# No. _____

# In the
# Supreme Court of the United States

OCTOBER TERM, 2021

TONI MARIE RAMBO,

*Petitioner,*

v.

THE STATE OF TEXAS

*Respondent.*

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

## PETITION FOR WRIT OF CERTIORARI

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# QUESTION PRESENTED FOR REVIEW

DOES THE SENTENCE IMPOSED ON MRS. RAMBO CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF HIS EIGHTH AMENDMENT RIGHTS?

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## REPORTS OF OPINIONS

The decision of the Twelfth Court of Appeals for Texas is reported as *Rambo v. State*, No. 12-20-00119-CR (Tex. App.—Tyler, July 21, 2021, pet. filed). It is attached to this Petition in the Appendix. The decision of the Texas Court of Criminal Appeals to deny Mrs. Rambo's Petition for Discretionary Review, dated October 20, 2021, is also attached to this Petition in the Appendix.

## JURISDICTION

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

Consequently, Mrs. Rambo files the instant Application for a Writ of Certiorari under the authority of 28 U.S.C., § 1257(a).

## BASIS OF FEDERAL JURISDICTION

## IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in Smith County, Texas because Mrs. Rambo was indicted for violations of state law by a Grand Jury for Smith County, Texas.

# CONSTITUTIONAL PROVISIONS

**U.S. CONST. amend. V**

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

**U.S. CONST. amend. VIII**

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

**U.S. CONST. amend. IVX**

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

# STATEMENT OF THE CASE

## 1. Procedural History.

The Twelfth Court of Appeals affirmed Ms. Rambo's appeal in an opinion that was handed down on July 21, 2021. *Rambo v. State*, No. 12-20-00119-CR (Tex. App.—Tyler, July 21, 2021, pet. filed). No motion for rehearing was filed. The Court of Criminal Appeals denied Mrs. Rambo's petition for discretionary review on October 20, 2021.

## 2. Statement of Facts

Azleway is a faith-based, non profit provider of services to children in need throughout Texas. Their services include foster care, adoption, residential services, and substance abuse recovery for teens.

Ms. Rambo was a resident of Troup, Texas and an employee at Azleway for 29 years. (4 RR 32-33). During the sentencing hearing, she described her duties at Azleway:

> Q. Can you describe your work for us at Azleway and what you did to help people.
>
> A. Well, the kids at Azleway all called me "Momma." I made sure that when they needed something, that they had it; whether it was Christmas gifts, birthday presents, clothing, and special items that -- a child of foster care, there's no guarantee that they're going to have half of what they need. I still have contact with kids. I adopted an Azleway kid who has given me the only grandchildren

> I may ever have. I was in charge of quality control, which means I monitored each separate office. Mainly paperwork, to make sure that everything was done.
>
> Because as we all know, the State has to have every "T" crossed and every "I" dotted. I also worked with the main ranch, the boys' ranch. When I first went to work there, we had about 26 kids. And at our highest, we were probably in the 70s. When I first started, there were no foster homes. And when I left, we were up to over 400 children. At one point I think we were even way above that.So the individual regional directors would contact me if they needed something. We had a system that we had had for a couple of years where you -- all the paperwork is scanned and put into a system. And, of course, it's new and it's hard for some people to get used to. And so I worked with them on making sure that that system was in place. I was involved in just a little bit of everything. I was liaison with CPS, with licensing. If licensing came to the ranch, most of the time I dealt with them on investigations. If they needed something, they called me. I worked with the State contract office. I did the contracts for Azleway, including juvenile probation contracts; making sure they were in order so that we could accept juvenile probation kids, which was a very small part of our population. Like I said, I pretty much had my finger in every pie, and it just had grown from that. I started as a receptionist answering the phone.

As Ms. Rambo admitted in her plea hearing and at her sentencing hearing, she stole money from Azleway during the last few years of her employment with them. Ms. Rambo was forthright about her guilt and accepted responsibility for her actions. It should be noted that Ms. Rambo does not have a gambling addition. She does not have substance abuse issues. She testified that a large percentage of the money she

took from Azleway went back to the children and the other employees at Azleway. (4 RR 39). Ms. Rambo did not live a lavish lifestyle; she drove older model vehicles and did not own her own home. (4 RR 37).

