In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2023-0654
	:	
Appellant,	:	On Appeal from the
	:	Hamilton County
v.	:	Court of Appeals,
	:	First Appellate District
TOMMY GLOVER,	:	
	:	Court of Appeals
Appellee.	:	Case No. C-220088

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

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INTRODUCTION

In *State v. Gwynne*, — Ohio St. 3d —, 2022-Ohio-4607, this Court considered the rules for imposing and reviewing consecutive criminal sentences. It first held that trial courts "must consider the overall aggregate prison term to be imposed when making the consecutive-sentence findings under R.C. 2929.14(C)(4)." *Id*. at ¶1. The Court further held that, in reviewing the trial court's determination to impose an aggregate prison term, appellate courts must "review the record de novo and decide whether the record clearly and convincingly does not support the consecutive-sentence finding." *Id*. This case requires the Court to clarify that *Gwynne* does not permit the type of second-guessing that the appeals court here did—and if *Gwynne* does permit it, *Gwynne* itself should be fixed.

The trial court here properly followed the consecutive-sentencing statute when it sentenced Defendant-Appellant Tommy Glover to a total of 60 years—out of a possible 139 years—for a crime spree of six armed robberies and five kidnappings. The trial court made every required statutory finding, in both the hearing and the judgment entry. It noted, among other thing, Glover's lack of remorse or even acceptance of responsibility, and his resistance to changing his ways, and thus his danger to society.

Most important, the trial court satisfied *Gwynne*'s requirement to consider the "overall aggregate prison term," and to avoid a binary choice between all concurrent sentences and all consecutive sentences. *See Gwynne* at ¶1. Here, the trial court blended six consecutive aggravated-robbery sentences and six consecutive gun specifications with

five *concurrent* robbery sentences and sixteen *concurrent* gun specifications. And even those six aggravated-robbery sentences were just *seven* years each, the midpoint of the three-to-eleven-year range for a first-degree felony. So this was no "max and stack"—it was a "midpoint and partial stack," resulting in less than half of what Glover was eligible for, in light of his crime spree and victimization of so many people.

But the appeals court reversed, misapplying both the appellate-review statute for consecutive sentences, R.C. 2953.08(G)(2), and *Gwynne*. *State v. Glover*, 2023-Ohio-1153 (1st Dist.) ("App.Op."). The statute and *Gwynne* allow an appeals court to reject a sentence only "if it clearly and convincingly finds … [t]hat the record does not support the sentencing court's findings." R.C. 2953.08(G)(2); *Gwynne* at ¶12. The appeals court recited that test, but under no fair reading cannot it be said that *this* record "does not support" the trial court. The First District simply substituted its judgment for the trial court's.

That substitution is shown by both (1) the parts of the record that the appeals court ignored and (2) the appeals court's reasoning, which relied on factors that appear nowhere in the statute or *Gwynne*. For example, the appeals court never acknowledged his lack of remorse and even his affirmative resistance, including eye-rolling and questioning the guilty verdict. Instead, the appeals court relied on its belief that it was somehow unfair that *six* armed robberies could get more time than some rape or murder cases, because driving people around at gunpoint for hours involved "a lack of physical harm." App.Op. ¶101. And it said mistakenly that the State had recommended only 20 to 25

years, when in fact the State conveyed the victims' requests, which ranged *from* 20 to 25 to "the maximum," which was 139. The appeals court also objected that the result was "tantamount to a life sentence," *id.* at ¶59, but that is what happens when someone commits that many felonies in a spree. Worst of all, the appeals court did not merely vacate the sentence, but used its modification power to impose a mere 25-year sentence—which it reached by keeping the unchallenged gun specifications at 18 and reducing the core felony sentence from 42 years to just *one* sentence of the *seven*-year midrange.

The Court should reverse the First District's judgment and reinstate the trial court's sentence. It can do so by clarifying that *Gwynne*'s guidance on appellate review does not give license to this type of appellate rewriting. Or, if the Court concludes that such a result does flow from *Gwynne,* it should modify *Gwynne* so that it does not lead to such results.

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 State is directly interested here in seeing justice done throughout Ohio, and in seeing valid sentences upheld, especially against serial offenders like Jones.

STATEMENT OF THE CASE AND FACTS

The Attorney General incorporates the State's fact statement, and stresses these:

A. Glover committed a crime spree of armed robberies and kidnappings, terrorizing multiple victims and frightening neighborhoods.

