No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 2021

FELIPE NIEVES-PEREZ,

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE TRIAL COURT VIOLATE MR. NIEVES-PEREZ'S RIGHT TO DUE PROCESS BY DENYING HIS MOTION TO QUASH THE INDICTMENT?

II. DOES THE LIFE SENTENCE IMPOSED ON MR. NIEVES-PEREZ CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF HIS EIGHTH AMENDMENT RIGHTS?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REPORTS OF OPINIONS

The decision of the Twelfth Court of Appeals for Texas is reported as *Nieves-Perez v. State*, No. 12-19-00389-CR(5th Cir. March 18, 2021)(not published). It is attached to this Petition in the Appendix. The decision of the Texas Court of Criminal Appeals to deny Mr. Nieves-Perez's Petition for Discretionary Review, dated June 16, 2021, is also attached to this Petition in the Appendix.

JURISDICTION

The decision by the Court of Criminal Appeals of Texas affirmed the Twelfth Court of Appeals of Texas's judgment of conviction and sentence in the 114th District Court of Smith County, Texas.

Consequently, Mr. Nieves-Perez files the instant Application for a Writ of Certiorari under the authority of 28 U.S.C., § 1257(a).

BASIS OF FEDERAL JURISDICTION

IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in Smith County, Texas because Mr. Nieves-Perez was indicted for violations of state law by a Grand Jury for Smith County, Texas.

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VIII

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

U.S. CONST. amend. IVX

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Procedural History.

On March 18, 2021, the Twelfth Court of Appeals for Texas affirmed Mr. Nieves-Perez's conviction and sentence. On June 16, 2021, the Texas Court of Criminal Appeals denied Mr. Nieves-Perez's petition for discretionary review.

2. Statement of Facts

This criminal case involves a credit card "skimming" fraud operation [9 R.R. 18]. Mr. Nieves-Perez and two other individuals allegedly used credit and debit card information fraudulently obtained by the use of "skimming" machines installed in "point of sales" locations to make unauthorized purchases. There was no allegation that Mr. Nieves-Perez used force or weapons to commit the offense. Several witnesses testified for the State regarding the unauthorized use of their debit or credit cards; all testified that the monies used for the unauthorized purchases were returned to their accounts. Mr. Nieves-Perez entered a plea of guilty to the charged conduct and a plea of "true" to the enhancement paragraph. He elected to have his punishment assessed by the jury. The jury, after hearing evidence, returned a sentence of life imprisonment. The notice of appeal was then timely filed.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. THE TRIAL COURT ERRED BY DENYING MR. NIEVES-PEREZ'S MOTION TO QUASH THE INDICTMENT.

The trial court erred when it denied Mr. Nieves-Perez's motion to quash the indictment. Both the U.S. Constitution and the Texas Constitution guarantee an accused the right to be informed of the nature and cause of the accusation against him. An accused is entitled to fair notice of the charged offense. Tex. Const. art. 1, § 10. The charging instrument must sufficiently convey this notice so the accused may prepare his defense and should set forth the offense "in plain and intelligible words." Tex. Code. Crim. Proc. Ann. art. 21.02(7) (Vernon 2009); *State v. Barbernell*, 257 S.W.3d 248, 250 (Tex. Crim. App. 2008).

"An 'indictment' is the written statement of a grand jury accusing a person therein named of some act or omission which, by law, is declared to be an offense." Tex. Code Crim. Proc. art. 21.01. An indictment is sufficient if it charges the commission of an offense "in ordinary and concise language of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged." Tex. Code Crim. Proc. Ann. art. 21.11 (Vernon 2009).

An indictment is usually legally sufficient if it delineates the penal statute in question. *Moff*, 154 S.W.3d at 602. An indictment must allege that (1) a person, (2) committed an offense. *Teal v. State*, 230 S.W.3d 172, 179 (Tex. Crim. App. 2007); *Cook v. State*, 902 S.W.2d 471, 477 (Tex. Crim. App. 1995). The indictment in this case alleged that Mr. Nieves-Perez "with the intent to establish, maintain, or participate in a combination or in the profits of a combination, the combination consisting of the defendant and Yoerlan Suarez-Corrales and Dairon Jimenez-Roja, who collaborated in carrying on criminal activity, intentionally and knowingly commit the offense of Fraudulent Use or Possession of Identifying Information More Than 10 But Less Than 50 Items" in Cause No. 114-1656-18.[1 C.R. 7-8].