Ms. Rambo testified about what happened to the money she took:

Q. Did the majority of this money go back into the children and other people at Azleway?

A. A lot of it did.

Q. Now, do you own your home?

A. No.

Q. What model vehicle do you have?

A. I have a 2011 Toyota.

Q. Do you have a lot of money in savings?

A. No.

Q. So where did it all go?

A. I honestly -- one thing, when I was let go over at Azleway, I didn't have a whole lot of money, but I did have a few thousand. And, of course, I was let go with, you know, nothing and I couldn't file unemployment. So it went towards that. I honestly -- I was -- I was very open with Azleway's money. I helped a lot of people. I helped my family. I helped lots of Azleway kids. Kids who had left and been gone and came back for -- with their kids needing gas money or needing help with rent. (4 RR 37).

Ms. Rambo also acknowledged that her actions was wrong. She also expressed sincere remorse at her actions during the following colloquy at the sentencing hearing:

Q. Now, I'm sure you regret your actions, right?

A. Yes. Very much so.

Q. And do you regret your actions because you were caught, or –

A. No. I regret my actions because they were wrong. I knew better. Nothing about it was right. And if I could go back and change it, I would.(4 RR 32).

Ms. Rambo also testified that she planned to repay Azleway. (4 RR 40).

The allegations regarding the first-degree theft of property constitute the offense to which she entered a plea of guilty and for which she was sentenced to a 40-year term of imprisonment and restitution in the amount of $196, 828.31.

# REASONS WHY CERTIORARI SHOULD BE GRANTED

## I. DOES THE FORTY-YEAR SENTENCE IMPOSED ON MRS. RAMBO CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE UNITED STATES CONSTITUTION?

The Eighth Amendment of the United States Constitution requires that a criminal sentence be proportionate to the crime for which the defendant has been convicted. *Solem v. Helm*, 463 U.S. 277, 290 (1983); *see* U.S. CONST. amend. VIII. An allegation of excessive or disproportionate punishment is a legal claim "embodied in the Constitution's ban on cruel and unusual punishment " and based on a "narrow principle that does not require strict proportionality between the crime and the sentence." *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991); *see* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

The Eighth Amendment of the United States Constitution is applicable to state courts through the Due Process Clause of the Fourteenth Amendment, prohibits punishments that are "grossly disproportionate to the severity of the crime" and those that do not serve any "penological purpose." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1144 (2019); *see* also *Estelle v. Gamble*, 429 U.S. 97, 103 & n.7 (1976); *see* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."); *id*. amend. XIV.

Ms. Rambo concedes that "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Ewing v. California*, 538 U.S. 11, 21 (2003); *State v. Simpson*, 488 S.W.3d 318, 323 (Tex. Crim. App. 2016). The United States Supreme Court has only twice held that a non-capital sentence imposed on an adult was constitutionally disproportionate. *See*, e.g., *Solem v. Helm*, 463 U.S 277, 303 (1983) (concluding that life imprisonment without parole was a grossly disproportionate sentence for the crime of "uttering a no-account check" for $100); *Weems v. United States*, 217 U.S. 349, 383 (1910) (concluding that the punishment of fifteen years in a prison camp was grossly disproportionate to the crime of falsifying a public record). The United States Supreme Court has observed that the principle of disproportionate sentences is "applicable only in the 'exceedingly rare' and 'extreme' case." *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003); *see* also *Harmelin*, 501 U.S. at 1001. "The gross disproportionality principle reserves a constitutional violation for only the extraordinary case." *Id*. at 77.

Texas courts have generally held that a punishment that falls within the limits prescribed by valid statute is not excessive, cruel, or unusual. *See Simpson*, 488 S.W.3d at 323; *Ex parte Chavez*, 213 S.W.3d 320, 323-24 (Tex. Crim. App. 2006) (noting that "the sentencer's discretion to impose any punishment within the

prescribed range is essentially unfettered."); *see Foster v. State*, 525 S.W.3d 898, 912 (Tex. App.—Dallas 2017, pet. ref'd). Ms. Rambo concedes that her sentence of 40 years imprisonment is within the prescribed statutory range of imprisonment.

An allegation of disproportionate punishment, however, is a valid legal claim. The concept of proportionality is embodied in the Constitution's ban on cruel and unusual punishment and requires that punishment be graduated and proportioned to the offense. *State v. Simpson*, 488 S.W.3d 318, 322 (Tex. Crim. App. 2016); *see* also U.S. CONST. amend. VIII. "But, this is a narrow principle that does not require strict proportionality between the crime and the sentence." *Id*; *see* also *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)(Kennedy, J., concurring).