Tommy Glover terrorized the Cincinnati-area cities of Norwood and St. Bernard with a crime spree of armed robberies and kidnapping in the summer of 2020. App.Op. ¶2; Sentencing Hearing (Feb. 25, 2022) ("Sent. Hrg.") at 533–44; 545–46; 549–555. His routine (with a partner) was to kidnap a victim at gunpoint in the victim's car, forcing the victim to drive to an ATM and withdraw cash for him. Sent. Hrg. at 549. Along the way, he would threaten their lives. He was especially angry with two college students, who got lost driving because they did not know the area well. *Id.* at 550. He also terrorized one victim, a developmentally delayed man, by coming back days later to victimize the same man again. *Id.* at 551. On at least five occasions, he repeated this pattern. One time, instead of kidnapping the victim, he simply stole the victim's car and phone and took off. *Id.* at 552. Not only did all these victims fear for their lives, but countless more residents in those neighborhoods lived in fear as the spree continued, until Glover was caught.

B. The trial court sentenced Glover to 60 years of a possible 139 after making the required findings

After a bench trial, the court convicted Glover of eleven first-degree felonies—six aggravated robberies and five kidnappings—with each count allowing for a sentence of three to eleven years. R.C. 2929.14(A)(1). (The trial court declined to apply the Reagan-Tokes Law, finding it unconstitutional. That holding went unchallenged on appeal, so this case proceeds under prior law.) Each of those eleven counts also carried two distinct

gun specifications—a one-year specification for having the firearm during the crime and a three-year specification for brandishing it and using it to facilitate the offense. R.C. 2929.14(B)(1)(a); 2941.141 (one year); 2941.145 (three years). *See* Judgment Entry, 2-25-22.

On each of the eleven first-degree felonies, the court started with a midrange seven-year sentence within the three-to-eleven-year range. Sent. Hrg. at 557; R.C. 2929.14(A)(1). It then blended both consecutive and concurrent sentences. It determined that the seven-year sentences for the six aggravated robbery counts should run consecutively, making 42 years (of a possible 66 if maximized). Sent. Hrg. at 557–62. It determined that the remaining five kidnapping sentences, or 35 years (of a possible 55 if maximized), would run concurrently to the robbery sentences. *Id.* Thus, on the eleven felonies together, Glover received 42 of a possible 121 years. *Id.*

The gun-specification sentences—which Glover does not challenge—were likewise partly concurrent. Of eleven three-year and eleven one-year specifications, the trial court imposed six consecutive three-year specifications for those attached to the six aggravated-robbery counts, totaling eighteen years. *Id.* The remaining five three-year specifications (attached to the kidnappings), and all eleven one-year specifications, netted Glover no new time. *Id.*

Thus, all told, Glover was sentenced to 60 years of a possible 139 (accepting the specification sentences as-is, without reviewing whether those could be still higher under R.C. 2929.14(B)(1)(g)).

Before imposing consecutive sentences, R.C. 2929.14(C)(4) requires courts to make certain findings. It states, in relevant part:

> (4) If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> …
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.
>
> (c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

R.C. 2929.14(C)(4).

The trial conducted the required analysis. It itemized the required findings in both the sentencing hearing and the sentencing entry. *See* Sent. Hrg. 2-25-22 at 562–63. Specifically, as to the first two requirements, the court explained that the sentence was "necessary to protect the public" and was "not disproportionate to the seriousness of the offender's conduct and danger the offender poses to the public." Hearing at 563. As to the third requirement, the court found both options (b) and (c) met. The court told Glover that the crimes involved "five different victims," showing a course of conduct, and "the harm caused by two or more of the offenses were so great or unusual that no prison term

for any of the offenses committed, as part of one or more courses of conduct[,] adequately reflects the seriousness of your conduct." *Id.* at 562–63. While only one three options is required, the court additionally found that Glover had a criminal history showing dangerousness, citing a juvenile record for assault in a school. *Id.* at 563.