Mr. Nieves-Perez's counsel engaged in the following colloquy with the trial court in presenting his argument:

> **MR. ESTRADA:** Other issue, Your Honor, I would like to bring to the attention is the indictment is fatally flawed because it fails to provide adequate notice to the defendant and for counsel to prepare a defense. There is a second case that he's -- that Mr. Nieves-Perez is charged with based out of the unlawful interception, use, or disclosure of wire, oral, or electronic communication. That statute is Article 16.02. That is his second charge that he has, Your Honor. That's in this court as well. The case that we have before us today is the engaging case. There is a predicate offense, an enumerated offense, Your Honor, that is not identified as a 16.02. It's identified by a charge Mr. Nieves-Perez has never been arrested for, never been charged with, Your Honor; and that's based out of statute which I believe is Article 32 which does qualify for the engaging case. But, however, there's never been any charge, any

accusation, any indictment presented that would make him subject to that enumerated statute list, Your Honor. Therefore, this engaging statute should not qualify against Mr. Nieves-Perez. In addition to that, Your Honor, the indictment also fails to provide adequate notice because the tracking language of the statute fails. And I'll agree with the State that they do not have to allege the manner and means, but it has totrack the correct language of the statute to provide adequate notice. And the way this indictment is read it fails to provide adequate notice because it does not correctly track the statute of the Article 32 offense that they're trying to use to pigeon hole Mr. Felipe Nieves-Perez' charge. In addition to that, Your Honor -- and I'll provide an exhibit to you. Right now there is legislative movement to codify and make this particular offense into an engaging in organized criminal activity offense. At this time it has not been passed by legislature. And it's the legislative intent that when this bill is passed -- right now it's sitting in front of the governor's desk waiting to be signed. When this bill is passed it's not going to be retroactive. It's going to take effect upon its passing, and that's already -- that's there waiting for the governor to sign. It's not going to be a retroactive statute. [6 RR 7-9].

The trial court denied Mr. Nieves-Perez's motion, stating the following:

With regard to the second issue which is the substance of the indictment so I think I disagree with you on a couple issues, Mr. Estrada. First, you seem to make a big point that Mr. Nieves-Perez had not been charged with this fraudulent use or possession. He was only charged with the engaging that alleged fraudulent use or possession as the underlying offense. He's not actually required to be charged in both cases. Traditionally that was going on for a period of time, and people were getting convicted in both cases, the fraudulent use and possession and then the engaging. And then I think the first case that resolved -- the first case I remember anyway that resolved 2 that was the *Nguyen* case from the Court of Criminal Appeals that said, wait a minute. You can't be convicted of both of those offenses on the same facts. And so I think our DA's office kept doing it for a little while. They would get conviction in one and move on or they would get convictions in both. They'd run with

> the same sentence and they'd run concurrently. So I think they even stopped doing that now because it's basically no effect, and it's really not permitted as jeopardy barred. At least that's my understanding of the law on that. So he didn't have to have been separately charged with the fraudulent use or possession. And you're 100 percent right, the legislature is considering 71.02 and I don't know if they've actually -- I would have to look at your legislative history. I don't know if they actually voted on that change yet or if it's been approved or signed by the governor. But what they're wanting to do I think, the change in the statute that they're making is moving offenses under Chapter 32 which are fraudulent use and possession statutes up from Section (a)(8) into an (a)(1) offense which just makes it one of those ones they just, you know, it changes the proof. You just have to show that they committed the offense. The proof is extremely complicated the way it is right now and difficult and requires a lot of people for a 50 item charge. But anyway I think they're planning to make the proof easier, but it is still an enumerated offense under 71.02 under Chapter 32. So it is an enumerated offense. It's not that it's going to change it. Just its category is going to change if that law passes or if it has passed. I haven't kept up with it that much. The other thing is the offenses that are not in (a)(1) do not require specific pleadings of the elements of the underlying offense, just the pleading of the elements of the engaging. The charge also does not require application of the fraudulent use items -- fraudulent use allegations. It's just the engaging. That's what that conviction is for to return a verdict of guilty. All right. So the Court is denying the motion to quash on the date because you've looked at the date. You agree with the date. And on the other issue the Court finds it's without merit. [6 RR 16].

The trial court erred, because the indictment in this case fails to state an offense. In order to determine if a charging instrument alleges an offense, the reviewing court must decide whether the allegations in it are clear enough that one can identify the offense alleged. *See id.* at 180. A trial court and the defendant must

be able to identify what penal code provision is alleged and whether it is one that vests jurisdiction in the trial court. *Id*. An indictment that tracks the statutory language generally satisfies constitutional and statutory requirements. *State v. Mays*, 967 S.W.2d 404, 406 (Tex. Crim. App. 1998).Moreover, a trial court may not consider evidence beyond the face of the indictment to test the sufficiency of the material allegations. *State v. Rosenbaum*, 910 S.W.2d 934, 937-38 (Tex. Crim. App. 1994); *see* also *Carpenter v. State*, 477 S.W.2d 22, 23 (Tex. Crim. App. 1972) (a court may not look beyond the face of murder indictment to see if there is sufficient evidence to support it).

The charging instrument must convey sufficient notice to allow the accused to prepare a defense. A defendant must be given sufficient notice before trial of the "nature and cause" of the accusation against her to enable the defendant to anticipate the State's evidence and prepare a proper defense. *Kfouri v. State*, 312 S.W.3d 89, 91 (Tex. App.—Houston [14th Dist.] 2010, no pet.). An indictment must also satisfy the constitutional requirement of subject-matter jurisdiction over "an offense." *Teal v. State*, 230 S.W.3d 172, 181 (Tex. Crim. App. 2007).

