No. 23-___

In the Supreme Court of the United States

TYSHAWN SHEPARD,
Petitioner,

v.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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March 25, 2024

QUESTION PRESENTED

Does the Sixth Amendment's guarantee of a right to trial by jury allow prison administrators to use their own post-conviction factual findings as the basis for affirmatively extending a defendant's incarceration?

PARTIES TO THE PROCEEDING

Tyshawn Shepard was the defendant in the Cuyahoga County Court of Common Pleas, the appellant in the Court of Appeals for the Eighth District of Ohio, and the petitioner in the Supreme Court of Ohio.

The State of Ohio was the plaintiff in the Cuyahoga County Court of Common Pleas, the appellee in the Court of Appeals for the Eighth District of Ohio, and the respondent in the Supreme Court of Ohio.

No party to the proceeding is a corporation.

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STATEMENT OF JURISDICTION

The Supreme Court of Ohio entered its certified judgment on October 26, 2023. On January 22, 2024, Justice Kavanaugh extended the time for filing this Petition to and including March 24, 2024—or effectively to and including March 25, pursuant to Rule 30.1 of this Court. *See* No. 23A665. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES AND CONSITUTITIONAL PROVISIONS INVOLVED

Ohio Revised Code Sections 2929.14, 2929.144, and 2967.271 are set forth in the Appendix at App. 69a-121a.

STATEMENT OF THE CASE

Tyshawn Shepherd left the courtroom after being sentenced clothed with a legal presumption that he would be a free man in eight years. This presumption was not conditional or contingent on a parole board or any other entity taking steps to shorten his sentence—as a matter of law, at the end of Shepard's seventh year of

incarceration the doors of the prison would open and he would walk out a free man. Indeed, the only way he can be made to serve more than eight years is if someone determines that one or more specific facts have occurred during his incarceration that legally enable the prison doors to remain closed.

This case is about whether the Sixth Amendment requires the factual findings prolonging Shepard's incarceration to be made by a jury of his peers beyond a reasonable doubt, or whether the Framers of the Constitution would be satisfied with vesting the decision to acquit or condemn Shepard in a state employee.

I. Ohio Law Empowers The Department Of Rehabilitation And Correction To Extend Certain Defendants' Incarceration.

In 2018 the Ohio General Assembly enacted Senate Bill 201 ("S.B. 201"), which "provide[d] for indefinite prison terms for first[-] or second[-]degree felonies." Reagan Tokes Act, Am. Sub, S.B. no. 201, 132nd G.A., at preface (2018). The ultimate length of a sentence imposed pursuant to S.B. 201 depends on both judicial discretion and administrative fiat.

Initially, all defendants sentenced under S.B. 201 receive a "presumptive release date." *Id.* This date is set by the trial judge, who selects the "minimum term" of imprisonment the defendant shall serve from within a statutorily defined range. *See* Ohio Rev. Code § 2929.14(A)(1)(a), (2)(a). Unlike parole systems or other forms of indeterminate sentencing, S.B. 201 does not require a defendant to clear any additional hurdles before being released upon completion of the "minimum "term. Rather, S.B. 201 establishes a "presumption that the person shall be released from the

service of the sentence on the expiration of the offender's minimum prison term," unless the person subsequently earns an earlier release date. *Id.* § 2967.271 (B).

Notwithstanding this "presumption" of release, *id.*, S.B. 201 also empowers the Department of Rehabilitation and Correction ("Department") "to rebut the release presumption and keep the offender in prison." Am. Sub. S.B. 201, preface. Before the Department may extend a person's term of incarceration, it must establish that the person committed certain "institutional rule infractions" or other "violations of law" and "continues to pose a threat to society," or that the person has been subject to restrictive and secured classifications used for dangerous inmates. Ohio Rev. Code § 2967.271(C)(1)-(3).

Moreover, S.B. 201 leaves it to the Department to decide for itself whether it has rebutted the presumption of release. These factual questions are adjudicated at an administrative hearing within and before the Department itself. *Id.*; *see also* Ohio Rev. Code § 2930.16(C)(1) (describing hearings regarding release determinations as hearings "before the department"); OH. PAROLE BD., PAROLE BOARD HANDBOOK 32-33 (Mar. 2023), *available at* https://dam.assets.ohio.gov/image/upload/drc.ohio.gov/Forms/SysServ_Parole%20Board%20Handbook.pdf (outlining procedures for S.B. 201 hearings). S.B. 201 does not prescribe the allocation of burdens, either as to persuasion or production, that controls at this hearing. It is left to the Department whether, for example, the factual findings must be determined by a preponderance of the evidence, clear and

convincing evidence, proof beyond a reasonable doubt, or some other standard of proof.

S.B. 201 also empowers the Department to decide how long to extend the defendant's prison term, up to an additional 50% of the presumptive term imposed by the trial judge. Ohio Rev. Code §§ 2929.144(B)-(C), 2967.271(D). For example, while trial judges cannot incarcerate a defendant convicted of a typical second-degree felony for more than eight years, *see id.* § 2929.14(A), the Department can extend such a defendant's incarceration to a total of twelve years.

II. In 2021, Shepard Received An S.B. 201 Sentence With Presumptive Release In Eight Years.

On November 30, 2021, Shepard was sentenced after pleading guilty to one count of drug possession, a second-degree felony. App. 64a. The trial court sentenced him pursuant to S.B. 201 and set a presumptive release date of eight years—the longest amount of time for which a trial court can itself incarcerate a defendant for a second-degree felony under S.B. 201—but allowed the Department to extend Shepard's incarceration by an additional four years if it "makes specified determinations at a hearing regarding" Shepard's "conduct," "threat to society," "restrictive house and/or security classification while confined." App. 65a-66a. This sentence was imposed "over defense counsel's objection." App. 60a.

Shepard appealed his sentence to the Court of Appeals for the Eighth District of Ohio, arguing that S.B. 201's provisions for extending incarceration were unconstitutional. Specifically, Shepard argued that allowing the Department to make its own factual determinations about whether to extend his incarceration beyond the

court's otherwise-controlling release date violated (1) his right to a trial by jury pursuant to the Sixth Amendment; (2) his right to substantive due process pursuant to the Fourteenth Amendment; and (3) the separation of powers established by the Ohio Constitution. *See* App. 61a. On August 11, 2022, the Eighth District concluded that it was bound by district precedent on all of these issues. App. 62a.

Shepard then appealed his sentence to the Supreme Court of Ohio, raising the same three constitutional issues. *See* App. 1a. Like this Court, the Supreme Court of Ohio has discretion over which direct appeals it hears; accordingly, appeals to that court are initiated by filing a "jurisdictional memo" much akin to a petition for certiorari. *See* Oh. S.Ct.Prac.R. 5.02, 7.01. Because the issues Shepard set forth in his jurisdictional memo were already pending before the state high court in separate cases, the court accepted Shepard's appeal but placed it in abeyance until those cases were resolved. *See* App. 1a.

On July 26, 2023, the Supreme Court of Ohio decided *State* v. *Hacker*, one of the earlier cases to invoke the same general constitutional arguments as Shepard's appeal. *See* App. 2a. However, in *Hacker*, the court did not substantively engage with the Sixth Amendment issue Shepard was pursuing. Rather, after nine sentences of analysis, the court concluded that "the right to a jury trial is not implicated" by S.B. 201 because "*no determination by the* [*Department*] regarding [a defendant]'s behavior while in prison *will change the range of penalties* prescribed by the legislature and *imposed by the trial court*." App. 15a-16a (emphases added).

The *Hacker* opinion did not mention that trial court sentences imposed under S.B. 201 establish a presumptive release date, or that the Department can ultimately choose to impose a term of incarceration that is 150% longer than the term imposed by the trial court's order alone. These issues raise significant questions about the *Hacker* opinion's conclusion that "no determination by the [Department]" will "change the range of penalties . . . imposed by the trial court." App. 15a-16a. And those questions were particularly relevant to Shepard's appeal, because the trial court had sentenced him to the longest duration of incarceration it could upon conviction for a second-degree felony—eight years. Yet S.B. 201 contemplated that the Department could extend Shepard's incarceration even beyond that. Thus, the Department would not merely be "chang[ing] the range of penalties" imposed by the trial court, but it would be imposing a penalty the trial court could never have imposed in the first place.

Nonetheless, on October 26, 2023, the Supreme Court of Ohio issued a slip opinion summarily rejecting Shepard's arguments pursuant to *Hacker*. App. 1a.

This Petition followed.

REASONS FOR GRANTING THE PETITION

The Framers of the Constitution viewed the right to trial by jury as "the heart and lungs, the mainspring and the center wheel" of our liberties, without which "the body must die; the watch must run down; the government must become arbitrary." *United States* v. *Haymond*, 139 S.Ct. 2369, 2375 (2019) (plurality op.) (quoting Letter from Clarendon to W. Pym (Jan. 27, 1766), in 1 Papers of John Ad-

ams 169 (R. Taylor ed. 1977)). Accordingly, they adopted the Sixth Amendment to ensure that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. In so doing, the Framers aimed to "secur[e] to the people at large, their just and rightful controul in the judicial department" by "ensuring that the judge's authority to sentence derives wholly from the jury's verdict." *Blakely* v. *Washington*, 542 U.S. 296, 306 (2004) (quotations omitted).

This right is directly implicated, and indeed imperiled, by S.B. 201. And more broadly, there is growing uncertainty and disagreement among courts about how this right should even be understood in the first place. Both of these concerns warrant this Court's review of this matter.

I. This Case Highlights The Need For Guidance From This Court On The Scope Of The Sixth Amendment Right To A Jury Trial.

A. This Court has established that facts which increase an offender's exposure to incarceration must be found by a jury, but has not defined the outer boundaries of that rule.

In *Apprendi* v. *New Jersey*, this Court held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed," which "must be established by proof beyond a reasonable doubt." 530 U.S. 466, 490 (2000) (quoting *Jones* v. *United States*, 526 U.S. 227, 252-53 (1999) (STEVENS, J., concurring)). As a general matter, the question is simple: Does a factual finding, once made, "expose the defendant to a greater punishment than that authorized" by the facts underlying the conviction itself? *Id.* at 494. If so, then that fact must be found by a

jury beyond a reasonable doubt or admitted by the defendant. *Id.*; *see also Blakely*, 542 U.S. at 303 ("[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (emphasis in original)).

After *Apprendi* was decided, it was not applied uniformly across all aspects of sentencing. *Apprendi* itself held that a jury must make any finding of fact that may increase a defendant's maximum potential sentence. *Id.* at 491. However, in *Harris* v. *United States*, this Court concluded that the converse was not necessarily true, and that "facts increasing the defendant's minimum sentence" did not need to be submitted to a jury, as it construed these as "sentencing factors" rather than an element of the offense itself. 536 U.S. 545, 565 (2002).

Four dissenting Justices in *Harris* noted that the distinction drawn between minimum and maximum sentences "rest[ed] on either a misunderstanding or rejection of the very principles that animated *Apprendi* just two years ago." *Id.* at 572 (THOMAS, J., dissenting). Rejecting the notion that "clever statutory drafting" should allow *Apprendi* to be "easily [] avoided," the dissent proffered a more logical effects-driven analysis: "When a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is by definition an element of a separate legal offense" irrespective of "[w]hether [it] raises the floor or raises the ceiling" of punishment. *Id.* at 579 (THOMAS, J., dissenting) (alterations and quotations removed). Accordingly, the dissent in *Harris* would have applied *Apprendi*

and required that a nominal "sentencing factor" nonetheless needed to be found by a jury if it escalated either end of a potential sentencing range.

Eleven years later, the dissenting view prevailed when this Court overruled *Harris*. Adopting the dissent's reasoning, the Court held that "[w]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Alleyne* v. *United States*, 570 U.S. 99, 114-15 (2013). And the Court emphasized that "there is no basis in principle or logic to distinguish" between "facts that raise the maximum [penalty] form those that increase the minimum." *Id.* at 116.

Similarly, this Court has applied *Apprendi* to sanctions for post-conviction wrongdoing—albeit in a divided opinion. In *United States* v. *Haymond*, this Court struck down a statute under which a person could be sentenced to additional prison time based on "judicial factfinding" that he "engaged in additional conduct in violation of the terms of his supervised release." 139 S.Ct. at 2378 (plurality op.). While the terms of supervised release itself were "part of the final sentence for" that defendant's crime, this Court emphasized that a finding that these terms were violated "must" be made by a jury because that finding "trigger[ed] a new mandatory prison term." *Id.*; *see also id.* at 2385-86 (BREYER, J., concurring in the judgment) (disagreeing with applying *Apprendi* in "the supervised-release context" generally, but noting that the statute in question was "more like punishment for a new offense, to which the jury right would typically attach").

But because there was no majority in *Haymond*, it is not clear how or when *Apprendi* applies to incarceration triggered by post-conviction events. *See*, *e.g.*, *United States* v. *Shakespeare*, 32 F.4th 1228, 1237-39 (10th Cir. 2022) (outlining and ultimately eliding the "analytically complex question" of which *Haymond* opinion controls). Justice Breyer's concurrence held that the "combination" of "three aspects" of the sentencing scheme there at issue produced a punishment for a "new offense[:]" (1) it "applies only when a defendant commits a discrete set of federal criminal offenses[;]" (2) it "takes away the judge's discretion to decide whether violation of a condition of supervised release should result in imprisonment[;]" and (3) it "imposes a mandatory minimum term of imprisonment . . . upon a judge's finding that a defendant has 'committed any' listed 'criminal offense.'" *Haymond*, 139 S.Ct. at 2385-86 (BREYER, J., concurring) (quoting 18 U.S.C. § 3583(k)). The plurality opinion reached the same conclusion, but only considered whether the overall sentence Haymond could receive following a supervised-release violation was greater than the sentence he could have received for his initial conviction. *Id.* at 2378-79 (plurality op.).

Thus, the precise boundaries of *Haymond*'s holding remain undecided. While courts have generally taken Justice Breyer's concurrence in *Haymond* to be the narrower and therefore the controlling opinion—*see Shakespeare*, 32 F.4th at 1238-39 (citing *Marks* v. *United States*, 430 U.S. 188, 193 (1977))—neither the plurality nor concurrence define a rule that is wholly subsumed by the other. The plurality only held that the supervised-release statute at issue was unconstitutional "as applied in

cases like" Haymond's, where it "expose[d] a defendant to an additional . . . prison term well *beyond* that authorized by the jury's verdict." 139 S.Ct. at 2382 (plurality op.) (emphasis in original). It contemplated that other supervised release statutes might give rise to the same problem in rare instances, but would not have found a Sixth Amendment problem if Haymond's underlying offense carried a potentially harsher penalty than the supervised release violation. *Id.* at 2379, 2384 (plurality op.). Conversely, the concurrence simply held that the statute at issue was unconstitutional because it effectively defined a "new criminal offense[]," which must be adjudicated and penalized separately from the original offense. *Id.* at 2386 (BREYER, J., concurring). While both approaches yielded the same result in *Haymond*—and do so here as well, *see* Section II.A, *infra*—as a practical matter it remains unclear whether the Sixth Amendment permits non-juries to penalize defendants for "new" offenses if the penalty does not exceed the statutory maximum penalty for a prior offense.

Moreover, assuming Justice Breyer's concurrence is the controlling opinion, the *Haymond* plurality identified two ways in which the scope of that opinion was unclear in itself. *First*, the concurrence's emphasis on the "discrete set of . . . offenses" at issue creates a complicated line-drawing problem. 139 S.Ct. at 2384 n.9 (plurality op.). This approach raises but does not answer "inherently subjective" questions about how broadly a sentencing system can apply before it triggers *Apprendi*. *Id.* *Second*, the final two aspects described in Justice Bryer's concurrence

"amount to the same thing—a worry that [the statute] imposes a new mandatory minimum sentence without a jury." *Id.*

Therefore, this Court's guidance is needed to clarify which elements of the *Haymond* ruling govern the application of *Apprendi*, and the outer limits of *Apprendi* more broadly.

B. State courts are split on the scope and application of *Apprendi*.

State courts are also divided on when the relationship between a factual finding and the terms of a sentence trigger *Apprendi*—and indeed on how to even answer the question in the first place.

Some state courts focus on the practical effects that a factual determination can have on the range of sentences a defendant may experience. For example, in "presumptive probation" systems—*i.e.*, systems that create a rebuttable presumption that defendants will be sentenced to probation—many state courts apply *Apprendi* and require juries to determine any "offender-related factor [used] to depart from the presumptive sentence." *State* v. *Allen*, 706 N.W.2d 40, 46 (Minn. 2005); *see also*, *e.g.*, *State* v. *Frinell*, 414 P.3d 430, 433 (Ore. App. 2018) (citing *State* v. *Buehler*, 136 P3d 64 (Ore. App. 2006) ("[W]hen a defendant's presumptive sentence for an offense is probation, sentencing the defendant to imprisonment is an upward dispositional departure that requires jury findings.").

Similarly, numerous state courts have concluded that removing eligibility for parole effectively increases a defendant's minimum sentence—and therefore any fact-finding which can trigger ineligibility must be conducted by a jury. *See*, *e.g.*, *State* v. *Grate*, 106 A.3d 466, 475-76 (N.J. 2015) (striking down a statute which "re-

quire[d] the sentencing court to impose a period of parole ineligibility if the court finds a substantial likelihood that the defendant is involved in organized criminal activity" (quotations omitted)); *People* v. *Lockridge*, 870 N.W.2d 502, 516 (Mich. 2015) (holding that denying eligibility for parole "increas[es] the prescribed range of penalties" for an offense, and thus "all the pertinent facts" related thereto must be found by a jury); *State* v. *Soto*, 322 P.3d 334, 344, 348-49 (Kan. 2014) (holding a statute delaying parole eligibility from 25 years to 50 years based on judicial fact-finding was unconstitutional under *Alleyne*).

Conversely, a minority of state courts only apply *Apprendi* to factfinding which extends the term of incarceration permitted by statute, treating anything else as a matter of judicial discretion. For example, the Mississippi Supreme Court held that as long as the duration of a defendant's incarceration remained "within statutory parameters," restrictions on parole eligibility are irrelevant. *Fogleman* v. *State*, 283 So. 3d 685, 689-90 (Miss. 2019). Courts in these states classify parole eligibility as "only impact[ing] the actual amount of jail time the defendant must serve," rather than the range of penalties available to a sentencing court, and thus place it beyond the scope of *Apprendi*. *Id.* (quotations and alterations removed); *see also People* v. *Barnes*, 90 N.E.3d 1117, 1140 (Ill. 1st App. 2017) (holding that judicial factfinding disqualifying a defendant from parole "change[s] the actual amount of jail time defendant serves, [but] does not increase defendant's mandatory minimum sentence and thus does not violate *Alleyne*").