The trial court explained its concerns both in its concluding statement and at several points during the hearing. In concluding, the court noted, "[y]ou have absolutely no remorse." *Id.* at 564. In the hearing, Glover had declined to speak, *id.* at 537, but later interrupted once to insist that reasonable doubt of his guilt still existed, *id.* at 548, and he was corrected by the court for "rolling [his] eyes" at the bench, *id.* at 552. Police officers testified that his crimes were some of the worst they had seen in their careers. *Id.* at 544, 545–46. Several victim impact statements were supplied, *id.* at 531, at least one victim attended the hearing, *id.* at 567, and the State conveyed victims' wishes and statements as to how traumatized they had been, *id.* at 539–41. The trial court's sentencing judgment entry restates its findings of the statutory factors. Judgment Entry at 5–6.

C. The First District reduced the 42 years of armed-robbery sentences to just one seven-year sentence, resulting in an aggregate 25-year sentence.

Glover appealed his convictions on several grounds, along with his sentence. The First District affirmed the convictions, but reversed the 60-year sentence, and imposed its own modified sentence of 25 years. App.Op. ¶106. The appeals court said that the record did not support the trial court's findings. *Id.* at ¶¶58–61.

Among other things, and as detailed in the argument below, the appeals court objected that the sentence was "tantamount to a life sentence." App.Op. ¶59. The court said that Glover's victims suffered no "physical harm," *id.* at ¶75, and that the "lack of physical harm weighs against stacking all of the seven-year aggravated-robbery sentences," *id.* at ¶96. It noted particular sentences in other cases for rape and murder, objecting that "other than life sentences without a possibility for parole, many offenders who commit the most serious crimes may serve significantly shorter sentences than Glover." *Id.* at ¶98. It said that Glover's juvenile adjudication could not be considered as criminal history showing dangerousness, because the law under which he was convicted could include non-violent "disruption" as well as assault in school. *Id.* at ¶¶90–-91.

The court conceded that "[t]o be clear, we do not suggest that under the facts of this case, the trial court could not have stacked *some* of the sentences. Rather, we are firmly convinced that the record does not support the trial court's proportionality finding based on it stacking *all* the aggravated-robbery and gun-specification sentences." *Id.* at ¶100 (emphasis original). It concluded that

> The lack of physical harm, combined with Glover's lack of criminal history, firmly convinces us that the trial court erred by finding that a 60-year sentence was proportionate to his conduct and the danger he poses to the public. This is especially true because before trial, the state offered 15 years in exchange for a guilty plea, and after trial, the state recommended a 20- to 25-year sentence.

Id. at ¶101. The court then noted that "Glover's appeal did not specifically mention the consecutive sentencing for the gun specifications. And for penalty-enhancing specifications, a trial court need not make consecutive-sentencing findings." *Id.* at 105.

The court then invoked its power to modify sentences under R.C. 2953.08(G)(2), concluding that "because the trial court's proportionality findings were clearly and convincingly unsupported by the record, we default to a single seven-year sentence for aggravated robbery." *Id.* at 106. It added that seven-year sentence to the unreviewed eighteen years in specifications, thus ordering an aggregate sentence of 25 years. *Id.*

This Court granted review of the State's appeal, accepting propositions addressing the trial court's duty to consider an aggregate sentence and an appeal's courts review under the statutes and *Gwynne*. *08/01/2023 Case Announcements #2*, 2023-Ohio-2664.

ARGUMENT

While this case addresses two propositions of law—one each about the trial court's job and the appeals court's job—the case can also be viewed as asking two questions in another way. That other angle asks (1) what to do about Glover's sentence and the appellate modification, and (2) along the way, what to about *Gwynne*. The Attorney General submits that the first answer is straightforward: The Court should reverse the First District and reinstate the trial court's sentence, because the trial court did it right, and the appeals court did it wrong. *Gwynne* is a closer call, at least in this case. *Gwynne* should not be read to require, or even permit, the type of appellate review shown here. But *if* the

Court reads *Gwynne* to require such an outcome, then *Gwynne* itself should be modified or reversed, as the statutes do not give such license as the First District claimed.

In *Gwynne*, this Court held that R.C. 2929.14(C)(4) requires trial courts, before imposing consecutive sentences, to consider the appropriateness of each individual sentence to be added after the first one, along with the "aggregate prison term" that results from consecutively stacked sentences. 2022-Ohio-4607 ¶1 (citing R.C. 2929.14(C)(4)). It also held that R.C. 2953.08(G)(2) requires appellate courts "to review the record de novo and decide whether the record clearly and convincingly does not support the consecutive-sentence findings." *Id*. In this case, the trial court complied with the first holding, as it *did* consider the aggregate sentence here, as shown especially by the fact that it blended consecutive and concurrent sentences. But the appeals court violated *Gwynne*'s second holding, as *Gwynne* still requires *some* deference, and the First District applied none. And its complaints about the record are both legally wrong and based on misreadings of the record before it.

