In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2021-1033
	:	
Appellee,	:	On Appeal from the
	:	Delaware County
v.	:	Court of Appeals,
	:	Fifth Appellate District
SUSAN GWYNNE,	:	
	:	Court of Appeals
Appellant.	:	Case No. 16 CAA12 0056

MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL DAVE YOST IN SUPPORT OF APPELLEE STATE OF OHIO

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INTRODUCTION

The Court accepted jurisdiction on two propositions of law. While the State should prevail on both, this *amicus* brief addresses only the second. In particular, it addresses the question whether Susan Gwynne's sentence is unconstitutionally excessive. The answer to that question is "no."

The Eighth Amendment to the United States Constitution and Article I, Section 9 of the Ohio Constitution both forbid "cruel and unusual punishments." As originally understood, both provisions forbade cruel and unusual *forms* of punishment—neither was understood as a "guarantee against disproportionate sentences." *Harmelin v. Michigan*, 501 U.S. 957, 985 (1991) (op. of Scalia, J.). This Court and the Supreme Court of the United States have nonetheless read a proportionality requirement into the cruel-and-unusual-punishment clauses. But proportionality review is narrowly cabined in two ways relevant here. First, a sentence violates the cruel-and-unusual-punishments clauses on proportionality grounds only if it is "*grossly disproportionate* to the crime." *Id*. at 1001 (Kennedy, J., concurring) (quotation and citation omitted); *accord State v. Hairston*, 118 Ohio St. 3d 289, 2008-Ohio-2338, ¶13. Second, "for purposes of the Eighth Amendment and Article I, Section 9 of the Ohio Constitution, proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively." *Hairston*, 118 Ohio St.3d 289 at ¶20.

The second of these principles resolves this case. Gwynne's cumulative sixty-five-year sentence reflects multiple individual sentences running consecutively. None of those individual sentences, standing alone, is grossly disproportionate to the crime for which it was imposed. Therefore, Gwynne's Eighth Amendment challenge, which rests exclusively on the alleged disproportionality of her *cumulative* sentence, fails.

STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio's chief law officer and "shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested." R.C. 109.02. The Attorney General is interested in defending against a claim that application of Ohio's consecutive sentencing statutes and related provisions results in an Eighth Amendment violation.

STATEMENT OF THE CASE AND FACTS

1. Susan Gwynne used her position as a nurse's aide to steal over 3,000 items from forty-six nursing-home residents. *State v. Gwynne*, 2021-Ohio-2378, ¶¶2–3 (5th Dist.) ("App.Op."). The State indicted her on over 100 crimes, including burglary, theft, and receiving stolen property. In exchange for the State's agreeing to dismiss fifty-five of the charges, Gwynne pleaded guilty to seventeen counts of burglary, four counts of third-degree theft, ten counts of fourth-degree theft, and fifteen counts of receiving stolen property. *Id.* at ¶4.

Then came sentencing. The trial court concluded that, "to protect the public from future crime and to" adequately "punish" Gwynne, it was "necessary" to impose consecutive sentences. App.Op.¶¶22–23 (quoting sentencing transcript at 30–31). It further concluded that the imposition of "consecutive sentences" would not result in a sentence "disproportionate to the seriousness of [her] conduct and the danger she pose[d] to the public." *Id*. Finally, the court stressed that the harm caused by Gwynne's "multiple offenses was so great or unusual that no single prison term for any of the offenses … would adequately reflect the seriousness of" Gwynne's misconduct. *Id.* Based on those findings, the trial court imposed a sentence of three years for each of the fifteen second-degree felony burglaries, twelve months for each of the third-degree felony thefts, twelve months for each of the fourth-degree felony thefts, and 180 days for each first-degree misdemeanor receiving-stolen-property offenses. *Id*. ¶6. The trial court ordered the felony sentences to be served consecutively, and the misdemeanor sentences concurrently. All told, Gwynne would serve a sixty-five year prison sentence. *Id.*

2. Gwynne appealed her sentence. She argued that the trial court sentenced her without properly considering the general purposes and principles of sentencing, which appear in R.C. 2929.11 and R.C. 2929.12. *See State v. Gwynne*, 2017-Ohio-7570, ¶17 (5th Dist). The Fifth District agreed. *Id.* ¶30; *see also* App.Op.¶7. But this Court reversed. It concluded that the general principles and purposes of sentencing found in R.C. 2929.11 and 2929.12 apply to individual sentences, *not* to cumulative sentence resulting from

multiple individual sentences served consecutively. *State v. Gwynne*, 158 Ohio St.3d 279, 2019-Ohio-4761, ¶¶17–18, 20. This Court remanded the case to the Court of Appeals to consider whether the record supported the findings the trial court made (under R.C. 2929.14(C)(4)) in support of the cumulative sentence. *Id.* at ¶¶19–20.