The Legislature has provided some guidance as to the adequacy of notice through Chapter 21 of the Code of Criminal Procedure. In particular, Art. 21.03 provides that "[e]verything should be stated in an indictment which is necessary to

be proved." U.S. Const., Amend. VI.; Tex. Const. Art. I, § 10. *State v. Mays*, 967 S.W.2d 404, 406 (Tex.Crim.App. 1998). *Ferguson v. State*, 622 S.W.2d 846, 849 (Tex.Crim.App. 1981) (op. on reh'g). Tex. Code Crim. Proc. Art. 21.03.

An indictment is generally sufficient to provide notice if it follows the statutory language. Tracking the language of the statute may be insufficient, however, if the statutory language is not completely descriptive, so that more particularity is required to provide notice. For example, when a statute defines the manner or means of commission in several alternative ways, an indictment will fail for lack of specificity if it neglects to identify which of the statutory means it addresses. On the other hand, the State need not plead evidentiary matters. *Olurebi v. State*, 870 S.W.2d 58, 62 (Tex.Crim.App. 1994); *see* also *Mays*, 967 S.W.2d at 407; *Berg v. State*, 747 S.W.2d 800, 809 (Tex.Crim.App. 1984) (op. on reh'g).

In *Hughitt v. State*, 583 S.W.3d 623, 631 (Tex. Crim. App. 2019), the Court of Criminal Appeals affirmed the decision of the 11th Court of Appeals in dismissing an indictment alleging a violation of the Engaging statute for failure to state a proper predicate offense. The Court of Criminal Appeals agreed that possession of a controlled substance with intent to deliver is not a valid predicate offense for a greater offense of engaging in organized criminal activity, and upheld the judgment of the court of appeals vacating the conviction. *See Hughitt*, 583 S.W.3d at 631.

Like in the *Hughitt* case, the indictment in this case fails to allege a proper predicate offense. It also fails to track the statute and fails to state an offense. Mr. Nieves-Perez was charged with two separate offenses: 114-1305-18 alleged offense Unlawful Interception, Use or Disclosure of Wire, Oral, or Electronic Communications Texas Penal Code 16.02, a second degree felony and in Cause Number 114—1656—18 Engaging in Organized Criminal Activity Texas Penal Code 71.02. a first degree felony. Not all charged offenses can be used with the Engaging In Organized Criminal Activity article 71 .02 Texas Penal Code. In order for EOCA to apply to a defendant, the state must show a defendant committed a predicate offense that is enumerated in 71.02. Cause number 114-1305—18 Unlawful Interception, Use or Disclosure of Wire, Oral, or Electronic Communication is not an enumerated offense under 71.02 of the Texas Penal Code. The State is attempting to use an offense Mr. Nieves-Perez was never been charged with or arrested for as the predicate offense for EOCA. The State appeared to use Fraudulent Use or Possession of Identifying Information as its predicate offense.. The indictment does not property track the language of the predicate offense and therefore failed to give notice of the charges against him. *See* Art. 21 .03 Texas Code of Criminal Procedure "everything should be stated in an indictment which is necessary to be proved.

The Twelfth Court of Appeals rejected Petitioner's argument, stating that "we reject any argument that the indictment failed to provide notice because Appellant was not arrested for or charged with the predicate offense" and "we conclude that the indictment here was not required to track the language or list the elements of the underlying offense in order to provide adequate notice of the charged offense". *Nieves-Perez v. State*, No. 12-19-00389-CR (Tex. App.-Tyler, 2021).

The Court of Appeals erred. Mr. Nieves-Perez had an absolute right to demand the nature and cause of the accusation against him be properly listed in the indictment. *See Adams v. State,* 707 SW2d 900 (Tex. Crim. App. 1986). At minimum the state is required to track the language with essential facts to provide notice. The State failed to do on this case and Mr. Nieves-Perez received a sentence of life imprisonment. Therefore, the trial court erred in denying Mr. Nieves-Perez's motion to quash the indictment. This error violated Mr. Nieves-Perez's constitutional rights and demands reversal.

QUESTION #2

I. DOES THE LIFE SENTENCE IMPOSED ON MR. NIEVES-PEREZ CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE UNITED STATES CONSTITUTION?.

The Eighth Amendment of the United States Constitution and Article I, section 13 of the Texas Constitution require that a criminal sentence be proportionate to the crime for which the defendant has been convicted. *Solem v. Helm*, 463 U.S. 277, 290 (1983); *Noland v. State*, 264 S.W.3d 144, 151 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd); *Baldridge v. State*, 77 S.W.3d 890, 893 (Tex. App.—Houston [14th Dist.] 2002, pet. ref'd); *see* U.S. CONST. amend. VIII; TEX. CONST. art. I, § 13.An allegation of excessive or disproportionate punishment is a legal claim "embodied in the Constitution's ban on cruel and unusual punishment " and based on a "narrow principle that does not require strict proportionality between the crime and the sentence." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991); *see* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

"An allegation of disproportionate punishment is a valid legal claim. The concept of proportionality is embodied in the Constitution's ban on cruel and unusual punishment and requires that punishment be graduated and proportioned to the offense." *State v. Simpson*, 488 S.W.3d 318, 322 (Tex. Crim. App. 2016); *see* also

