

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

v.

MARQUIS HAIRSTON,

Appellant.

Case No. 07-0394

On Appeal from the Franklin
County Court of Appeals,
Tenth Appellate District

REPLY BRIEF

On August 30, 2007, Appellee State of Ohio filed a brief in the above-captioned case in response to Appellant Marquis Hairston's brief. Now comes counsel for Marquis Hairston and submits to this Court a Reply Brief, in response to the brief filed by Appellee, State of Ohio.

Sincerely,

CLARK LAW OFFICE



Toki M. Clark (#0041493)
233 South High Street, 3rd Floor
Columbus, OH 43215
(614) 224-2125

Counsel for Appellant
Marquis Hairston

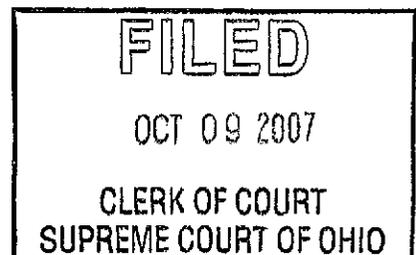


TABLE OF AUTHORITIES

CASE LAW:

Harmelin v. Michigan (1991), 501 U.S. 957, 1005 4, 7

McDougle v. Maxwell (1964), 1 Ohio St.2d 68, 70 6, 7, 9

Patterson v. State (Ala.Crim.App. 1993) 628 So.2d 1945. 5

Solem v. Helm (1983), 463 U.S. 277, 290 n.17. 3, 4, 6, 8, 9, 11

State v. Weitbrecht (1999), 86 Ohio St.3d 368. 6, 7

State of Ohio v. Albert, 10th Dist. No. 06AP-439, 2006-Ohio-6902. 10

State of Ohio v. Butler, 7th Dist. No. 01JE34, 2003-Ohio-3468. 14

State of Ohio v. Carruth, 2nd Dist. No. 19997, 2004-Ohio-2317. 14

State of Ohio v. Cason, 8th Dist. No. 86413, 2006-Ohio-1561 17

State of Ohio v. Dellinger, 6th Dist. No. H-04-016, 2005-Ohio-663 13

State of Ohio v. Hall, 8th Dist. No. 83361, 2004-Ohio-5963 16

State of Ohio v. Harrison, 10th Dist. No. 06AP-827, 2007-Ohio-2872. 11

State of Ohio v. Hatfield, 10th Dist. No. 06 AP-1205, 2007-Ohio-3735. 10

State of Ohio v. Hatfield, 12th Dist. No. 2001-10-075, 2002-Ohio-3598. 15

State of Ohio v. Glen Haynie, 3rd Dist. No. 9-03-52, 2004-Ohio-2451. 13

State of Ohio v. Johnson, 11th Dist. No. 00CR672, 2002-Ohio-2977 15

State of Ohio v. Maurice Johnson, 9th Dist. No. 22688, 2006-Ohio-1313. 12

State of Ohio v. Oliver L. Madison, 10th Dist. No. 06AP-1126, 2007-Ohio-3547. 9

State of Ohio v. McDonald, 2nd Dist. No. 19100, 2002-Ohio-4969 14

State of Ohio v. Price (1989), 52 Ohio App.3d 39 15

State of Ohio v. Riley, 10th Dist. No. 06AP-1091, 2007-Ohio-4409 10

State of Ohio v. Sarkozy, 8 th Dist. No. 86952, 2006-Ohio-3977	17, 18
State of Ohio v. Sheppard, 1 st Dist. No. C-060042, 2007-Ohio-24.	12
State of Ohio v. Sims, 9 th Dist. No. 23232, 2007-Ohio-700.	11, 12
State of Ohio v. Tate, 11 th Dist. No. 02CR98, 2004-Ohio-6689	15
State of Ohio v. Thompson, 10 th Dist. No. 07AP-74, 2007-Ohio-4315.	10
State of Ohio v. Walker, 8 th Dist. No. 86216, 2006-Ohio-108.	16, 17
State of Ohio v. Williams, 10 th Dist. No. 06AP-1144, 2007-Ohio-4411	10
United States v. O'Driscoll (C.A. 10, 1985), 761 F.2d 589	4