3. On remand, the Fifth District Court of Appeals affirmed Gwynne's sixty-five-year sentence. The trial court, it reasoned, had adequately considered the required factors. App.Op.¶¶21, 24, 26. The Fifth District opined that the sixty-five-year sentence was "wholly excessive … for a non-violent first time felony offender." App.Op.¶25. But it acknowledged that each of Gwynne's individual sentences was within the statutory range. *See* R.C. 2929.14. Following *State v. Hairston*, 118 Ohio St.3d 289, the Fifth District held that, because none of Gwynne's individual sentences was disproportionate, her aggregate prison term resulting from her consecutive sentences necessarily comported with the Eighth Amendment's prohibition of cruel and unusual punishments. App.Op.¶¶29–30.

4. Gwynne sought discretionary review, raising two propositions of law:

> Proposition of Law No. I: A trial court errs when it sentences a defendant to consecutive terms of imprisonment, when such a sentence is clearly and convincingly not supported by the record.
>
> Proposition of Law No. II: A sentence that shocks the conscience violates the Eighth Amendment's prohibition against cruel and unusual punishment, and thus is contrary to law.

This Court accepted review. *See State v. Gwynne*, 165 Ohio St.3d 1449, 2021-Ohio-3908.

ARGUMENT

This case presents the question whether Gwynne's sentence violates the Eighth Amendment. It does *not* present the question whether her sentence violates Article I, Section 9 of the Ohio Constitution. It does not present that question because Gwynne's brief fails to present any argument about Article I, Section 9. Thus, any arguments resting on that provision are forfeited. *See State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, ¶17 (citing S.Ct.Prac.R. 16.02(B)(4) and *State v. Carter*, 27 Ohio St.2d 135, 139 (1971)). To be sure, Gwynne cites Article I, Section 9, in passing at page 9 of her merit brief, but only to assert that that provision "has never been construed by the Ohio Supreme Court as being anything other than coextensive with the federal provision." Gwynne has not made any arguments regarding the "unique language and historical background" of Ohio's constitution. *Stolz v. J&B Steel Erectors*, 155 Ohio St.3d 567, 2018-Ohio-5088, ¶28 (Fischer, J., concurring). She has, in other words, failed to make any argument concerning her entitlement to relief under Article I, Section 9. Accordingly, the case must be decided under the Eighth Amendment alone.

For the sake of completeness, however, and because Gwynne is not entitled to relief under either provision, this brief addresses both.

***Amicus* Attorney General's Proposition of Law:**

> *If an adult criminal defendant is sentenced to prison for multiple felonies, and if each of the individual sentences is constitutional under the Eighth Amendment and Article I, Section 9, then the cumulative sentence that results from being made to serve the sentences consecutively is also constitutional under those provisions.*

The Eighth Amendment prohibits "cruel and unusual punishments." So does Article I, Section 9. Is Gwynne's cumulative sentence—a sixty-five-year sentence comprising multiple individual sentences running consecutively—cruel and unusual on the ground that it is "'*grossly disproportionate*' to the crime"? *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) (emphasis added); *accord Hairston*, 118 Ohio St. 3d 289 at ¶13.

No. That follows from this Court's decision in *Hairston*, which held that, "for purposes of the Eighth Amendment and Section 9, Article I of the Ohio Constitution, proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively." *Hairston*, 118 Ohio St.3d 289 at ¶20. Here, it is undisputed (and indisputable) that Gwynne's individual sentences are not grossly disproportionate to the crimes for which they were imposed. That ends the case; the "cumulative impact" of those independently valid sentences is irrelevant. In any event, a sixty-five-year cumulative sentence is hardly "grossly disproportionate" punishment for Gwynne, who used her position as a nurse's aide for elderly citizens to exploit dozens of vulnerable Ohioans. Her sentence is reasonable, and will serve to deter others in positions of authority from exploiting people they are responsible for assisting.

This Court should affirm the Fifth District.

I. The constitutional prohibition of "cruel and unusual punishments" does not forbid consecutive terms of years for adult felons.