Courts taking this approach also do not require juries to make the factual findings needed to rebut a presumption that a defendant will be sentenced to probation rather than incarceration. *State* v. *Carr*, 451, 53 P.3d 843, 850 (Kan. 2002); *see also State* v. *Anderson*, 867 N.W.2d 718, 724 (S.D. 2015) ("[I]nitially denying probation and revoking probation . . . do[] not alter the range of years of imprisonment that a court may impose for a particular offense" and therefore "the core concern of *Apprendi* . . . is not implicated.")

The variation in state courts' approaches to *Apprendi* has come to a head in Ohio, as even within the state there is disagreement on the correct framework to apply. When faced with the parole eligibility question, the Supreme Court of Ohio took the practical approach. Recognizing that the denial of parole eligibility effectively creates a new mandatory minimum sentence, the court concluded that foreclosing eligibility "expose[d] the defendant to separate prison terms" that he would not have faced otherwise. *State* v. *Bowers*, 167 N.E.3d 947, 952-53 (Oh. 2020). Accordingly, only a jury could resolve the "predicate facts" which determine eligibility. *Id.*

Conversely, when rejecting the application of *Apprendi* to S.B. 201, the court failed to acknowledge the mechanical realities of how the Department's factual findings extend the prison term to which a defendant is exposed. The court implied that both the minimum and maximum sentences provided for by S.B. 201 are "imposed by the trial court," App. 16a, but this is incorrect. The trial court only imposes the minimum sentence, which establishes the defendant's presumptive release date.

Ohio Rev. Code § 2929.144(B). The trial court cannot change or delay this date—only the Department can impose the maximum sentence on a defendant, and only by affirmatively rebutting the presumption of release through additional factfinding. *Id.* § 2929.144(C).

To be clear, even a minimalist view of *Apprendi* does not save S.B. 201. As set forth below—*see* Section II, *infra*—S.B. 201 fails under either opinion in *Haymond* and empowers the Department to incarcerate individuals beyond the "statutory parameters" of "judicial discretion," *Fogleman*, 283 So. 3d at 690. Nonetheless, clarification from this Court on which of these flaws are fatal will resolve lingering uncertainty and resolve divisions among state courts. Accordingly, this Court should issue a writ of certiorari in this case.

II. Regardless Of Which Analysis Controls, The Sixth Amendment Prohibits An Administrative Agency From Making Factual Findings That Expose Defendants To Prolonged Incarceration.

Notwithstanding the divergence among other courts, the Supreme Court of Ohio was wrong when it affirmed S.B. 201 against an *Apprendi* challenge. Indeed, its holding ultimately rested on a mischaracterization of S.B. 201's operation. Properly understood, S.B. 201 fails under any of the foregoing framings of the right to trial by jury.

A. S.B. 201 empowers the Department to impose a longer period of incarceration than the trial court could have imposed from the facts before it.

At its most general level, *Apprendi* stands for the proposition that "a defendant's constitutional rights [are] violated" when that defendant is subject to a punishment "greater than the maximum" otherwise allowed by state law on the basis of

facts that were not found by jury or admitted by the defendant. *Blakely*, 542 U.S. at 303-04 (citing *Apprendi*, 530 U.S. at 491-97, and collecting authorities). Critically, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts," but rather "the maximum he may impose without any additional findings." *Id.*; *see also Haymond*, 139 S.Ct. at 2378 (plurality op.) ("[U]nder our Constitution, when 'a finding of fact alters the legally prescribed punishment so as to aggravate it' that finding must be made by a jury." (quoting *Alleyne*, 570 U.S. at 114)). At least in the context of limiting the term of incarceration, courts agree that any extension beyond what is authorized by "verdict and [] statute" must rest on facts determined by a jury or admitted by the defendant. *Fogleman*, 283 So.3d at 691.

Such is the case here. The portion of Shepard's sentence impacted by S.B. 201 imposed a "minimum term" of eight years—App. 65-66a—meaning Shepard will presumptively be released from incarceration on that charge after eight years. Eight years was the longest presumptive sentence that the trial court could impose for a second-degree felony under S.B. 201. *See* Ohio Rev. Code § 2929.14(A)(2)(a). Thus, the "verdict and statute authorized the judge to sentence [Shepard] from [two] to [eight] years." *Fogleman*, 283 So.3d at 691; Ohio Rev. Code § 2929.14(A)(2)(a). Yet S.B. 201 allows the Department to extend Shepard's sentence by 50%, for a potential total of 12 years. *See* App. 66a; *see also* Ohio Rev. Code § 2929.144(B)(1).

Omitting this analysis is what led the Supreme Court of Ohio to the wrong result on this question. In rejecting an *Apprendi* challenge to S.B. 201, the court incorrectly stated that "no determination by the [Department] regarding [a defendant]'s behavior while in prison will change the range of penalties prescribed by the legislature and imposed by the trial court." App. 16a. Yet immediately before offering that assertion, the court acknowledged that "the trial court has the discretion to sentence [defendants] to *any minimum sentence within the appropriate range*," and that the maximum sentence the Department can impose "is calculated based on that minimum sentence." App. 16a (emphasis added).

Indeed, this simplified characterization of S.B. 201's mechanics implicitly overstates the scope of the trial court's statutory sentencing power. It glosses over the limits on how long of a sentence a trial court may impose, and omits any mention of the fact that the trial court's minimum sentence controls defendants' release dates unless and until the Department overrides it. The fact that the maximum sentence the Department can impose is "calculated based on" the trial court's sentence does not equate to the trial court "imposing" that maximum sentence. App. 16a. Quite the opposite, this dynamic means that: (1) by definition, the trial court can *never* itself impose a sentence as long as the Department can impose in any particular case; and (2) that limiting the trial court's prospective sentencing range empowers the Department to impose sentences in excess of what a trial court could ever impose on its own.

In reality, S.B. 201 only allows trial courts to select a presumptive release date for a defendant from within a limited range. Thus, any facts authorizing an upward departure from that selection, and indeed from that range, must be found by a jury.

B. S.B. 201 empowers the Department to incarcerate defendants for subsequent offences not proven beyond a reasonable doubt.

Flipping the analysis to focus on S.B. 201's substance, rather than its mechanics, nonetheless produces the same result—a violation of the Sixth Amendment. Indeed, it is all but axiomatic that the extended incarceration imposed pursuant to S.B. 201 is "punishment for a new offense," not merely the "revocation" of a conditional release. *See Haymond*, 139 S.Ct. at 2386 (BREYER, J., concurring).

First and foremost, the extended incarceration imposed by the Department is just that—incarceration. True, some state courts have concluded *Apprendi* applies with less force in the context of parole, probation, or other "dispositional departures" from incarceration. *Carr*, 53 P.3d at 850; *see also*, *e.g.*, *Anderson*, 867 N.W.2d at 724. But the presumptive release date established by S.B. 201 does not grant an alternative method of completing a sentence to a defendant as an act of judicial or administrative grace. Rather, it "release[s]" the defendant "from service of the sentence," ending his incarceration as an operation of law. Ohio Rev. Code § 2967.271(B).

Second, this extended incarceration is imposed a sanction for conduct which could otherwise be "sentenced as new [] criminal conduct," rather than conduct which merely violates the specific terms of a conditional sentence. *Haymond*, 139

S.Ct. at 2386 (BREYER, J., concurring); *see also id.* at 2381 (plurality op.) (noting that a "conviction on one crime" cannot "allow the government to evade the need for another jury trial on any other offense the defendant might commit"). Indeed, S.B. 201 is explicit in allowing the Department to extend a defendant's incarceration as a sanction for "commit[ting] a violation of law that was not prosecuted[] and . . . demonstrate[s] that the offender has not been rehabilitated." Ohio Rev. Code § 2967.271(C)(1)(a).

To be sure, some aspects of S.B. 201 are less explicit in specifying what sort of conduct can trigger this additional sanction—but this vagueness does not save the statute. For example, S.B. 201 provides that a defendant's incarceration may be extended in response to "institutional rule infractions that involved compromising the security of a state correctional institution." Ohio Rev. Code § 2967.271(C)(1)(a). This mélange of infractions is not defined by any statute or regulation. *See* Ohio Admin. Code § 5120-9-06(C). But even loosely defined, it is clear that violating such policies does not constitute a "breach of trust" owing to a "failure to follow [] court-imposed conditions." *Haymond*, 139 S.Ct. at 2386 (Breyer, J., concurring). Rather, these violations are penalized with additional prison time as a sanction for "the particular conduct" itself. *Id.*

Taken together, the terms of S.B. 201 empower the Department to decide for itself whether a defendant has done something to warrant additional incarceration beyond the term which was or could have been imposed at the time of conviction. Such decisions are the quintessential purview of jurors, not administrators.

CONCLUSION

For the reasons set forth above, the Court should issue a writ of certiorari in this case.

Respectfully submitted.

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APPENDIX

APPENDIX A

Supreme Court of Ohio Clerk of Court - Filed October 26, 2023 - Case No. 2022-1159

THE SUPREME COURT OF OHIO

State of Ohio	**Case No. 2022-1159**
v.	**JUDGEMENT ENTRY**
Tyshawn Shepard	**APPEAL FROM THE COURT OF APPEALS**

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed on the authority of *State v. Hacker*, __ Ohio St.3d __, 2023-Ohio-2535, __ N.E.3d __, consistent with the opinion rendered herein.

It is further ordered that mandates be sent to and filed with the clerks of the Court of Appeals for Cuyahoga County and the Court of Common Pleas for Cuyahoga County.

(Cuyahoga County Court of Appeals; No. 111162)

/s/ Sharon L. Kennedy
Sharon L. Kennedy
Chief Justice

APPENDIX B

SLIP OPINION NO. 2023-OHIO-2535

THE STATE OF OHIO, APPELLEE, *v.* HACKER, APPELLANT.

THE STATE OF OHIO, APPELLEE, *v.* SIMMONS, APPELLANT.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Hacker*, Slip Opinion No. 2023-Ohio-2535.]

Criminal law—Sentencing—R.C. 2967.271—Due Process Clause of the Fourteenth Amendment—Sixth Amendment right to a jury trial—Separation-of-powers doctrine—The Reagan Tokes Law is not void for vagueness, and it is not facially unconstitutional, because (1) it provides that offenders receive a hearing before the Department of Rehabilitation and Correction ("DRC") may extend their prison sentence beyond the minimum but within the maximum term imposed by the trial court, (2) the right to a jury trial is not implicated since no determination by the DRC at the hearing changes the sentence range prescribed by the legislature and imposed by the trial court, and (3) the authority it gives the DRC to extend an offender's prison sentence beyond the minimum but within the maximum range imposed by the trial court does not exceed the power given to the executive branch

of the government and does not interfere with the trial court's discretion when sentencing the offender.

(Nos. 2020-1496 and 2021-0532—Submitted January 11, 2023—Decided July 26, 2023.)

APPEALS from the Court of Appeals for Logan County, No. 8-20-01, 2020-Ohio-5048, and the Court of Appeals for Cuyahoga County, No. 109476, 2021-Ohio-939.

DETERS, J.

{¶ 1} The "Reagan Tokes Law," which became effective in March 2019, requires that for certain first- and second-degree felony offenses, a sentencing court impose on the offender an indefinite sentence consisting of a minimum and a maximum prison term. There is a presumption that the offender will be released from incarceration after serving the minimum prison term. But if that presumption is rebutted, the Ohio Department of Rehabilitation and Correction ("DRC") may maintain the offender's incarceration up to the maximum prison term set by the trial court. In these appeals, which we have consolidated for decision, appellants, Christopher P. Hacker (case No. 2020-1496) and Danan Simmons Jr. (case No. 2021-0532), maintain that indefinite sentencing under the Reagan Tokes Law is unconstitutional because it violates the separation-of-powers doctrine, the offender's right to a jury trial, and procedural due process. We disagree and therefore affirm the judgments of the Third and Eighth District Courts of Appeals.

I. The Underlying Cases

A. State v. Hacker

{¶ 2} In December 2019, Hacker pled guilty to one count of aggravated robbery with a one-year firearm specification. Because aggravated robbery is a first-degree felony offense, Hacker was subject to sentencing under the Reagan Tokes Law. *See* 2018 Am.Sub.S.B. No. 201, effective Mar. 22, 2019. Prior to sentencing, Hacker filed an objection to the imposition of an indefinite sentence and attached as support the decision of the Hamilton County Court of Common Pleas in *State v. O'Neal*, Hamilton C.P. No. B-1903562, 2019 WL 7670061 (Nov. 20, 2019). In *O'Neal*, the common pleas court declared the Reagan Tokes Law to be unconstitutional on the grounds that it violated the separation-of-powers doctrine and procedural due process. The First District Court of Appeals subsequently reversed the trial court's judgment. *State v. O'Neal*, 1st Dist. Hamilton No. C-190736, 2022-Ohio-3017.[1]

{¶ 3} The trial court overruled Hacker's objection and sentenced him to prison for a minimum term of six years and a maximum term of nine years for the felony offense. The court also sentenced him to a mandatory one-year prison term for the firearm specification, to be served prior to the indefinite sentence. The court imposed a $10,000 fine and ordered Hacker to pay court costs.

{¶ 4} Hacker appealed to the Third District, which affirmed the trial court's decision on separation-of-powers and due-process grounds. 2020-Ohio-5048, 161

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[1] This court has accepted the defendant's appeal in *O'Neal*, and the case is being held pending this court's decision in these cases. 168 Ohio St.3d 1418, 2022-Ohio-3752, 196 N.E.3d 854

N.E.3d 112, ¶ 18, 23. The court of appeals declined to consider Hacker's contention that the Reagan Tokes Law violated his right to a jury trial, finding that he had waived that argument by not raising it in the trial court. *Id.* at ¶ 17.

B. State v. Simmons

{¶ 5} In December 2019, Simmons pled guilty to one count of having weapons while under a disability, one count of drug trafficking with a one-year firearm specification, and one count of drug possession. Because the drug-trafficking offense to which he pled guilty is a second-degree felony offense, Simmons was subject to sentencing under the Reagan Tokes Law. At the sentencing hearing, however, the trial court noted that it had previously held the Reagan Tokes Law to be unconstitutional on the grounds cited by the Hamilton County Court of Common Pleas in *O'Neal*, Hamilton C.P. No. B-1903562, 2019 WL 7670061. The court therefore imposed a definite sentence of four years for Simmons's drug-trafficking offense.

{¶ 6} The state appealed to the Eighth District. That court concluded that the Reagan Tokes Law is constitutional, reversed the lower court's sentencing judgment, and remanded the case for resentencing. 2021-Ohio-939, 169 N.E.3d 728, ¶ 23.

II. The Reagan Tokes Law

{¶ 7} The Reagan Tokes Law provides for indefinite sentencing for offenders convicted of first- or second-degree felonies for which life imprisonment is not an available sentence ("eligible felonies"). R.C. 2929.14(A)(1)(a) and (2)(a). When sentencing an offender for an eligible felony, the trial court must choose a "minimum

term" from a range of possible minimum prison terms. *Id.* For an eligible first-degree felony offense, the range for the minimum prison term is 3 to 11 years; for an eligible second-degree felony offense, the range is 2 to 8 years. *Id.* The minimum prison term chosen by the trial court dictates the maximum prison term, which must be one and a half times the minimum term. *Id.*; R.C. 2929.144(B)(1). For example, if the court imposes a minimum prison term of four years, the maximum prison term will be six years.

{¶ 8} R.C. 2967.271(B) lays out how the minimum and maximum prison terms affect the amount of time an offender sentenced under the Reagan Tokes Law will be incarcerated: "When an offender is sentenced to a non-life felony indefinite prison term, there shall be a presumption that the person shall be released from service of the sentence on the expiration of the offender's minimum prison term or on the offender's presumptive earned early release date, whichever is earlier" (the "presumption of release"). The "presumptive earned early release date" is the date resulting from a reduction, if any, of the offender's minimum prison term, R.C. 2967.271(A)(2), on the recommendation of the director of the DRC for "exceptional conduct" or "adjustment to incarceration," R.C. 2967.271(F)(1).

{¶ 9} The presumption of release may be rebutted by the DRConly if the department determines, at a hearing, that one or more of the following applies:

> (1) Regardless of the security level in which the offender is classified at the time of the hearing, both of the following apply:
>
> (a) During the offender's incarceration, the offender committed institutional rule infractions that involved compromising the security of

> a state correctional institution, compromising the safety of the staff of a state correctional institution or its inmates, or physical harm or the threat of physical harm to the staff of a state correctional institution or its inmates, or committed a violation of law that was not prosecuted, and the infractions or violations demonstrate that the offender has not been rehabilitated.
>
> (b) The offender's behavior while incarcerated, including, but not limited to the infractions and violations specified in division (C)(1)(a) of this section, demonstrate that the offender continues to pose a threat to society.
>
> (2) Regardless of the security level in which the offender is classified at the time of the hearing, the offender has been placed by the department in extended restrictive housing at any time within the year preceding the date of the hearing.
>
> (3) At the time of the hearing, the offender is classified by the department as a security level three, four, or five, or at a higher security level.

R.C. 2967.271(C).

{¶ 10} If the presumption of release is rebutted, the DRC may maintain the offender's incarceration beyond the minimum prison term or, if applicable, the presumptive earned-early-release date for a "reasonable period * * * specified by the department" not to exceed the maximum prison term established under R.C. 2929.144. R.C. 2967.271(D).

III. Legal Analysis

{¶ 11} Legislation is entitled to a strong presumption of constitutionality. *Ohio Pub. Interest Action Group, Inc. v. Pub. Util. Comm.*, 43 Ohio St.2d 175, 331 N.E.2d 730 (1975), paragraph four of the syllabus. Because Hacker and Simmons raise facial challenges to the Reagan Tokes Law, the presumption of constitutionality may be overcome only if the law is unconstitutional in *all* instances. *Harrold v.*

Collier, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 37, citing *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The distinction between a facial challenge and an as-applied challenge is important, because a party bringing the latter need show only that the legislation is unconstitutional as applied to a specific set of facts. *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 55 N.E.2d 629 (1944), paragraph six of the syllabus. Conversely, in a facial challenge, if the law can be applied constitutionally in at least one instance, the challenge fails. *Salerno* at 745.