Appellee State of Ohio makes numerous arguments in its merit brief in opposition to the contentions presented by Appellant Marquis Hairston in his brief. The arguments of the State of Ohio are worthy of consideration, but they still fall short of being strong enough to legally support the 134-year sentence imposed by the trial court. Appellant Hairston replies to the State's arguments as follows:

A. IMPROVIDENTLY GRANTED

The State of Ohio contends that the case before this Court was improvidently allowed and should thus be dismissed. The State supports this contention with a presentation of Hairston's Scioto County case, and the conclusion drawn that since Hairston has a lengthy sentence to serve in Scioto County, any additional time generated by his Franklin County case will keep him incarcerated till death. Hence, it makes little sense for this Court to review this case, according to the State.

The problem with this rationale is that it ignores the fact that Hairston's case is one of great interest to the citizens of the state of Ohio. This case can have an appreciable impact on sentencing schemes throughout this state in criminal cases. Thus, this case is not one that only serves to influence one man in one court. It can have far-reaching consequences. For this reason, this case was not improvidently allowed.

The State further contends this case was improvidently allowed due to Proposition of Law modifications which, in the state's view, amount to concessions. However, if a constitutional violation has occurred, whether it be in the application of the United States Constitution or the Ohio Constitution, this Court, our state's highest court, should be able to address it and it must be brought to this court's attention. Clearly, this case has by no means been improvidently allowed.

C. CRUEL AND UNUSUAL PUNISHMENT

Appellee State of Ohio references the deference reviewing courts are to extend to sentencing courts, and notes that the need for individualized sentencing decisions results in a wide range of constitutional sentences. *Solem v. Helm* (1983), 463 U.S. 277, 290 n.17. Appellant Hairston agrees with Appellee in much of this regard, but the difference between adversaries here is that such deference is by no means unlimited, and the range in sentence differences is not as wide as the state contends it to be. In a civilized society, there will be differences in punishments. No one disputes this. Appellant merely contends that there does become a point where sentencing differences can enter into a zone of iniquity. And in this case, we are there.

D. CRUEL AND UNUSUAL PUNISHMENT STANDARD IS OFFENSE-SPECIFIC

Much of Appellee's merit brief suggests that Appellant Hairston is opposed solely to the consecutive sentence rendered. To the contrary, Appellants are of the position that the sentence rendered violates the United States and Ohio Constitutions because of disproportionality, especially when compared to other sentences in other cases. Hairston's sentence is disproportionate not only because he received the maximum sentence for each and every crime, but also because all the maximum sentences were then imposed consecutively, resulting in a cruel and unusual punishment of 134 years, which is disproportionate to the underlying infraction. *Solem v. Helm* (1983), 463 U.S. 277.

E. CHALLENGE TO 134-YEAR AGGREGATE SENTENCE FAILS

Under this heading, the State of Ohio attempts to distinguish the case of *Solem v. Helm* (1983), 463 U.S. 277, from the instant matter. The connection between the two cases, however, rests on the issue of proportionality. In *Solem*, *supra*, the United States

Supreme Court found the Respondent in *Solem* to have received a criminal sentence that quite simply was disproportionate to the underlying offense---life imprisonment for uttering a \$100.00 check. In Appellant Hairston's case, he essentially is given a life sentence that too is disproportionate to the underlying offense. Hairston here is not attempting to downplay the criminal actions he engaged in; rather, Appellant is asking this Court to squarely consider whether a constitutional violation occurred, in light of this issue of disproportionality. *Solem*, supra.

So the issue here is not whether the as-applied standard is to be used or whether the courts have authority to impose consecutive sentences; the issue is succinctly whether Marquis Hairston's constitutional rights were violated as a result of a disproportionate sentence. On Appellant's side of this argument, we tend to think so. *Solem*, supra.