For these and other reasons below, the Court should reverse the First District and reinstate the trial court's sentence.

***Amicus* Attorney General's Proposition of Law No. 1:**

> *Any assessment of an overall aggregate sentence required by* Gwynne and *R.C. 2929.14(C)(4) is satisfied when a trial court considers all of the statutory factors in imposing consecutive sentences and expressly measures the resulting total, and that is automatically shown when a trial court blends consecutive and concurrent sentences.*

Ohio law—R.C. 2929.14(C)(4)—lists the determinations that sentencing courts must make before requiring a sentence for one crime to run consecutively to another. In *Gwynne*, this Court held that the statute also requires trial courts to "consider the overall aggregate prison term to the imposed" as a result of the consecutively stacked sentences. 2022-Ohio-4607 ¶1.

The *Gwynne* dissenters, however, said that the statute "does not require consideration of the aggregate prison term." *Id.* at ¶¶62–63 (Kennedy, C.J. dissenting, joined by DeWine and Fischer, JJ.). As long as the statutory factors are met, said the dissent, that is enough. A court need not use "magical words" to show that it considered the aggregate, as "[w]hen a trial court orders a defendant to serve multiple consecutive prison terms, of course it knows the amount of time that it has sentenced the defendant to serve." *Id.* Thus, the dissent would allow a trial court to consider the aggregate, but it is not required to, and is not required to state that it did. A reconsideration motion remains pending in *Gwynne*.

In this case, the court need not revisit that debate on *Gwynne*'s first holding, because the trial court here *did* expressly consider the overall aggregate sentence, thus

complying with *Gwynne*'s requirement to do so and with the dissent's allowance to do so. Thus, as explained below, the trial court did everything right.

A. A trial court may impose consecutive sentences if it makes required findings, and *Gwynne* specifies that a court must consider the resulting "overall aggregate prison term."

Ohio law presumes that a defendant convicted of multiple crimes will serve his sentences concurrently. R.C. 2929.41(A). A court may impose consecutive sentences only when some law specifically permits it to do so. And R.C. 2929.14(C ()4) is one such law. It authorizes a court to impose consecutive sentence after making several findings in a sentencing hearing and incorporating them into a sentencing judgment entry. *State v. Bonnell*, 140 Ohio St. 3d 209, 2014-Ohio-3177, syllabus.

First, a court must find that "the consecutive service is necessary to protect the public from future crime or to punish the offender." R.C. 2929.14(C ()4). Second, it must find that "consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public." *Id.* Third, it must find that at least one of these three alternatives is met:

> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.
>
> (b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

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

Id.

In *Gwynne*, the court considered how R.C. 2929.14(C)(4) applies to cases in which the sentencing court requires a defendant to serve multiple sentences consecutively. The trial court in that case required the defendant, Susan Gwynne, to serve consecutively 46 separate prison terms, resulting in an aggregate sentence of 65 years. 2022-Ohio-4607 ¶5. The trial court in *Gwynne* determined that R.C. 2929.14(C)(4) justified each individual sentence. Did it need also to determine that the statute justified imposing the aggregate 65-year term? According to this Court, it did. The appropriateness of requiring a defendant to consecutively serve a *particular* sentence, the Court reasoned, did not "permit any amount of consecutively stacked individual sentences." *Id.* at ¶1. Instead, the total aggregate sentence must be justified based on "findings" under R.C. 2929.14(C)(4) "made in consideration of the aggregate term to be imposed." *Id.*

B. The trial court here made the required findings, and it expressly considered the resulting "overall aggregate prison term," blending consecutive and concurrent sentences such that Glover received a sentence far below his possible maximum.

The trial here made all of the required findings, both in the sentencing hearing and in its judgment entry, and no one seems to dispute that point.