U.S. CONST. amend. VIII. "But, this is a narrow principle that does not require strict proportionality between the crime and the sentence." *Id*; *see* also *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)(Kennedy, J., concurring). This Court has observed that the principle of disproportionate sentences is "applicable only in the 'exceedingly rare' and 'extreme' case." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003); *see* also *Harmelin*, 501 U.S. at 1001). "The gross disproportionality principle reserves a constitutional violation for only the extraordinary case." *Id*. at 77. Mr. Nieves-Perez contends that his life sentence for this fraud case constitutes such a situation.[1]

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[1] The Court of Appeals stated that the Eighth Amendment argument was not preserved. The Court of Appeals erroneously found that Mr. Nieves-Perez was required to preserve the argument at the time the sentence was imposed. The Court stated, "In this case, after the trial judge assessed Appellant's punishment at imprisonment for life in accordance with the jury's verdict, she asked whether there was any legal reason why the sentence could not be formally pronounced. Defense counsel responded, "No, Your Honor." Because Appellant had the opportunity to object to his sentence at the punishment hearing and failed to do so, we conclude that he failed to preserve this issue for our review. *Nieves-Perez v. State, supra* at 4-5. Mr. Nieves-Perez, however, preserved his complaint for review by raising it in a motion for new trial and obtaining an adverse ruling in the trial court. Because Petitioner raised the issue in his motion for new trial, it was preserved for review. *See Pantoja v. State*, 496 S.W.3d 186, 193 (Tex. App.-Fort Worth, 2016, pet. ref'd) (holding that issue of cruel and unusual punishment was preserved when raised in a motion for new trial); *Reynolds v. State*, 430 S.W.3d 467, 471 (Tex. App.-San Antonio 2014, no pet.) (same); *see*, e.g., *Rhoades v. State*, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996) (holding that to preserve disproportionate-sentencing complaint, defendant must make timely, specific objection in trial court or raise the issue in motion for new trial); *Nolandv. State*, 264 S.W.3d 144, 151-52 (Tex. App.-Houston [1st Dist.] 2007, pet. ref'd); *Trevino v. State*, 174 S.W.3d 925, 927-28 (Tex. App.-Corpus Christi-Edinburg 2005, pet. ref'd); *Papillion v. State*, 908 S.W.2d 621, 623 (Tex. App.-Beaumont 1995, no pet.) (holding defendant preserved cruel-and-unusual-punishment issue for appeal by asserting it in timely filed motion for new trial despite failure to object at sentencing). The Court of Appeals went on to state that "even if Appellant preserved his issue, we could not grant him relief because his sentence does not constitute cruel and unusual punishment".

"To determine whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime, a court must judge the severity of the sentence in light of the harm caused or threatened to the victim, the culpability of the offender, and the offender's prior adjudicated and unadjudicated offenses." *Simpson*, 488 S.W.3d at 323; *see* also *Graham v. Florida*, 560 U.S. 48, 60 (2010). A court reviewing a claim of a constitutionally disproportionate sentence "initially make[s] a threshold comparison of the gravity of the offense against the severity of the sentence, and then consider[s] whether the sentence is grossly disproportionate to the offense." *Davis v. State*, 125 S.W.3d 734, 736 (Tex. App.—Texarkana 2003, no pet.); *see* also *Jackson v. State*, 989 S.W.2d 842, 846 (Tex. App.—Texarkana 1999, no pet.). If such a disproportion is found, only then does the reviewing court examine the next two *Solem* factors, i.e., comparisons of sentences for similar crimes in the same jurisdiction and sentences for the same offense in other jurisdictions. *Jackson*, 989 S.W.2d at 846; *see* also *McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir. 1992) (analyzing *Solem* and *Harmelin* in light of the latter's scattered plurality opinion and concluding "disproportionality survives; *Solem* does not").

A sentence may be disproportionate to the gravity of the offense even when it is within the range permitted by law. *See Ex parte Chavez*, 213 S.W.3d 320, 323-24 (Tex. Crim. App. 2006). Although generally, punishment assessed within the

punishment statutory range is not subject to a challenge for excessiveness. *See Lawrence v. State*, 420 S.W.3d 329, 333 (Tex. App.—Fort Worth 2014, pet. ref'd).Texas courts have generally held that a punishment that falls within the limits prescribed by a valid statute is not excessive, cruel, or unusual. *See State v. Simpson*, 488 S.W.3d 318, 323 (Tex. Crim. App. 2016); *Ajisebutu v. State*, 236 S.W.3d 309, 314 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) ("Generally, a sentence within the statutory range of punishment for an offense will not be held cruel or unusual under the Constitution of either Texas or the United States.").

It has been held that a sentence within the range of punishment may still violate the Eighth Amendment if it is grossly disproportionate to the offense committed. *Solem v. Helm*, 463 U.S. 277, 290 (1983). In the present case, life imprisonment is a grossly disproportionate sentence considering the evidence presented as to the crime. In analyzing a proportionality challenge, the Courts consider: (1) the gravity of the offense and the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences imposed for the commission of the same crime in other jurisdictions. *Solem*, 463 U.S. at 392; *State v. Stewart*, 282 S.W.3d 729 (Tex.App.-Austin 2009, no pet.). The Courts need only consider the second and third factors, however, if it is determined that the sentence is grossly disproportionate to the offense after comparing the gravity of the offense against the severity of the

sentence. *Solem*, 463 U.S. at 392. In judging the gravity of the offense, the Court considers the "harm caused or threatened to the victim or society, and the culpability of the offender." *Solem*, 463 U.S. at 292.