F. LIFE EXPECTANCY NOT CONTROLLING

While it is true that defendants convicted of theft offenses in other jurisdictions have been sentenced to life sentences, as cited by Appellee, those cases involved the worst type of offenders. *United States v. O'Driscoll* (C.A. 10, 1985), 761 F.2d 589; *Harmelin v. Michigan* (1991), 501 U.S. 957. Appellee tries to compare Hairston to characters such as O'Driscoll, but O'Driscoll, as the court there determined, is a man who engaged in cruel conduct, vicious and callous conduct. While Hairston did commit bad crimes, his conduct does not rise to that of the worst type of offender in this case. The unfortunate victims of his crimes were given baby carrots, got to keep keys on request, a woman was tied loosely, they engaged in conversation to the point that the victims felt comfortable enough to even make requests, and they did isolate the animals. Appellant

and his co-defendants then went to pawn shops in the area to trade in the stolen contraband. While Appellant is not too bright, he also is not the worst type of offender.

The State cites to the case of *Patterson v. State* (Ala.Crim.App. 1993) 628 So.2d 1945, but in this case the defendant was convicted of murder and was sentenced to 30 years imprisonment. Clearly, the defendant in *Patterson*, supra, can not be compared to Marquis Hairston.

Hairston is a man in his twenties. He is young. The state contends that age and life expectancy is not a factor, but the trial court did consider Hairston's young age when imposing the 134-year sentence. (Volume III, T. 411)

Since Hairston is not the worst type of offender, and since his sentence is disproportionate to the nature of the crime, this Court should determine that the trial court erred in sentencing him in the manner in which it did.

F. PRESS COVERAGE

The State argues that any press coverage of the Hairston case was simply due to the "terror" caused by Marquis Hairston, and not due to the public being alarmed by the 134-year sentence. However, there was outrage in this community on the day the Columbus Dispatch reported Hairston's sentence for the German Village offenses with his picture, juxtaposed next to an article of a white defendant who was sentenced to 20-years incarceration for a killing in Grove City. The comparison of the two sentences sent shock waves throughout our community and this was widely discussed on television and radio, based upon the disparity in the two sentences. So while it is true that Hairston's case generated public interest prior to the sentence, post-sentence publicity elevated because of this 134-year feature. And while there have been other German Village

crimes and serial crimes that have resulted in publicity, Hairston's case is most prominent because of the added facet of the 134-year sentence.

In *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, this Court said that for an Eighth Amendment cruel and unusual punishment violation to occur, the penalty must be so greatly disproportionate to the offense as to shock the sense of justice of the community. And in *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 70, this Court said that cases in which cruel and unusual punishments have been found are limited to those sanctions which under the circumstances would be considered shocking to any reasonable person. In the instant case, if any member of our community is asked if they heard about the guy who was sentenced to 134 years in prison for committing robberies in German Village, an appreciable number of respondents would answer affirmatively. This is because the lengthy sentence stands out. It stands out because it is shocking. It is shocking because it is an unusually lengthy sentence for a case where no victim is physically harmed, except to the extent cited in the record. Consequently, the sentence is in fact shocking to this community's sense of justice. *Weitbrecht*, supra, *McDougle*, supra.

G. SURVEYING PUNISHMENTS IN OTHER CASES

The state of Ohio contends Appellant Hairston does not pass the first step of the disproportionality test to gain access to the field of comparative sentence analysis. The law, however, in this area is rather simple: In *Solem v. Helm* (1983), 463 U.S. 277, the United States Supreme Court said "...the United States Supreme Court set forth the following three-part test to determine whether a sentence is proportionate to the offense for which the offender was convicted: First, we look to the gravity of the offense and the

harshness of the penalty....Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction....Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.” This three-step roadmap is plain and easy to follow.

Appellee further contends that Hairston has to clear the first prong, demonstrating disproportionality, to get to the second and third prongs of the test, and that he has failed to show disproportionality. This reasoning of clearing the first hurdle in order to even get to hurdle two and three was supported by this court in *Weitbrecht*, *supra.*, but this reasoning was based on a concurring opinion written in the case of *Harmelin v. Michigan* (1991), 501 U.S. 957, 1005. Appellant is of the position that this Court should consider all three steps in determining disproportionality. But regardless of the manner in which these three prongs are applied to Hairston, it is the position of Appellant that disproportionality is apparent in this case.