The Eighth Amendment and Article I, Section 9 both prohibit "cruel and unusual punishments." Neither the text of these provisions, nor the cases interpreting them, gives defendants any right to protest the alleged disproportionality of cumulative sentences. In other words, if the sentences imposed on a defendant are independently constitutional, so too is the aggregate sentence that results from each sentence running consecutively.

A note for the reader: The Attorney General already addressed many of these issues in a brief he filed in a different case. *See* Br. of *Amicus Curiae* Ohio Attorney General Dave Yost, *State v. Patrick*, No. 2019-655 (November 21, 2019). This brief borrows substantially from that one.

A. As originally understood, the "cruel and unusual punishment" clauses prohibited severe methods of punishment unknown to the common law and not authorized by statute.

Constitutional language must be interpreted according to "the common understanding of the people who framed and adopted" it. *Pfeifer v. Graves*, 88 Ohio St. 473, 487 (1913). True, courts must adhere to binding precedents. But respecting precedent does not mean extending wrongly decided cases "to the limits of [their] logic." *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 615 (2007) (plurality). Instead, courts must read binding precedents "in light of and in the direction of the constitutional text

and constitutional history." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part and rev'd in part by* 561 U.S. 477; *accord Alden v. Maine*, 527 U.S. 706, 741 (1999). "Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom." *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 195 n.16 (1999) (quotation omitted). The original meaning should guide courts in deciding when to hit the brakes: because constitutional provisions mean what they were understood to mean by "the people who framed and adopted" them, *Pfeifer*, 88 Ohio St. at 487, courts must bear in mind the original meaning when deciding whether to extend past decisions any further. In recent years, the Supreme Court has seemingly embraced this principle in its Eighth Amendment cases, refusing to extend past decisions any further beyond the Amendment's original meaning. *See, e.g.*, *Bucklew v. Precythe*, 139 S.Ct. 1112, 1123–25 (2019).

With all that in mind, turn to the text.

The Eighth Amendment. The Eighth Amendment, which applies to the States through the Fourteenth Amendment, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The ban on "cruel and unusual punishments," as originally understood, prohibited certain "*methods*" of corporal punishment. *Bucklew*, 139 S.Ct. at 1123, 1124 (emphasis added). Specifically, it banned "long disused (unusual) forms of punishment that intensified the sen-

tence of death with a (cruel) superaddition of terror, pain, or disgrace." *Id.* at 1124 (alterations, citations, and internal quotation marks omitted).

That is as far as the Eighth Amendment went. Thus, the Eighth Amendment's prohibition on cruel and unusual punishments, as originally understood, "relates" only "to the character of the punishment, and not the process by which it is imposed." *See United States v. Tsarnaev*, __U.S.__, slip op. 14 n.2 (2022) (quoting *Gardner v. Florida*, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting)). What is more, because the Eighth Amendment's prohibition relates only to the *character* of the punishment imposed, it was not originally understood to require sentences proportionate to the severity of the crime committed. *See Graham v. Florida*, 560 U.S. 48, 98–102 (2010) (Thomas, J., dissenting); *Harmelin*, 501 U.S. at 974–85 (opinion of Scalia, J.). If the character of the punishment was constitutional—and prison terms always are—the Eighth Amendment was satisfied without regard to the question whether the term imposed was "excessive."

Article I, Section 9. Article I, Section 9 of the Ohio Constitution was originally understood the same way. The People of Ohio, through a constitutional convention, drafted their own cruel-and-unusual-punishments clause in 1802, and retained it largely verbatim in the 1851 Constitution. They used the same words as the Eighth Amendment: "Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." Ohio Constitution, Article I, Section 9. *See also State v. Weitbrecht*, 86 Ohio St.3d 368, 370 (1999). Given that Ohio adopted this provision barely

a decade after the Eighth Amendment's ratification, it is reasonable to assume, absent historical evidence to the contrary, that Ohioans meant their guarantee to provide the very same protections. There is no contrary historical evidence.

What is more, there is affirmative evidence that Article I, Section 9 *does not* require proportionate sentences. Ohio's 1802 Constitution included, in addition to the precursor to Article I, Section 9, a separate provision that specifically required the legislature to adopt "penalties … proportioned to the nature of the offence." Ohio Constitution of 1802, Art. VIII, §14. The full text of that provision read:

> Punishment to be proportioned to offense.
>
> > All penalties shall be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason. When the same undistinguished severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the slightest offenses. For the same reasons, a multitude of sanguinary laws are both impolitic and unjust; the true design of all punishments being to reform, not to exterminate mankind.

