the sense of justice in the community. See *State v. Chaffin*, 30 Ohio St.2d 13, 282 N.E.2d 46 (1972). As a general rule, a sentence that falls within the terms of a valid statute cannot amount to a cruel and unusual punishment. *State v. Stevens*, 5th Dist. Stark No. 2017CA00024, 2017-Ohio-8692, ¶ 10, quoting *McDougle v. Maxwell*, 1 Ohio St.2d 68, 69, 203 N.E.2d 334 (1964).

{¶24} Proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the

sentences imposed for commission of the same crime in other jurisdictions. *State v. Morin*, 5th Dist. Fairfield No. 2008-CA-10, 2008-Ohio-6707, ¶ 69, citing *Solem v. Helm*, 463 U.S. 277, 290-292, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). However, in *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, ¶ 20, the Ohio Supreme Court held that “[w]here none of the individual sentences imposed on an offender are grossly disproportionate to their respective offenses, an aggregate prison term resulting from consecutive imposition of those sentences does not constitute cruel and unusual punishment.” Thus, Eighth Amendment proportionality review does not apply to consecutive sentences. *State v. Williams*, 1st Dist. Hamilton No. C-160336, 2017-Ohio-8898, 101 N.E.3d 547, ¶ 31, citing *Hairston* at ¶ 20.

{¶25} Under the circumstances of the case *sub judice*, while appellant cogently contrasts his twenty-one and one-half year aggregate prison term with a number of Ohio, out-of-state, and federal cases in his well-researched argument, we find appellant cannot overcome the barrier of *Hairston* in regard to the consecutive nature of his overall sentence.

{¶26} Appellant's Second Assignment of Error is therefore overruled.

### III.

{¶27} In his Third Assignment of Error, appellant contends the trial court erred in sentencing him to a consecutive thirty-month prison term under Count 51, misrepresentation in the sale of a stock, involving the victim Clarence S. We disagree.

{¶28} Pursuant to *Marcum, supra*, this Court may vacate or modify a felony sentence on appeal only if it determines by clear and convincing evidence that: (1) the record does not support the trial court's findings under relevant statutes, or (2) the

sentence is otherwise contrary to law. *State v. Harris*, 5th Dist. Muskingum No. CT2018-0005, 2018-Ohio-2257, ¶ 25. Clear and convincing evidence is that evidence which will provide a firm belief or conviction as to the facts sought to be established. See *State v. Phillips*, 5th Dist. Ashland No. 17 COA 012, 2018-Ohio-143, ¶ 19, citing *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶29} Appellant first urges that the trial court's issuance of a sentence on Count 51 ignored the recent Victims' Rights Amendment to the Ohio Constitution. The amendment provides, among other things, that a crime victim shall have the right, "which shall be protected in a manner no less vigorous than the rights afforded to the accused," \*\*\* "to be heard in any public proceeding involving release, plea, sentencing, disposition, or parole, or in any public proceeding in which a right of the victim is implicated[.]" Ohio Constitution, Article I, Section 10a(A)(3).

{¶30} While appellant presents an interesting question of the impact of the aforesaid constitutional provision on aspects of Ohio sentencing law, the new amendment was not adopted until after appellant's sentencing. We therefore find his constitutional argument lacks merit.

{¶31} On more general grounds, we agree with the State's responsive contention that the existence of a victim's request for mercy on a defendant does not amount to clear and convincing evidence warranting appellate modification of a sentence. It appears undisputed that the trial court read and considered a letter from Clarence S. (who is married to a close relative of appellant) expressing that he did not want appellant to receive an additional prison sentence. However, the court, in its discretion, did not accept

the plea for mercy made by Clarence. Under these circumstances, we find no grounds to reverse or alter appellant's Count 51 sentence pursuant to the mandates of R.C. 2953.08.

{¶32} Appellant's Third Assignment of Error is overruled.

{¶33} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Muskingum County, Ohio, is hereby affirmed.

By: Wise, John, P. J.

Delaney, J., and

Wise, Earle, J., concur.

JWW/d 0809