No. 19-5030

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

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

John F. Litle III* 310321
Asst. Prosecuting Attorney
D. MICHAEL HADDOX
Prosecuting Attorney
Muskingum County, Ohio
27 North 5th Street
Zanesville, Ohio 43701
(740) 455-7123

Counsel for the Respondent
*Counsel of Record

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QUESTIONS PRESENTED

Whether the twenty-one year sentence imposed by the state trial court violated the Eighth Amendment ban on cruel and unusual punishments?[1]

[1] Appellant's actual sentence is twenty-one and one-half years imprisonment. *State v. Mathew*, 2018-Ohio-3405 (Ct. App. 2018).

OPINIONS BELOW

The opinion of the Supreme Court of Ohio denying review of the judgment of the appellate court is reported at *State v. Mathew*, 154 Ohio St.3d 1500 (2019). The opinion of the Ohio Court of Appeals, Fifth District, affirming the sentence of the Muskingum County Court of Common Pleas is recorded at *State v. Mathew*, 2018-Ohio-3405 (Ct. App. 2018).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

INTRODUCTION

This Court should not grant certiorari where the Supreme Court of Ohio, and the District Court of Appeals, adhering to this Court's guidance and the accepted standard of law throughout the United States, focused Eighth Amendment proportionality review on the individual sentences received by Appellant.

By arguing that this Court should treat separate sanctions for different crimes as a single sanction for appellate review, Appellant urges this Court to adopt an unworkable standard. By the proposed standard, criminals create a colorable Eighth Amendment claim by means of recidivism, and criminality receives a bulk-offense discount. Courts across the country addressing this issue agree that when a person, such as Appellant, commits a series of crimes over a period of time, against many different persons, a court considering the criminal sentence for purposes of the Eighth Amendment must evaluate the sentence handed down for each, separate crime.

Finally, Appellant's sentence in this case simply is not disproportionate, or grossly disproportionate, and does not in any way shock the conscience as do the grossly lenient sentences referenced by Appellant.

STANDARD OF REVIEW

This is an appeal from the Supreme Court of Ohio's refusal to review the decision of the appellate court. The case involves the Eighth Amendment to the United States Constitution. Interpretation of the Constitution is subject to *de novo* review.

STATEMENT OF THE CASE

The Ohio Revised Code provides the following sentencing ranges where a court imposes a term of imprisonment, in pertinent part:

> For a felony of the second degree ("F2")… two, three, four, five, six, seven, or eight years, …
>
> For a felony of the third degree ("F3") … a prison term of nine, twelve, eighteen, twenty-four, thirty, or thirty-six months, …
>
> For a felony of the fourth degree ("F4"), a prison term of six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months, and …
>
> For a felony of the fifth degree ("F5"), a prison term of six, seven, eight, nine, ten, eleven, or twelve months.

OHIO REV. CODE ANN. § 2929.14(A).

Furthermore, the Ohio Revised Code provides for the imposition of consecutive sentences, stating, in pertinent part,

> a trial court may require the offender to serve multiple prison terms consecutively if the court finds that the consecutive sentence 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 …
>
> ***
>
> 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 offender's conduct; …"

OHIO REV. CODE ANN. § 2929.14(C)(4).

Between August 1, 2014 and December 31, 2015, Appellant held himself out as an insured, licensed securities broker in the State of Ohio. During the same time, sixty-eight year old Marjorie Dobson was enjoying the beginning of her retirement. Marjorie held a job continuously since the age of sixteen, and accumulated a retirement nest egg of just over $130,000. She lived in the same house for thirty-three years, raising children in a small town, where she knew Appellant from a young age.

Over the course of a year, Appellant bilked

from Marjorie the entire balance of her retirement portfolio, leaving her working multiple part-time jobs, on reduced social-security income, saddled with debt and the obligation to work until she dies to prevent her children from inheriting her burden. Marjorie is but one of sixteen separate individuals targeted by and fleeced by Appellant's calculated, ongoing frauds.

These frauds included opening up a store-front as a brokerage, preparing false documentation of investment performance, making misrepresentations about licensure and insurance while even employing unknowing staff to keep up the appearance of propriety while the victims' property was being swindled away.