The fact that the 1802 Ohio Constitution included this provision *in addition to* the cruel-and-unusual-punishments language shows that the prohibition on cruel-and-unusual punishments language *was not* understood to ban disproportionate sentences. If it were, the proportionality requirement in Section 14 would have been superfluous.

Why does this matter? Because the People of Ohio dropped the proportionality requirement, but retained the prohibition on cruel and unusual punishments, in the

1851 Constitution. The records of the debates on the 1851 Constitution do not discuss the proportionality provision or explain why it was not continued in the 1851 Constitution. *See* Ohio Convention Debates (1851) vol.2 at 328 (discussing Art. I, §9). But because the cruel-and-unusual-punishments clause would not have been understood to require proportionate sentences, and because the People dropped the proportionality requirement while retaining the cruel-and-unusual-punishments clause, the only logical conclusion is that the Constitution today contains no right to proportionate sentences.

Although Article I, Section 9 and the Eighth Amendment mean roughly the same thing, both served an independent and important purpose. Before the Fourteenth Amendment's ratification in 1868, the Bill of Rights applied only against the federal government. *See Barron v. Baltimore*, 32 U.S. 243, 250 (1833). Thus, the People of Ohio, in 1803 and 1851, would have been without any protection against cruel and unusual punishments imposed by the State had they not ratified a cruel-and-unusual-punishments clause of their own.

This Court's case law confirms that Article I, Section 9's original meaning mirrors that of the Eighth Amendment. One case, for example, recognizes that the identically worded provisions were both originally understood as applying only in "extremely rare cases" to protect individuals from "inhumane punishment such as torture or other barbarous acts." *Weitbrecht*, 86 Ohio St.3d at 370. Another case, closer in time to the 1851 ratification, provides further evidence of Section 9's original meaning. The Court, look-

ing to cases interpreting the Eighth Amendment, explained that Article I, Section 9 prohibited "punishments of torture, such as those … where the prisoner was drawn and dragged to the place of execution," "emboweled alive; beheaded and quartered," burned alive, or subjected to other execution methods "in the same line of unnecessary cruelty." *Holt v. State*, 107 Ohio St. 307, 314 (1923) (quoting *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878)). So, as with the Eighth Amendment, Section 9 prohibited only unconstitutional *forms* of punishment.

In sum, Article I, Section 9, just like the Eighth Amendment, was not originally understood to prohibit disproportionate sentences.

B. Sentencing an adult convicted of multiple felonies to multiple prison terms to be served consecutively is constitutional under binding case law.

This Court, and the Supreme Court of the United States, have interpreted the Eighth Amendment and Article I, Section 9 as prohibiting sentences that are "disproportionate to the crime." *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, ¶25. Thus, while neither provision originally spoke to the excessiveness of sentences, courts today interpret both as guaranteeing "the right not to be subjected to excessive sanctions." *Miller v. Alabama*, 567 U.S. 460, 469 (2012) (quotation omitted); *accord*, *In re C.P.*, 131 Ohio St.3d 513, at ¶25. This Court, for its part, has interpreted the Eighth Amendment to prohibit "punishments which are so disproportionate to the offense as to shock the moral sense of the community." *McDougle v. Maxwell*, 1 Ohio St.2d 68, 69 (1964) (citations omitted);

accord, *Weitbrecht*, 86 Ohio St.3d at 373. In this section, the Attorney General explores the development of this doctrine.

1. Any understanding of proportionality review must begin with *Weems v. United States*, 217 U.S. 349 (1910). There, the Supreme Court of the United States concluded that a territorial court violated the Eighth Amendment by imposing a sentence of "cadena temporal." "Cadena temporal" consisted of incarceration at hard labor with chains on the wrists and ankles at all times. *Id.* at 364. Those sentenced to cadena temporal were subject to lifelong government surveillance even after leaving prison, and they were deprived of important rights, such as the right of parental authority. *Id.* at 364–65. The Supreme Court held that this severe punishment, derived from the Spanish Penal Code and unknown to Anglo-American law, was cruel and unusual. *Id.* at 377.

The result in *Weems* fully accords with the Eighth Amendment's original meaning: cadena temporal was both severe (making it cruel) and unlike any punishment available in the Anglo-American legal tradition (making it unusual). *Id*. at 365–67; *see also Harmelin*, 501 U.S. at 991–92 (op. of Scalia, J.). Thus, the punishment is unconstitutional under the Eighth Amendment as originally understood—as explained above, the Amendment prohibits "long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) superaddition of terror, pain, or disgrace." *Bucklew*, 139 S. Ct. at 1124 (alterations, citations, and internal quotation marks omitted). But *Weems* also includes language regarding proportionality. In one passage, the Court stated that

"punishment for crime should be graduated and proportioned to [the] offense." 217 U.S. at 367.