{¶ 12} Despite seeking to have the entire Reagan Tokes Law declared unconstitutional, Hacker and Simmons do not suggest that R.C. 2929.14 and 2929.144, which establish a trial court's power to impose indefinite sentences on offenders convicted of eligible felonies, violate any constitutional standard. Instead, they argue that R.C. 2967.271, which allows the DRC to maintain an offender's incarceration beyond the minimum prison term imposed by a trial court, violates the separation-of-powers doctrine, procedural due process, and the right to a jury trial. We consider each constitutional challenge in turn.

A. Separation of Powers

{¶ 13} Hacker and Simmons each maintain that the Reagan Tokes Law violates the separation-of-powers doctrine because the DRC—part of the executive branch—has been given the authority to maintain an offender's incarceration beyond the minimum prison term imposed by a trial court. Hacker and Simmons reason that the power given to the DRC infringes on the authority of the judicial

branch. We disagree. While the Reagan Tokes Law certainly demonstrates the interplay among the three branches of government, the authority given to the DRC—which is to be exercised within the bounds of the sentence imposed by the trial court—does not infringe on the power of the courts.

{¶ 14} The separation-of-powers doctrine is "implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *S. Euclid v. Jemison*, 28 Ohio St.3d 3d 157, 159, 503 N.E.2d 136 (1986). The doctrine "requires that each branch of a government be permitted to exercise its constitutional duties without interference from the other two branches of government." *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 56; *see also State ex rel. Johnston v. Taulbee*, 66 Ohio St.2d 417, 423 N.E.2d 80 (1981), paragraph one of the syllabus ("The administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers").

{¶ 15} "What are legislative powers, or what executive or judicial powers [are], is not defined or expressed in the constitution, except in general terms. The boundary line between them is undefined, and often difficult to determine." *State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 647, 4 N.E. 81 (1885). But the boundaries of each branch's power have been described in cases throughout the years. Relevant here is the principle that the legislative branch "define[s] crimes," "fixes the penalty," and "provide[s] such discipline and regulations for prisoners, not in conflict with the

fundamental law, as the legislature deems best." *Id.* Thus, with the Reagan Tokes Law, the General Assembly established indefinite sentencing for offenders convicted of eligible felonies and a scheme for offender discipline by the DRC. The judicial branch determines whether a person is guilty of an offense and, after a finding of guilt, imposes a prison sentence within the bounds established by the legislature. *Id.* at 647-648; *see also State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 136, 729 N.E.2d 359 (2000). And "[p]rison discipline is an exercise of executive power." *Id.* The question is whether the discipline exercised by the DRC under the Reagan Tokes Law interferes with the judiciary's authority to determine guilt and impose a sentence.

{¶ 16} Once the trial court imposes minimum and maximum prison terms under R.C. 2929.14(A)(1)(a) or (2)(a), the sentence for the offender has been set. "[D]efendants who have been sentenced under the Reagan Tokes Law have received the entirety of their sentences and the sentences have been journalized." *State v. Maddox*, 168 Ohio St.3d 292, 2022-Ohio-764, 198 N.E.3d 797, ¶ 16. If the DRC determines that the presumption of release has been rebutted, it may maintain the offender's incarceration—but only within the bounds set by the trial court. It does not impede the court's exercise of its judicial powers.

{¶ 17} Hacker and Simmons ground their separation-of-powers arguments in this court's decision in *Bray*. In that case, the court considered petitions for writs of habeas corpus filed by three offenders whose stated prison terms had been extended by the addition of "bad time" under former R.C. 2967.11. *Bray* at 133. The statute at

issue provided: "As part of a prisoner's sentence, the parole board may punish a violation committed by the prisoner by extending the prisoner's stated prison term for a period of fifteen, thirty, sixty, or ninety days in accordance with this section." Former R.C. 2967.11(B), 146 Ohio Laws, Part VI, 10752, 11007. A "violation" was defined as "an act that is a criminal offense under the law of this state or the United States, whether or not a person is prosecuted for the commission of the offense." Former R.C. 2967.11(A), 146 Ohio Laws, Part VI, at 11007. The court in *Bray* concluded that the "bad time" provision unconstitutionally allowed the executive branch to "try[], convict[], and sentenc[e] inmates for crimes committed while in prison." *Id.* at 136.

{¶ 18} Hacker and Simmons argue that R.C. 2967.271 suffers from the same problems as the former bad-time law because it allows the DRC to try and convict prisoners for various infractions—including crimes—committed while incarcerated, *see* R.C. 2967.271(C), and to sentence them to a prison term that extends beyond their presumptive release dates.

{¶ 19} But their arguments fail to account for this court's discussion of *Bray*, 89 Ohio St.3d 132, 729 N.E.2d 359, in a case released less than two months after *Bray* was decided. In *Woods v. Telb*, 89 Ohio St.3d 504, 733 N.E.2d 1103 (2000), *superseded by statute on other grounds as stated in State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, the state appealed the Sixth District Court of Appeals' judgment granting a writ of habeas corpus to a prisoner who had been sentenced to 30 days in a county jail for violating the conditions of his postrelease

control. The court of appeals had concluded that R.C. 2967.28— the postrelease-control statute—violated the separation-of-powers doctrine and the Due Process Clauses of the state and federal Constitutions. *Woods* at 507.

{¶ 20} Under former R.C. 2967.28(B), 146 Ohio Laws, Part IV, 7136, 7597, in effect in 2000, offenders convicted of first- and second-degree felony offenses, third-degree felony offenses in which physical harm was caused or threatened, or felony sex offenses, were subject to mandatory postrelease control. Offenders convicted of other felony offenses were subject to postrelease control at the Ohio Parole Board's discretion. Former R.C. 2967.28(C), 146 Ohio Laws, Part IV, at 7597-7598. And besides determining whether and how long an offender would be subject to postrelease control, the parole board had the authority to sanction offenders for violating the conditions of their postrelease control. The possible sanctions included a prison term not to "exceed nine months." Former R.C. 2967.28(F)(3), 146 Ohio Laws, Part IV, at 7601. The statute further provided that "the maximum cumulative prison term for all violations * * * shall not exceed one- half of the stated prison term originally imposed upon the offender as part of this sentence." *Id.*

{¶ 21} The Sixth District concluded that R.C. 2967.28 violated the separation-of-powers doctrine because the powers given to the Adult Parole Authority ("APA")—an executive-branch agency—"usurped judicial authority." *Woods* at 511. This court reversed, reasoning that the conditions of postrelease control—which include the period of control to which an offender would be subjected and the violations of which

could lead to "essentially, 'time and a half' "—were part of the sentence imposed by the trial court. *Id.*

{¶ 22} In arriving at this conclusion, this court distinguished *Bray*:

> While we acknowledged [in Bray] that prison discipline is a proper exercise of executive power, we concluded that trying, convicting, and sentencing inmates for crimes committed while in prison is not an appropriate exercise of executive power. The commission of the 'crime' actually resulted in an additional sentence being imposed by an administrator. If an offense was serious enough to constitute an additional crime, and the prison authorities did not feel that administrative sanctions were sufficient (i.e., isolation, loss of privileges), the prison authorities should bring additional charges in a court of law, as they did before SB 2. Accordingly, we held that R.C. 2967.11 violated the doctrine of separation of powers and is therefore unconstitutional.

(Citation omitted.) *Woods*, 89 Ohio St.3d at 512, 733 N.E.2d 1103. The court further explained that "in contrast to the bad-time statute, post-release control is part of the original judicially imposed sentence" and that the power to determine the duration of postrelease control and the sanctions for an offender's violation of postrelease-control conditions was consistent with the authority that had been delegated to the APA in the past under a prior system of parole. *Id.* Moreover, the court noted that the authority of the judiciary was not impeded by the APA's performance of its disciplinary function. *Id.*

{¶ 23} The statutory scheme established in the Reagan Tokes Law is analogous to that in R.C. 2967.28. Should the DRC determine that the presumption of release is rebutted as the result of an offender's behavior during his incarceration, the additional

time that the offender may have to serve is limited by the sentence that has already been imposed by the trial court. R.C. 2967.271(D).

{¶ 24} Hacker's separation-of-powers argument is not limited to his challenge to the DRC's authority to hold an offender beyond his presumptive minimum prison term. He also maintains that the authority granted to the DRC director under R.C. 2967.271(F)(1) to recommend that an offender be released before he completes his minimum prison term constitutes executive-branch interference with the judiciary's power. We address this argument summarily. Hacker has no standing to challenge that provision of the Reagan Tokes Law, because he cannot demonstrate that he is aggrieved by it. *See State v. Grevious*, _____ Ohio St.3d _____, 2022-Ohio-4361, N.E.3d___, ¶ 14 ("To have standing to challenge the constitutionality of a statute, a party must have a direct interest in the statute of such a nature that his or her rights will be adversely affected by its enforcement"). Indeed, Hacker and other offenders can only benefit from the DRC's recommending that they be released before they have served their minimum prison terms.

{¶ 25} We conclude that allowing the DRC to rebut the presumption of release for disciplinary reasons does not exceed the power given to the executive branch and does not interfere with the trial court's discretion when sentencing an offender. Therefore, we hold that the Reagan Tokes Law does not violate the separation-of-powers doctrine.

B. The Right to a Jury Trial

{¶ 26} Simmons protests that R.C. 2967.271 violates his right to a jury trial because the DRC is authorized to maintain his incarceration beyond the minimum prison term set by the trial court without any jury findings to support the extended incarceration.[2]

{¶ 27} In support of his argument, Simmons directs us to a line of cases from the United States Supreme Court, beginning with *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In that case, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Thus, the Supreme Court determined that a statute that permitted the increase of the maximum term of imprisonment from 10 to 20 years when the trial judge—not a jury—found that the defendant had committed a crime with a racial bias violated the constitutional right to a jury trial. *Id.* at 491-495. " '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.'" (Brackets added in *Apprendi*.) *Id.*, quoting *Jones v. United States*, 526 U.S. 227, 252-253, 119 S.Ct. 1215, 143 L.Ed.2d 311 (Stevens, J., concurring).

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[2] Hacker also raised the right-to-a-jury-trial issue, but because he did not preserve the issue below, he has waived it. *See State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986), fn. 1 ("a criminal defendant may not raise constitutional errors on appeal unless such were specifically found to have been raised below"

{¶ 28} But here, the "prescribed range of penalties" is determined upon the return of a guilty verdict—or, as in the cases before us, when the offender pleads guilty to the charged offenses. Once an offender is found guilty of an eligible offense, the trial court has the discretion to sentence him to any minimum sentence within the appropriate range. R.C. 2929.14(A)(1)(a) and (2)(a). And the maximum sentence is calculated based on that minimum sentence. *Id.*; R.C. 2929.144(B)(1). Because no determination by the DRC regarding Simmons's behavior while in prison will change the range of penalties prescribed by the legislature and imposed by the trial court, the right to a jury trial is not implicated.

C. Due Process

{¶ 29} Both Hacker and Simmons contend that the Reagan Tokes Law violates offenders' due-process rights.[3] Their due-process challenges have two bases. First, they claim that the law is unconstitutionally vague. Second, they argue that the procedure provided by the law is insufficient to protect their rights. The problem with their arguments, however, is that they each raise a facial challenge. As such, they must show that in *all* circumstances, offenders are denied notice and a hearing. They have not made any such demonstration.

1. Void-for-Vagueness Doctrine

[3] Neither Hacker nor Simmons has mounted a separate challenge under Ohio's Due Course of Law Clause, Article I, Section 16 of the Ohio Constitution, so we confine our discussion to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

{¶ 30} The vagueness claims challenge the adequacy of the notice given by the Reagan Tokes Law as to what conduct will trigger maintenance of an offender's incarceration. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Thus, the adequacy of notice is evaluated from two perspectives: whether a person subject to the law can understand what is prohibited and whether those prohibitions are clear enough to prevent arbitrary enforcement.

{¶ 31} Hacker and Simmons argue that R.C. 2967.271(C)(1)—which provides for a rebuttal of the presumption of release, in part, when the DRC determines that an offender's "infractions or violations demonstrate that the offender has not been rehabilitated," R.C. 2967.271(C)(1)(a), and when "the offender continues to pose a threat to society," R.C. 2967.271(C)(1)(b)—does not give offenders adequate notice of what circumstances may result in the DRC's maintaining their incarceration beyond the minimum prison term. To succeed in challenging the Reagan Tokes Law, Hacker and Simmons must demonstrate "that the statute [is] so unclear that [they] could not reasonably understand that it prohibited the acts in which [they] engaged," *State v. Anderson*, 57 Ohio St.3d 168, 171, 566 N.E.2d 1224 (1991).

{¶ 32} The phrases in the law highlighted by Hacker and Simmons must not be read in isolation. The infractions or violations that may "demonstrate that the

offender has not been rehabilitated" are those "that involved compromising the security of a state correctional institution, compromising the safety of the staff of a state correctional institution or its inmates, or physical harm or the threat of physical harm to the staff of a state correctional institution or its inmates, or * * * a violation of law that was not prosecuted." R.C. 2967.271(C)(1)(a). This statutory provision puts offenders on notice about which acts are prohibited and may result in the rebuttal of the presumption of their release.

{¶ 33} Simmons further protests that the DRC is given "unfettered discretion" to determine whether certain infractions warrant maintaining an offender's incarceration. Similarly, Hacker quotes the Hamilton County Common Pleas Court's decision in *O'Neal* in support of his argument that the law " 'fails to provide a guideline as to how each consideration shall be weighed,' " *id.*, Hamilton C.P. No. B-1903562, 2019 WL 7670061, at *7. But the DRC is authorized to make similar determinations in other contexts. *See, e.g.*, Ohio Adm.Code 5120-9-50(B) (giving a warden discretion to determine whether to allow an escorted visit to a dying relative or a private viewing to an offender "who [is] not likely to pose a threat to public safety"); Ohio Adm.Code 5120-9-15(C)(1) (allowing a correctional institution to deny an application for visitation by a member of an inmate's immediate family if "[t]he applicant's presence in the institution could reasonably pose a threat to the institution's security"). Allowing the DRC some discretion does not, on its own, make the Reagan Tokes Law unconstitutionally vague.

{¶ 34} Both Hacker and Simmons provide hypothetical situations in which an offender's incarceration may be maintained beyond the minimum prison term for committing a minor infraction. But while such situations—if they do occur— may show that the Reagan Tokes Law is vague as applied, they do not satisfy the requirement in a facial challenge that the law be unconstitutional in all circumstances.

2. Procedural Due Process

{¶ 35} In their procedural-due-process claims, Hacker and Simmons protest that the Reagan Tokes Law provides insufficient procedure to protect offenders' rights. "Due process under the Ohio and United States Constitutions demands that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner where the state seeks to infringe a protected liberty or property interest." *State v. Hochhausler*, 76 Ohio St.3d 455, 459, 668 N.E.2d 457 (1996).

{¶ 36} As an initial matter, the state argues that offenders do not have a liberty interest in not being held beyond the minimum prison term imposed by a trial court. To be sure, this court has held that when the APA is vested with discretion whether to grant parole to an offender, the offender has "no expectancy of parole or a constitutional liberty interest sufficient to establish a right of procedural due process." *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128 (1994). But here, the DRC's discretion to maintain an offender's incarceration

beyond the minimum prison term imposed by the trial court is curtailed by R.C. 2967.271(B), which creates a presumption that an offender will be released at the completion of his minimum sentence. The presumption can be rebutted based on the offender's behavior while incarcerated. R.C. 2967.271(C). The presumption of release creates an interest that entitles offenders to due-process protection. *See Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) ("the State having created the [statutory] right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause").

{¶ 37} Because a liberty interest is at stake in these cases, due process requires a hearing before offenders are deprived of that interest. R.C. 2967.271(C) provides for a hearing: "The [DRC] may rebut the presumption [of release] only if the department determines, *at a hearing*, that one or more [statutorily identified circumstances] applies * * *." (Emphasis added.) Nevertheless, Hacker and Simmons maintain that the hearing provided for in R.C. 2967.271(C) is inadequate. They point to what they claim are shortcomings in the DRC's Policy No. 105-PBD-15, which sets forth the DRC's standard procedure for conducting hearings as required by the statute. *See Additional Term Hearing 105-PBD-15* (Mar. 1, 2023) available at https://drc.ohio.gov/about/resource/policies-and-procedures/105-pbd- parole-board/additional-term-hiring (accessed July 19, 2023) [https://perma.cc/SF9T-4GWJ],

superseding Additional Term Hearing 105-PBD-15 (Mar. 15, 2021), available at https://drc.ohio.gov/about/resource/policies-and-procedures/parole-board/additional-term-hiring (accessed Mar. 30, 2023) [https://perma.cc/QA6B-DGNU].

{¶ 38} But recall that Hacker and Simmons each present a facial challenge to the Reagan Tokes Law. Their challenges are to the law itself, not to the policies used by the DRC in furtherance of the law. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745, 107 S.Ct. 2095, 95 L.Ed.2d 697. The fact that the law "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id.*

{¶ 39} For that reason, "[w]hen determining whether a law is facially invalid, a court must be careful not to exceed the statute's actual language and speculate about hypothetical or imaginary cases." *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶ 21, citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). It bears repeating that the Reagan Tokes Law provides the offender with a hearing before his incarceration is maintained. So, it does not, by its terms, deprive an offender of "notice and an opportunity to be heard * * * at a meaningful time and in a meaningful manner," *Hochhausler*, 76 Ohio St.3d 455 at 459, 668 N.E.2d 457. Considering the DRC's nonstatutorily mandated practices for conducting hearings would require this court to "exceed the statute's actual

language" and engage in "speculat[ion] about hypothetical or imaginary cases," *Wymsylo* at ¶ 21. And that is beyond the scope of a facial challenge. *See id.* Constitutional challenges to the application of the DRC's policies made under R.C. 2967.271(C) would be subject to review as as-applied challenges, should the facts of a specific case so warrant.

{¶ 40} The Reagan Tokes Law is not void for vagueness. And we also hold that it is not facially unconstitutional, because it provides that offenders receive a hearing before they may be deprived of their liberty interest.

IV. Conclusion

{¶ 41} The Reagan Tokes Law carries a presumption of constitutionality, and to rebut that presumption in a facial challenge, Hacker and Simmons were required to demonstrate that "no set of circumstances exists under which the [law] would be valid," *Salerno*, 481 U.S. at 745, 107 S.Ct. 2095, 95 L.Ed.2d 697. They have not done so. We therefore affirm the judgments of the Third and Eighth District Courts of Appeals that the Reagan Tokes Law is constitutional.