The State of Ohio indicted Appellant on sixty-five (65) felony counts related to his securities scheme on December 21, 2016. He was arrested and arraigned on January 13, 2017. Bond was set in the amount of $1,000,000 cash, property or surety, permitting his release upon the posting of $10,000 and a payment plan with a bondsman.

On May 8, 2017, Appellant pled guilty to thirty-six (36) counts of the indictment. The court ordered a pre-sentence investigation report prepared and made part of the court's file, containing the facts of the case and the input of Appellant and the victims. On July 10, 2017, the court considered at length the facts of the case and merged numerous counts for purposes of conviction. The State of Ohio elected the twenty (20) total remaining counts from the merged offenses.

The court sentenced Appellant on three (3) counts related to victim Marjorie Dobson as follows.

> Count 3, Misrepresentation in the sale of a security, F2 – four (4) years, of potential maximum of eight (8) years.
>
> Count 5, Misrepresentation in the sale of a security, F2 – four (4) years, of potential maximum of eight (8) years.
>
> Count 9, Theft from the elderly, F2 – four (4) years, of potential maximum of eight (8) years.

The court ordered the counts served concurrently with one another, and consecutively to some of the additional counts.

Four counts related to victims J.P, J.B.(1), J.B(2), and J.A. were sentenced next.

> Count 10, Attempted misrepresentation in the sale of a security, F3 – thirty (30) months, of potential maximum of thirty-six (36) months.
>
> Count 12, Attempted Theft, F3 – thirty (30) months, of potential maximum of thirty-six (36) months.
>
> Count 13, Attempted misrepresentation in the sale of a security, F5 – eleven (11) months, of potential maximum of twelve (12) months.
>
> Count 16, Attempted misrepresentation in the sale of a security, F4 – seventeen

(17) months, of potential maximum of eighteen (18) months.

The counts were ordered to be served concurrently to one another, and consecutively to additional counts.

Victims J.B.(3) and T.H.'s counts were reflected in the next counts for sentencing.

Count 19, Misrepresentation in the sale of a security, F3 – thirty (30) months, of potential maximum of thirty-six (36) months.

Count 25, Misrepresentation in the sale of a security, F4 – seventeen (17) months, of potential maximum of eighteen (18) months.

Similarly, these counts were ordered to be served concurrently to one another and consecutively to some other counts.

The single count involving D.M. and D.M.(2) was sentenced consecutively.

Count 29, Misrepresentation in the sale of a security, F3 – thirty (30) months, of potential maximum of thirty-six (36) months.

Victim S.M.'s count was separately consecutively sentenced.

Count 32, Misrepresentation in the sale of a security, F3 – thirty (30) months, of potential maximum of thirty-six (36)

months.

Victims M.M. and V.M.'s counts were sentenced with victims R.P. and W.P. as follows.

> Count 36, Misrepresentation in the sale of a security, F3 – thirty (30) months, of potential maximum of thirty-six (36) months.
>
> Count 40, Misrepresentation in the sale of a security, F4 – seventeen (17) months, of potential maximum of eighteen (18) months.
>
> Count 41, Misrepresentation in the sale of a security, F4 – seventeen (17) months, of potential maximum of eighteen (18) months.
>
> Count 42, Securities fraud, F4 – seventeen (17) months, of potential maximum of eighteen (18) months.
>
> Count 43, Securities fraud F4 – seventeen (17) months, of potential maximum of eighteen (18) months.
>
> Count 47, Publishing a false statement, F4 – seventeen (17) months, of potential maximum of eighteen (18) months.

The counts were ordered served concurrently with one another, and consecutively to the other consecutive counts.

Victim C.S.(1)'s sentence was grouped alone and ordered to be served consecutively to the other counts.

> Count 51, Misrepresentation in the sale of a security, F3 – thirty (30) months, of potential maximum of thirty-six (36) months.

Finally, victims C.S. (2) and R.S.'s counts were sentenced.

> Count 57, Misrepresentation in the sale of a security, F3 – thirty (30) months, of potential maximum of thirty-six (36) months.
>
> Count 63, Misrepresentation in the sale of a security, F4 – seventeen (17) months, of potential maximum of eighteen (18) months.

Those counts were again ordered served concurrently to one another, and consecutive to the other consecutive sentences.