The test for prong one is based on an inference of disproportionality—an inference—not hard core proof, just an inference. *Weitbrecht*, *supra.* For the reasons advanced by Appellant above addressing how the sentence rendered is shocking to a reasonable person, this Court should conclude that Hairston has demonstrated an inference of disproportionality. *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, 70; *Weitbrecht* (1999), 86 Ohio St.3d 368, 370-371.

The mere fact that this Honorable Court accepted this case for review is indicia of the inference needed to meet prong one of this tripartite test. This Court accepts cases that are of great public interest. The very public nature of this case and what is occurring in the case has captivated our community and generated public discussion. And now,

barring any improvidently allowed determinations, this case has earned a place in an elite group of cases that are selectively accepted by this Court. This positioning in and of itself says something about this case's role in our community. Since the very test for disproportionality encompasses a sense of "community" and the impact thereon, the selection of this case before this Court advances the placement of this case in terms of meeting prong number one. And since disproportionality does not have to be proven--- only an inference has to be raised, indicia of the inference should suffice to meet the first prong. Additional factual evidence such as 134 years for the robberies with limited physical harm, maximum consecutive sentencing, German Village area, press coverage, etc., all together convincingly demonstrate the inference of disproportionality.

With prong number one scaled, prong two's relevance becomes apparent. Prong two allows a comparison between Hairston's sentence and the sentences of other criminal defendants within Franklin County. Pursuant to *Solem v. Helm* (1983), 463 U.S. 277, "if more serious crimes than Hairston's are subject to the same penalty, or to less serious penalties, that is **some indication** that the punishment at issue may be excessive." (emphasis supplied). With this second step in the process, this Court can look to other cases for sentence comparison. And by use of the term "some indication" that punishment by be excessive, the United States Supreme Court is expressly stating that courts may look to other factors to determine whether punishment is unconstitutional.

Appellee State of Ohio suggests that Appellant seeks to require Courts to have some systematic scheme that guarantees proportional sentences. Appellant solely seeks to have Hairston's sentence removed from the zone of iniquity and sentenced in accordance with a term that is not cruel and unusual punishment. Appellee further argues

that sentence comparisons cannot occur because various factors such as prior criminal history are unknown. However, in *Solem, supra*, the court made no mention of such an issue. This is much simpler than Appellee seems to suggest. Besides, the *Solem* Court made room for Courts to make the considerations using a myriad of approaches. Therefore, for the second prong, this Court can and should look at other Franklin County cases and determine whether criminal defendants who have committed more egregious offenses than Marquis Hairston have received similar or lighter sentences. What follows is a sampling of more egregious cases in Franklin County where defendants receive lighter sentences than Marquis Hairston:

In the case of *State of Ohio v. Oliver L. Madison*, 10th Dist. No. 06AP-1126, 2007-Ohio-3547, Madison was convicted of eight counts of rape and one count of kidnapping after a jury trial in Franklin County. All charges pertained to one woman claiming to have been repeatedly raped over a period of days in 2005. Madison was sentenced to nine (9) years incarceration and adjudicated to be a sexual predator.

In comparing Marquis Hairston's sentence to Madison's sentence where both cases are Franklin County cases, this Court should conclude that Madison's case is a more serious crime than the crime committed by Hairston. Most people, if not all people, if they had to make a choice, would rather be tied up nude and robbed over a 15 minute period or so, than repeatedly raped over a number of days. This Court should also conclude that with 134-years compared to 9-years, Madison received a much lighter sentence than Hairston. If this Court so concludes, it should find that this is evidence that Hairston's sentence is cruel and unusual. *Solem, supra*, *McDougle, supra*.

In the Franklin County case of State of Ohio v. Albert, 10th Dist. No. 06AP-439, 2006-Ohio-6902, Albert was convicted of one count of rape and one count of abduction. He was sentenced to eight years imprisonment on the rape count and three years on the abduction count, time to be served concurrently.