"To determine whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime, a court must judge the severity of the sentence in light of the harm caused or threatened to the victim, the culpability of the offender, and the offender's prior adjudicated and unadjudicated offenses." *Graham v. Florida*, 560 U.S. 48, 60 (2010). A court reviewing a claim of a constitutionally disproportionate sentence "initially make[s] a threshold comparison of the gravity of the offense against the severity of the sentence, and then consider[s] whether the sentence is grossly disproportionate to the offense." *Davis v. State*, 125 S.W.3d 734, 736 (Tex. App.—Texarkana 2003, no pet.).

If such a disproportion is found, only then does the reviewing court examine the next two *Solem* factors, i.e., comparisons of sentences for similar crimes in the same jurisdiction and sentences for the same offense in other jurisdictions. *Jackson*, 989 S.W.2d at 846; *see* also *McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir. 1992) (analyzing *Solem* and *Harmelin* in light of the latter's scattered plurality opinion and concluding "disproportionality survives; Solem does not").

The Twelfth Court of Appeals affirmed Ms. Rambo's sentence, writing:

> We first must determine whether Appellant's sentence is grossly disproportionate. In so doing, we are guided by the holding in ***Rummel v. Estelle***, 445 U.S. 263, 100 S. Ct. 1133, 63 L.Ed. 2d 382 (1980). In ***Rummel***, the Supreme Court addressed the proportionality claim of an appellant who had received a mandatory life sentence under a prior version of the Texas habitual offender statute for a conviction of obtaining $120.75 by false pretenses. *See* ***id.***, 445 U.S. at 266, 100 S. Ct. at 1135. A life sentence was imposed because the appellant also had two prior felony convictions—one for fraudulent use of a credit card to obtain $80.00 worth of goods or services and the other for passing a forged check in the amount of $28.36. ***Id.***, 445 U.S. at 266, 100 S. Ct. at 1134–35. After recognizing the legislative prerogative to classify offenses as felonies and, further, considering the purpose of the habitual offender statute, the court determined that the appellant's mandatory life sentence did not constitute cruel and unusual punishment. ***Id.***, 445 U.S. at 285, 100 S. Ct. at 1145. In the case at hand, the offense committed by Appellant—first degree felony theft—is more serious than the combination of offenses committed by the appellant in ***Rummel***, while Appellant's forty-year sentence is less severe than the life sentence upheld by the Supreme Court in ***Rummel***. Thus, it is reasonable to conclude that if the sentence in ***Rummel*** was not unconstitutionally disproportionate, then neither is the sentence assessed against Appellant. Therefore, since we do not find the threshold test to be satisfied, we

> need not apply the remaining elements of the ***Solem*** test. Appellant's second issue is overruled. *Rambo v. State* at 4.

The Court of Appeals erred. A sentence may be disproportionate to the gravity of the offense even when it is within the range permitted by law. *See Ex parte Chavez*, 213 S.W.3d 320, 323-24 (Tex. Crim. App. 2006). Although generally, punishment assessed within the punishment statutory range is not subject to a challenge for excessiveness. *See Lawrence v. State*, 420 S.W.3d 329, 333 (Tex. App.—Fort Worth 2014, pet. ref'd).Texas courts have generally held that a punishment that falls within the limits prescribed by a valid statute is not excessive, cruel, or unusual. *See State v. Simpson*, 488 S.W.3d 318, 323 (Tex. Crim. App. 2016); *Ajisebutu v. State*, 236 S.W.3d 309, 314 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd) ("Generally, a sentence within the statutory range of punishment for an offense will not be held cruel or unusual under the Constitution of either Texas or the United States.").

It has been held that a sentence within the range of punishment may still violate the Eighth Amendment if it is grossly disproportionate to the offense committed. *Solem v. Helm*, 463 U.S. 277, 290 (1983). In the present case, a sentence of forty years' imprisonment is a grossly disproportionate sentence considering the evidence presented as to the crime in the plea hearing.

Ms. Rambo has no criminal history, did not use a weapon to commit the crime, and showed genuine and extensive remorse for her actions.