Appellant did not receive a maximum sentence on any count. On the most serious counts, he received a sentence of half the maximum potential sentence. Moreover, for his series of crimes, under Ohio law, he faced a statutory maximum penalty, if served consecutively, of sixty-one (61) years imprisonment for the offenses for which he pled guilty and for which the court convicted him after merger. Appellant received an aggregate sentence of twenty-one and one-half (21.5) years.

In ordering some of the sentences served consecutively to one another, the sentencing court specifically found that his "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 [Appellant's] conduct." *State v. Mathew*, 2018-Ohio-3405 (Ct. App. 2018), Paragraph 17.

REASONS FOR DENYING CERTIORARI

I. Review Is Unnecessary Because the Courts Are In Agreement About Addressing the Eighth Amendment in Aggregate Sentences

There is no conflict to certify between the Circuit Courts of Appeal related to this issue because even in the absence of direct guidance from this Court, the matter has been consistently resolved in each of the courts having occasion to craft redress.

In the State of Ohio, *State v. Hairston*, 118 Ohio St. 3d 289 (2008), is controlling. *Hairston* reviewed numerous cases in concluding that "for purposes of the Eighth Amendment … proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively." *Id.* at 295. The court reasoned 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." *Id.*

The Second Circuit shares this analysis. *United States v. Aiello*, 864 F.2d 257 (2d Cir. 1988), *see also Fernandez v. Artuz*, No. 97 CV 2989 (MGC), 2002 U.S. Dist. LEXIS 8261 (S.D.N.Y. May 9, 2002). In *Aiello*, the defendant was sentenced to life in prison plus 140 years for multiple criminal counts. The court curtly explained, "Eighth amendment analysis

focuses on the sentence imposed for each specific crime, not on the cumulative sentence." *Id.* at 265. It went on, "As the Supreme Court once explained, 'if [the defendant] has subjected himself to a severe penalty, it is simply because he has committed a great many such offences.'" *Id. citing O'Neil v. Vermont*, 144 U.S. 323, 331 (1892).

The Tenth Circuit has operated under this standard of law for over thirty years. In *United States v. Schell*, 692 F.2d 672 (10th Cir. 1982), the Tenth Circuit identified the principle that challenging the imposition of two ten-year prison terms run consecutively to a prior, 95-year term would require the court to find that "virtually any sentence, however short, becomes cruel and unusual punishment when the defendant was already scheduled to serve lengthy sentences for prior convictions." *Id.* at 675. In *Hawkins v. Hargett*, 200 F.3d 1279 (10th Cir. 1999), the same Circuit referenced that the Eighth Amendment focuses on the sentence imposed for each specific crime, not the aggregate. However, in *United States v. Jolley*, 275 Fed. Appx. 758 (10th Cir. 2008), the Tenth District determined that it "need not definitely resolve" the question of whether an Eighth Amendment appeal must be brought only upon the individual, and not the aggregate sentence, and upheld the sentence in that case on other grounds. *Id.* at 759, fn2.

Addressing this issue, many federal courts of appeal reference the Seventh Circuit decision of *Pearson v. Ramos*, 237 F.3d 881 (7th Cir. 2001). While not directly on point, as Pearson was contesting intra-prison sanctions, the reasoning of the *Pearson* court

transcends to this case. "[I]t is wrong to treat stacked sanctions as a single sanction. To do so produces the ridiculous consequence of enabling a prisoner, simply by recidivating, to generate a colorable Eighth Amendment claim." *Id.* at 886. "Every disciplinary sanction, like every sentence, must be treated separately, not cumulatively, for purposes of determining whether it is cruel and unusual. Any other rule would permit a defendant, at the end of a long criminal career, to ask a court to tack together all his criminal punishments and decide whether, had they been a single punishment, they (it) would have been cruel and unusual." *Id.*

In the Sixth Circuit, in *United States v. Beverly*, 369 F.3d 516 (6th Cir. 2004), the court appears to adopt the reasoning of other circuits without explanation, stating, "Turns was sentenced to five years for the first of four counts of armed bank robbery … and to twenty years for the remaining three counts, to run consecutively. No one of these sentences is intrinsically 'grossly disproportionate' to the crime of armed bank robbery. Mandating consecutive sentences is not an unreasonable method of attempting to deter a criminal, who has already committed several offenses using a firearm, from doing so again." *Id.* at 537. Numerous other courts agree. *See, e.g.*, *Dyer v. Ryan*, No. CV 17-01528-PHX-JJT (DMF), 2018 U.S. Dist. LEXIS 107226 (D. Ariz. June 26, 2018); *McPherson v. Ryan*, No. CV-14-02120-TUC-JAS (BGM), 2017 U.S. Dist. LEXIS 129828 (D. Ariz. Aug. 14, 2017); *Redmond v. Biter*, No. ED CV 15-1522 SJO (AFM), 2015 U.S. Dist. LEXIS 175090 (C.D. Cal. Dec. 11, 2015); *Wahleithner v. Thompson*, 134 Wn. App. 931 (Wash. 2006).