In the Franklin County case of State of Ohio v. Riley, 10th Dist. No. 06AP-1091, 2007-Ohio-4409, Riley was convicted of felonious assault and murder. The Franklin County trial court sentenced Riley to eight years of imprisonment for the felonious assault and a term of fifteen years to life imprisonment for the murder, with the sentences to be served concurrently.

In the Franklin County case of State of Ohio v. Williams, 10th Dist. No. 06AP-1144, 2007-Ohio-4411, Williams plead guilty to two counts of attempted murder and was sentenced to 18 years of incarceration.

In the Franklin County case of State of Ohio v. Thompkins, 10th Dist. No. 07AP-74, 2007-Ohio-4315, Thompkins was found guilty by a jury of attempted murder and two counts of felonious assault. The conviction stemmed from Thompkins abducting an ex-girlfriend and repeatedly stabbing her with a knife. A Franklin County trial court sentenced Thompkins to 10 years incarceration for attempted murder and one eight-year prison term on the two felonious assault convictions, which the trial court had merged. The prison terms ran consecutively.

In the case of State of Ohio v. Hatfield, 10th Dist. No. 06AP-1205, 2007-Ohio-3735, Hatfield was found guilty of one count of aggravated murder, one count tampering with evidence, and one count of gross abuse of a corpse. A Franklin County trial court sentenced him to life in prison with parole eligibility after 20 years for the aggravated

murder, four years for tampering with evidence, and 11 months for gross abuse of a corpse. The trial court ordered the sentences to run consecutively.

In the Franklin County case of State of Ohio v. Harrison, 10th Dist. No. 06AP-827, 2007-Ohio-2872, Harrison was charged with one count aggravated murder but a jury convicted him of the lesser-included offense of voluntary manslaughter. The trial court sentenced him to six years incarceration on the voluntary manslaughter charge with a three year consecutive sentence for the firearm specification.

The foregoing Franklin County case presentation is a mere drop in the ocean of the multitude of cases where more serious offenders have been sentenced to much lighter sentences than Marquis Hairston's 134-year sentence in Franklin County. This presentation of cases is evidence that the 134-year sentence is not proportionate to the underlying offense. *Solem, supra*.

Prong three of the *Solem* analysis provides that courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. Presented below is a listing of crimes from other jurisdictions in Ohio with their accompanying sentences:

In the case of State of Ohio v. Sims, 9th Dist. No. 23232, 2007-Ohio-700, a Summit County jury found Sims guilty of aggravated burglary, aggravated robbery, and kidnapping for breaking into a woman's apartment to steal the proceeds from her social security check. When she refused to give Sims money, Sims began stabbing her with a steak knife, slapping and kicking her, ransacking her apartment and screaming obscenities at her. He and a co-defendant held her in her apartment for approximately one hour, threatening to kill her. She crawled on her hands and knees to another

neighbor's home to call police. Sims was sentenced to seven years imprisonment for the aggravated robbery conviction, seven years imprisonment for the aggravated burglary conviction, and seven years imprisonment for the kidnapping conviction. The Court ordered the three sentences to run concurrent.

None of Marquis Hairston's convictions were run concurrent. And as for any argument that Hairston was the worst type of offender, this Sims case demonstrates that Hairston was not the worst type of offender.

In *State of Ohio v. Sheppard*, 1st Dist. No. C-060042, 2007-Ohio-24, Sheppard was convicted of aggravated burglary, kidnapping, theft of a motor vehicle, and receiving stolen property. He gained access to a man's home, tackled the resident, tied his hands and dragged him to his basement. The victim was seated in his chair with feet bound. Sheppard and a co-defendant remained in that home for at least two hours. The victim was hit on his head twice. After he lay on the ground for a few minutes, he was able to untie himself and sneak out the basement. The Hamilton County trial court sentenced Sheppard to eight years for aggravated burglary, seven years for kidnapping, 18 months for theft of a motor vehicle, 18 months for receiving stolen property. The aggravated burglary and kidnapping were run consecutively, but they otherwise were made concurrent to the remaining prison terms. Sheppard was thus sentenced to a total of 15 years, and it appears as if he did not get a maximum sentence for either the aggravated burglary or the kidnapping, unlike Marquis Hairston.