In analyzing a proportionality challenge, the Courts consider: (1) the gravity of the offense and the harshness of the penalty; (2) sentences imposed on other criminals in the same jurisdiction; and (3) sentences imposed for the commission of the same crime in other jurisdictions. *Solem*, 463 U.S. at 392; *State v. Stewart*, 282 S.W.3d 729 (Tex.App.-Austin 2009, no pet.). The Courts need only consider the second and third factors, however, if it is determined that the sentence is grossly disproportionate to the offense after comparing the gravity of the offense against the severity of the sentence. *Solem*, 463 U.S. at 392. In judging the gravity of the offense, the Court considers the "harm caused or threatened to the victim or society, and the culpability of the offender." *Solem*, 463 U.S. at 292.[1]

Here, the gravity of the offense did not require or even justify a sentence of forty years' imprisonment and was disproportionate. Although this was a serious offense, Ms. Rambo did not use violence or a weapon to commit the crime. The

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

imposition of this sentence constituted cruel and unusual punishment because the nature of the offense did not warrant such a severe sentence.

Ms. Rambo's supervisor, Gary Duke, worked with Ms. Rambo for 15 years. Mr. Duke was the Executive Director at Azleway, the victim in this case. Mr. Duke testified on Ms. Rambo's behalf at the sentencing hearing. Mr. Duke spoke highly of Ms. Rambo's work ethic and testified she adopted a child from Azleway that was a difficult placement. Mr. Duke further testified that " I don't believe she's a threat to the community. Again, I just -- I think she made some very poor decisions and used very poor judgment at times. But in terms of -- I'm a Licensed Professional Counselor by trade. And I have no reason to believe at all that she is a threat to the community". (4 RR. 14). Ms. Rambo presents no threat to public safety.

Given the underlying facts of the offense and Ms. Rambo's lack of any criminal history, the imposition of a sentence of forty years' imprisonment was excessive and grossly disproportionate to the conduct of Ms. Rambo. The forty-year sentence, therefore, exceeded what was necessary to punish her for her criminal conduct. Therefore, the sentence of forty years' imprisonment for theft of property violates the United States constitution, and should be set aside.

# CONCLUSION

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

Respectfully submitted,

/s/ Amy R. Blalock
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# RELIEF REQUESTED

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

Respectfully submitted,

/s/ Amy R. Blalock
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# CERTIFICATE OF SERVICE

I certify that on the 18th day of January 2022, I served one (1) copy of the foregoing Petition for Writ of Certiorari on the following individuals by mail (certified mail return receipt requested) by depositing same, enclosed in post paid, properly addressed wrapper, in a Post Office or official depository, under the care and custody of the United States Postal Service, or by other recognized means pursuant to the Rules of the Supreme Court of The United States of America, Rule 29:

Michael West
Smith County District Attorney's Office
100 N. Broadway
Suite 400,
Tyler, TX 75702

Toni Marie Rambo
SID # Tx 11027495
TDCJ # 02315841
Christina Melton Crain Unit
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/s/ Amy R. Blalock
**AMY R. BLALOCK**

# No. _____

# In the

# Supreme Court of the United States

OCTOBER TERM, 2021

TONI MARIE RAMBO,

*Petitioner,*

v.

THE STATE OF TEXAS,

*Respondent.*

## APPENDIX

# NO. 12-20-00119-CR

# IN THE COURT OF APPEALS

# TWELFTH COURT OF APPEALS DISTRICT

# TYLER, TEXAS

| | | |
|---|---|---|
| ***TONI MARIE RAMBO, APPELLANT*** | ***§*** | ***APPEAL FROM THE 114TH*** |
| ***V.*** | ***§*** | ***JUDICIAL DISTRICT COURT*** |
| ***THE STATE OF TEXAS, APPELLEE*** | ***§*** | ***SMITH COUNTY, TEXAS*** |

***MEMORANDUM OPINION***

Toni Marie Rambo appeals her conviction for first degree felony theft. In two issues, she argues that the evidence is insufficient to support the amount of restitution ordered and her sentence amounts to cruel and unusual punishment. We affirm.

## BACKGROUND

Appellant was charged by indictment with and pleaded "guilty" to theft of U.S. currency valued between $150,000 and $300,000 from Azleway Boys Ranch, a nonprofit organization, and others. The matter proceeded to a trial on punishment, following which the trial court found Appellant "guilty" as charged and sentenced her to imprisonment for forty years. The trial court also ordered that Appellant pay restitution in the amount of $196,828.31. This appeal followed.

## SUFFICIENCY OF THE EVIDENCE OF AMOUNT OF RESTITUTION

In her first issue, Appellant argues that the evidence is legally insufficient to support the amount of restitution ordered by the trial court.