The trial court also satisfied *Gwynne*'s requirement to expressly consider the "overall aggregate sentence" resulting from its consecutiveness determination. 2022-Ohio-

4607 ¶1. The court expressly did the math, reached its 60-year aggregate, and explained that *that* resulting sentence was necessary to protect the public, was not disproportionate, and so on. Sent. Hrg. at 557–64.

In particular, the court undoubtedly avoided the mistake that the *Gwynne* majority objected to—viewing the consecutiveness inquiry as a binary question. 2022-Ohio-4607 ¶1. That is, *Gwynne* warned courts not to simply find that once a threshold was met to justify some consecutive sentences, any amount of consecutive sentences would be automatically justified. Courts should consider midpoints. Here, the trial court did just that, as it did run all five kidnapping sentences concurrently.

Further, while distinct from the consecutiveness inquiry, the trial court also chose a seven-year midpoint for each count, even before the consecutiveness inquiry, showing restraint. And likewise, while also distinct from the issue here, the court also collapsed most of the specifications. (That issue is distinct because the appellate-review standard in proposition two here, and in *Gwynne*'s second holding, covers only the underlying felony sentences, and does not extend to specifications.)

Thus, because the trial court necessarily "consider[ed] the overall aggregate prison term to be imposed," it satisfied *Gwynne*. 2022-Ohio-4607 ¶1.

C. The appeals court was wrong to the extent it viewed the trial court's sentence as "stacking *all* the" relevant sentences.

The Fist District's approach to this issue is unclear at best, but to the extent that it suggested that the trial court failed this part of *Gwynne*, it was wrong. The appeals court seemed to criticize the trial court for "stacking *all* the aggravated-robbery and gun-specification sentences." App.Op. ¶100 (emphasis original). The appeals court conceded that "[t]o be clear, we do not suggest that on the facts of this case, the trial court could not have stacked *some* of the sentences." *Id.* (emphasis original). But, it said, "we are firmly convinced that the record does not support the trial court's proportionality finding based on it stacking *all* the aggravated-robbery and gun-specification sentences." *Id.*

The problem with that reasoning is that the appeals court failed to plainly acknowledge that the trial court did not stack *all* of the sentences, because it did run all of the kidnapping counts—five of the eleven felony counts—concurrently. Perhaps that is what the appeals court meant in specifying that the trial court stacked the "aggravated-robbery" ones. But if so, then it is hard to see what the trial court did wrong, as it did pick a midpoint of partial consecutives—just not the same one the appeals court would have picked.

Further, the appeals court's mention of stacking "*all* . . . . the gun specifications sentences" is both wrong and irrelevant. It is wrong because the trial court *did* collapse most of them, keeping only the six three-year specifications from the aggravated-robbery counts, but collapsing the five three-year specifications from the kidnappings as well as

all eleven one-year specifications. And it is irrelevant because, as the appeals court acknowledged a few paragraphs later, the specifications were not part of Glover's appeal, and could not have been. *Id.* at ¶105. (Again, because the specifications are not on appeal, the Court need not address whether the specification sentences could have been longer.)

Worst of all, the appeals court did not pick a different midpoint in running some-but-not-all sentences consecutively, as it went on to invoke its modification power to impose "a single seven-year sentence for aggravated robbery." *Id.* at ¶106. So it allowed essentially *no* consecutive sentences—because again, the specifications were not appealed or appealable under R.C. 2953.08(G)(2)—despite having conceded that at least *some* consecutiveness was justified on this record.

For these reasons, the trial court did not violate *Gwynne*'s first holding, requiring assessment of an aggregate sentences, and the appeals court was wrong to suggest otherwise.

Amicus Attorney General's Proposition of Law No. 2:

> *An appeals court's power to review consecutive criminal sentences under R.C. 2953.08(G)(2) and* State v. Gwynne *does not allow it to substitute its judgment for the trial court's, to misread the record, or to rely on factors that are not part of the statutory scheme.*

As noted above, *Gwynne* gave guidance both to trial courts on how to impose consecutive sentences and to appeals courts on how to review them. Here, the First District went far beyond what *Gwynne* directed, so the Court should reverse. Or, if the First District's judgment is consistent with *Gwynne,* then *Gwynne* must be modified, as the First

District's approach was unmoored from the statute, and it amounted to a substitution of its appellate judgment for the trial court's careful assessment.

A. The appellate-review statute and *Gwynne* instruct an appeals court to apply deference and to affirm unless it is clearly and convincingly persuaded that the record cannot support the trial court's judgment.