In the case of *State of Ohio v. Maurice Johnson*, 9th Dist. No. 22688, 2006-Ohio-1313, Johnson was found guilty of awakening a woman in her bedroom in the early morning hours to commit a felony offense. He wore a mask and held a gun. He then

ordered her onto the second floor hallway of her Akron, Ohio home. Upon entering the hallway, the victim saw a second man holding a gun to her son's head. The men demanded jewelry. They also threatened to kill the victim's daughter, who was also present in the home. The defendant was caught and convicted by a jury, and sentenced to a total of fifteen years in prison for aggravated robbery and aggravated burglary, each with firearm specifications. Defendant was also convicted of having weapons under disability.

In the case of State of Ohio v. Dellinger, 6th Dist. No. H-04-016, 2005-Ohio-663, the Huron County trial court found Defendant guilty and sentenced him to Count 1 aggravated robbery (F1) 8 years; Count 2 Robbery (F2) 7 years; Count 3 Burglary (F2) 7 years; Count 4 Kidnapping (F2) 7 years; Count 5 Disrupting Public Services (F4) 17 months; Count 6 Theft (F5) 11 months; Count 7 Burglary (F2) 7 years; Count 8 Possessing Criminal Tools (F5) 1 month; and Count 9 Attempted disrupting public services (F5) 11 months. The trial court ordered counts 1 through 6 to be served concurrently; Counts 7 through 9 to be served concurrently to each other and consecutively to Counts 1 through 6. The aggregate sentence was 15 years. Defendant was not sentenced to the maximum time for any of the offenses.

In the case of State of Ohio v. Glen Haynie, 3rd Dist. No. 9-03-52, 2004-Ohio-2451, the Marion County trial court found Defendant guilty of one count of kidnapping and one count of aggravated burglary. According to the facts, defendant forced his way into the office of his former girlfriend, and held her hostage in the office with a knife to her neck and the door barricaded with furniture. He repeatedly threatened to kill her. Officers had to kick the office door in and wrestle the defendant away from the victim.

He was sentenced to eight years for the kidnapping and seven years on the aggravated burglary, the sentences were ordered to be run consecutive to each other, and consecutive to a prior offense Defendant had.

In the case of State of Ohio v. Carruth, 2nd Dist. No. 19997, 2004-Ohio-2317, the Defendant was convicted of aggravated robbery, aggravated burglary, and kidnapping for forcing his way into a victim's home at gunpoint with a co-defendant. They demanded money and threatened to kill a resident before stealing money, tires, a camcorder and a gun. Defendant was sentenced to a term of imprisonment totaling sixteen years.

In State of Ohio v. Butler, 7th Dist. No. 01JE34, 2003-Ohio-3468, a Jefferson County jury found defendant guilty of robbing a gas station in the early morning. The trial court sentenced defendant to a total aggregate sentence of fifteen years imprisonment. He received eight years for burglary. The court merged two armed robbery counts into concurrent four year terms, and ordered that term be served consecutive to the burglary sentence. The court merged three firearm specifications into one, for which it imposed an additional consecutive term of three years.

In the case of State of Ohio v. McDonald, 2nd Dist. No. 19100, 2002-Ohio-4969, Defendant McDonald and a co-defendant broke into a female victim's home, called her a "bitch," hit her over the head with a gun, knocking her onto her floor. They stole money from her and poured beer down her back. They tied her up and left. The defendant was found guilty by a jury and sentenced to seven years imprisonment for kidnapping, eight years for aggravated burglary, and eight years for aggravated robbery, to be served concurrently. McDonald also received three years on each firearm specification, to be

served concurrently with each other, but consecutive to the underlying crimes, for an aggregate sentence of eleven years.