### Standard of Review and Applicable Law

Texas law authorizes a sentencing court to order payment of restitution to the victim for losses sustained as a result of the convicted offense. *See* TEX. CODE CRIM. PROC. ANN. art.

42.037(a) (West Supp. 2020). Restitution can be ordered only for injury resulting from the offense charged and can be made only to the victim, except where justice dictates payment be made to a person or party who has compensated the victim for loss. ***Gonzalez v. State***, 954 S.W.2d 98, 106 (Tex. App.–San Antonio 1997, no pet.).

Due process also requires that a factual basis exist in the record for the amount of restitution ordered. *See* ***Martin v. State***, 874 S.W.2d 674, 676 (Tex. Crim. App. 1994); *see also* ***Cartwright v. State***, 605 S.W.2d 287, 289 (Tex. Crim. App. [Panel Op.] 1980). The requirement that restitution be "just," means that it must be supported by sufficient factual evidence in the record that the expense was incurred. *See* ***Thompson v. State***, 557 S.W.2d 521, 525–26 (Tex. Crim. App. 1977).

Challenges to the sufficiency of the evidence supporting a restitution order can be raised for the first time on appeal. ***Idowu v. State***, 73 S.W.3d 918, 921–22 (Tex. Crim. App. 2002); ***King v. State***, No. 12-17-00194-CR, 2018 WL 345737, at *1 (Tex. App.–Tyler Jan. 10, 2018, no pet.) (mem. op., not designated for publication). We review a trial court's restitution order for abuse of discretion. ***Cartwright***, 605 S.W.2d at 289. The trial court abuses its discretion when it acts in an arbitrary or unreasonable manner. ***Montgomery v. State***, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990). Thus, we review the record to determine if there was sufficient factual evidence of an amount which the court could find "just." ***Cartwright***, 605 S.W.2d at 289; ***King***, 2018 WL 345737, at *1.

**Discussion**

The contents of a presentence investigation report (PSI) may support a restitution order when, as was the case here, the trial court takes judicial notice of the PSI and neither party objects to the accuracy of its contents. *See* ***Martin v. State***, No. 02-06-019-CR, 2007 WL 805456, at *1 (Tex. App.–Fort Worth Mar. 15, 2007, no pet.) (mem op., not designated for publication) (citing ***Busby v. State***, 951 S.W.2d 928, 931–32 (Tex. App.–Austin 1997), *aff'd*, 984 S.W.2d 627 (Tex. Crim. App. 1998)). Here, the PSI contains the affidavit of Chester Amidon, Jr., in which he states that on or about August 2, 2018, Azleway Boy's Ranch sustained losses as the result of this offense in the amount of $196,828.31. Therefore, because there is evidence in the record that shows that the amount of restitution has a factual basis, we hold that the trial court did not abuse its discretion in ordering the payment of restitution in the amount of $196,828.31.

*See* ***Cartwright***, 605 S.W.2d at 289; ***King***, 2018 WL 345737, at *1. Appellant's first issue is overruled.

## CRUEL AND UNUSUAL PUNISHMENT

In her second issue, Appellant argues that the forty-year sentence imposed by the trial court amounts to cruel and unusual punishment. However, as Appellant concedes in her brief, she made no timely objection to the trial court raising the issue of cruel and unusual punishment and has, therefore, failed to preserve any such error. *See* ***Rhoades v. State***, 934 S.W.2d 113, 120 (Tex. Crim. App. 1996) (waiver with regard to rights under the Texas Constitution); ***Curry v. State***, 910 S.W.2d 490, 497 (Tex. Crim. App. 1995) (waiver with regard to rights under the United States Constitution); *see also* TEX. R. APP. P. 33.1; ***Mays v. State***, 285 S.W.3d 884, 889 (Tex. Crim. App. 2009) ("Preservation of error is a systemic requirement that a first-level appellate court should ordinarily review on its own motion[;] . . . it [is] incumbent upon the [c]ourt itself to take up error preservation as a threshold issue."). But even despite Appellant's failure to preserve error, we conclude that the sentence about which she complains does not constitute cruel and unusual punishment.