In the late twentieth and early twenty-first centuries, the Supreme Court embraced *Weems*'s statements regarding proportionality. The proportionality principle has played a significant role in capital cases. The Supreme Court invoked it when holding that the Eighth Amendment prohibited imposing the death penalty for some crimes, including rape. *See, e.g., Coker v. Georgia*, 433 U.S. 584, 591–92 (1977). The Court also invoked proportionality principles when holding that certain classes of defendants are categorically ineligible for the death penalty. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 574–75 (2005).

The proportionality principle also undergirds cases concerning sentences for juvenile criminals. Both this Court and the Supreme Court have recognized that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. In particular, three differences between children and adults make the former "less deserving of the most severe punishments." *Id*. (quoting *Graham*, 560 U.S. at 68). *First*, "children have a lack of maturity and an underdeveloped sense of responsibility," which leads to "recklessness, impulsivity, and heedless risk-taking." *State v. Long*, 138 Ohio St. 3d 478, 2014-Ohio-849, ¶12 (quoting *Miller*, 567 U.S. at 471). "*Second*, children are more vulnerable … to negative influences and outside pressures." *Id*. (quoting *Miller*, 567 U.S. at 471) (emphasis added). *Finally*, "a child's character is not as

'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be evidence of irretrievabl[e] deprav[ity]." *Id*. (quoting *Miller*, 567 U.S. at 471). In light of these characteristics, courts have held that some punishments are disproportionate, and so cruel and unusual, as applied to juvenile offenders. Courts, for example, are categorically barred from sentencing juveniles to life without parole for nonhomicide offenses. *Graham,* 560 U.S. 48. And for homicides, courts can impose a life-without-parole sentence only if they first make an individualized determination regarding the appropriateness of that sentence. *Miller*, 567 U.S. at 469, 479; *see also Jones v. Mississippi*, 141 S.Ct. 1307, 1314 (2021). Along the same lines, this Court has held that the same rule applies to "term-of-years prison sentence[s] that exceed[] a defendant's life expectancy." *State v. Moore*, 149 Ohio St. 3d 557, 2016-Ohio-8288, ¶1. And similar insights led this Court to hold that the prohibition on cruel and unusual punishments prohibits sentencing juvenile offenders who remain under the jurisdiction of the juvenile court to mandatory, lifelong sex-offender registration-and-notification requirements. *In re C.P.*, 131 Ohio St.3d 513, at ¶¶1, 41, 61–62.

But as to adult felons facing a prison sentence, rather than death, the "proportionality principle" has little relevance. *See Rummel v. Estelle*, 445 U.S. 263, 272 (1980). As the Supreme Court recognized, the line between the punishment of death and various other sentences is clearer than any distinction between "one term of years and a shorter or longer term of years." *Id.* at 275. Accordingly, outside the context of capital

punishment, "*successful* challenges to the proportionality of particular sentences [are] exceedingly rare." *Harmelin*, 501 U.S. at 1001 (op. of Kennedy, J., concurring) (citations omitted). The Eighth Amendment, the courts have stressed, "does not require strict proportionality between crime and sentence." *Id.* It forbids only "sentences that are 'grossly disproportionate' to the crime." *Id.*; *accord Ewing v. California*, 538 U.S. 11, 30 (2003) (op. of O'Connor, J.). A sentence meets this standard only if it "shock[s] the moral sense of the community." *McDougle*, 1 Ohio St.2d at 69.

This forgiving "grossly disproportionate" standard recognizes that the decision of which sentence to impose "involves a substantive penological judgment" that generally is "within the province of legislatures, not courts." *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring) (quoting *Rummel*, 445 U.S. at 275–76); *see also State v. Blankenship*, 145 Ohio St.3d 221, 2015-Ohio-4624, ¶36 (citing *Weitbrecht*, 86 Ohio St.3d 368). The Eighth Amendment does not mandate that state legislatures adopt any one penological goal or theory—retribution, deterrence, rehabilitation, and incapacitation are all permissible goals to be considered in prescribing penalties for crime. *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring). Moreover, courts "lack clear objective standards to distinguish between sentences for different terms of years." *Id*. at 1001 (citing *Rummel*, 445 U.S. at 275). Given the absence of any such standards for adjudicating proportionality, any rigorous proportionality assessment would risk transforming the Eighth Amend-

ment from a prohibition on objectively heinous forms of punishment into a tool for constitutionalizing "the subjective views of individual Justices." *Coker*, 433 U.S. at 592.