The application of the *Solem* test has been modified by Texas courts and the Fifth Circuit Court of Appeals in light of the Supreme Court's decision in *Harmelin v. Michigan*, 501 U.S. 957 (1991) to require a threshold determination that the sentence is grossly disproportionate to the crime before addressing the remaining elements. *See*, e.g., *McGruder v . Puckett* , 954 F.2d 313, 316 (5th Cir. 1992), *cert. denied*, 506 U.S. 849(1992); *see* also *Jackson v. State*, 989 S.W.2d 842, 845-46 (Tex. App.—Texarkana 1999, no pet.).

Here, the gravity of the offense did not require or even justify a sentence of life imprisonment and was disproportionate. The imposition of life imprisonment constituted cruel and unusual punishment because the nature of the offense did not warrant such a severe sentence. Given the underlying facts of the offense, the imposition of a sentence of life imprisonment was excessive and grossly disproportionate to the conduct of Mr. Nieves-Perez.

Punishment is grossly disproportionate only when an objective comparison of the gravity of the offense against the severity of the sentence reveals the sentence to be extreme. *Hicks v. State*, 15 S.W.3d 626 (Tex.App.-Houston 14th Dist. 2000, pet.

ref'd). Here, under the three-part test set out in *Solem*, the proportionality of Mr. Nieves-Perez's sentence is grossly disproportionate based on the gravity of the offense and the harshness of the punishment and the disparate treatment he received as compared to the sentences of similarly situated defendants.

Finally, Article 1, section 13, of the Texas state constitution, is broader than the Eighth Amendment because it prohibits "cruel or unusual" punishment rather than punishment that is "cruel and unusual." Therefore, under the federal provision, punishment must be both cruel and unusual to be unconstitutional, but under the Texas provision, punishment may be unconstitutional if it is either cruel or unusual. There are a number of cases where Texas constitutional provisions have been interpreted to give greater rights than their federal counterparts.

In *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992), the Texas Supreme Court found in a civil free expression case that the Texas Constitution provides greater rights than its federal equivalent. In *Heitman v. State*, 815 S.W.2d 681 (Tex.Crim.App.1991), the Court of Criminal Appeals found that the Texas Constitution provides greater rights to criminal defendants that does its federal counterpart, and in *Bauder v. State*, 921 S.W.2d 696 (Tex.Crim.App.1996), the Court interpreted the double jeopardy clause of the Texas Constitution more broadly than the federal double jeopardy clause with respect to barring retrial after mistrial

resulting from reckless/intentional State conduct. Arguably, the difference in the language of the Texas Constitution affords greater Constitutional protection that the federal Constitution and Mr. Nieves-Perez need only prove his punishment was cruel or unusual, rather than both. Therefore, his sentence of life imprisonment for Engaging in Organized Criminal Activity violates both the United States and Texas constitutions, and should be set aside.

CONCLUSION

This Petition for Writ of Certiorari should be granted and the decision of the Texas Court of Criminal Appeals and the Twelfth Court of Appeals for Texas should be vacated, and the case should be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

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RELIEF REQUESTED

FOR THESE REASONS, the Petitioner moves this Court to grant a Writ of Certiorari in order to review the Judgment of the Court of Criminal Appeals for the State of Texas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 15th day of November 2021, I served one (1) copy of the foregoing Petition for Writ of Certiorari on the following individuals by mail (certified mail return receipt requested) by depositing same, enclosed in post paid, properly addressed wrapper, in a Post Office or official depository, under the care and custody of the United States Postal Service, or by other recognized means pursuant to the Rules of the Supreme Court of The United States of America, Rule 29:

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/s/ Amy R. Blalock
AMY R. BLALOCK

No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 2020

FELIPE NIEVES-PEREZ,

Petitioner,

V.

THE STATE OF TEXAS,

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APPENDIX

APPENDIX

“A”

NO. 12-19-00389-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

FELIPE NIEVES-PEREZ, APPELLANT	*§*	***APPEAL FROM THE 114TH***
V.	*§*	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	*§*	***SMITH COUNTY, TEXAS***

MEMORANDUM OPINION

Felipe Nieves-Perez appeals his conviction for engaging in organized criminal activity. In three issues, Appellant challenges the trial court's denial of his motion to quash the indictment, the length of his sentence, and the constitutionality of his court costs. We affirm.

BACKGROUND

Appellant was charged by indictment with engaging in organized criminal activity and unlawful interception, use or disclosure of wire, oral, or electronic communications. He filed a motion to quash the indictment in the organized crime case based—in pertinent part—on the ground that it fails to give adequate notice. After a hearing, the trial court denied the motion to quash. Subsequently, Appellant pleaded "guilty" to the organized crime charge, and the matter proceeded to a jury trial on punishment.