Numerous states share this conclusion. Succinctly, "there is nothing cruel and unusual about punishing a person committing *two* crimes more severely than a person committing only one crime, which is the effect of consecutive sentencing." *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999). (emphasis in original). South Dakota addressed the issue and concluded similarly. *State v. Buchhold*, 2007 S.D. 15 (2007). (adopting reasoning in *Aiello*, *Schell*, *Pearson*, *O'Neil*, *August*, *supra*, and *Berger*, *Close*, and *Jonas*, *infra*).

In Arizona, *State v. Jonas*, 164 Ariz. 242 (1990), and *State v. Berger*, 212 Ariz. 473 (2006) stand for the conclusion that "if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate." *Id.*

This is a conclusion shared by Colorado. "If a proportionality review were to consider the cumulative effect of all the sentences imposed, the result would be the possibility that a defendant could generate an Eighth Amendment disproportionality claim simply because the defendant had engaged in repeated criminal activity." *Close v. People*, 48 P.3d 528, 539 (Colo. 2002). Missouri has concluded the same. *State v. Nathan*, 522 S.W.3d 881, 892 (Mo. 2017) ("The Supreme Court has never suggested that multiple sentences for multiple crimes is impermissible. To do so would defy logic.")

Minnesota addressed this issue at

considerable length in the context of juvenile offenders receiving consecutive sentences in *State v. Mahdi Hassan Ali*, 895 N.W.2d 237, 242-246 (Minn. 2017). Ultimately, that court concluded with the rest of the country that Eighth Amendment inquiries are directed to individual sentences related to individual crimes, and leaving open the question the application of that doctrine to juvenile defendants.

The only cases which arguably veer from the nationwide consensus center around the newly created subclass of dangerous juvenile offenders receiving *de facto* life sentences without parole. Only in this subclass have some courts begun to treat multiple crimes as one single aggregate event in terms of sentence. *See, e.g.*, *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016), *State v. Zuber*, 227 N.J. 422 (2017); and *Bear Cloud v. State*, 2014 WY 113 (2014) It is Respondent's position that, if necessary, these cases can easily be distinguished from those falling into the nationwide consensus.

II. Appellant Cannot Prevail Even By Expanding the Eighth Amendment to Examine the Aggregate Effect of Consecutive Sentences

Despite the accepted national standard for purposes of the Eighth Amendment that proportionality review focus on individual sentences and not the cumulative impact of multiple sentences imposed consecutively, Appellant requests that this court apply the criteria of *Solem v. Helm*, 463 U.S.

277 (1983), to his aggregate sentence.[2] Even if the Court adopted this unwise standard, he would not prevail under the criteria of *Solem*.

Moreover, his case would be a poor choice to review that standard, because Appellant could not survive the first prong of *Solem/Harmelin*.

According to *Solem*, three factors must be considered, the first being a threshold inquiry: "(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." *Id.* at 290-292.

Appellant therefore requests that the Court solely consider his cumulative sentence of twenty-one and one-half years and compare it to the cumulative sentence of other individuals. He provides numerous examples of individuals that received either less time or approximately the same time that he did for what he considers the same or different crimes.

However, if such an approach is to be utilized, the cumulative impact of an offender's crimes, victims, harm imposed, and sentence must be similarly situated. As we will see, this was not always the case with Appellant's analysis.

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[2] Respondent assumes, without Appellant's express concession, that no argument of "cruel and unusual punishment" will accompany any of his individual sentences, none of which exceeded even at maximum, four years.