Judgments affirmed. KENNEDY, C.J., and FISCHER, DEWINE, and STEWART, JJ., concur.

BRUNNER, J., dissents, with an opinion joined by DONNELLY, J.

BRUNNER, J., dissenting.

I. INTRODUCTION

{¶ 42} In both of these cases, we were asked to consider the facial constitutionality of the Reagan Tokes Law ("RTL"). I agree with several of the majority's determinations in its analysis. Because the RTL is, in my view, akin to Ohio's former indefinite-sentencing scheme, I agree that the law does not violate the separation-of-powers doctrine. I also agree that appellants, Christopher P. Hacker and Danan Simmons Jr., lack standing to challenge the Adult Parole Authority's ("APA") exercise of its discretion to recommend a person's release from prison before the presumptive minimum sentence has been served, because they are not aggrieved by that provision of the RTL. I share the majority's view that the RTL does not violate the right to a jury trial, because nothing about the law permits a fact-finder other than a jury to find facts that increase the range of sentencing exposure of the defendant. With respect to the majority's overall due-process analysis, I agree that appellants do have a protectable interest in their freedom after their presumptive minimum sentence has expired, and thus, I disagree with the contrary argument of appellee, the state of Ohio. Similarly, I agree with the majority that a facial constitutional analysis involves a review of the law that is challenged, not the policies that may be adopted to enforce the law.

{¶ 43} But I part ways with the majority in that I do not agree with its conclusions about procedural due process. The procedures created by the RTL are insufficient in light of the gravity of the decision being made—whether to release a person from prison on his or her presumptive release date. This imbalance facially violates offenders' right to due process and is unconstitutional. And because the

unconstitutional portions of the RTL cannot be severed from the law without thwarting the intent of the legislature, I would invalidate as unconstitutional the entire RTL.

II. ANALYSIS

A. Standard of Review on Facial Challenges

{¶ 44} We have previously stated that "a facial constitutional challenge requires proof beyond a reasonable doubt." *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶ 20, citing *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006- Ohio-5512, 857 N.E.2d 1148, ¶ 21. But the beyond-a-reasonable-doubt standard "is an evidentiary standard that is poorly suited to the legal question whether a legislative enactment comports with the Constitution." *State v. Grevious*, ___ Ohio St.3d ___, 2022-Ohio-4361, ___ N.E.3d ___, ¶ 48 (DeWine, J., concurring in judgment only). And "while the beyond-reasonable-doubt standard is something that we have rotely pasted into constitutional opinions, there is no indication that we actually use it." *Id.* at ¶ 63 (DeWine, J., concurring in judgment only). I would steer parties— and courts—away from reciting the inaccurate beyond-a-reasonable-doubt standard when discussing constitutional challenges such as the RTL challenge and would instead adhere to the standard that reflects the reality of our review:

> The question of the constitutionality of every law being first determined by the General Assembly, every presumption is in favor of its constitutionality, and it must clearly appear that the law is in direct conflict with inhibitions of the Constitution before a court will declare it unconstitutional.

Ohio Pub. Interest Action Group, Inc. v. Pub. Util. Comm., 43 Ohio St.2d 175, 331 N.E.2d 730 (1975), paragraph four of the syllabus.

{¶ 45} Regardless of whether the phrase "beyond a reasonable doubt" is invoked,

> [f]acial challenges to the constitutionality of a statute are the most difficult to mount successfully, since the challenger must establish that no set of circumstances exists under which the act would be valid. *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). If a statute is unconstitutional on its face, the statute may not be enforced under any circumstances. When determining whether a law is facially invalid, a court must be careful not to exceed the statute's actual language and speculate about hypothetical or imaginary cases. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). Reference to extrinsic facts is not required to resolve a facial challenge. *Reading* [*v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 2006-Ohio-2181, 846 N.E.2d 840,] ¶ 15. *Wymsylo* at ¶ 21. As always, " '[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.' " *State v. Turner*, 163 Ohio St.3d421, 2020-Ohio-6773, 170 N.E.3d 842, ¶ 18, quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988). Questions of statutory interpretation are reviewed de novo. *State v. Pountney*, 152 Ohio St.3d 474, 2018- Ohio-22, 97 N.E.3d 478, ¶ 20.

B. The Reagan Tokes Law

{¶ 46} The General Assembly enacted 2018 Am.Sub.S.B. No. 201 ("S.B. 201") to

> provide for indefinite prison terms for first or second degree felonies, with presumptive release of offenders sentenced to such a term at the end of the minimum term; to generally allow the Department of Rehabilitation and Correction with approval of the sentencing court to reduce the minimum term for exceptional conduct or adjustment to incarceration; to allow the Department to rebut the release presumption and keep the offender in prison up to the maximum term if it makes specified findings; to require the Adult Parole Authority to study the

> feasibility of certain GPS monitoring functions; to prioritize funding for residential service contracts that reduce homeless offenders; to name those provisions of the act the Reagan Tokes Law; [and other purposes of no consequence to this case].

To support these goals, S.B. 201 amended numerous provisions of the Revised Code in minor ways and made three major changes to the Revised Code that are relevant to the cases before us.

{¶ 47} S.B. 201 inserted language into R.C. 2929.14 requiring courts sentencing offenders convicted of first- or second-degree felonies to impose an indefinite prison sentence consisting of a minimum and a maximum term. R.C.2929.14(A)(1)(a), (A)(2)(a). Specifically, for first-degree felonies, R.C. 2929.14(A)(1)(a) now provides:

> For a felony of the first degree committed on or after March 22, 2019, the prison term shall be an indefinite prison term with a stated minimum term selected by the court of three, four, five, six, seven, eight, nine, ten, or eleven years and a maximum term that is determined pursuant to section 2929.144 of the Revised Code, except that if the section that criminalizes the conduct constituting the felony specifies a different minimum term or penalty for the offense, the specific language of that section shall control in determining the minimum term or otherwise sentencing the offender but the minimum term or sentence imposed under that specific language shall be considered for purposes of the Revised Code as if it had been imposed under this division.

As for second-degree felonies, the provision is identical except as to penalties:

> For a felony of the second degree committed on or after March 22, 2019, the prison term shall be an indefinite prison term with a stated minimum term selected by the court of two, three, four, five, six, seven, or eight years and a maximum term that is determined pursuant to section 2929.144 of the Revised Code * * *.

R.C. 2929.14(A)(2)(a).

{¶ 48} The RTL also placed a new section, R.C. 2929.144, into Ohio's criminal-sentencing scheme. Under that section, the maximum sentence would be derived from the sentence for the crime by enhancing it by an additional 50 percent of the longest single sentence for the first- or second-degree felony imposed. R.C. 2929.144 provides:

> (A) As used in this section, "qualifying felony of the first or second degree" means a felony of the first or second degree committed on or after [March 22, 2019].
>
> (B) The court imposing a prison term on an offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree shall determine the maximum prison term that is part of the sentence in accordance with the following:
>
> (1) If the offender is being sentenced for one felony and the felony is a qualifying felony of the first or second degree, the maximum prison term shall be equal to the minimum term imposed on the offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code plus fifty per cent of that term.
>
> (2) If the offender is being sentenced for more than one felony, if one or more of the felonies is a qualifying felony of the first or second degree, and if the court orders that some or all of the prison terms imposed are to be served consecutively, the court shall add all of the minimum terms imposed on the offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree that are to be served consecutively and all of the definite terms of the felonies that are not qualifying felonies of the first or second degree that are to be served consecutively, and the maximum term shall be equal to the total of those terms so added by the court plus fifty per cent of the longest minimum term or definite term for the most serious felony being sentenced.
>
> (3) If the offender is being sentenced for more than one felony, if one or more of the felonies is a qualifying felony of the first or second degree, and if the court orders that all of the prison terms imposed are to run concurrently, the maximum term shall be equal to the longest of the minimum terms imposed on the offender under division (A)(1)(a) or

(2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree for which the sentence is being imposed plus fifty per cent of the longest minimum term for the most serious qualifying felony being sentenced.

(4) Any mandatory prison term, or portion of a mandatory prison term, that is imposed or to be imposed on the offender under division (B), (G), or (H) of section 2929.14 of the Revised Code or under any other provision of the Revised Code, with respect to a conviction of or plea of guilty to a specification, and that is in addition to the sentence imposed for the underlying offense is separate from the sentence being imposed for the qualifying first or second degree felony committed on or after the effective date of this section and shall not be considered or included in determining a maximum prison term for the offender under divisions (B)(1) to (3) of this section.

(C) The court imposing a prison term on an offender pursuant to division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree shall sentence the offender, as part of the sentence, to the maximum prison term determined under division (B) of this section. The court shall impose this maximum term at sentencing as part of the sentence it imposes under section 2929.14 of the Revised Code, and shall state the minimum term it imposes under division (A)(1)(a) or (2)(a) of that section, and this maximum term, in the sentencing entry.

(D) If a court imposes a prison term on an offender pursuant to division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree, section 2967.271 of the Revised Code applies with respect to the offender's service of the prison term.

{¶ 49} Finally, the RTL enacted R.C. 2967.271, which explains under what circumstances an offender may be required to serve more than the imposed minimum sentence:

(A) As used in this section:

(1) "Offender's minimum prison term" means the minimum prison term imposed on an offender under a non-life felony indefinite prison term, diminished as provided in section 2967.191 or 2967.193 of the Revised Code or in any other provision of the Revised Code, other than

division (F) of this section, that provides for diminution or reduction of an offender's sentence.

(2) "Offender's presumptive earned early release date" means the date that is determined under the procedures described in division (F) of this section by the reduction, if any, of an offender's minimum prison term by the sentencing court and the crediting of that reduction toward the satisfaction of the minimum term.

(3) "Rehabilitative programs and activities" means education programs, vocational training, employment in prison industries, treatment for substance abuse, or other constructive programs developed by the department of rehabilitation and correction with specific standards for performance by prisoners.

(4) "Security level" means the security level in which an offender is classified under the inmate classification level system of the department of rehabilitation and correction that then is in effect. (5) "Sexually oriented offense" has the same meaning as in section 2950.01 of the Revised Code.

(B) When an offender is sentenced to a non-life felony indefinite prison term, there shall be a presumption that the person shall be released from service of the sentence on the expiration of the offender's minimum prison term or on the offender's presumptive earned early release date, whichever is earlier.

(C) The presumption established under division (B) of this section is a rebuttable presumption that the department of rehabilitation and correction may rebut as provided in this division. Unless the department rebuts the presumption, the offender shall be released from service of the sentence on the expiration of the offender's minimum prison term or on the offender's presumptive earned early release date, whichever is earlier. The department may rebut the presumption only if the department determines, at a hearing, that one or more of the following applies:

(1) Regardless of the security level in which the offender is classified at the time of the hearing, both of the following apply:

(a) During the offender's incarceration, the offender committed institutional rule infractions that involved compromising the security of a state correctional institution, compromising the safety of the staff of a

state correctional institution or its inmates, or physical harm or the threat of physical harm to the staff of a state correctional institution or its inmates, or committed a violation of law that was not prosecuted, and the infractions or violations demonstrate that the offender has not been rehabilitated.

(b) The offender's behavior while incarcerated, including, but not limited to the infractions and violations specified in division (C)(1)(a) of this section, demonstrate that the offender continues to pose a threat to society.

(2) Regardless of the security level in which the offender is classified at the time of the hearing, the offender has been placed by the department in extended restrictive housing at any time within the year preceding the date of the hearing.

(3) At the time of the hearing, the offender is classified by the department as a security level three, four, or five, or at a higher security level.

(D)(1) If the department of rehabilitation and correction, pursuant to division (C) of this section, rebuts the presumption established under division (B) of this section, the department may maintain the offender's incarceration in a state correctional institution under the sentence after the expiration of the offender's minimum prison term or, for offenders who have a presumptive earned early release date, after the offender's presumptive earned early release date. The department may maintain the offender's incarceration under this division for an additional period of incarceration determined by the department. The additional period of incarceration shall be a reasonable period determined by the department, shall be specified by the department, and shall not exceed the offender's maximum prison term.

(2) If the department maintains an offender's incarceration for an additional period under division (D)(1) of this section, there shall be a presumption that the offender shall be released on the expiration of the offender's minimum prison term plus the additional period of incarceration specified by the department as provided under that division or, for offenders who have a presumptive earned early release date, on the expiration of the additional period of incarceration to be served after the offender's presumptive earned early release date that is specified by the department as provided under that division. The presumption is a rebuttable presumption that the department may

> rebut, but only if it conducts a hearing and makes the determinations specified in division (C) of this section, and if the department rebuts the presumption, it may maintain the offender's incarceration in a state correctional institution for an additional period determined as specified in division (D)(1) of this section. Unless the department rebuts the presumption at the hearing, the offender shall be released from service of the sentence on the expiration of the offender's minimum prison term plus the additional period of incarceration specified by the department or, for offenders who have a presumptive earned early release date, on the expiration of the additional period of incarceration to be served after the offender's presumptive earned early release date as specified by the department.
>
> The provisions of this division regarding the establishment of a rebuttable presumption, the department's rebuttal of the presumption, and the department's maintenance of an offender's incarceration for an additional period of incarceration apply, and may be utilized more than one time, during the remainder of the offender's incarceration. If the offender has not been released under division (C) of this section or this division prior to the expiration of the offender's maximum prison term imposed as part of the offender's non-life felony indefinite prison term, the offender shall be released upon the expiration of that maximum term.
>
> (E) The department shall provide notices of hearings to be conducted under division (C) or (D) of this section in the same manner, and to the same persons, as specified in section 2967.12 and Chapter 2930. of the Revised Code with respect to hearings to be conducted regarding the possible release on parole of an inmate.

R.C. 2967.271 also includes provisions permitting a trial court to reduce an offender's minimum sentence during the term of his or her imprisonment based on good behavior of the offender but only if a reduction is recommended by the Ohio Department of Rehabilitation and Correction ("ODRC"). R.C. 2967.271(F).[4]

[4] It is also noteworthy, though not directly relevant to the substantive analysis in this case, that the RTL also requires sentencing courts to notify the offender of the relevant provisions of the RTL. R.C. 2929.19(B)(2)(c).

C. The Reagan Tokes Law Does Not Violate an Offender's Right to a Jury Trial

{¶ 50} Both the United States Supreme Court and this court have explained that the historical role of the jury in finding facts necessary to convict or to increase a sentence range is protected by the Sixth Amendment to the United States Constitution. *See Alleyne v. United States*, 570 U.S. 99, 117, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) (holding that the defendant's Sixth Amendment right to a jury trial was violated when the jury found that the defendant had used or carried a weapon but the sentencing judge found that the defendant had brandished the weapon and the court used its finding to justify increasing the defendant's minimum prison sentence); *Oregon v. Ice*, 555 U.S. 160, 168-172, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009) (holding that the considerations necessary to impose consecutive sentences on a defendant, despite the effect of increasing the total aggregate sentence, are the traditional and proper prerogative of the sentencing judge rather than the jury); *United States v. Booker*, 543 U.S. 220, 232, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (holding that the defendant's Sixth Amendment right to a jury trial was violated by a trial judge's finding additional facts by a preponderance of the evidence to justify sentencing the defendant within the statutory maximum but beyond the otherwise-applicable guideline range); *Blakely v. Washington*, 542 U.S. 296, 303-304, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (holding that the defendant's Sixth Amendment right to a jury trial was violated when the trial judge, based on his own fact-finding that the defendant had acted with "deliberate cruelty," sentenced the defendant to more than

three years beyond the statutory maximum of the standard sentencing range); *Ring v. Arizona*, 536 U.S. 584, 588, 603-609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (holding that the trial judge's fact-finding that was used to support imposing a sentence of death over the term of imprisonment that would otherwise have been imposed violated the defendant's Sixth Amendment right to a jury trial); *Apprendi v. New Jersey*, 530 U.S. 466, 491-497, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (holding that a trial judge's finding that the crime committed by the defendant was racially motivated, in order to increase the sentence beyond the prescribed statutory maximum term, violated the defendant's Sixth Amendment right to a jury trial); *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147, 915 N.E.2d 292, ¶ 34-39 (discussing *Apprendi* and its progeny with approval and noting that historically, a sentencing judge's consideration of a defendant's criminal record has not been deemed offensive to the Sixth Amendment's jury-trial guarantee); *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, *abrogated in part by Ice* (holding that a number of Ohio statutes requiring judicial fact-finding violated the defendant's Sixth Amendment right to a jury trial).[5]

{¶ 51} However, the statutory amendments enacted through the RTL do not require a judge or anyone else to make factual findings that alter the minimum or

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[5] Some of the statutes severed or deemed unconstitutional in *Foster* were later reenacted by the General Assembly. *See State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, *superseded by statute as stated in State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 3-4, 19-23; 2011 Am.Sub.H.B. No. 86.

maximum range of sentences to be imposed on the defendant. The RTL does not impact a defendant's right to a jury trial during the guilt and sentencing phases of the trial. If the jury convicts the defendant of a first- or second-degree felony, the trial judge imposes a sentence in the usual manner, selecting a sentence of two to eight years for a second-degree felony, R.C. 2929.14(A)(2)(a), or three to 11 years for a first-degree felony, R.C. 2929.14(A)(1)(a), and the RTL does not require any special fact-finding to support that sentencing choice. The RTL then creates a presumptive minimum sentence, R.C. 2967.271(B), and a maximum sentence at 150 percent of the minimum sentence, R.C. 2929.144(A)(1).[6] That too requires no fact-finding—it is purely a matter of mathematics and statutory application. The only situation in which fact-finding operates within the framework of the RTL is when, based on an offender's behavior or security classification, the ODRC seeks to maintain custody of the offender beyond the expiration of the presumptive minimum prison term. *See* R.C. 2967.271(C). However, that process does not affect the minimum or maximum sentence imposed or the range that could have been imposed; it affects only the amount of time that the offender spends incarcerated within the range of the imposed minimum and maximum sentence. Thus, the RTL does not transgress the *Apprendi* line of cases.

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[6] For the sake of simplicity, I speak in terms of sentencing for a single qualifying felony offense. For cases in which multiple qualifying felony offenses are involved, the maximum sentence is calculated under R.C. 2929.144(B)(2) or (3) by adding 50 percent of the longest term for the single "most serious" felony for which the defendant is being sentenced.