Applying this relaxed "grossly disproportionate" standard, courts have held that even very long sentences for relatively minor crimes pass constitutional muster. *Harmelin*, for example, rejected an Eighth Amendment challenge brought by a defendant who "was convicted of possessing 672 grams of cocaine and sentenced to a mandatory term of life in prison without possibility of parole." *Harmelin*, 501 U.S. at 961 (op. of Scalia, J.). The controlling opinion in that case, invoking (among other things) the "dangers flowing from drug offenses," concluded that the mandatory life sentence was not grossly disproportionate. *Id*. at 1008–09 (Kennedy, J., concurring). Consider also the decision in *Rummel v. Estelle*, 445 U.S. 263 (1980). The defendant in that case was sentenced to life imprisonment with the possibility of parole under Texas's three-strikes law. *Id*. at 264, 278. The Court rejected the defendant's Eighth Amendment challenge—this despite the fact that the three felonies all involved small-dollar fraud. *Id*. at 265–66; *accord Ewing*, 538 U.S. at 30. The decision in *Hutto v. Davis*, 454 U.S. 370 (1982), is of a piece with *Rummel*. There, the Court rejected an Eighth Amendment challenge to consecutive 20-year prison terms for distributing marijuana and possessing marijuana with the intent to distribute. *Id*. at 371, 374–75.

In the past forty years, the Supreme Court of the United States has identified only one prison sentence that violated the Eighth Amendment in its application to adult

offenders—and that outlier case has been confined to its facts. *See Solem v. Helm*, 463 U.S. 277 (1983). The defendant, Helm, tried to pass a no-account check worth $100. Under a South Dakota recidivist statute, he was sentenced to life without parole. *Id.* at 280–82. The Court concluded that Helm's life-without-parole sentence was "far more severe" than the life sentence upheld in *Rummel*. *Id.* at 297. And it further justified its holding by comparing Helm's sentence to the sentence he could have received in South Dakota for other offenses, *id.* at 298, and the sentence he could have received in other States for writing a bad check, *id.* at 300–01. The Court acknowledged that this intra- and inter-jurisdictional comparison would be appropriate only in the rare case. *Id.* at 290 n.16. And the controlling opinion *Harmelin* concluded that the "rare case" arises *only after* "a threshold comparison of the crime committed and the sentence imposed leads to an inference of grossly disproportionality." 501 U.S. at 1005 (Kennedy, J., concurring); *accord*, *Weitbrecht*, 86 Ohio St.3d at 373 n.4 (citing *Harmelin*, 501 U.S. at 1005). That would seem to mean that courts can compare one defendant's sentence to another only to confirm, but not to establish in the first instance, the excessiveness of a prisoner's sentence.

This Court's cases are in accord with those from the Supreme Court of the United States. For example, *State v. Chaffin*, held that a sentence of 20-to-40-years, imposed for selling marijuana, did not violate the prohibition on cruel and unusual punishments. 30 Ohio St.2d 13, 17 (1972). The decision in *Weitbrecht*, is even more telling. There, the de-

fendant committed a minor misdemeanor traffic offense because she had a heart attack and lost consciousness while driving. 86 Ohio St.3d 368 at 374 (Pfefier, J., dissenting). Multiple people died as a result, however, and the State charged the defendant with involuntary manslaughter, which carried a potential five-year sentence. *See id.*; *see also id.* at 370. This Court held that the potential sentence violated neither the Eighth Amendment nor Article I, Section 9. *Id.* at 374.

2. The discussion above sets the stage for the question in this case: If a court imposes numerous sentences on an adult defendant, and if those sentences are all constitutionally permissible standing alone, do they become cruel and unusual if made to run consecutive to one another? The answer is no.