A. The Gravity and Harshness

The first prong of the *Solem* analysis requires the sentence meet the "narrow proportionality principle" set forth in *Harmelin v. Michigan*, 501 U.S. 957 (1991). Thus, there need not even be strict proportionality between crime and sentence. *Id.* at 1001. Courts have applied this as an "extreme" or "gross disproportionality" test. *See, e.g.*, *United States v. Layne*, 324 F.3d 464 (6th Cir. 2003); *United States v. Marks*, 209 F.3d 577 (6th Cir. 2000); *Commonwealth v. Yu Qun*, 2016 N. Mar. I. LEXIS 20 (2016); *State v. Harrison*, 402 S.C. 288 (2013). (upholding a 20.5 year sentence for leaving the scene of a negligence accident involving death and driving without a license); *United States v. Farley*, 607 F.3d 1294 (11th Cir. 2010); *State v. Harris*, 844 S.W.2d 601 (Tenn. 1992); *State v. Houston*, 2015 UT 40 (2015), etc.

In one of the cases cited by Appellant himself in an effort to deflect from the gravity of his crimes, *United States v. Bartoli*, No. 5:03CR387, 2016 U.S. Dist. LEXIS 175814 (N.D. Ohio Dec. 20, 2016), the sentencing Judge saw through to the effects of "financial" offenses.

Bartoli bilked money and savings from 700 victims, stealing over $65 million from his targets. Then he fled the country for a decade. When he was finally captured and sentenced, the court considered the harm caused to each victim, not just the financial dollar figure, and imposed a sentence of twenty (20) years, the statutory maximum sentence under the federal law under which he was charged.

The district court in *Bartoli* addressed the federal sentencing range guidelines and explained that the victims had "losses that were not accounted for by a simple number in the loss amount column plugged into the advisory guidelines." *Id.* at 6-7. The court then reviewed some of the losses of different victims, including a woman, Linda, who had to continue working instead of retiring for an additional decade. When she finally retired, she had twenty-one (21) days to spend with her husband before he passed away.

> The advisory guidelines include a loss amount of just over $277,000 for David and Linda. The guidelines, however, cannot begin to quantify the decade of retirement that Bartoli stripped away from the couple -- ten years that a couple could have spent visiting family, travelling the world, and perhaps more importantly, enjoying the company of one another. Instead of those ten years, Linda received 21 days with an ailing husband who ultimately passed away.

Id. at 8-9.

The court reviewed statements and the harm caused to victim after victim, and found that beyond the mere financial figure, "Bartoli imposed life destroying impacts on many of his victims." *Id.* at 6. The jointly recommended sentencing range guideline was for 87 to 108 months; the court found that anything less than the statutory maximum of 240 months was not appropriate. *Id.* at 10.

Thus, the bilking another of their financial security and life savings is a crime the severity of which is not merely a summation of the amount and the means by which their resources were pilfered. The same numerical value could mean a month's salary or an individual's life-savings, depending on the victim. Furthermore, the sentence an individual receives must incorporate the harm suffered by the actual victim(s) for a just penalty.

Appellant cannot surpass this threshold showing. He claims that his offense is just about dollars, and claims that his ongoing fraud, perpetrated over the course of months, involving false business fronts, manufactured earnings reports and other indicia of premeditation and calculation were a "mistake" of some sort, and the product of "panic." The record does not bear out that claim and instead demonstrates the acts of a calculating criminal.

The victims whose lives Appellant destroyed did not experience an inconvenience, or a disruption in their regularly scheduled private-jet service. They have returned to the work force while moving in to their children's homes to make ends meet. They were hard-working persons whose nest-egg might have seemed like a year's salary to someone from the city, but constituted enough on which they could retire.

Marjorie Dobson works two part-time jobs, 8 hours a day, standing on concrete, earning minimum wage, without air conditioning, at age sixty-nine. Said Marjorie to the court's pre-sentence

investigator, "This is what I have to look forward to until I die."

Appellant's sentence in this case does not shock the reader with some type of disproportionality. Appellant fleeced and defrauded sixteen persons of their savings, including numerous retirees, leaving some individuals penniless and desperate in the twilight of their lives. His sentence was not disproportionate, and fell well within the moderate range of those penalties provided for by statute.

Appellant cannot make a case which would survive the first prong of *Solem*/*Harmelin* even under his preferred reading of those cases, making this case a manifestly bad vehicle for the proposition of law he seeks to advance.