The legislature is vested with the power to define crimes and prescribe penalties. *See* ***Davis v. State***, 905 S.W.2d 655, 664 (Tex. App.–Texarkana 1995, pet. ref'd); *see also* ***Simmons v. State***, 944 S.W.2d 11, 15 (Tex. App.–Tyler 1996, pet. ref'd). Courts have repeatedly held that punishment which falls within the limits prescribed by a valid statute is not excessive, cruel, or unusual. *See* ***Harris v. State***, 656 S.W.2d 481, 486 (Tex. Crim. App. 1983); ***Jordan v. State***, 495 S.W.2d 949, 952 (Tex. Crim. App. 1973); ***Davis***, 905 S.W.2d at 664. In the case at hand, Appellant was convicted of first-degree felony theft, the punishment range for which is five to ninety-nine years or life. *See* TEX. PENAL CODE ANN. §§ 12.32(a), 31.03(a), (b), (e)(6)(A), (f)(3)(B) (West 2019). Here, the sentence imposed by the trial court falls within the range set forth by the legislature. Therefore, the punishment is not prohibited as cruel, unusual, or excessive per se.

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

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

We first must determine whether Appellant's sentence is grossly disproportionate. In so doing, we are guided by the holding in ***Rummel v. Estelle***, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980). In ***Rummel***, the Supreme Court addressed the proportionality claim of an appellant who had received a mandatory life sentence under a prior version of the Texas habitual offender statute for a conviction of obtaining $120.75 by false pretenses. *See* ***id.***, 445 U.S. at 266, 100 S. Ct. at 1135. A life sentence was imposed because the appellant also had two prior felony convictions—one for fraudulent use of a credit card to obtain $80.00 worth of goods or services and the other for passing a forged check in the amount of $28.36. ***Id.***, 445 U.S. at 266, 100 S. Ct. at 1134–35. After recognizing the legislative prerogative to classify offenses as felonies and, further, considering the purpose of the habitual offender statute, the court determined that the appellant's mandatory life sentence did not constitute cruel and unusual punishment. ***Id.***, 445 U.S. at 285, 100 S. Ct. at 1145.

In the case at hand, the offense committed by Appellant—first degree felony theft—is more serious than the combination of offenses committed by the appellant in ***Rummel***, while Appellant's forty-year sentence is less severe than the life sentence upheld by the Supreme Court in ***Rummel***. Thus, it is reasonable to conclude that if the sentence in ***Rummel*** was not unconstitutionally disproportionate, then neither is the sentence assessed against Appellant. Therefore, since we do not find the threshold test to be satisfied, we need not apply the remaining elements of the ***Solem*** test. Appellant's second issue is overruled.

## DISPOSITION

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

**JAMES T. WORTHEN**
Chief Justice

Opinion delivered July 21, 2021.
*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*

(DO NOT PUBLISH)

# COURT OF APPEALS

# TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

# JUDGMENT

**JULY 21, 2021**

**NO. 12-20-00119-CR**

**TONI MARIE RAMBO,**
Appellant
V.
**THE STATE OF TEXAS,**
Appellee

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Appeal from the 114th District Court
of Smith County, Texas (Tr.Ct.No. 114-1997-19)

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

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

James T. Worthen, Chief Justice.
*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
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**10/20/2021** **COA No. 12-20-00119-CR**
**RAMBO, TONI MARIE** **Tr. Ct. No. 114-1997-19** **PD-0654-21**

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

Deana Williamson, Clerk

MICHAEL J. WEST
ASSISTANT DISTRICT ATTORNEY
100 N. BROADWAY
4TH FLOOR
TYLER, TX 75702
* DELIVERED VIA E-MAIL *

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**10/20/2021** **COA No. 12-20-00119-CR**
**RAMBO, TONI MARIE** **Tr. Ct. No. 114-1997-19** **PD-0654-21**

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

Deana Williamson, Clerk

12TH COURT OF APPEALS CLERK
KATRINA MCCLENNY
1517 W. FRONT, ROOM 354
TYLER, TX 75701
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**RAMBO, TONI MARIE** **Tr. Ct. No. 114-1997-19** **PD-0654-21**

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

Deana Williamson, Clerk

AMY R. BLALOCK

LAW OFFICE
TYLER, TX 75710
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**RAMBO, TONI MARIE** **Tr. Ct. No. 114-1997-19** **PD-0654-21**

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

Deana Williamson, Clerk

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

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**RAMBO, TONI MARIE** **Tr. Ct. No. 114-1997-19** **PD-0654-21**

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

Deana Williamson, Clerk

STATE PROSECUTING ATTORNEY
STACEY SOULE
P. O. BOX 13046
AUSTIN, TX 78711
* DELIVERED VIA E-MAIL *