Indeed, this Court already answered the question in *Hairston*. That case specifically upheld, against an Eighth Amendment challenge, consecutive prison sentences totaling 134 years for an adult convicted of multiple felonies. 118 Ohio St.3d 289 at ¶¶1, 23. In *Hairston*, the defendant had participated in a string of home-invasion robberies, burglaries, and kidnapping, and pleaded guilty to fourteen separate felonies with three separate gun specifications. *Id.* at ¶¶2–6. As is typical of consecutive sentences, the length of Hairston's total sentence resulted from the sheer number of crimes he committed. *Id.* at ¶16. This Court held that, "for purposes of the Eighth Amendment and Section 9, Article I of the Ohio Constitution, proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed

consecutively." *Id.* at ¶20; *see also id.* at ¶17. In other words, the cruel-and-unusual analysis requires assessing the proportionality of the sentence imposed for each specific crime, *not* the total resulting prison time. *Id.* at ¶20. "Where 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.* Because each of Hairston's individual sentences was within the statutory range for the particular crime, his overall (consecutive) prison sentence of 134 years did not violate the Eighth Amendment or Article I, Section 9 of the Ohio Constitution, *id.* at ¶23, even though it was a "de facto life sentence," *id.* at ¶27 (Lanzinger, J., concurring).

The weight of precedent from around the country accords with *Hairston*. Many cases recognize that proportionality challenges are to be resolved based on the proportionality of each individual sentence, *not* based on the total number of years of imprisonment. *See, e.g.*, *State v. Becker*, 304 Neb. 693, 703–07 (2019). "[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." *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001); *see also State v. Buchold*, 2007 S.D. 15, ¶¶30–33; *State v. Berger*, 212 Ariz. 473, 479 (2006); *State v. August*, 589 N.W.2d 740, 742–44 (Iowa 1999); *Wells-Yates v. People*, 2019 CO 90M, ¶¶38, 74. While

some cases hold otherwise, *see, e.g.*, *Randall Book Corp. v. State*, 316 Md. 315, 331 (1989), they are in the minority.

II. Gwynne's consecutive sentences are constitutional.

The principles discussed in the previous section require this Court to affirm the Fifth District.

A. Gwynne's sentence comports with the Eighth Amendment, with Article I, Section 9, and with the binding decisions interpreting those provisions.

Gwynne's consecutive sentences accord with the relevant constitutional text and with the cases interpreting it.

Start with the text. As explained above, neither the Eighth Amendment nor Article I, Section 9, permitted proportionality review as originally understood. Thus, as an original matter, Gwynne's attempt to win relief under either provision would die aborning.

Now turn to the precedent. This Court's decision in *Hairston* answers the question in this case and forecloses Gwynne's cruel-and-unusual-punishments claim. Again, *Hairston* held that "proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively." 118 Ohio St.3d 289 at ¶20. Gwynne has not, and could not possibly, argue that any of her individual sentences are grossly disproportionate for constitutional purposes—again, even a life sentence for a single drug possession offense does not cross that line. *See Harmel-*

in, 501 U.S. at 1009 (Kennedy, J., concurring). Because none of her individual sentences is unconstitutional standing alone, neither is the cumulative sentence. *Hairston*, 118 Ohio St.3d 289 at ¶20.

Incidentally, *Hairston* fully accords with this court's decision in *State v. Moore*. As noted above, *Moore* held that "a term-of-years prison sentence that exceeds a defendant's life expectancy violates the Eighth Amendment to the United States Constitution when it is imposed on a juvenile nonhomicide offender." 149 Ohio St. 3d 557, at ¶1. Critically, however, *Moore* did not reach this conclusion on the ground that the *de facto* life sentence was grossly disproportionate to the crimes committed. Instead, it interpreted the United States Supreme Court's decision in *Graham* as imposing a "categorical prohibition" on sentencing juvenile offenders convicted of non-homicide offenses to life without parole. *Id*. at ¶33. And it understood the *de facto* life sentence before it to violate this prohibition. *Id.* at ¶34. Nothing in *Moore*, however, calls into question the rule in *Hairston*. In other words, in cases (like this one) involving no "categorical restriction" on life sentences, *Hairston*'s command to review individual sentences without regard to their cumulative totals remains in force.

B. Gwynne's arguments for reversing the Fifth District all fail.

1. Gwynne admits, with considerable understatement, that *Hairston* "appears to present a significant, if not unsurmountable, hurdle" for those hoping to prevail in a proportionality challenge based on the severity of a cumulative sentence. Gwynne

Br.12. In truth, the hurdle is insurmountable for all the reasons laid out above: Gwynne can prevail only if this Court overrules *Hairston*.