In *State v. Hatfield*, 12th Dist. No. 2001-10-075, 2002-Ohio-3598, Defendant threatened and terrorized a homeowner. He removed a safe from the home. He was caught and convicted of aggravated burglary and aggravated robbery. Defendant received consecutive sentences of seven years on each count, for a total of fourteen years imprisonment.

In the case of *State v. Johnson*, 11th Dist. No. 00CR672, 2002-Ohio-2977, the defendant was convicted after a jury trial of aggravated burglary with a three year gun specification, and kidnapping with a gun specification. The Trumbull County court sentenced defendant to three years imprisonment on the aggravated burglary count, with an additional three years for the firearm specification, and three years on the kidnapping count with the firearm specification merging. The sentences were run concurrently.

In the case of *State of Ohio v. Price* (1989), 52 Ohio App.3d 39, the Hamilton County trial court convicted defendant of two counts aggravated robbery with gun specifications. The trial court imposed a sentence of three years imprisonment on the gun specification and concurrent indefinite terms of not less than ten nor more than twenty-five years on the aggravated robbery charges.

In *State of Ohio v. Tate*, 11th Dist. No. 02CR98, 2004-Ohio-6689, defendant robbed a bank. He was sentenced to nine years incarceration for aggravated robbery with three years attaching for a gun specification, seven years for four counts of kidnapping, with these counts to be served concurrent with one another and with the aggravated robbery charge. The Trumbull County court also sentenced him whereby firearm

specifications merged with an aggravated robbery specification. All total, defendant was sentenced to twelve years incarceration.

In the case of State of Ohio v. Hall, 8th Dist. No. 83361, 2004-Ohio-5963, the defendant and a co-worker entered the victim's home in Cleveland, Ohio with ski masks. They held the victim and her three children, her 12-year-old nephew, her adult girlfriend, and her girlfriend's infant son at gunpoint while they searched the house for money. The Defendant took \$80 cash and a handgun. They threatened the victim. She threw a clock out of a window and yelled for help and one of the men shot her. She dove out the window and onto the roof and a man shot her twice more. She was taken to the hospital and treated for gunshot wounds in her chest, arm and leg. The bullet that entered her chest struck her in the right breast, grazed her heart, and struck her left lung before exiting on the left side of her chest. The defendant was convicted and sentenced to prison terms of eight years each for the counts of attempted murder (1 count), aggravated burglary (2 counts), aggravated robbery (2 counts), and kidnapping (3 counts), concurrent with six-year prison terms for two counts of felonious assault and having a weapon under disability. Ten one-year firearm specifications and ten three-year firearm specifications were merged into a single three year specification, consecutive to the combined eight-year prison term for the predicate offenses.

In the case of State v. Walker, 8th Dist. No. 86216, 2006-Ohio-108, the Cuyahoga County trial court acknowledged that appellant therein had a prior criminal record which included two counts of burglary in 1972, robbery in 1975, aggravated robbery in 1979, felonious assault and aggravated robbery in 1979, and possession of criminal tools and having a weapon under disability in 1987. In this case, a jury found Defendant/Appellant

guilty of one count of kidnapping, six counts of rape, and one count of aggravated burglary. Walker had threatened his victim in this case with death while holding a knife to her. With an extension cord, he tied the victim's hands and ankles, placing the victim's knees in an up position. He then gagged the victim with a collar from a coat, took off his jacket and clothes from the waist down, and proceeded to penetrate her vaginally three times in a period of two and a half hours. The trial court sentenced him to ten to twenty-five years on the kidnapping and rape counts, to run concurrently, and one and one-half to five years for the aggravated burglary count, to run concurrently with the kidnapping counts. While this case is a more serious offense than Hairston's, the Solem case allows for this court to consider a myriad of cases for sentence comparisons.

In the case of State of Ohio v. Cason, 8th Dist. No. 86413, 2006-Ohio-1561, defendant robbed a home while present in the home were two adults and four children. Defendant was convicted of two counts of aggravated robbery with firearm specifications, three counts of aggravated burglary with firearm specification, six counts of kidnapping with firearm specifications, felonious assault with firearm specifications, and possession of criminal tools. Cason stipulated to the offense of having a weapon under disability. The trial court sentenced Cason to a total prison term of eleven years.