{¶ 52} It could be argued that R.C. 2967.271 encourages fact-finding by the ODRC to, in effect, alter a minimum sentence, because it permits a trial court to reduce an offender's minimum sentence based on good behavior and on the recommendation of the ODRC. *See* R.C. 2967.271(F). However, as the majority determines here, it is not clear that Hacker, Simmons, or any other offender would have standing to challenge this provision, as there appears to be no injury or detriment to offenders because of it. *See State v. Bates*, 167 Ohio St.3d 197, 2022-Ohio-475, 190 N.E.3d 610, ¶ 20-22 ("It is fundamental that appeal lies only on behalf of a party aggrieved," and thus, a "party aggrieved by a court's error * * * must challenge it on direct appeal; otherwise, the sentence will be subject to res judicata"); *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007- Ohio-5024, 875 N.E.2d 550, ¶ 27 (noting that the question of standing depends on whether the party has alleged a personal stake in the outcome of the controversy). Rather, this provision appears to be a benefit to every offender sentenced for a qualifying felony offense since courts do not generally have the authority to reduce sentences (other than through certain statutory mechanisms like judicial release or the granting of some relief undermining the conviction). *See, e.g.*, *State v. Smith*, 42 Ohio St.3d 60, 537 N.E.2d 198 (1989), paragraph one of the syllabus. Thus, any possibility of a sentence reduction (however conditioned) is more beneficial than the status quo and therefore is of benefit to the offender. No right to this benefit is being asserted by either Hacker or Simmons.

D. The Reagan Tokes Law Does Not Violate Separation of Powers

{¶ 53} This court discussed the basis of the separation-of-powers doctrine in a similar case more than 20 years ago:

> This court has repeatedly affirmed that the doctrine of separation of powers is "implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 158-159, 503 N.E.2d 136, 138 (1986); *State v. Warner*, 55 Ohio St.3d 31, 43- 44, 564 N.E.2d 18, 31 (1990). *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 475, 715 N.E.2d 1062, 1085 (1999); *State v. Hochhausler*, 76 Ohio St.3d 455, 463, 668 N.E.2d 457, 465-466 (1996).
>
> "The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others." *State ex rel. Bryant v. Akron Metro. Park Dist.*, 120 Ohio St. 464, 473, 166 N.E. 407, 410 (1929). *See also Knapp v. Thomas*, 39 Ohio St. 377, 391-392 (1883); *State ex rel. Finley v. Pfeiffer*, 163 Ohio St. 149, 126 N.E.2d 57, paragraph one of the syllabus.

State ex rel. Bray v. Russell, 89 Ohio St.3d 132, 134, 729 N.E.2d 359 (2000). The separation-of-powers doctrine exists not to protect the powers of each branch of the government for the benefit of that branch but for the benefit of the people who rely on a government of checks and balances as a shield against the arbitrary use of power. *Id.* at 135. In *Bray*, we also discussed the role of the judiciary:

> In our constitutional scheme, the judicial power resides in the judicial branch. Section 1, Article IV of the Ohio Constitution. The determination of guilt in a criminal matter and the sentencing of a defendant convicted of a crime are solely the province of the judiciary. *See State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 648, 4 N.E. 81, 86 (1885). *See also Stanton v. Tax Comm.*, 114 Ohio St. 658, 672, 151 N.E. 760, 764 (1926) ("the primary functions of the judiciary are to declare what the law is and to determine the rights of parties conformably thereto"); *Fairview v. Giffee*, 73 Ohio St. 183, 190, 76 N.E.

> 865, 867 (1905) ("It is indisputable that it is a judicial function to hear and determine a controversy between adverse parties, to ascertain the facts, and, applying the law to the facts, to render a final judgment").
>
> *Bray* at 136.

{¶ 54} In *Bray*, we confronted a facial challenge to the following statutory provision:

> "As part of a prisoner's sentence, the parole board may punish a violation committed by the prisoner by extending the prisoner's stated prison term for a period of fifteen, thirty, sixty, or ninety days in accordance with this section. * * * If a prisoner's stated prison term is extended under this section, the time by which it is so extended shall be referred to as 'bad time.'"

Id. at 135, quoting former R.C. 2967.11(B), 146 Ohio Laws, Part VI, 10752, 11007. We concluded that the so-called "bad time" statute was unconstitutional in that it violated the separation-of-powers doctrine because even though the statute provided that "bad time" was "part of a prisoner's sentence," it was actually an addition to the sentence and was therefore "no less than the executive branch's acting as judge, prosecutor, and jury." *Id.* We also distinguished prison discipline from the extension of a prison sentence for "bad time," stating, "Prison discipline is an exercise of executive power and nothing in this opinion should be interpreted to suggest otherwise. However, trying, convicting, and sentencing inmates for crimes committed while in prison is not an exercise of executive power." *Id.* at 136.

{¶ 55} The RTL is like the former "bad time" statute insofar as it permits the executive branch of the government, based on violations or crimes allegedly committed by an offender but never proved in a court of law, to impose a punishment

on the offender. *See* R.C. 2967.271(C)(1)(a), (b). But it does differ from the former "bad time" statute in one vital respect: whereas the former "bad time" statute added time to an offender's sentence beyond the sentence imposed by the trial court, the RTL operates within the confined range of the indefinite sentence imposed by the trial court. *See* R.C. 2967.271. In other words, under the RTL, if an offender is sentenced to a prison term of 8 to 12 years, the executive branch of the government may continue to hold the offender after the offender's minimum 8- year sentence based on the offender's having committed certain violations or the offender's security level, but it may not hold the offender past the expiration of the maximum 12-year sentence imposed by the court. *See* R.C. 2967.271(C), (D)(1).

{¶ 56} In this respect, the RTL is more analogous to the indefinite- sentencing scheme that existed in Ohio before Senate Bill 2 ("S.B. 2") took effect on July 1, 1996, and significantly changed Ohio's criminal code. *See* Am.Sub.S.B. No. 2, Sections 1 through 6, 146 Ohio Laws, Part IV, 7136. In the sentencing scheme that existed before S.B. 2, many sentences were indefinite, composed of a minimum prison term (determined by the trial court based on statutory criteria) and a maximum prison term (set by statute based on the degree of the offense). *See* former R.C. 2929.11(B), Am.Sub.S.B. No. 258, 143 Ohio Laws, Part I, 1308, 1433-1434.[7] Within the minimum

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[7] Former R.C. 2929.11(B), Am.Sub.S.B. No. 258, 143 Ohio Laws, Part I, at 1433-1434, provided:

> (B) Except as provided in division (D) or (H) of this section, sections 2929.71 and 2929.72, and Chapter 2925. of the Revised Code, terms of imprisonment for felony shall be imposed as follows:

(1) For an aggravated felony of the first degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be five, six, seven, eight, nine, or ten years, and the maximum term shall be twenty- five years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of ten, eleven, twelve, thirteen, fourteen, or fifteen years, and the maximum term shall be twenty- five years;

(2) For an aggravated felony of the second degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be three, four, five, six, seven, or eight years, and the maximum term shall be fifteen years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of eight, nine, ten, eleven, or twelve years, and the maximum term shall be fifteen years;

(3) For an aggravated felony of the third degree:

(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or

and maximum sentence imposed by the trial court, the Ohio Parole Board had the authority to continue an offender's term of imprisonment or to release the offender depending on a variety of factors, including the offender's conduct while incarcerated. *See* former R.C. 2967.13(A), Am.Sub.H.B. No. 571, Section 1, 143 Ohio Laws, Part IV, 6342, 6430; *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶ 34, *abrogated in part by Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517; *see also* Diroll, Ohio Criminal Sentencing Commission, *Thoughts on Applying S.B. 2 to "Old Law" Inmates*,

https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/general/SB2.pdf

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the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be two, three, four, or five years, and the maximum term shall be ten years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of five, six, seven, or eight years, and the maximum term shall be ten years;

(4) For a felony of the first degree, the minimum term shall be four, five, six, or seven years, and the maximum term shall be twenty-five years;

(5) For a felony of the second degree, the minimum term shall be two, three, four, or five years, and the maximum term shall be fifteen years;

(6) For a felony of the third degree, the minimum term shall be two years, thirty months, three years, or four years, and the maximum term shall be ten years;

(7) For a felony of the fourth degree, the minimum term shall be eighteen months, two years, thirty months, or three years, and the maximum term shall be five years.

(accessed July 15, 2023). The parole board also had the authority to reduce an offender's minimum sentence for good behavior or earned credit. *See* former R.C. 2967.19, Am.Sub.H.B. No. 571, Section 1, 143 Ohio Laws, Part IV, at 6437; former R.C. 2967.193, Am.Sub.H.B. No. 571, Section 1, 143 Ohio Laws, Part IV, at 6441. At no time during the long history of indefinite sentencing before S.B. 2 became effective did this court find that indefinite sentencing or the parole board's involvement in indefinite sentencing violated either the state or the federal Constitution. *See, e.g.*, *State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 644-652, 4 N.E. 81 (1885); *see also, e.g.*, *State v. Witwer*, 64 Ohio St.3d 421, 428-429, 596 N.E.2d 451 (1992); *State v. Summers*, 5th Dist. Stark No. 94-CA-0243, 1995 Ohio App. LEXIS 5986, *14 (Oct. 23, 1995); *State v. Perkins*, 93 Ohio App.3d 672, 685-686, 639 N.E.2d 833 (8th Dist.1994).

{¶ 57} Thus, while the RTL shares certain features with the former "bad time" statute that we concluded in *Bray* violated the separation-of-powers doctrine, the RTL lacks the critical feature of delegating the judicial guilt-finding and sentencing functions to the parole board. Unlike the former "bad time" statute, under which time could be added to an offender's sentence, under the RTL, the offender's sentence *is* the sentence. What the RTL allows is for a department of the executive branch of the government to decide when, within the range of the indefinite sentence, an offender has been rehabilitated enough (as reflected by the offender's conduct and security level) to merit release. While it is theoretically questionable whether a parole board should have this power or whether indefinite sentencing is an appropriate division of power between the judicial and the executive branches of the

government, indefinite sentencing has a long history in Ohio and the United States, and it has not been invalidated as a violation of the separation-of-powers doctrine. Nothing about the RTL justifies a different result here.

E. The Reagan Tokes Law Violates Procedural Due Process

{¶ 58} Both the Ohio and United States Constitutions guarantee procedural due process. Ohio Constitution, Article I, Section 16; Fourteenth Amendment to the U.S. Constitution, Section 1.

> While the Ohio Constitution is a document of independent force, *Arnold v. Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993), paragraph one of the syllabus, the Due Course of Law Clause of Article I, Section 16 of the Ohio Constitution is more often than not considered the functional equivalent of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 15. *But see Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, ¶ 34 (lead opinion) (noting that this court departed from the general rule in *State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d1156, ¶ 23-24).

State v. Ireland, 155 Ohio St.3d 287, 2018-Ohio-4494, 121 N.E.3d 285, ¶ 37 (lead opinion). It is therefore reasonable to rely on federal caselaw to establish a floor for what is fair, even while acknowledging that the Ohio Constitution may well require an elevated floor of due-process protection in some cases.

{¶ 59} Due process can seem an imprecise concept at times, but it "requires, at a minimum, an opportunity to be heard when the state seeks to infringe a protected liberty or property right," and that "opportunity to be heard must occur at a meaningful time and in a meaningful manner." *State v. Cowan*, 103 Ohio St.3d 144, 2004-Ohio-4777, 814 N.E.2d 846, ¶ 8, citing *Boddie v. Connecticut*, 401 U.S. 371, 377,

91 S.Ct. 780, 28 L.Ed.2d 113 (1971), *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), and *Hochhausler*, 76 Ohio St.3d at 459, 668 N.E.2d 457. "[F]reedom 'from bodily restraint,' lies 'at the core of the liberty protected by the Due Process Clause.' " *Turner v. Rogers*, 564 U.S. 431, 445, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011), quoting *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). The state has argued that the RTL sentencing scheme is like release on parole under Ohio's former indefinite- sentencing scheme and that no liberty interest is therefore implicated. It is true that "[t]here is a crucial distinction between being deprived of a liberty one has, as in [revocation of] parole, and being denied a conditional liberty that one desires," as in "discretionary parole release from confinement" or parole eligibility. (Emphasis deleted.) *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 9, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). However, the United States Supreme Court has made clear that drawing that distinction must be done with caution, for freedom from restraint is a protectable interest for prisoners insofar as it may be violated by infringements that impose atypical and significant hardship or that affect the duration of the prisoner's sentence. *See Sandin v. Conner*, 515 U.S. 472, 484, 487, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), fn. 11. Moreover, the RTL provides that "there shall be a presumption that the person shall be released from service of the sentence on the expiration of the offender's minimum prison term or on the offender's presumptive earned early release date, whichever is earlier." R.C. 2967.271(B). Thus, the RTL is different from the former Ohio parole system as the state has prescribed, under which no presumption

or expectation of liberty had to be overcome. Here, to the extent that the state would overcome such a presumption and alter the duration of an offender's sentence to deprive the offender of physical freedom, I agree with the majority that due process must be required— and a significant degree of procedural due process at that. *See* majority opinion, ¶ 35-38.

{¶ 60} In evaluating procedural-due-process claims, both this court and the United States Supreme Court have generally applied the *Mathews* balancing test. *See Liming v. Damos*, 133 Ohio St.3d 509, 2012-Ohio-4783, 979 N.E.2d 297, ¶ 28; *Mathews*, 424 U.S. at 335, 96 S.Ct. 893, 47 L.Ed.2d 18. "Under the *Mathews* balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake." *Nelson v. Colorado*, 581 U.S. 128, 135, 137 S.Ct. 1249, 197 L.Ed.2d 611 (2017).

{¶ 61} Freedom from imprisonment is perhaps the most basic and essential private interest and lies at the core of the liberty protected by the Due Process Clause. *Turner* at 445. Counterbalancing that, however, the government's interest in protecting society from the depredations of criminals who are not yet rehabilitated is self-evident and strong. With those considerations arguably balanced, the due-process issue in these cases collapses into a single question: Under the procedures established by the RTL, is there a risk of erroneously overcoming the presumption of release and unjustifiably depriving an offender of his or her liberty beyond the presumptive release date?

{¶ 62} Under the RTL, an offender is presumed to be released upon the expiration of his or her minimum term. R.C. 2967.271(B). Yet the ODRC may rebut that presumption and continue the offender's incarceration for "a reasonable period determined by the department * * * not [to] exceed the offender's maximum prison term" if any of three findings are made. R.C. 2967.271(D)(1). The first possibility is a multipart finding that "the offender committed institutional rule infractions that" compromised the security of the institution, either compromised or threatened the safety of staff or inmates, or "committed a violation of law that was not prosecuted, and the infractions or violations demonstrate that the offender has not been rehabilitated," R.C. 2967.271(C)(1)(a), *and* "[t]he offender's behavior while incarcerated, including, but not limited to the infractions and violations specified [in R.C. 2967.271(C)(1)(a)] demonstrate that the offender continues to pose a threat to society," R.C. 2967.271(C)(1)(b). The second possibility is that "the offender has been placed by the department in extended restrictive housing at any time within the year preceding the date of the hearing." R.C. 2967.271(C)(2). And the third possibility is that "[a]t the time of the hearing, the offender is classified by the department as a security level three, four, or five, or at a higher security level." R.C. 2967.271(C)(3). The ODRC is required to hold a hearing at which it may attempt to rebut the presumption based on such findings, R.C. 2967.271(C), (D), and to give notice of the hearing to victims and certain court personnel (though not to the inmate), R.C.

2967.271(E), 2967.12, and Chapter 2930. The RTL does not specify the contents of (or the standards to be applied at) this hearing.[8]

{¶ 63} Considering for the moment only the hearing at which the ODRC may attempt to rebut the presumption, it is particularly troubling, from the standpoint of avoiding fact-finder bias, that the entity that will seek to rebut the presumption of release is the same entity that will decide whether the presumption has, in fact, been rebutted. *See* R.C. 2967.271(C). Moreover, once the ODRC has judged its own submission and found the presumption to be rebutted, it has the discretion to decide whether it "*may* maintain the offender's incarceration" for "an additional period" that "shall be * * * *reasonable*" but "shall not exceed the offender's maximum prison term." (Emphasis added.) R.C. 2967.271(D)(1). There is no statutory guidance whatsoever about what types of circumstances prompt the exercise of this discretion or what constitutes a "reasonable" "additional period" of incarceration. And while there are provisions requiring notice to offenders regarding administrative procedures for determining classifications and rules infractions, *see* Ohio Adm.Code 5120-9-53(B) and 5120-9-08(C), there is no provision requiring that offenders receive notice of a hearing pursuant to R.C. 2967.271. *See* R.C. 2967.271(E); *see also* R.C. 2967.12 (notice to law enforcement and victims); R.C. 2930.01 et seq. (victims' rights).

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[8] The state's briefs include copies of procedures adopted by the ODRC for rules-infraction-board hearings and hearings pursuant to the RTL. However, referring to extrinsic facts and changeable procedures that exceed the statutory language and do not have the force of law is not appropriate in resolving a facial constitutional challenge. *Wymsylo*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, at ¶ 21.

Finally, while R.C. 2967.271 indisputably requires a hearing, there is no provision requiring (or even permitting) the offender's presence at the hearing. These are obvious and significant defects.

{¶ 64} Moreover, the three possibilities for rebutting an offender's presumptive release date (demonstration of a lack of rehabilitation and continued threat to society, placement in extended restrictive housing, or high security level) are matters determined under other, separate hearing processes. I proceed to determine whether those processes at all compensate for the absence of due-process provisions in R.C. 2967.271.

{¶ 65} First, an inmate's security level is initially determined by reception-center institutions that collect information for the Bureau of Classification. Ohio Adm.Code 5120-9-52. Classification is accomplished by considering the following:

> (1) Nature or seriousness of the offense for which the inmate was committed;
>
> (2) Length of sentence for which the inmate was committed;
>
> (3) Medical and mental health status;
>
> (4) Previous experience while on parole, furlough, probation, post release control, administrative release or while under any other form of correctional supervision[;]
>
> (5) Nature of prior criminal conduct as shown by the official record;
>
> (6) Age of inmate;
>
> (7) Potential for escape;
>
> (8) Potential of danger to the inmate, other inmates, staff, or the community through the inmate's actions or actions of others;

> (9) Availability of housing, work, and programming at the various institutions;
>
> (10) The physical facilities of an institution; [and]
>
> (11) Any other relevant information contained in the reports.