B. Same Jurisdiction Comparison

Should an assessment of Appellant's cited proportionality cases be necessary, it is important to distinguish those which are wholly inapplicable to his case and which bear some relevance.

Appellant provides a single case sample in an effort to compare a sentence in the same jurisdiction as was his crime. Despite his failure to provide a sufficient citation, the State is aware of the case of Adam Siddle. *State v. Siddle*, 2017-Ohio-2843 (Ct. App. 2017). Like many of the allegedly comparable cases to follow, *Siddle* is not a comparable case to that of Appellant for a number of reasons. First, *Siddle* did not involve securities fraud. Second,

Siddle involved only a single victim – a publicly funded business – which mishandled its finances and the supervision of its employee, Adam Siddle. Finally, Siddle received seven years of eight years maximum on the offense of theft.

The other case Appellant located within his jurisdiction is an excellent comparison with Appellant's case, and further demonstrates that his sentence is not disproportionate either to his acts, or to the sentences given to others in his jurisdiction. *State v. Fanaro*, 2008-Ohio-841 (Ct. App. 2008).

In *Fanaro*, Fanaro had sixteen (16) victims, just like Appellant. Fanaro's victims were all between the ages of 60-90 and retired. Also, like Appellant, Fanaro used prior relationships to lure his victims into ever deeper levels of his fraud, to their detriment.

Fanaro even had previous securities misconduct allegations in Florida, just as did Appellant before coming to Ohio. Fanaro had additional charges, such as Engaging in a Pattern of Corrupt Activity, but generally his offenses centered on securities fraud convictions. He received a nineteen (19) year sentence from Licking County, a sentence very much comparable to Appellant's twenty-one and one-half (21.5) year sentence in neighboring Muskingum County for similar crimes.

Appellant cannot make his case for disproportionate sentencing, even relying on the flawed standard of his choosing, utilizing either of these comparisons within his own jurisdiction.

C. Other Jurisdictions Comparisons

Appellant provides other cases from other jurisdictions within Ohio and beyond, focusing solely on the numeric dollar value losses alleged in those cases compared with the years of imprisonment imposed by those courts. However, much like *Siddle*, many of the cases are not appropriate for comparison. For instance, *State v. Beck*, 2016-Ohio-8122 (Ct. App. 2016). (only one victim); *State v. Ulmer*, 182 Ohio App. 3d 96 (2009) (involved two counts of Unlawful Sexual Conduct with a Minor, not securities fraud or thefts); *State v. Willan*, 2011-Ohio-6603 (Ct. App. 2011) (dealt with small loans and RICO charge).

As referenced above, reviewing a criminal case as a cumulative, consecutive sentence and distilling the acts of the criminal to the mere number of dollars stolen cheapens the harm and suffering of crime victims and denies victims humanity and agency. Appellant seems to acknowledge this fact in his final argument. Nonetheless, a response to the referenced cases, where possible, is appropriate.

Appellant cites *State v. Castile*, 2015-Ohio-5121 (Ct. App. 2015), in which three victims were bilked out of investments of $6,000, $5,000, and $250,000, respectively. The sentencing court considered the harm to the victims, that one was a disabled veteran, and the community caused by Castile's conduct. He received thirteen and one half years on a case involving thirteen fewer victims than Appellant's case. The cases are proportionate.

In *State v. Edwards*, 2006-Ohio-353 (Ct. App. 2006), Edwards was convicted of numerous counts of securities fraud and engaging in a pattern of corrupt activity. The record is unclear as to the number and nature of the victims, but the losses suffered totaled $400,000. Edwards received a sentence of four years in rural Marion County. Respondent proposes that the sentence warranting an appellate guffaw is that of Edwards, not Appellant, and that arguably Marion County sentencing practices ought to be a cautionary tale, not a model to be emulated. Nonetheless, Respondent concedes that the cases appear to have superficial similarities.

In *State v. Schneider*, 2011-Ohio-4097 (Ct. App. 2011), Appellant cites a case where a woman assisted her husband in a vast scheme to bilk $60 million dollars from numerous investors. She received a 10-year mandatory sentence, other counts were sentenced concurrently. Appellant does not cite the sentence received by her husband.