R.C. 2953.08(G)(2) tells courts of appeals how to review a trial court's decision to impose consecutive sentences. It says that courts hearing appeals of decisions imposing consecutive sentences "shall review the record, including the findings underlying the sentence or modification given by the sentencing court." *Id*. "The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing." *Id*. Critically, "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." Instead, the "appellate court may" increase, reduce, or otherwise modify the sentence "if it clearly and convincingly finds either of the following: (a) That the record does not support the sentencing court's findings under division … (C)(4) of section 2929.14," or "(b) That the sentence is otherwise contrary to law." *Id*.

In *Gwynne*, this Court recognized that "R.C. 2953.08(G)(2) gives some amount of deference to a trial court's decision concerning consecutive sentences." 2022-Ohio-4607 ¶18. But the deference required differs from the well-known *legal* review standards, such as the abuse-of-discretion standard. *Id.* Instead, the "deference" arises from the

"legislature's determination that an appellate court must use a higher evidentiary standard" than the one the trial court applies when making findings in the first place "when it reviews the record and determines" whether to "modify the trial court's order of consecutive sentences." *Id.* This "higher evidentiary standard" stems from three aspects of appellate review under the statute: its limiting review to the findings the trial court "actually made," its using the clear-and-convincing standard rather than the preponderance-of-the-evidence standard that applies in trial courts, and the "inversion of the ultimate question" so that the burden is to show that the consecutive sentences are *not* warranted. *Id.* at ¶¶21–23. The Court described this review of the record as *de novo* review. The label matters less than the function: the standard requires the appellate court to review the record and to reverse if it "clearly and convincingly finds that the record does not support the findings" the trial court made regarding consecutive sentences. *Id.* at ¶23.

B. The record here easily supports the trial court's imposition of six consecutive seven-year sentences for the armed robberies, giving 42 of a possible 121 years for the underlying felonies independent of the gun specifications.

The record here easily supports the trial court's sentence. As an initial matter, no one disputes that the trial court stated the requisite findings in both the sentencing hearing and in the judgment entry. That is, this is not a case in which a party challenges a court's statements as using insufficient language to count as the findings. Glover challenged only whether the record supports those stated findings.

Next, two other preliminary points are critical: (1) the sentences on the specifications are not part of the appeal, and (2) both the underlying felony sentences and the specifications must be understood in the context of Glover's potential maximum sentence. The specification-based sentences are set aside here for two reasons, both of which the appeals court acknowledged: (1) Glover did not challenge them, and (2) he could not anyway, at least not under the part of the appellate-review statute concerning the record's support. App.Op. ¶105; *State v. James*, 2015-Ohio-4987 (8th Dist.) ("R.C. 2919.14(C)(4) does not apply to penalty enhancing specifications.") (Specification sentences may be challenged on other grounds, but again, Glover did not do so.) Further, as detailed above, Glover's 60-year sentence resulted from 42 years on the felonies and 18 years in specifications. The specifications, while not at issue, amounted to six three-year specifications attached to the six aggravated-robbery counts, and he faced no extra time on the five three-year specifications on the five kidnapping counts, and no time for the eleven one-year specifications that folded in the three-year ones. Sent. Hrg. at 557–62.

His core felony sentences, at issue here, were a mere 42 years out of a potential 121. His eleven felony counts (again, six aggravated robberies and five kidnappings) were each eligible for three to eleven years. The court chose the midrange of seven for each, and ran only the six consecutively, running the other five concurrently. A "max and stack" of eleven times eleven would have been 121 (again, aside from specifications).

The trial court chose those partly consecutive sentences based on several factors shown on the record. First, the court found, and two police officers testified, that Glover's crimes were some of the worst they had seen. Sergeant Klingelhoffer said "[i]n my 11-year career there I would have to say this is essentially one of the worst crimes I ever had to investigate." Sent. Hrg. at 544. Detective Ingram, with 22 years on the force, said likewise, saying these crimes "will be embedded in my memory just as memories of the victims." He noted that one "cannot go out by herself at night," and another, who was developmentally delayed, was victimized twice. *Id.* at 545–546. This testimony was buttressed by several victim impact statements. *Id.* at 531. The court agreed with the officers, noting that "[t]hese were terrible crimes," *id.* at 549, and "[t]his is going to be one of the ones I remember forever for my career too," *id.* at 547.