Ohio Adm.Code 5120-9-52(C). That classification is thereafter reviewed and revised periodically by a classification committee at the institution. Ohio Adm.Code 5120-9-53. The inmate receives 48 hours' notice of such review, during which he or she may submit a written statement and may meet with at least one member of the committee. Ohio Adm.Code 5120-9-53(B). The inmate may appeal the committee's recommendation to the warden and may appeal the warden's decision to the bureau. Ohio Adm.Code 5120-9-53(D).

{¶ 66} Second, regarding restrictive housing and rule infractions, Ohio Adm.Code 5120-9-06 sets forth some 61 rules of inmate conduct that forbid a range of behavior, from homicide, hostage-taking, escape, assault, etc., to mundane and vaguely defined behavior such as "[b]eing out of place," showing "[d]isrespect to an officer, staff member, visitor[,] or other inmate," or even "[a]ny violation of any published institutional rules, regulations or procedures." Ohio Adm.Code 5120-9-06(C); *see also, e.g.*, Ohio Adm.Code 5120-9-25(F) (requiring inmates' sideburns, beards, and moustaches to be clean and neatly trimmed). An inmate may be "found guilty" of a violation of these rules based on "some evidence of the commission of an act and the intent to commit the act." Ohio Adm.Code 5120-9-06(D).

{¶ 67} Hearings on rule violations are held before the rules-infraction board ("RIB"), which consists of two ODRC staff members who have "completed RIB training" and who did not witness or investigate the alleged violation. Ohio Adm.Code 5120-9-08(B). Hearings are generally required to be held within seven business days of issuance of a conduct report, and an inmate receives 24 hours' notice of the hearing. Ohio Adm.Code 5120-9-08(C). Inmates are allowed to make a statement in their defense and may request witnesses, Ohio Adm.Code 5120-9-08(E)(2)(d), but that request may be denied if the witness-request form has not been completed or for reasons of relevancy, redundancy, unavailability, or security, Ohio Adm.Code 5120-9-08(E)(3). The inmate may require the presence of the charging official. Ohio Adm.Code 5120-9-08(F)(5). Witnesses are apparently not sworn but may be subject to discipline for presentation of false testimony. *See* Ohio Adm.Code 5120-9-08(F)(1). The inmate may not address or examine witnesses but may ask the chair of the board to do so. Ohio Adm.Code 5120-9-08(F)(2). In the discretion of the board, the inmate charged may be excluded from the hearing during a witness's examination if there is a risk of disturbance or of harm to the witness. Ohio Adm.Code 5120-9-08(F)(4). The board may take testimony or evidence in person, by telephone, or by "any [other] form or manner it deems appropriate." Ohio Adm.Code 5120-9-08(F)(6). In the event that information from a confidential source is used, the inmate is prevented from being present while the board considers and evaluates that information. Ohio Adm.Code 5120-9-08(G). An inmate may be found guilty of a rule violation only if the two staff members who are presiding over the hearing agree; if

they do not agree, a tie-breaking vote must be cast by a designee of the managing officer after reviewing the record of the hearing. Ohio Adm.Code 5120-9-08(K).

{¶ 68} Finally, one possible outcome of a rule violation is the inmate's placement in restrictive housing. Ohio Adm.Code 5120-9-08(L)(1). An inmate may also be placed in restrictive housing pending an investigation or a hearing on an incident. Ohio Adm.Code 5120-9-10(B) and 5120-9-11. The inmate may appeal a decision of an RIB panel to the managing officer, Ohio Adm.Code 5120-9-08(O), and may further appeal to the chief legal counsel, Ohio Adm.Code 5120-9-08(P).

{¶ 69} These procedures, designed to process rules infractions and set security classifications within the ODRC, are likely sufficient for those purposes when the state's interest in institutional security is great and the inmate's interest in institutional privileges is comparatively less. But the RTL uses the outcomes of these procedures for a far more constitutionally significant purpose—whether to release an inmate on his or her presumptive release date. Thus, we must ask: Under these procedures, is there a risk of using this data to wrongly overcome the presumption of release and deprive an inmate of his or her liberty?

{¶ 70} While any human endeavor is fallible and has *some* risk of error, certain safeguards have been judicially shown to produce reliable results for a fair process before deprivation of certain basic rights—among which is liberty of person, including freedom from unlawful restraint. Important among these constitutional safeguards are notice, a meaningful hearing, the right to counsel, and the opportunity to confront and cross-examine adverse witnesses. *United States v. Gonzalez-Lopez*,

548 U.S. 140, 145-46, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); *Crawford v. Washington*, 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 141 Ohio St.3d 113, 2014-Ohio-4364, 22 N.E.3d 1040, ¶ 34 ("the essence of due process is notice and a *meaningful* opportunity to be heard" [emphasis sic]), citing *State v. Mateo*, 57 Ohio St.3d 50, 52, 565 N.E.2d 590 (1991). As the United States Supreme Court has carefully observed:

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *E.g.*, *ICC v. Louisville & N.R. Co.*, 227 U.S. 88, 93-94, 33 S.Ct. 185, 187-188, 57 L.Ed. 431 (1913); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-104, 83 S.Ct. 1175, 1180-1181, 10 L.Ed.2d 224 (1963). What we said in *Greene v. McElroy*, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959), is particularly pertinent here: "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment * * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny."

(Ellipses sic.) *Goldberg v. Kelly*, 397 U.S. 254, 269-70, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). In fact, in the somewhat analogous context of a parole revocation, the United

States Supreme Court has declared "the minimum requirements of due process" as "includ[ing]":

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

{¶ 71} Yet, in both of the RTL's statutory procedures as well as the other, administrative procedures on which the RTL relies, notice is minimal (measured in hours) or nonexistent, the rights to counsel and to confront witnesses are entirely absent, and the decision-making factfinder and the prosecutor are one and the same (i.e., the ODRC). These shortcomings and shortcuts are perhaps permissible when the controversy at issue is merely the question of security level or restrictive housing—i.e., when the offender's interest is a relatively minor matter of different institutional privileges and the state's countervailing interest in maintaining institutional security is great. But the absence of these procedural safeguards of fairness is far more significant when the interest at issue is the choice between incarceration and freedom. The RTL, as presently constituted, facially violates offenders' rights to procedural due process because it provides insufficient procedural guarantees to reduce the risk of an erroneous result, given the gravity of the interests affected. *Nelson*, 581 U.S. at 135, 137 S.Ct. 1249, 197 L.Ed.2d 611 ("Under the

Mathews balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake").

F. Severability

{¶ 72} The Revised Code instructs:

> If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.

R.C. 1.50. We have previously explained how we weigh the propriety of severance:

> Three questions are to be answered before severance is appropriate. " '(1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?' "

Foster, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶ 95, *abrogated in part by Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, quoting *Geiger v. Geiger*, 117 Ohio St. 451, 466, 160 N.E. 28 (1927), quoting *State v. Bickford*, 28 N.D. 36, 147 N.W. 407 (1913), paragraph 19 of the syllabus.

{¶ 73} Simmons takes the position that if any part of the RTL is unconstitutional, there is cause to invalidate the entire act; Hacker does not address this issue. The state argues that if portions of the RTL offend the Constitution, they may be severed.

{¶ 74} Neither Hacker nor Simmons has challenged the constitutionality of the indefinite-sentencing structure set forth in R.C. 2929.14(A)(1) and (2), the method for calculating the maximum sentence set forth in R.C. 2929.144, the notification provisions in R.C. 2929.19(B)(2)(c), the definitions set forth in R.C. 2967.271(A), or the establishment of a presumptive minimum sentence as provided by R.C. 2967.271(B). Hacker does challenge the constitutionality of the provisions in R.C. 2967.271(F) permitting a trial court to make a reduction in the minimum sentence based on an offender's good behavior and the recommendation of the ODRC. However, as mentioned above and found by the majority, it is not clear that Hacker (or any offender) would have standing to challenge those provisions, as there appears to be no injury or detriment to offenders because of the provisions, and, in fact, they benefit offenders. *See* majority opinion at ¶ 24 *Bates*, 167 Ohio St.3d 197, 2022-Ohio-475, 190 N.E.3d 610, at ¶ 20-22; *Ohio Pyro*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, at ¶ 27; *see also supra* at ¶ 52. In short, all that has been challenged and all that the due-process analysis directly affects is the executive action involved in retaining an offender beyond a presumptive release date. R.C. 2967.271(C) and (D) are therefore the only parts of the RTL that are unconstitutional as a due-process violation. Yet, it is also necessary to invalidate R.C. 2967.271(E) and 2929.19(B)(2)(c)(ii), (iii), and (iv), as those provisions require notice of the substance of R.C. 2967.271(C) and (D) and cannot stand on their own. *See Foster* at ¶ 95.

{¶ 75} Clearly, the indefinite-sentencing provisions and the presumption of release at the expiration of the offender's minimum sentence each " ' "may be read and

may stand by" ' " themselves, *id.*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶ 95, quoting *Geiger*, 117 Ohio St. at 466, 160 N.E. 28, quoting *Bickford*, 28 N.D. 36, 147 N.W. 407, at paragraph 19 of the syllabus. It is not necessary to insert words or terms to separate the constitutional part of a statute from the unconstitutional parts and to give effect to the former only. *Id.* Nothing about invalidating the language in R.C. 2967.271(C), (D), and (E) and 2929.19(B)(2)(c)(ii), (iii), and (iv) would prevent a trial court from imposing an indefinite sentence when the minimum sentence is the presumed release date. However, without R.C. 2967.271(C), (D), and (E) and 2929.19(B)(2)(c)(ii), (iii), and (iv), there would be no mechanism for enforcing any sentence beyond the presumptive minimum and the maximum sentence would become merely symbolic. Accordingly, " ' "the unconstitutional part [is] so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out." ' " *Foster* at ¶ 95, quoting *Geiger* at 466, quoting *Bickford* at paragraph 19 of the syllabus.

{¶ 76} The state suggests curing this problem by also striking the presumption of a minimum sentence. But neither Hacker nor Simmons has challenged that provision, and more importantly, there is nothing apparently unconstitutional about designating the minimum sentence as the presumptive release date. We may not arbitrarily strike a provision to make a statutory scheme work in the context of other stricken parts that violate offenders' rights to procedural due process. The state alternatively suggests that this problem could be cured by permitting standard parole

procedures to operate in the context of indefinite sentencing. However, there is nothing in the RTL that permits this. Creating a requirement such as this just to try to "fix" the now patchwork statutory scheme, even if well intentioned, would be a textbook example of judicial fiat.

{¶ 77} Because of the basic due-process infirmity in the RTL, there remains no mechanism to enforce the maximum sentence and the intention of the legislature is largely thwarted. The balance struck between flexibility on the maximum and flexibility on the minimum—as provided in R.C. 2967.271(F)—is destroyed by the unenforceability of those parts of the RTL that are unconstitutional. Consequently, invalidating the entire RTL structure is the only legally justifiable course.

III. CONCLUSION

{¶ 78} The RTL is akin to Ohio's former indefinite-sentencing scheme and consequently does not violate the separation-of-powers doctrine. Hacker and Simmons lack standing to challenge the discretion granted to the APA to recommend their release before they have served their presumptive minimum sentences because they are not aggrieved by the RTL as to these circumstances. The RTL also does not violate the right to a jury trial, because nothing about the law permits a fact-finder other than a jury to find facts that increase the defendant's sentencing-range exposure.

{¶ 79} However, the RTL does facially violate offenders' rights to procedural due process. The procedures created by the RTL are insufficient in relation to the gravity of the decision being undertaken—determining whether to release an

offender on his or her presumptive release date, affecting the offender's personal liberty. For this reason, the RTL facially violates offenders' rights to procedural due process, requiring severance of certain provisions, without which the remaining language collapses in its operation, leaving part of the RTL meaningless and without a mechanism to implement it. Therefore, the RTL is wholly unconstitutional. Accordingly, I respectfully dissent and would reverse the judgments of the Third and Eighth District Courts of Appeals upholding and applying the RTL as currently written.

DONNELLY, J., concurs in the foregoing opinion.

Dave Yost, Attorney General, Benjamin M. Flowers, Solicitor General, Michael J. Hendershot, Chief Deputy Solicitor General, and Samuel C. Peterson, Deputy Solicitor General; and Eric C. Stewart, Logan County Prosecuting Attorney, for appellee in case No. 2020-1496.

Triplett McFall Wolfe Law, L.L.C., Tina M. McFall, and Marc S. Triplett, for appellant in case No. 2020-1496.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Daniel T. Van and Tasha L. Forchione, Assistant Prosecuting Attorneys, for appellee in case No. 2021-0532.

Cullen Sweeney, Cuyahoga County Public Defender, and John T. Martin, Assistant Public Defender, for appellant in case No. 2021-0532.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Daniel T. Van, Assistant Prosecuting Attorney, urging affirmance for amicus curiae Cuyahoga County Prosecutor's Office in case No. 2020-1496.

Steven L. Taylor, Legal Research and Staff Counsel, urging affirmance for amicus curiae Ohio Prosecuting Attorneys Association in case Nos. 2020-1496 and 2021-0532.

Timothy Young, Ohio Public Defender, Stephen P. Hardwick, Assistant Public Defender, and Daniel S. Marcus, Supervising Attorney, urging reversal for amicus curiae The Ohio Public Defender in case No. 2020-1496.

Mayle, L.L.C., Andrew R. Mayle, Benjamin G. Padanilam, and Ronald J. Mayle, urging reversal for amicus curiae Edward Maddox in case No. 2020-1496.

Dave Yost, Attorney General, Benjamin M. Flowers, Solicitor General, Michael J. Hendershot, Chief Deputy Solicitor General, and Samuel C. Peterson, Deputy Solicitor General, urging affirmance for amicus curiae Ohio Attorney General Dave Yost in case No. 2021-0532.

APPENDIX C

COURT OF APPEALS OF OHIO
EIGHTH APPELATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO

Plaintiff-Appellee **No. 111162**

v.

TYSHAWN SHEPARD

Defendant-Appellant

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED

RELEASED AND JOURNALIZED: August 11, 2022

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Fallon Kilbane McNally, Assistant Prosecuting Attorney, *for appellee*.

Cullen Sweeney, Cuyahoga County Public Defender, and Robert B. McCaleb, Assistant Public Defender, *for appellant*.

EILEEN T. GALLAGHER, J.:

{¶ 1} In this consolidated appeal, defendant-appellant, Tyshawn Shepard ("Shepard"), appeals from his sentence. He raises the following assignment of error for review:

> The trial court erred when it found S.B. 201 to be constitutional and imposed an indefinite sentence pursuant to S.B. 201.

{¶ 2} After careful review of the record and relevant case law, we affirm Shepard's sentence.

I. Factual and Procedural History

{¶ 3} In Cuyahoga C.P. No. CR-20-653555-A, Shepard pleaded guilty to drug possession in violation of R.C. 2925.11(A), a felony of the second degree. Over defense counsel's objection, Shepard was sentenced to an indefinite prison term of eight to twelve years under the Reagan Tokes Law.

{¶ 4} In Cuyahoga C.P. No. CR-20-654029-A, Shepard pleaded guilty to assault in violation of R.C. 2903.13(A), a felony of the fifth degree. Shepard was sentenced to a six-month term of imprisonment.

{¶ 5} In Cuyahoga C.P. No. CR-20-654033-A, Shepard pleaded guilty to burglary in violation of R.C. 2911.12(A)3), a felony of the third degree; and theft in violation of R.C. 2913.02(A)(1), a felony of the fifth degree. Shepard was sentenced to a 30-month term of imprisonment on the burglary offense, to run concurrently with a six-month term of imprisonment on the theft offense.

{¶ 6} In Cuyahoga C.P. No. CR-20-654172-A, Shepard pleaded guilty to burglary in violation of R.C. 2911.12B), a felony of the fourth degree; burglary in violation of R.C. 2911.12B), a felony ofthe fourth degree; attempted having weapons while under disability in violation of R.C. 2923.02 and 2923.13(A)(2), a felony of the fourth degree; misuse of credit cards in violation of R.C. 2913.216B)2), a felony of the fifth degree; and resisting arrest in violation of R.C. 2921.33(A), a misdemeanor of the second degree. Shepard was sentenced a 12-month term of imprisonment on each burglary offense, a 12-month term of imprisonment on the attempted having weapons while under disability offense, a six-month term of imprisonment on the misuse of credit cards offense, and a 9o-day term of imprisonment on the resisting arrest offense. Each sentence imposed in Case No. CR-20-654172-A was ordered to run concurrently, for a total prison term of 12 months.

{¶ 7} The aggregate sentences imposed in Case Nos. CR-20-653555-A, CR-20-654029-A, CR-20-654033-A, and CR-20-654172-A were ordered to run concurrently with each other.

{¶ 8} Shepard now appeals from the trial court's sentence.

II. Law and Analysis

{¶ 9} In his sole assignment of error, Shepard argues the trial court erred in sentencing him under the Reagan Tokes Law, which became effective March 22, 2019. He contends the Reagan Tokes Law is unconstitutional because it violates the constitutional right to trial by a jury, separation-of-powers doctrine, and due process.

{¶ 10} As acknowledged by Shepard on appeal, the question of whether the Reagan Tokes Law is constitutional was decided in this court's en bane opinion in *State v. Delvallie,* 2022-Ohio-470, 185 N.E.3d 536 (8th Dist.). There, this court found "that the Reagan Tokes Law, as defined under R.C. 2901.011, is not unconstitutional," and reaffirmed the principles established in *State v. Gamble,* 2021-Ohio-1810, 173 N.E.3d 132 (8th Dist.); *State v. Simmons,* 2021-Ohio0-939, 169 N.E.3d 728 (8th Dist.); and *State v. Wilburn,* 2021-Ohio-578, 168 N.E.3d 873 (8th Dist.). See *Delvallie* at ¶ 17. Because Shepard does not advance any novel argument left unaddressed by the *Delvallie* decision, we find the constitutional challenges presented in this appeal are overruled.[1]

{¶ 11} Shepard's sole assignment of error is overruled.

{¶ 12} Judgement affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending is terminated. Case remanded to the trial court for execution of sentence.

---

[1] Neither party has raised any issues as to the imposed sentence and, therefore, any determination as to the validity of the sentence is beyond the scope of this direct appeal. *State v. Harper,* 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248, ¶ 26; *State v. Henderson,* 161 Ohio St.3d 285, 2020-Ohio0-4784, 162 N.E.3d 776, ¶ 27.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

/s/Eileen T. Gallagher

EILEEN T. GALLAGHER, JUDGE

LISA B. FORBES, P.J., and EMANUELLA D. GROVES, J., CONCUR

FILED AND JOURNALIZED PER APP.R.22(C)

AUG 11 2022

CUYAHOGA COUNTY CLERK OF THE COURT OF APPEALS

By */s/ Greg Hercik* DEPUTY

N.B. Judge Eileen T. Gallagher joined the dissent by Judge Lisa B. Forbes in *Delvallie* and would have found that R.C. 2967.271(C) and (D) of the Reagan Tokes Law are unconstitutional.