The case of *State v. Copeland*, 2005-Ohio-5899 (Ct. App. 2005) involved a scam with kiting two checks, securities fraud, theft by deception, money laundering, misrepresentation in the sale of securities, and passing bad checks. While the number of victims is again unclear, the number appears to be less than that in Appellant's case. Copeland's thefts amounted to $868,386.68, *Id.*, not $3,000,000 as claimed by Appellant. He was sentenced to twenty-three years in prison, a sentence largely commensurate with Appellant's sentence.

Back in 1988, the case of *State v. Walden*, 54

Ohio App. 3d 160 (1988) involved four counts of securities fraud, wherein Walden sold stock to 220 members of the public and received five (5) one-year concurrent sentences related to losses of $181,000. Respondent finds it hard to opine the relevance of the securities fraud approaches of the late eighties upon the sentencing practices of the latter part of the second decade of the twenty-first century, but agrees that Walden was engaged in securities fraud and did receive a light sentence.

As for the rest of the cases cited by Appellant, most cases were provided without a proper citation by which they could be found, to include (provided citation attached)(cases not cited in Table of Authorities): *United States v. Kenneth Jackson*, 1:15CR263, *United States v. Krinos*, 4:17-cr-00001, *United States v. Maison*, 1:15-cr-00117, *State of Indiana v. Charles Blackwelder*, Hamilton Superior Court, 29D02-1406-FB-005291, *United States v. Larry M. Westby*, 1:16-cr-00160, *United States v. Eric Merkle*, 1:08-cr-00242, *State v. Raul Marrero*, Dupage County, Illinois, and *United States v. Eric Bloom, Morthern District of Illinois*, 1:12-cr-00409.

As demonstrated here, even under Appellant's erroneous proposed Eighth Amendment test involving the comparative proportionality of aggregate consecutive sentences, his argument fails. He fails to produce a gross disproportionality, or even a jurisdictional disproportionality between the crime and the sentence.

III. Appellant's Proposed or Implied Standard Would Create an Unworkable Chaos for Criminal Courts

Weighing the sentence to pronounce upon a criminal defendant is one of the most important and solemn tasks handed to any judicial official. Society entrusts men and women, learned in the law and experienced over a career, to make decisions concerning the life, death, and freedom of other persons, and expects those men and women to make decisions with decency, impartiality, justice, and wisdom.

The American system of justice remains the model for the world for many reasons. One of those reasons are the vast, and growing, number of rights afforded the accused.

For the most part, the American justice system rewards the trust placed in its hands, and lives up to the expectations placed within its sole authority by American citizens.

Still, for those who participate in the justice system, it is not a mystery that some persons misuse and manipulate their rights and freedoms. Some utilize their freedom to travel to run from the law, some their freedom of contract to corrupt and steal, or some their freedom to associate to conspire.

The work of judges in crafting sentences is necessarily an individualized and intricate practice.

The best work does not easily confine itself to rubrics, or adapt itself to cages. It can be said that while many cases are similar, there are no two cases that are the same.

A good judge is asked to evaluate hundreds of factors. These include the safety of the public, a defendant's record, community support, family, attitude in the courtroom, reactions to probation interviews, victim's testimony, letters, financial records, injuries, medical records, arguments of counsel, settled law and emerging law, sound public policy, general and specific deterrence, legislative priorities, rehabilitative practices, recidivism concerns, community concerns, and a nearly endless host of other inputs.

Against that backdrop, this Court is repeatedly entreated to dabble in the realm of answering which of several sentences to a term of years in prison is "cruel and unusual" punishment by comparing one defendant's sentence to another's. This case is no different.

A deep review of the cases discussed in Section II of this brief, taking into account the actual human beings who make up the victims, defendants, defense counsel, prosecutors, judges, witnesses and investigators involved in those cases, would yield all this Court needs to know about the dignity of crafting a jurisprudence around comparing sentences for different criminals based solely on the raw dollar amounts with which they were able to get away.

There is no dignity in it.

Human beings are different. So sentencings on different cases with different defendants and different victims are necessarily different.

Is it the province of this Court to mediate the different sentencing priorities between Muskingum and Marion and Cuyahoga Counties, in Ohio, reflecting crimes in the Ohio Revised Code? What can be the guideline?[3]

If given the opportunity, criminals will use litigation related to their freedom from cruel and unusual punishment to cruelly and unusually punish the courts with endless, individualized, case-by-case appellate review of every state and federal court sentence handed down in the United States.