In the case of State of Ohio v. Sarkozy, 8th Dist. No. 86952, 2006-Ohio-3977, the defendant asked his victim if he could borrow money. He had recently been released from jail and the victim had offered to assist him. He drove to her house and she let him in. Once inside, he immediately demanded money and proceeded to punch her in the face. He then dragged her upstairs to her locked storage box. While upstairs, he choked her with an electrical cord and beat her severely. He then dragged her to her laundry

room, where he left her momentarily so he could retrieve a knife from her kitchen. When he returned to the laundry room, he used the kitchen knife to slash her throat and stab her in the chest. Despite the victim's injuries, Sarkozy continued to beat and drag her. Although she survived the brutal attack, she suffered extensive physical and emotional injuries. The trial court sentenced Sarkozy to ten years for attempted murder, three years for the firearm specification, ten years for aggravated robbery, and four years for kidnapping. The trial court ordered that the sentences be served consecutively, for a total term of incarceration of 27 years.

The above cases from outside of Franklin County demonstrate that cases similar to Hairston's result in lighter sentences. Over and over, trial courts render sentences where the defendant's get concurrent, non-maximum sentences. This occurs in cases similar to Hairston's and in case far more egregious than Hairston's. Even in cases where the defendant is the worse type of offender, the sentencing court dispensed lighter sentences than Hairston's. Since Hairston clearly was not the worst type of offender---remember the baby carrots---he should have received some concurrent sentences and some non-maximum considerations.

Appellee State of Ohio at Page 38 of its brief considers Hairston's conduct to be shocking, citing to "prolonged, extreme restraints, extensive looting, brandishing of a firearm, threatening serious physical harm." As the foregoing cases demonstrate, Hairston's conduct pales in comparison to numerous crimes where defendants are given concurrent, non-maximum sentences.

court should find that the trial court violated Appellant's constitutional rights, and that the Franklin County Court of Appeals abused its discretion in affirming the trial court.

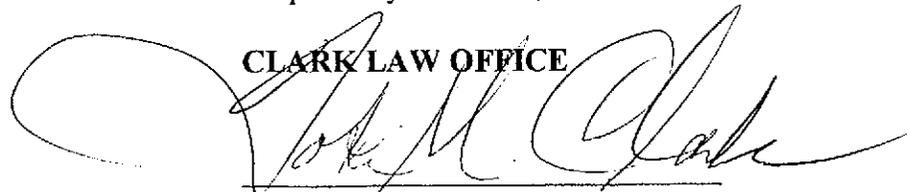
CONCLUSION

In closing, Appellant is not suggesting that the conduct in this case is anything but criminal and reprehensible. Appellant is suggesting, however, that the trial courts of this state must be fair and impartial and pass sentences in a manner that is not in violation of the Constitution. When the conduct of Marquis Hairston is compared to the conduct of other criminals as presented above, his sentence clearly is disproportionate because he failed to receive any non-maximum sentence, and he failed to get any concurrent sentence, resulting in an absurd result of 134 years.

Other more violent offenders and similarly situated offenders have received non-maximum and/or concurrent sentences. Why can't Marquis Hairston? Isn't he also entitled to the Equal Protection of laws under our system of jurisprudence? The trial court and the appellate court have answered this question in the negative and for this reason, Appellant Marquis Hairston respectfully requests that this Court conclude that he was in fact given a disproportionate sentence that amounts to a cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution and Article 1, Section 9 of the Ohio Constitution.

Respectfully submitted,

CLARK LAW OFFICE



Toki M. Clark (#0041493)
233 South High Street, 3rd Floor
Columbus, Ohio 43215
(614) 224-2125

CERTIFICATE OF SERVICE

Counsel for Appellant Marquis Hairston hereby certifies that a true and accurate copy of the foregoing Reply Brief was hand-delivered to Steven Taylor, Esq., Office of the Prosecuting Attorney, 369 South High Street, 14th Floor, Columbus, Ohio 43215, this 9th day of October, 2007.



TOKI M. CLARK