The court also noted, as witnesses did, Glover's lack of remorse. *Id.* at 546, 556. Glover said he would not speak at all, *id.* at 537, but later interrupted to question his guilt, saying there was still "[r]easonable doubt that I did these crimes," *id.* at 548. The court even needed to admonish him not to show his disrespect: "sir, you got a little problem? You're rolling your eyes. You got an issue?" *Id.* at 552. The court also noted that statements in Glover's jailhouse calls showed his lack of remorse. *Id.* at 556.

The State, for its part, acknowledged that "he did not have a record," but "he came out swinging with this indictment." *Id.* at 538. As for the rejected plea deal, the State explained that "a sentence of 15 is not appropriate" and the offer had been a "gift" to

spare victims from testifying. The State passed on the victims' views: "I know some of the victims asked for the maximum," but that "I think some of them are in the ballpark of the 20 to 25 range." *Id.* at 546.

Taking all that into account, the trial court determined that Glover should serve six consecutive sentences—again, with five others concurrent—with each at a midrange seven years. Thus, the court sentenced Glover to 42 years of a potential 121, and added 18 years of specifications, not 44.

C. The First District went far beyond any appellate warrant granted by the statute and *Gwynne*, as it misread the record, ignored parts of the record, and relied on factors not in the law.

The First District rejected the trial court's sentence, and in doing so, went far beyond what the statute and *Gwynne* authorize an appeals court to do. The appeals court acknowledged that *Gwynne* still called for "deference," but its application showed no such deference at all. In particular, the appeals court outright misread the record, ignored parts of it, and relied on factors not even in the law.

While the court cited many issues, its main concern seemed to be that, in its view, the sentence was more than the State sought, App.Op.¶60, was "tantamount to a life sentence," *id.* at ¶59, and was unfair because these victims suffered no "physical harm," *id.* at ¶96, yet Glover's sentence was longer than some rapists or murderers, *id.* at 98. Each reason fails to withstand scrutiny, as all are based on misreading or ignoring the record.

State's and victims' recommendations. First, the appeals court outright misread the record as to what the State sought. The court said simply that "the state, based on the victims' and officers' wishes, recommended a sentence of between 20 and 25 years." *Id.* at ¶60. That seemed to carry much weight, as the court said it "agree[d] with the state and Glover." *Id.* But the transcript plainly shows that the State did *not recommend* 20-25 years. The State said it "would defer to the Court, as far as what the victims ask," but passed along that "some of the victims asked for the maximum," while "some of them are in the ballpark of 20 to 25 years." *Id.* at 546. The court ignored the "ask[ing] for maximum" part, and it treated the 20-25 as if *that* were a maximum, when it was the State's or victims' *minimum* recommendation. The appeals court also cited the State' offer of fifteen years if Glover had pleaded guilty—a deal he refused. App.Op. ¶¶60, 104. But it did not mention the State's explanation that the plea term was a "gift," offered to spare the victims from having to testify. Sent. Hrg. at 539, 544, 546.

The appeals court compounded that misreading by relying on a purported statement that the State sought concurrent, *not* consecutive sentences. The court quoted the State's assistant prosecutor as saying "[a]t a minimum I do not think that whatever sentence the Court imposes for each victim should run consecutive with each other. These were separate incidents, separate dates." App.Op.¶60 (quoting Sent. Hrg. At 539). While that snippet does include the phrases "do not think" and "should run consecutive," everything about the context suggests that the more natural reading is that the assistant

prosecutor misspoke, mixing the "do not think" and "consecutive" to say the opposite of what she meant. That is shown by the immediate stress on "separate incidents, separate dates." Further, in the preceding lines, she explained that "the aggravated robbery and kidnapping for each of the victims do not have to merge for purposes of sentences." *Id.* So she was speaking of favoring *separate, unmerged,* sentences—that is, consecutive ones.