Judge Lisa B. Forbes is constrained to apply *Delvallie*. For a full explanation, see *State v. Delvallie*, 2022-Ohio-47O, 185 N.E.3d 536 (8th Dist.) (Forbes, J., dissenting).

Judge Emanuella D. Groves concurred with the opinions of Judge Lisa B. Forbes (dissenting) and Judge Anita Laster Mays (concurring in part and dissenting in part) in *Delvallie* and would have found the Reagan Tokes Law unconstitutional.

APPENDIX D

IN THE COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO	Case No: CR-20-653555-A
Plaintiff	Judge: MICHAEL J RUSSO
TYSHAWN SHEPARD	INDICT:
Defendant	2913.51 RSP-MV
	2913.51 RECEIVING STOLEN PROPERTY
	2925.03 TRAFFICKING OFFENSE
	ADDITIONAL COUNTS…
	JOURNAL ENTRY

*** THIS IS AN INDEFINITE SENTENCE UNDER THE REAGAN TOKES ACT S.B. 201/R.C. 2929.144***

DEFENDANT IN COURT. COUNSEL KEVIN M SPELLACY PRESENT. COURT REPORTER MARGUERITE PHILLIPS PRESENT.

ON A FORMER DAY OF COURT THE DEFENDANT PLEADED GUILTY TO DRUG POSSESSION 2925.11 A F2 AS AMENDED IN COUNT(S) 4 OF THE INDICTMENT DRUG POSSESSION IN AN AMOUNT EQUAL TO OR GREATER THAN 10 GRAMS BUT LESS THAN 20 GRAMS.

COUNT(S) 1, 2, 3 WAS/WERE DISMISSED.

DEFENDANT ADDRESSES THE COURT, PROSECUTOR FALLON MCNALLY ADDRESSES THE COURT, OTHERS ADDRESS THE COURT

THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.

THE COURT IMPOSES A PRISON SENTENCE AT OF 8 YEAR(S).

DEFENDANT SENTENCED TO A MANDATORY SENTENCE OF A MINIMUM OF 8 YEARS AND A MAXIMUM OF 12 YEARS ON COUNT 4, FOR A STATED PRISON TERM OF 8 YEARS MINIMUM AND 12 YEARS MAXIMUM IMPRISONMENT.

THIS SENTENCE IS TO BE SERVED CONCURRENTLY WITH THE SENTENCES IMPOSED IN CASES CR-654172, 654033, AND 654029. THE COURT RECOMMENDS THAT DEFENDANT BE PLACED IN A FACILITY OTHER THAN LCI DUE TO SECURITY CONCERNS.

THE COURT HAS NOTIFIED THE DEFENDANT THAT PURSUANT TO R.C. 2929.19(B)(2)(C), IT IS REBUTTABLY PRESUMED THAT THE DEFENDANT WILL BE RELEASED FROM SERVICE OF THE SENTENCE ON THE EXPIRATION OF THE AGGREGATE MINIMUM PRISON TERM IMPOSED (AND

AFTER THE SERVICE OF THE SPECIFICATION) OR PRESUMPTIVE EARLY RELEASE DATE, WHICHEVER IS EARLIER; THAT THE DEPARTMENT OF REHABILITATION AND CORRECTION MAY REBUT THE PRESUMPTION IF IT MAKES SPECIFIED DETERMINATIONS AT A HEARING REGARDING OFFENDER'S CONDUCTWHILE CONFINED, THREAT TO SOCIETY, RESTRICTIVE HOUSING AND/OR SECURITY CLASSIFICATION WHILE CONFINED PURSUANT TO R.C. 2967.271; MAY THEN MAINTAIN THE DEFENDANT'S INCARCERATION AFTER THE EXPIRATION OF THE AGGREGATE MINIMUM PRISON TERM FOR A REASONABLE TIME; AND MAY MAKE SUCH DETERMINATIONS MORE THAN ONE TIME UP TO THE AGGREGATE MAXIMUM PRISON TERM. THE TRIAL COURT CAN CONDUCT A HEARING AND FIND THE EARLY RELEASE DATE IS REBUTTED PURSUANT TO 2967.271(F)(1).

AS A RESULT OF THE CONVICTION(S) IN THIS CASE AND THE IMPOSITION OF A PRISON SENTENCE, AND PURSUANT TO R.C. 2967.28(F)(4)(C), THE DEFENDANT WILL/MAY BE SUBJECT TO A PERIOD OF POST-RELEASE CONTROL OF: A MANDATORY MINIMUM 18 MONTHS, UP TO A MAXIMUM OF 3 YEARS.

THE ADULT PAROLE AUTHORITY WILL ADMINISTER THE POST-RELEASE CONTROL PURSUANT TO R.C.2967.28, AND THE DEFENDANT HAS BEEN ADVISED THAT IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL, THE PAROLE BOARD MAY IMPOSE A PRISON TERM AS PART OF

THE SENTENCE OF UP TO HALF OF THE STATED PRISON TERM OR STATED MINIMUM TERM ORIGINALLY IMPOSED UPON THE DEFENDANT IN NINE-MONTH INCREMENTS. IF WHILE ON POST-RELEASE CONTROL THE DEFENDANT IS CONVICTED OF A NEW FELONY, THE SENTENCING COURT WILL HAVE AUTHORITY TO TERMINATE THE POST-RELEASE CONTROL AND ORDER A CONSECUTIVE PRISON TERM OF UP TO THE GREATER OF TWELVE MONTHS OR THE REMAINING PERIOD OF POST-RELEASE CONTROL.

DEFENDANT TO RECEIVE JAIL TIME CREDIT FOR 377 DAY(S), TO DATE.

COSTS WAIVED

FINE(S) WAIVED.

COURT FINDS THAT THE DEFENDANT IS INDIGENT AND WAIVES THE MANDATORY FINE.

DEFENDANT ADVISED OF APPEAL RIGHTS.

DEFENDANT INDIGENT, COURT APPOINTS PUBLIC DEFENDER AS APPELLATE COUNSEL.

TRANSCRIPT AT STATE'S EXPENSE.

ALL MOTIONS NOT SPECIFICALLY RULED ON PRIOR TO THE FILING OF THIS JUDGMENT ENTRY ARE DENIED AS MOOT.

THE COURT ELECTS TO NOT SUSPEND DEFENDANT'S DRIVING PRIVILEGES.

DEFENDANT REMANDED.

SHERIFF ORDERED TO TRANSPORT DEFENDANT TYSHAWN SHEPARD, DOB: 01/15/1992, GENDER: MALE, RACE: BLACK.

11/30/2021

CPMR2 11/30/2021 16:50:33

/s/ Michael J. Russo

Judge Signature 11/30/2021

APPENDIX E

Ohio Revised Code Section 2929.14

Definite Prison Terms

(A) Except as provided in division (B)(1), (B)(2), (B)(3), (B)(4), (B)(5), (B)(6), (B)(7), (B)(8), (B)(9), (B)(10), (B)(11), (E), (G), (H), (J), or (K) of this section or in division (D)(6) of section 2919.25 of the Revised Code and except in relation to an offense for which a sentence of death or life imprisonment is to be imposed, if the court imposing a sentence upon an offender for a felony elects or is required to impose a prison term on the offender pursuant to this chapter, the court shall impose a prison term that shall be one of the following:

(1)

(a) For a felony of the first degree committed on or after March 22, 2019, the prison term shall be an indefinite prison term with a stated minimum term selected by the court of three, four, five, six, seven, eight, nine, ten, or eleven years and a maximum term that is determined pursuant to section 2929.144 of the Revised Code, except that if the section that criminalizes the conduct constituting the felony specifies a different minimum term or penalty for the offense, the specific language of that section shall control in determining the minimum term or otherwise sentencing the offender but the minimum term or

sentence imposed under that specific language shall be considered for purposes of the Revised Code as if it had been imposed under this division.

(b) For a felony of the first degree committed prior to March 22, 2019, the prison term shall be a definite prison term of three, four, five, six, seven, eight, nine, ten, or eleven years.

(2)

(a) For a felony of the second degree committed on or after March 22, 2019, the prison term shall be an indefinite prison term with a stated minimum term selected by the court of two, three, four, five, six, seven, or eight years and a maximum term that is determined pursuant to section 2929.144 of the Revised Code, except that if the section that criminalizes the conduct constituting the felony specifies a different minimum term or penalty for the offense, the specific language of that section shall control in determining the minimum term or otherwise sentencing the offender but the minimum term or sentence imposed under that specific language shall be considered for purposes of the Revised Code as if it had been imposed under this division.

(b) For a felony of the second degree committed prior to March 22, 2019, the prison term shall be a definite term of two, three, four, five, six, seven, or eight years.

(3)

(a) For a felony of the third degree that is a violation of section 2903.06, 2903.08, 2907.03, 2907.04, 2907.05, 2907.321, 2907.322, 2907.323, or 3795.04 of the Revised Code, that is a violation of division (A) of section 4511.19 of the Revised Code if the offender previously has been convicted of or pleaded guilty to a violation of division (A) of that section that was a felony, or that is a violation of section 2911.02 or 2911.12 of the Revised Code if the offender previously has been convicted of or pleaded guilty in two or more separate proceedings to two or more violations of section 2911.01, 2911.02, 2911.11, or 2911.12 of the Revised Code, the prison term shall be a definite term of twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months.

(b) For a felony of the third degree that is not an offense for which division (A)(3)(a) of this section applies, the prison term shall be a definite term of nine, twelve, eighteen, twenty-four, thirty, or thirty-six months.

(4) For a felony of the fourth degree, the prison term shall be a definite term of six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.

(5) For a felony of the fifth degree, the prison term shall be a definite term of six, seven, eight, nine, ten, eleven, or twelve months.

(B)

(1)

(a) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.141, 2941.144, or 2941.145 of the Revised Code, the court shall impose on the offender one of the following prison terms:

(i) A prison term of six years if the specification is of the type described in division (A) of section 2941.144 of the Revised Code that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or suppressor on or about the offender's person or under the offender's control while committing the offense;

(ii) A prison term of three years if the specification is of the type described in division (A) of section 2941.145 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense;

(iii) A prison term of one year if the specification is of the type described in division (A) of section 2941.141 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense;

(iv) A prison term of nine years if the specification is of the type described in division (D) of section 2941.144 of the Revised Code that charges the offender with having a firearm that is an automatic firearm or that was equipped with a firearm muffler or suppressor on or about the offender's person or under the offender's control while committing the offense and specifies that the offender previously has been convicted of or pleaded guilty to a specification of the type described in section 2941.141, 2941.144, 2941.145, 2941.146, or 2941.1412 of the Revised Code;

(v) A prison term of fifty-four months if the specification is of the type described in division (D) of section 2941.145 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using the firearm to facilitate the offense and that the offender previously has been convicted of or pleaded guilty to a specification of the type described in section 2941.141, 2941.144, 2941.145, 2941.146, or 2941.1412 of the Revised Code;

(vi) A prison term of eighteen months if the specification is of the type described in division (D) of section 2941.141 of the Revised Code that charges the offender with having a firearm on or about the

offender's person or under the offender's control while committing the offense and that the offender previously has been convicted of or pleaded guilty to a specification of the type described in section 2941.141, 2941.144, 2941.145, 2941.146, or 2941.1412 of the Revised Code.

(b) If a court imposes a prison term on an offender under division (B)(1)(a) of this section, the prison term shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. Except as provided in division (B)(1)(g) of this section, a court shall not impose more than one prison term on an offender under division (B)(1)(a) of this section for felonies committed as part of the same act or transaction.

(c)

(i) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of section 2923.161 of the Revised Code or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in division (A) of section 2941.146 of the Revised Code that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home, the court, after imposing a prison term on the offender for the violation of section 2923.161 of the Revised Code or for

the other felony offense under division (A), (B)(2), or (B)(3) of this section, shall impose an additional prison term of five years upon the offender that shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code.

(ii) Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a violation of section 2923.161 of the Revised Code or to a felony that includes, as an essential element, purposely or knowingly causing or attempting to cause the death of or physical harm to another, also is convicted of or pleads guilty to a specification of the type described in division (C) of section 2941.146 of the Revised Code that charges the offender with committing the offense by discharging a firearm from a motor vehicle other than a manufactured home and that the offender previously has been convicted of or pleaded guilty to a specification of the type described in section 2941.141, 2941.144, 2941.145, 2941.146, or 2941.1412 of the Revised Code, the court, after imposing a prison term on the offender for the violation of section 2923.161 of the Revised Code or for the other felony offense under division (A), (B)(2), or (3) of this section, shall impose an additional prison term of ninety months upon the offender that shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section

2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code.

(iii) A court shall not impose more than one additional prison term on an offender under division (B)(1)(c) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term on an offender under division (B)(1)(c) of this section relative to an offense, the court also shall impose a prison term under division (B)(1)(a) of this section relative to the same offense, provided the criteria specified in that division for imposing an additional prison term are satisfied relative to the offender and the offense.

(d) If an offender who is convicted of or pleads guilty to an offense of violence that is a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.1411 of the Revised Code that charges the offender with wearing or carrying body armor while committing the felony offense of violence, the court shall impose on the offender an additional prison term of two years. The prison term so imposed shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(1)(d) of this section for felonies committed as part of the same act or transaction. If a court imposes an additional prison term under division

(B)(1)(a) or (c) of this section, the court is not precluded from imposing an additional prison term under division (B)(1)(d) of this section.

(e) The court shall not impose any of the prison terms described in division (B)(1)(a) of this section or any of the additional prison terms described in division (B)(1)(c) of this section upon an offender for a violation of section 2923.12 or 2923.123 of the Revised Code. The court shall not impose any of the prison terms described in division (B)(1)(a) or (b) of this section upon an offender for a violation of section 2923.122 that involves a deadly weapon that is a firearm other than a dangerous ordnance, section 2923.16, or section 2923.121 of the Revised Code. The court shall not impose any of the prison terms described in division (B)(1)(a) of this section or any of the additional prison terms described in division (B)(1)(c) of this section upon an offender for a violation of section 2923.13 of the Revised Code unless all of the following apply:

(i) The offender previously has been convicted of aggravated murder, murder, or any felony of the first or second degree.

(ii) Less than five years have passed since the offender was released from prison or post-release control, whichever is later, for the prior offense.

(f)

(i) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in division (A) of section 2941.1412 of the Revised Code that charges the offender with committing the offense by discharging a firearm at a peace officer as defined in section 2935.01 of the Revised Code or a corrections officer, as defined in section 2941.1412 of the Revised Code, the court, after imposing a prison term on the offender for the felony offense under division (A), (B)(2), or (B)(3) of this section, shall impose an additional prison term of seven years upon the offender that shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code.

(ii) If an offender is convicted of or pleads guilty to a felony that includes, as an essential element, causing or attempting to cause the death of or physical harm to another and also is convicted of or pleads guilty to a specification of the type described in division (B) of section 2941.1412 of the Revised Code that charges the offender with committing the offense by discharging a firearm at a peace officer, as defined in section 2935.01 of the Revised Code, or a corrections officer, as defined in section 2941.1412 of the Revised Code, and that the

offender previously has been convicted of or pleaded guilty to a specification of the type described in section 2941.141, 2941.144, 2941.145, 2941.146, or 2941.1412 of the Revised Code, the court, after imposing a prison term on the offender for the felony offense under division (A), (B)(2), or (3) of this section, shall impose an additional prison term of one hundred twenty-six months upon the offender that shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or 5120. of the Revised Code.

(iii) If an offender is convicted of or pleads guilty to two or more felonies that include, as an essential element, causing or attempting to cause the death or physical harm to another and also is convicted of or pleads guilty to a specification of the type described under division (B)(1)(f) of this section in connection with two or more of the felonies of which the offender is convicted or to which the offender pleads guilty, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(f) of this section for each of two of the specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications. If a court imposes an additional prison term on an offender under division (B)(1)(f) of this section relative to an offense, the

court shall not impose a prison term under division (B)(1)(a) or (c) of this section relative to the same offense.

(g) If an offender is convicted of or pleads guilty to two or more felonies, if one or more of those felonies are aggravated murder, murder, attempted aggravated murder, attempted murder, aggravated robbery, felonious assault, or rape, and if the offender is convicted of or pleads guilty to a specification of the type described under division (B)(1)(a) of this section in connection with two or more of the felonies, the sentencing court shall impose on the offender the prison term specified under division (B)(1)(a) of this section for each of the two most serious specifications of which the offender is convicted or to which the offender pleads guilty and, in its discretion, also may impose on the offender the prison term specified under that division for any or all of the remaining specifications.

(2)

(a) If division (B)(2)(b) of this section does not apply, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense or, for offenses for which division (A)(1)(a) or (2)(a) of this section applies, in addition to the longest minimum prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(iii) The court imposes the longest prison term for the offense or the longest minimum prison term for the offense, whichever is applicable, that is not life imprisonment without parole.

(iv) The court finds that the prison terms imposed pursuant to division (B)(2)(a)(iii) of this section and, if applicable, division (B)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism

outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

(v) The court finds that the prison terms imposed pursuant to division (B)(2)(a)(iii) of this section and, if applicable, division (B)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

(b) The court shall impose on an offender the longest prison term authorized or required for the offense or, for offenses for which division (A)(1)(a) or (2)(a) of this section applies, the longest minimum prison term authorized or required for the offense, and shall impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 of the Revised Code that the offender is a repeat violent offender.

(ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in

division (CC)(1) of section 2929.01 of the Revised Code, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

(iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

(c) For purposes of division (B)(2)(b) of this section, two or more offenses committed at the same time or as part of the same act or event shall be considered one offense, and that one offense shall be the offense with the greatest penalty.

(d) A sentence imposed under division (B)(2)(a) or (b) of this section shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. The offender shall serve an additional prison term imposed under division (B)(2)(a) or (b) of this section consecutively to and prior to the prison term imposed for the underlying offense.

(e) When imposing a sentence pursuant to division (B)(2)(a) or (b) of this section, the court shall state its findings explaining the imposed sentence.