At the punishment trial, the evidence showed that a convenience store owner told the Tyler Police Department he found a credit card skimming device inside one of his gas pumps. Through the use of an innovative investigation strategy, Tyler Police officers were able to apprehend Appellant and his two codefendants while they were attempting to recover stolen credit card information from the skimming device. In their possession, the officers found two

computers and about forty gift cards containing credit card information stolen from over three hundred people.

Ultimately, the jury assessed Appellant's punishment at imprisonment for life. This appeal followed.

MOTION TO QUASH

In Appellant's first issue, he argues that the trial court erred by denying his motion to quash the indictment because the indictment fails to (1) allege a proper predicate offense, (2) track the engaging statute, and (3) state an offense under the engaging statute.

Standard of Review and Applicable Law

A criminal defendant has a constitutional right to fair notice of the charged offense. ***State v. Barbernell***, 257 S.W.3d 248, 250 (Tex. Crim. App. 2008). A charging instrument must convey sufficient notice to allow the accused to prepare a defense. ***Id.*** To that end, the code of criminal procedure provides that an indictment must include everything that is necessary to be proved. *See* ***id.***; TEX. CODE CRIM. PROC. ANN. art. 21.03 (West 2009). In most cases, an indictment that tracks the statutory text of an offense is sufficient to provide a defendant with adequate notice. ***Barbernell***, 257 S.W.3d at 251. We review a trial court's ruling on a motion to quash a charging instrument de novo. ***Smith v. State***, 309 S.W.3d 10, 13-14 (Tex. Crim. App. 2010).

A person commits the offense of engaging in organized criminal activity as alleged in this case if,

> with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang, the person commits or conspires to commit
>
> . . . .
>
> (8) any felony offense under Chapter 32[.]

TEX. PENAL CODE ANN. § 71.02(a) (West Supp. 2020).

Analysis

The indictment in this case alleges that Appellant

> did then and there, with the intent to establish, maintain, or participate in a combination or in the profits of a combination, the combination consisting of the defendant and Yoerlan Suarez-

> Corrales and Dairon Jimenez-Roja, who collaborated in carrying on criminal activity, intentionally and knowingly commit the offense of Fraudulent Use or Possession of Identifying Information More Than 10 But Less Than 50 Items[.]

Under Chapter 32 of the penal code, a person commits the offense of fraudulent use or possession of identifying information if he, with the intent to harm or defraud another, obtains, possesses, transfers, or uses an item of

> (1) identifying information of another person without the other person's consent or effective consent;
>
> (2) information concerning a deceased natural person, including a stillborn infant or fetus, that would be identifying information of that person were that person alive, if the item of information is obtained, possessed, transferred, or used without legal authorization;
>
> (3) identifying information of a child younger than 18 years of age.

Id. § 32.51(b) (West Supp. 2020). An offense under Section 32.51 is a second degree felony when the number of items obtained, possessed, transferred, or used is ten or more but less than fifty. ***Id.*** § 32.51(C)(3) (West Supp. 2020).

In arguing that the indictment failed to provide proper notice, Appellant noted in his motion to quash that he was never arrested for or charged with fraudulent use or possession of identifying information. He further noted that unlawful interception, use or disclosure of wire, oral, or electronic communications,[1] with which he was charged, is not a predicate offense for engaging in organized criminal activity. *See* ***id.*** § 71.02(a). Finally, Appellant argued that the indictment fails to provide notice in violation of his right to due process because it "lists a new offense without material elements [and] does not properly track the language of the predicate offense[.]" He argues similarly on appeal. We disagree.

First, regarding Appellant's apparent argument that a defendant charged with engaging in organized criminal activity must be separately charged with the underlying offense, we note that he cites no authority for this proposition, and we know of none. *See* TEX. R. APP. P. 38.1(i) (requiring brief to contain clear and concise argument with appropriate citations to authorities). To the contrary, the court of criminal appeals has held that prosecuting a defendant for both engaging in organized criminal activity and its predicate offense violates the constitutional

[1] *See* TEX. PENAL CODE ANN. § 16.02(b) (West 2019).

prohibition against double jeopardy. *See* ***Ex parte Chaddock***, 369 S.W.3d 880, 882 (Tex. Crim. App. 2012); U.S. CONST. amend. V. Therefore, we reject any argument that the indictment failed to provide notice because Appellant was not arrested for or charged with the predicate offense.

Furthermore, we reject Appellant's argument that his indictment failed to provide notice by naming the predicate offense without tracking the language of its statute and listing its elements. When an element of an offense is the commission of an underlying offense, courts have consistently held that the elements of and facts surrounding the underlying offense need not be alleged in the indictment. *See, e.g.*, ***Alba v. State***, 905 S.W.2d 581, 585 (Tex. Crim. App. 1995) (in capital murder case, indictment need not allege constituent elements of underlying offense); ***Linville v. State***, 620 S.W.2d 130, 131 (Tex. Crim. App. 1981) (in robbery case, elements and facts surrounding underlying theft need not be alleged in indictment); ***Crum v. State***, 946 S.W.2d 349, 359 (Tex. App.—Houston [14th Dist.] 1997, pet. ref'd) (in organized crime case, indictment need not allege manner and means of underlying offense). Consequently, we conclude that the indictment here was not required to track the language or list the elements of the underlying offense in order to provide adequate notice of the charged offense. *See* ***id.*** Accordingly, we overrule Appellant's first issue.