The blended concurrent and consecutive sentences. The appeals court added yet another misreading of the record by either misstating, or at least ignoring by omission, the trial court's extensive use of concurrent sentences and use of a midrange baseline. The appeals court acknowledged that "under the facts of this case, the trial court" could have "stacked *some* of the sentences." App.Op. at ¶100 (emphasis original). But then it said that "we are firmly convinced that the record does not support the trial court's proportionality finding based on it stacking *all* the aggravated-robbery and gun-specification sentences." *Id.* (emphasis original). As noted above under Proposition One, this description of stacking "all" the named sentences is either wrong or at least misleading. True, the trial court did stack "all" of the *robbery* sentences, but it did not stack the kidnapping counts, *and* it set those robbery counts at a modest seven years. Further, the trial court did not stack "all" of the gun-specification sentences, and in any event, it does not matter—for, as the court later acknowledged, the specifications are not part of the appeal. So the First District's description of an "all"-stacking case is wrong.

Juvenile record. In addition, the appeals court also objected that the trial court should not, in its view, have "placed significant weight" on Glover's juvenile record. App.Op. ¶93. This Court need not address the appeals court's view of that record for a simpler reason: The trial court's "reliance" on that record was superfluous. The trial court found that Glover met *both* options (b) and (c) of the three alternatives for the third step of R.C. 2929.14(C). Because only one is needed, the trial court's finding under option (b)—that Glover's courses of conduct caused harm so great that no single term would adequately reflect the seriousness of his crimes, etc.—independently justifies the ultimate sentence regardless of the juvenile issue. (And while that is conclusive, we do not know what was in the presentence investigation report or if more was known about the juvenile offense.)

"Tantamount to a life sentence" and comparing violent felonies to "lack of physical harm." Perhaps more than anything, the appeals court disapproved of the resulting sentence being "tantamount to a life sentence"—60 years for someone age 23—and the idea that such a long sentence was too much compared to cases involving violent felonies such as rape and murder.

This view encompasses overlapping errors. First, the "life sentence" outcome is simply what happens when someone commits *several* felonies. The alternative is to establish some lesser number of years as a ceiling, so that after three or four first-degree felonies, all other crimes—the fifth, sixth, and beyond—are all "freebies" for an offender.

Second, the "comparative" approach has multiple flaws. For starters, it is the General Assembly that chose to place aggravated robbery—such as Glover's armed robberies—on the same level as rape, etc. The appeals court's view essentially challenges that equality, as if armed robbery should be a lower level than rape. Further, the appeals court's approach is not only limited to the cases the court found, but is skewed by not mentioning the factors that the trial court considered here, such as Glover's lack of remorse and even affirmative denial of responsibility.

Finally, and perhaps most important, nothing about the appeals court's "comparative" view is rooted in the appellate-review statute. That statute asks whether the record can support the trial court's findings, not whether the appeals court would find differently. The appeals court did not and could not say that the record gave no support or little support regarding Glover's danger, but said only that it was not "enough" compared to these other concerns—concerns that are not in the statute.

In sum, everything about the appeal's courts rejection of the trial court's sentence was flawed.

Modification to a single sentence. On top of all that, the appeals court did not simply vacate the trial court's sentence and remand for resentencing, but invoked its power to modify sentences, imposing a single seven-year sentence—the term that the trial court had set for six sentences—for all of the underlying felonies. It left the eighteen years of specification-based sentences alone, because it had to, resulting in 25 years.

While the statute does grant a power to modify, this extreme reduction was not only inconsistent with the record, but it was also inconsistent with the appeals court's own reasoning. The court conceded that *some* consecutive sentences were reasonable, but just not "all" of them. But it then made *everything* concurrent, with *no consecutive sentences* on the underlying felonies. (And again, the specifications are outside the scope of this appeal.) That clinches it: The appeals court substituted its view for the trial court's.

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All of the above is reason enough to reverse here, regardless of what the Court does with *Gwynne*, either in *Gwynne* itself on reconsideration or in this or any other pending case. While *Gwynne*'s discussion of "de novo" review might have led to the appeals court's overreach here, the Attorney General urges that *Gwynne* is best read not to authorize decisions like the First District's. Thus, the Court can reverse here while merely clarifying that *Gwynne* did not direct outcomes like this. Or, alternatively, if the court below faithfully applied *Gwynne,* then *Gwynne* needs to be modified, as *this* outcome cannot be what the statute empowers appeals courts to do.

CONCLUSION

The Court should reverse the First District's judgment and reinstate the trial court's judgment as to Glover's sentence.

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 Appellant State of Ohio was served this 23d day of October, 2023, by e-mail on the following:

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