That is not to say that convicted criminals like Appellant should not have access to, or a day in, court. This is far from true. But Appellant's case does, in particular, demonstrate how redefining cruel and unusual punishment to mean something more akin to "sentences that criminals do not like," as Appellant suggests, would mean that even utilizing the highest sentencing standards and practices

[3] The only endpoint of this type of intervention is to mandate or encourage the lowest common sentencing denominator, which is an outcome no less unjust than the opposite. In fact, the Court ought to consider one day doing away entirely with inter-jurisdictional proportionality comparisons. Comparisons between different states reflect increasingly diversified priorities, and comparisons between state and federal sentences reflect a wholly separate bias related to the intense selectivity by which federal defendants are chosen for prosecution. The comparisons are not relevant and are getting less so. If there must be a test, there ought to be a different one.

within the law would yield ceaseless, frivolous litigation.

In this case, the sentencing court carefully weighed-out and evaluated the facts of the crime. The court analyzed those facts against the law concerning thirty-six complex legal counts. Thereafter, the court determined that sixteen of those counts constituted allied offenses of similar import, and ordered those counts merged for purposes of conviction to protect Appellant's rights against being twice placed in jeopardy. The State was permitted to choose which of the merged counts upon which to proceed. Only then did the court address Appellant's sentence on the remaining twenty counts.

The court did not hand out a maximum sentence. It did not hand out even half of the maximum sentence. The court grouped criminal charges and victims in a conscientious way, and carefully crafted the counts, issuing some sentences concurrently, and some consecutively. The Hon. Judge Kelly Cottrill upheld the highest ideals of the judicial profession in designing a just, wise, and fair sentence.

By Appellant's proposed Eighth Amendment standard, this sentence must be measured and compared against sentences handed down on dissimilar cases, with dissimilar participants, in dissimilar courts, carrying dissimilar dockets, with dissimilar prosecution practices, and with dissimilar electorates.

It is not difficult to understand why Appellant

and other criminal defendants would prefer the proposed method. This type of standard would perpetually tie the "evolving standards of decency" to the devolving standards of human behavior and declining expectations for human conduct in our nation's most dysfunctional jurisdictions. This standard would function like a cable-tie, perpetually tightening in a single direction, and never to the benefit of anyone but the criminal. That outcome is not the purpose of the Eighth Amendment, or any provision of the Constitution, for that matter.

This Court once cited with approval that "an unintended but positive consequence of 'Three Strikes' has been the impact on parolees leaving the state," of California. *Ewing v. California*, 538 U.S. 11, 27 (2003).

Indeed. States like Ohio, and jurisdictions like Muskingum County similarly desire to convince criminals to make their home somewhere else, to commit their crimes against victims elsewhere, or to, alternatively, conform their conduct to pro-social societal norms.

One of the means of accomplishing this outcome is by ensuring that while criminal sentences are just, there is not a discount for committing multiple offenses, for accumulating victims, or for committing crime sprees across one or multiple states.

Under Appellant's theory, an offender who commits many crimes against persons in multiple counties and states would be the subject of a jealous jurisdictional tug-of-war. In such cases, once one

jurisdiction secures justice for its victims and redress for the crimes committed against its sovereignty, nothing would remain within the permissive purview of the Eighth Amendment to allow the criminal to face justice in a neighboring jurisdiction related to that jurisdiction's victims.

Such a standard is unworkable, and it is unjust. This Court should decline Appellant's invitation to expand Appellant's wrongdoings into an unjust and unworkable approach to the Eighth Amendment.

CONCLUSION

The Respondent requests that the Court deny the Petition for a Writ of Certiorari in this matter.

Respectfully Submitted

/S/ John F. Litle III

John F. Litle III* 310321
Asst. Prosecuting Attorney
D. MICHAEL HADDOX
Prosecuting Attorney
Muskingum County, Ohio
27 North 5th Street
Zanesville, Ohio 43701
(740) 455-7123
Counsel for the Respondent

**Counsel of Record*

CERTIFICATE OF SERVICE

I hereby swear and affirm that on the _15_ day of August, 2019, a copy of the foregoing was sent to Eric Allen, by Regular United States Mail, to 4200 Regent Street, Suite 200, Columbus, Ohio 43219.

/S/ John F. Litle III

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John F. Litle III 310321