CRUEL AND UNUSUAL PUNISHMENT

In Appellant's second issue, he argues that his life sentence is grossly disproportionate to his offense and constitutes cruel and unusual punishment in violation of the United States and Texas Constitutions. He contends that he preserved his complaint for our review by raising it in a motion for new trial and obtaining an adverse ruling in the trial court.

Before a complaint may be presented for appellate review, the record must show that it was made to the trial court by a timely request, objection, or motion. TEX. R. APP. P. 33.1(a)(1). An appellant fails to preserve error by failing to object when he has the opportunity. ***Burt v. State***, 396 S.W.3d 574, 577-78 (Tex. Crim. App. 2013). A sentencing issue may be preserved by objecting at the punishment hearing, or when the sentence is pronounced. ***Id.*** at 577. An appellant may raise a sentencing issue for the first time in a motion for new trial only if he did not have an opportunity to object during the punishment hearing. ***Id.*** at 577 n.4.

In this case, after the trial judge assessed Appellant's punishment at imprisonment for life in accordance with the jury's verdict, she asked whether there was any legal reason why the

sentence could not be formally pronounced. Defense counsel responded, "No, Your Honor." Because Appellant had the opportunity to object to his sentence at the punishment hearing and failed to do so, we conclude that he failed to preserve this issue for our review. *See* TEX. R. APP. P. 33.1(a)(1); ***Burt***, 396 S.W.3d at 577-78.

Furthermore, even if Appellant preserved his issue, we could not grant him relief because his sentence does not constitute cruel and unusual punishment. The United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. This provision was made applicable to the states by the Due Process Clause of the Fourteenth Amendment. ***Meadoux v. State***, 325 S.W.3d 189, 193 (Tex. Crim App. 2010). Similarly, the Texas Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted." TEX. CONST. art. 1, § 13. The difference between the Eighth Amendment's "cruel and unusual" phrasing and the Texas Constitution's "cruel or unusual" phrasing is insignificant. ***Cantu v. State***, 939 S.W.2d 627, 645 (Tex. Crim. App. 1997).

The legislature is vested with the power to define crimes and prescribe penalties. *See* ***Davis v. State***, 905 S.W.2d 655, 664 (Tex. App.—Texarkana 1995, pet. ref'd); *see also* ***Simmons v. State***, 944 S.W.2d 11, 15 (Tex. App.—Tyler 1996, pet. ref'd). Courts have repeatedly held that punishment falling within the limits prescribed by a valid statute is not excessive, cruel, or unusual. *See* ***Harris v. State***, 656 S.W.2d 481, 486 (Tex. Crim. App. 1983); ***Jordan v. State***, 495 S.W.2d 949, 952 (Tex. Crim. App. 1973); ***Davis***, 905 S.W.2d at 664. Under the applicable law, Appellant was convicted of engaging in organized criminal activity, a first degree felony, enhanced, the punishment range for which is imprisonment for fifteen to ninety-nine years or life and a possible fine of no more than $10,000.00. *See* TEX. PENAL CODE ANN. §§ 71.02(b) (West Supp. 2020), 12.42(C)(1) (West 2019). Thus, the sentence imposed by the trial court falls within the range set forth by the legislature. Therefore, the punishment is not prohibited as cruel, unusual, or excessive per se. *See* ***Harris***, 656 S.W.2d at 486; ***Jordan***, 495 S.W.2d at 952; ***Davis***, 905 S.W.2d at 664.

Nevertheless, Appellant urges us to perform the three-part test originally set forth in ***Solem v. Helm*** 463 U.S. 277, 103 S. Ct. 3001 77 L. Ed. 2d 637 (1983). Under this test, the proportionality of a sentence is evaluated by considering (1) the gravity of the offense and the harshness of the penalty, (2) the sentences imposed on other criminals in the same jurisdiction,

and (3) the sentences imposed for commission of the same crime in other jurisdictions. ***Id.***, 463 U.S. at 292, 103 S. Ct. at 3011. The application of the ***Solem*** test has been modified by Texas courts and the Fifth Circuit Court of Appeals in light of the Supreme Court's decision in ***Harmelin v. Michigan***, 501 U.S. 957, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) to require a threshold determination that the sentence is grossly disproportionate to the crime before addressing the remaining elements. *See, e.g.*, ***McGruder v. Puckett***, 954 F.2d 313, 316 (5th Cir. 1992), *cert. denied*, 506 U.S. 849, 113 S. Ct. 146, 121 L. Ed. 2d 98 (1992); *see also* ***Jackson v. State***, 989 S.W.2d 842, 845-46 (Tex. App.—Texarkana 1999, no pet.).