Gwynne makes no sustained argument for overruling *Hairston*. And that ought to end the case, as courts will not typically "overrule a precedent unless a party requests overruling, or at least unless the Court receives briefing and argument on the *stare decisis* question." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 n.4 (2020) (Kavanaugh, J., concurring in part). Instead of asking the Court to overrule *Hairston*, Gwynne points to a series of irrelevant factual distinctions. She notes, for example, that she and Hairston share no "offense-related and criminal-history similarities." Gwynne Br. 13. But those factual distinctions, assuming they are real, have no bearing on the legal holding in *Hairston*: "proportionality review should focus on individual sentences rather than on the cumulative impact of multiple sentences imposed consecutively." 118 Ohio St.3d 289 at ¶20. Gwynne has not, and could not, identify any factual distinction relevant to that holding.

Gwynne comes closest to arguing for the overruling of *Hairston* when she notes that *Hairston* relied on one set of non-binding precedents rather than another. Gwynne Br.14–15. But that is not an argument for overruling—it amounts to nothing more than an observation that *Hairston* might have been decided differently. In any event, as addressed above, the great weight of authority supports *Hairston*'s conclusion. So does common sense. If a defendant commits multiple crimes, there is nothing unjust or con-

science-shocking about making that defendant pay a penalty for each. And if each is proportionate to the crime for which it was imposed, the defendant has no legitimate grievance. If a defendant in these circumstances "subjected himself to a severe penalty, it is simply because he has committed a great many of such offenses." *State v. O'Neil*, 58 Vt. 140, 165 (1885), *affirmed on other grounds*, *O'Neil v. Vermont*, 144 U.S. 323, 331 (1892); *accord Becker*, 304 Neb. at 705. Gwynne's grievance, which amounts to a complaint about making her take responsibility for all of her crimes, "calls to mind a man sentenced to death for killing his parents, who pleads for mercy on the ground that he is an orphan." *Glossip v. Gross*, 576 U.S. 863, 898 (2015) (Scalia, J., concurring).

2. Without a way to evade *Hairston*, Gwynne's claims fails. But in truth, her claim would fail even if she could evade *Hairston* because there is nothing grossly disproportionate—nothing conscience-shocking—about the sentence she received. Certainly, her sentence is no *more* disproportionate than the life-without-parole sentence that *Harmelin* upheld in its application to a man convicted of drug possession.

Gwynne repeatedly insists, as though it is obvious, that a sixty-five year sentence for her string of crimes shocks the conscience. She compares her sentence to those imposed upon a cherry-picked collection of other defendants convicted of multiple burglaries and multiple thefts. But she overlooks a key difference between her case and theirs: Gwynne abused her job as a nurse's aide to take advantage of *forty-six* elderly Ohioans. If the goal of proportionality review is to ensure that sentences stop short of

"shock[ing] the moral sense of the community," *McDougle*, 1 Ohio St.2d at 69, it is hard to see any problem with her sentence. Has the "moral sense of the community" really atrophied to the point where Ohioans' shudder at a sixty-five-year prison term for a woman who used a position of power to exploit, instead of treating with honor, dozens of the vulnerable citizens whom she was hired to serve?

Regardless, the sentence is more than justified by its deterrent effect. Gwynne's behavior exemplifies a disturbing trend. One recent metastudy of data from around the world estimates that 13.8 percent of elderly men and women in institutional settings experience some degree of financial exploitation. Yongjie Yon, Maria, et al., *The prevalence of elder abuse in institutional settings: a systematic review and meta-analysis*, European Journal of Public Health, Volume 29, Issue 1, February 2019, Pages 58–67. So serious is the problem that the Attorney General operates an Elder Justice Unit committed to "protecting older Ohioans who are being exploited or harmed." Elder Justice, Office of Ohio Attorney General Dave Yost (visited March 4, 2022), https://perma.cc/8DDB-HDFX. The best way to prevent crimes motivated by self-interest is to impose penalties that scare the self-interested. Given the difficulty of detecting and prosecuting exploitative crimes, Gwynne's lengthy sentence is justified. It sends an important message to those who might follow in Gwynne's footsteps: the risk is not worth the reward.

In any event, the fact that different defendants in different cases received more lenient sentences does not make Gwynne's sentence unconstitutional. The "Eighth

Amendment does not mandate adoption of any one penological theory." *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring). Accordingly, the "federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation." *Id*. Perhaps the courts in Gwynne's curated sample were motivated more by one goal than another. Her appeal to out-of-state cases, Gwynne Br. 12, is especially irrelevant. As the controlling opinion in *Harmelin* recognized "marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure." *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring).

CONCLUSION

For the foregoing reasons, the Court should affirm the Fifth District's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellee State of Ohio was served this 11th day of March, 2022, by e-mail on the following:

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