We are guided by the holding in ***Rummel v. Estelle*** in making the threshold determination of whether Appellant's sentence is grossly disproportionate to his offense. 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980). In ***Rummel***, the Supreme Court considered the proportionality claim of an appellant who received a mandatory life sentence under a prior version of the Texas habitual offender statute for a conviction of obtaining $120.75 by false pretenses. *See* ***id.***, 445 U.S. at 266, 100 S. Ct. at 1135. In that case, the appellant received a life sentence because he had two prior felony convictions—one for fraudulent use of a credit card to obtain $80.00 worth of goods or services and the other for passing a forged check in the amount of $28.36. ***Id.***, 445 U.S. at 265-66, 100 S. Ct. at 1134-35. After recognizing the legislative prerogative to classify offenses as felonies and, further, considering the purpose of the habitual offender statute, the court determined that the appellant's mandatory life sentence did not constitute cruel and unusual punishment. ***Id.***, 445 U.S. at 284-85, 100 S. Ct. at 1144-45.

In this case, the combination of offenses committed by Appellant—engaging in organized criminal activity with a prior felony conviction for theft—is no less serious than the combination of offenses committed by the appellant in ***Rummel***, while Appellant's sentence is the same as the one upheld by the Supreme Court in ***Rummel***. Thus, it is reasonable to conclude that if the sentence in ***Rummel*** is not constitutionally disproportionate, then neither is Appellant's sentence in this case. Therefore, the threshold test has not been satisfied, and we need not apply the remaining elements of the ***Solem*** test. *See* ***McGruder***, 954 F.2d at 316; *see also* ***Jackson***, 989 S.W.2d at 845-46. Accordingly. we overrule Appellant's second issue.

COURT COSTS

In Appellant's third issue, he argues that the trial court erred by assessing an unconstitutional time payment fee as a court cost under former Section 133.103 of the Texas Local Government Code. Act of June 2, 2003, 78th Leg., R.S., ch. 209, § 62, sec. 133.103, 2003 Tex. Gen. Laws 979, 996-97 (amended and redesignated 2019) (current version at TEX. CODE CRIM. PROC. ANN. art. 102.030 (West Supp. 2020)). Several courts, including this one, have held subsections (b) and (d) of Section 133.03 unconstitutional. *See, e.g.*, ***Irvin v. State***, No. 12-19-00347-CR, 2020 WL 5406276, at *7 (Tex. App—Tyler Sept. 9, 2020, pet. filed) (mem. op., not designated for publication); ***Ovalle v. State***, 592 S.W.3d 615, 618 n.1 (Tex. App.—Dallas 2020, pet. filed); ***Simmons v. State***, 590 S.W.3d 702, 712 (Tex. App.—Waco 2019, pet. filed); ***Dulin v. State***, 583 S.W.3d 353 (Tex. App.—Austin 2019, pet. granted); ***Johnson v. State***, 573 S.W.3d 328, 340 (Tex. App.—Houston [14th Dist.] 2019, pet. filed). However, we do not agree that the trial court assessed the time payment fee in this case.

The judgment in this case shows $229.00 in court costs. The bill of costs likewise shows $229.00 in court costs and states the following:

> An additional time payment fee of $25.00 will be assessed if any part of a fine, court costs, or restitution is paid on or after the 31st day after the date the judgment assessing the fine, court costs or restitution is entered. ***See Texas Local Government Code, Section 133.103.***

Although the bill of costs states that the time payment fee could be assessed, the record does not show that it was assessed. Because the record does not show that the time payment fee was assessed, we conclude Appellant's argument is without merit. Accordingly, we overrule his third issue.

DISPOSITION

Having overruled Appellant's first, second, and third issues, we ***affirm*** the trial court's judgment.

GREG NEELEY
Justice

Opinion delivered March 18, 2021.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MARCH 18, 2021

NO. 12-19-00389-CR

FELIPE NIEVES-PEREZ,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 114th District Court
of Smith County, Texas (Tr.Ct.No. 114-1656-18)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

APPENDIX

“B”

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

6/16/2021 **COA No. 12-19-00389-CR**
NIEVES-PEREZ, FELIPE **Tr. Ct. No. 114-1656-18** **PD-0281-21**

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

AMY R. BLALOCK

LAW OFFICE
TYLER, TX 75710
* DELIVERED VIA E-MAIL *

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On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

SARAH BALES MIKKELSEN
ASSISTANT CRIMINAL DISTRICT ATTORNEY
SMITH COUNTY
100 N. BROADWAY, 4TH FLOOR
TYLER, TX 75702
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On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

DISTRICT ATTORNEY SMITH COUNTY
JACOB PUTNAM
100 N. BROADWAY
TYLER, TX 75702
* DELIVERED VIA E-MAIL *

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Deana Williamson, Clerk

12TH COURT OF APPEALS CLERK
KATRINA MCCLENNY
1517 W. FRONT, ROOM 354
TYLER, TX 75701
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NIEVES-PEREZ, FELIPE **Tr. Ct. No. 114-1656-18** **PD-0281-21**

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

STATE PROSECUTING ATTORNEY
STACEY SOULE
P. O. BOX 13046
AUSTIN, TX 78711
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OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

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Deana Williamson, Clerk

FELIPE NIEVES-PEREZ
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2661 FM 2054
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