(3) Except when an offender commits a violation of section 2903.01 or 2907.02 of the Revised Code and the penalty imposed for the violation is life imprisonment or commits a violation of section 2903.02 of the Revised Code, if the offender commits a violation of section 2925.03 or 2925.11 of the Revised Code and that section classifies the offender as a major drug offender, if the offender commits a violation of section 2925.05 of the Revised Code and division (E)(1) of that section classifies the offender as a major drug offender, if the offender commits a felony violation of section 2925.02, 2925.04, 2925.05, 2925.36, 3719.07, 3719.08, 3719.16, 3719.161, 4729.37, or 4729.61, division (C) or (D) of section 3719.172, division (E) of section 4729.51, or division (J) of section 4729.54 of the Revised Code that includes the sale, offer to sell, or possession of a schedule I or II controlled substance, with the exception of marihuana, and the court imposing sentence upon the offender finds that the offender is guilty of a specification of the type described in division (A) of section 2941.1410 of the Revised Code charging that the offender is a major drug offender, if the court imposing

sentence upon an offender for a felony finds that the offender is guilty of corrupt activity with the most serious offense in the pattern of corrupt activity being a felony of the first degree, or if the offender is guilty of an attempted violation of section 2907.02 of the Revised Code and, had the offender completed the violation of section 2907.02 of the Revised Code that was attempted, the offender would have been subject to a sentence of life imprisonment or life imprisonment without parole for the violation of section 2907.02 of the Revised Code, the court shall impose upon the offender for the felony violation a mandatory prison term determined as described in this division that cannot be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or 5120. of the Revised Code. The mandatory prison term shall be the maximum definite prison term prescribed in division (A)(1)(b) of this section for a felony of the first degree, except that for offenses for which division (A)(1)(a) of this section applies, the mandatory prison term shall be the longest minimum prison term prescribed in that division for the offense.

(4) If the offender is being sentenced for a third or fourth degree felony OVI offense under division (G)(2) of section 2929.13 of the Revised Code, the sentencing court shall impose upon the offender a mandatory prison term in accordance with that division. In addition to the mandatory prison term, if the offender is being sentenced for a fourth degree felony OVI offense, the court, notwithstanding division (A)(4) of this section, may sentence the offender to a definite prison term of not less than six months and not more than thirty months, and if the offender is being

sentenced for a third degree felony OVI offense, the sentencing court may sentence the offender to an additional prison term of any duration specified in division (A)(3) of this section. In either case, the additional prison term imposed shall be reduced by the sixty or one hundred twenty days imposed upon the offender as the mandatory prison term. The total of the additional prison term imposed under division (B)(4) of this section plus the sixty or one hundred twenty days imposed as the mandatory prison term shall equal a definite term in the range of six months to thirty months for a fourth degree felony OVI offense and shall equal one of the authorized prison terms specified in division (A)(3) of this section for a third degree felony OVI offense. If the court imposes an additional prison term under division (B)(4) of this section, the offender shall serve the additional prison term after the offender has served the mandatory prison term required for the offense. In addition to the mandatory prison term or mandatory and additional prison term imposed as described in division (B)(4) of this section, the court also may sentence the offender to a community control sanction under section 2929.16 or 2929.17 of the Revised Code, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

If the offender is being sentenced for a fourth degree felony OVI offense under division (G)(1) of section 2929.13 of the Revised Code and the court imposes a mandatory term of local incarceration, the court may impose a prison term as described in division (A)(1) of that section.

(5) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1414 of the Revised Code that charges that the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, an investigator of the bureau of criminal identification and investigation, as defined in section 2903.11 of the Revised Code, or a firefighter or emergency medical worker, both as defined in section 4123.026 of the Revised Code, the court shall impose on the offender a prison term of five years. If a court imposes a prison term on an offender under division (B)(5) of this section, the prison term shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(5) of this section for felonies committed as part of the same act.

(6) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.06 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1415 of the Revised Code that charges that the offender previously has been convicted of or pleaded guilty to three or more violations of division (A) of section 4511.19 of the Revised Code or an equivalent offense, as defined in section 2941.1415 of the Revised Code, or three or more violations of any combination of those offenses, the court shall impose on the offender a prison term of three years. If a court imposes a prison term on an offender under division (B)(6) of this section, the prison term shall not be reduced pursuant to

section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(6) of this section for felonies committed as part of the same act.

(7)

(a) If an offender is convicted of or pleads guilty to a felony violation of section 2905.01, 2905.02, 2907.21, 2907.22, or 2923.32, division (A)(1) or (2) of section 2907.323 involving a minor, or division (B)(1), (2), (3), (4), or (5) of section 2919.22 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1422 of the Revised Code that charges that the offender knowingly committed the offense in furtherance of human trafficking, the court shall impose on the offender a mandatory prison term that is one of the following:

(i) If the offense is a felony of the first degree, a definite prison term of not less than five years and not greater than eleven years, except that if the offense is a felony of the first degree committed on or after March 22, 2019, the court shall impose as the minimum prison term a mandatory term of not less than five years and not greater than eleven years;

(ii) If the offense is a felony of the second or third degree, a definite prison term of not less than three years and not greater than the

maximum prison term allowed for the offense by division (A)(2)(b) or (3) of this section, except that if the offense is a felony of the second degree committed on or after March 22, 2019, the court shall impose as the minimum prison term a mandatory term of not less than three years and not greater than eight years;

(iii) If the offense is a felony of the fourth or fifth degree, a definite prison term that is the maximum prison term allowed for the offense by division (A) of section 2929.14 of the Revised Code.

(b) The prison term imposed under division (B)(7)(a) of this section shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(7)(a) of this section for felonies committed as part of the same act, scheme, or plan.

(8) If an offender is convicted of or pleads guilty to a felony violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1423 of the Revised Code that charges that the victim of the violation was a woman whom the offender knew was pregnant at the time of the violation, notwithstanding the range prescribed in division (A) of this section as the definite prison term or minimum prison term for felonies of the same degree as the violation, the court shall impose on the offender a mandatory prison term that is either a definite prison term of six months or one of

the prison terms prescribed in division (A) of this section for felonies of the same degree as the violation, except that if the violation is a felony of the first or second degree committed on or after arch 22, 2019, the court shall impose as the minimum prison term under division (A)(1)(a) or (2)(a) of this section a mandatory term that is one of the terms prescribed in that division, whichever is applicable, for the offense.

(9)

(a) If an offender is convicted of or pleads guilty to a violation of division (A)(1) or (2) of section 2903.11 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1425 of the Revised Code, the court shall impose on the offender a mandatory prison term of six years if either of the following applies:

(i) The violation is a violation of division (A)(1) of section 2903.11 of the Revised Code and the specification charges that the offender used an accelerant in committing the violation and the serious physical harm to another or to another's unborn caused by the violation resulted in a permanent, serious disfigurement or permanent, substantial incapacity;

(ii) The violation is a violation of division (A)(2) of section 2903.11 of the Revised Code and the specification charges that the offender used an accelerant in committing the violation, that the violation caused physical harm to another or to another's unborn, and that the physical

harm resulted in a permanent, serious disfigurement or permanent, substantial incapacity.

(b) If a court imposes a prison term on an offender under division (B)(9)(a) of this section, the prison term shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(9) of this section for felonies committed as part of the same act.

(c) The provisions of divisions (B)(9) and (C)(6) of this section and of division (D)(2) of section 2903.11, division (F)(20) of section 2929.13, and section 2941.1425 of the Revised Code shall be known as "Judy's Law."

(10) If an offender is convicted of or pleads guilty to a violation of division (A) of section 2903.11 of the Revised Code and also is convicted of or pleads guilty to a specification of the type described in section 2941.1426 of the Revised Code that charges that the victim of the offense suffered permanent disabling harm as a result of the offense and that the victim was under ten years of age at the time of the offense, regardless of whether the offender knew the age of the victim, the court shall impose upon the offender an additional definite prison term of six years. A prison term imposed on an offender under division (B)(10) of this section shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code. If a court imposes an additional prison term on an offender under this division relative to a

violation of division (A) of section 2903.11 of the Revised Code, the court shall not impose any other additional prison term on the offender relative to the same offense.

(11) If an offender is convicted of or pleads guilty to a felony violation of section 2925.03 or 2925.05 of the Revised Code or a felony violation of section 2925.11 of the Revised Code for which division (C)(11) of that section applies in determining the sentence for the violation, if the drug involved in the violation is a fentanyl-related compound or a compound, mixture, preparation, or substance containing a fentanyl-related compound, and if the offender also is convicted of or pleads guilty to a specification of the type described in division (B) of section 2941.1410 of the Revised Code that charges that the offender is a major drug offender, in addition to any other penalty imposed for the violation, the court shall impose on the offender a mandatory prison term of three, four, five, six, seven, or eight years. If a court imposes a prison term on an offender under division (B)(11) of this section, the prison term shall not be reduced pursuant to section 2929.20, division (A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or 5120. of the Revised Code. A court shall not impose more than one prison term on an offender under division (B)(11) of this section for felonies committed as part of the same act.

(C)

(1)

(a) Subject to division (C)(1)(b) of this section, if a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(a) of this section for

having a firearm on or about the offender's person or under the offender's control while committing a felony, if a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(c) of this section for committing a felony specified in that division by discharging a firearm from a motor vehicle, or if both types of mandatory prison terms are imposed, the offender shall serve any mandatory prison term imposed under either division consecutively to any other mandatory prison term imposed under either division or under division (B)(1)(d) of this section, consecutively to and prior to any prison term imposed for the underlying felony pursuant to division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(b) If a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(d) of this section for wearing or carrying body armor while committing an offense of violence that is a felony, the offender shall serve the mandatory term so imposed consecutively to any other mandatory prison term imposed under that division or under division (B)(1)(a) or (c) of this section, consecutively to and prior to any prison term imposed for the underlying felony under division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(c) If a mandatory prison term is imposed upon an offender pursuant to division (B)(1)(f) of this section, the offender shall serve the mandatory prison term so imposed consecutively to and prior to any prison term imposed for the underlying felony under division (A), (B)(2), or (B)(3) of this section or any other section of the Revised Code, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(d) If a mandatory prison term is imposed upon an offender pursuant to division (B)(7) or (8) of this section, the offender shall serve the mandatory prison term so imposed consecutively to any other mandatory prison term imposed under that division or under any other provision of law and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(e) If a mandatory prison term is imposed upon an offender pursuant to division (B)(11) of this section, the offender shall serve the mandatory prison term consecutively to any other mandatory prison term imposed under that division, consecutively to and prior to any prison term imposed for the underlying felony, and consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(2) If an offender who is an inmate in a jail, prison, or other residential detention facility violates section 2917.02, 2917.03, or 2921.35 of the Revised Code or division (A)(1) or (2) of section 2921.34 of the Revised Code, if an offender who is under detention at a detention facility commits a felony violation of section 2923.131

of the Revised Code, or if an offender who is an inmate in a jail, prison, or other residential detention facility or is under detention at a detention facility commits another felony while the offender is an escapee in violation of division (A)(1) or (2) of section 2921.34 of the Revised Code, any prison term imposed upon the offender for one of those violations shall be served by the offender consecutively to the prison term or term of imprisonment the offender was serving when the offender committed that offense and to any other prison term previously or subsequently imposed upon the offender.

(3) If a prison term is imposed for a violation of division (B) of section 2911.01 of the Revised Code, a violation of division (A) of section 2913.02 of the Revised Code in which the stolen property is a firearm or dangerous ordnance, or a felony violation of division (B) of section 2921.331 of the Revised Code, the offender shall serve that prison term consecutively to any other prison term or mandatory prison term previously or subsequently imposed upon the offender.

(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:

(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.

(5) If a mandatory prison term is imposed upon an offender pursuant to division (B)(5) or (6) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of section 2903.06 of the Revised Code pursuant to division (A) of this section or section 2929.142 of the Revised Code. If a mandatory prison term is imposed upon an offender pursuant to division (B)(5) of this section, and if a mandatory prison term also is imposed upon the offender pursuant to division (B)(6) of this section in relation to the same violation, the offender shall serve the mandatory prison term imposed pursuant to division (B)(5) of this section consecutively to and prior to the mandatory prison term imposed pursuant to division (B)(6) of this section and consecutively to and prior to any prison term imposed for

the underlying violation of division (A)(1) or (2) of section 2903.06 of the Revised Code pursuant to division (A) of this section or section 2929.142 of the Revised Code.

(6) If a mandatory prison term is imposed on an offender pursuant to division (B)(9) of this section, the offender shall serve the mandatory prison term consecutively to and prior to any prison term imposed for the underlying violation of division (A)(1) or (2) of section 2903.11 of the Revised Code and consecutively to and prior to any other prison term or mandatory prison term previously or subsequently imposed on the offender.

(7) If a mandatory prison term is imposed on an offender pursuant to division (B)(10) of this section, the offender shall serve that mandatory prison term consecutively to and prior to any prison term imposed for the underlying felonious assault. Except as otherwise provided in division (C) of this section, any other prison term or mandatory prison term previously or subsequently imposed upon the offender may be served concurrently with, or consecutively to, the prison term imposed pursuant to division (B)(10) of this section.

(8) Any prison term imposed for a violation of section 2903.04 of the Revised Code that is based on a violation of section 2925.03 or 2925.11 of the Revised Code or on a violation of section 2925.05 of the Revised Code that is not funding of marihuana trafficking shall run consecutively to any prison term imposed for the violation of section 2925.03 or 2925.11 of the Revised Code or for the violation of section 2925.05 of the Revised Code that is not funding of marihuana trafficking.

(9) When consecutive prison terms are imposed pursuant to division (C)(1), (2), (3), (4), (5), (6), (7), or (8) or division (H)(1) or (2) of this section, subject to division (C)(10) of this section, the term to be served is the aggregate of all of the terms so imposed.

(10) When a court sentences an offender to a non-life felony indefinite prison term, any definite prison term or mandatory definite prison term previously or subsequently imposed on the offender in addition to that indefinite sentence that is required to be served consecutively to that indefinite sentence shall be served prior to the indefinite sentence.

(11) If a court is sentencing an offender for a felony of the first or second degree, if division (A)(1)(a) or (2)(a) of this section applies with respect to the sentencing for the offense, and if the court is required under the Revised Code section that sets forth the offense or any other Revised Code provision to impose a mandatory prison term for the offense, the court shall impose the required mandatory prison term as the minimum term imposed under division (A)(1)(a) or (2)(a) of this section, whichever is applicable.

(D)

(1) If a court imposes a prison term, other than a term of life imprisonment, for a felony of the first degree, for a felony of the second degree, for a felony sex offense, or for a felony of the third degree that is an offense of violence and that is not a felony sex offense, it shall include in the sentence a requirement that the offender be subject

to a period of post-release control after the offender's release from imprisonment, in accordance with section 2967.28 of the Revised Code. If a court imposes a sentence including a prison term of a type described in this division on or after July 11, 2006, the failure of a court to include a post-release control requirement in the sentence pursuant to this division does not negate, limit, or otherwise affect the mandatory period of post-release control that is required for the offender under division (B) of section 2967.28 of the Revised Code. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(2) If a court imposes a prison term for a felony of the third, fourth, or fifth degree that is not subject to division (D)(1) of this section, it shall include in the sentence a requirement that the offender be subject to a period of post-release control after the offender's release from imprisonment, in accordance with that division, if the parole board determines that a period of post-release control is necessary. Section 2929.191 of the Revised Code applies if, prior to July 11, 2006, a court imposed a sentence including a prison term of a type described in this division and failed to include in the sentence pursuant to this division a statement regarding post-release control.

(E) The court shall impose sentence upon the offender in accordance with section 2971.03 of the Revised Code, and Chapter 2971. of the Revised Code applies regarding

the prison term or term of life imprisonment without parole imposed upon the offender and the service of that term of imprisonment if any of the following apply:

(1) A person is convicted of or pleads guilty to a violent sex offense or a designated homicide, assault, or kidnapping offense, and, in relation to that offense, the offender is adjudicated a sexually violent predator.

(2) A person is convicted of or pleads guilty to a violation of division (A)(1)(b) of section 2907.02 of the Revised Code committed on or after January 2, 2007, and either the court does not impose a sentence of life without parole when authorized pursuant to division (B) of section 2907.02 of the Revised Code, or division (B) of section 2907.02 of the Revised Code provides that the court shall not sentence the offender pursuant to section 2971.03 of the Revised Code.

(3) A person is convicted of or pleads guilty to attempted rape committed on or after January 2, 2007, and a specification of the type described in section 2941.1418, 2941.1419, or 2941.1420 of the Revised Code.

(4) A person is convicted of or pleads guilty to a violation of section 2905.01 of the Revised Code committed on or after January 1, 2008, and that section requires the court to sentence the offender pursuant to section 2971.03 of the Revised Code.

(5) A person is convicted of or pleads guilty to aggravated murder committed on or after January 1, 2008, and division (A)(2)(b)(ii) of section 2929.022, division (A)(1)(e), (C)(1)(a)(v), (C)(2)(a)(ii), (D)(2)(b), (D)(3)(a)(iv), or (E)(1)(a)(iv) of section 2929.03, or division (A) or (B) of section 2929.06 of the Revised Code requires the

court to sentence the offender pursuant to division (B)(3) of section 2971.03 of the Revised Code.

(6) A person is convicted of or pleads guilty to murder committed on or after January 1, 2008, and division (B)(2) of section 2929.02 of the Revised Code requires the court to sentence the offender pursuant to section 2971.03 of the Revised Code.

(F) If a person who has been convicted of or pleaded guilty to a felony is sentenced to a prison term or term of imprisonment under this section, sections 2929.02 to 2929.06 of the Revised Code, section 2929.142 of the Revised Code, section 2971.03 of the Revised Code, or any other provision of law, section 5120.163 of the Revised Code applies regarding the person while the person is confined in a state correctional institution.

(G) If an offender who is convicted of or pleads guilty to a felony that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.142 of the Revised Code that charges the offender with having committed the felony while participating in a criminal gang, the court shall impose upon the offender an additional prison term of one, two, or three years.

(H)

(1) If an offender who is convicted of or pleads guilty to aggravated murder, murder, or a felony of the first, second, or third degree that is an offense of violence also is convicted of or pleads guilty to a specification of the type described in section 2941.143 of the Revised Code that charges the offender with having committed the

offense in a school safety zone or towards a person in a school safety zone, the court shall impose upon the offender an additional prison term of two years. The offender shall serve the additional two years consecutively to and prior to the prison term imposed for the underlying offense.

(2)

(a) If an offender is convicted of or pleads guilty to a felony violation of section 2907.22, 2907.24, 2907.241, or 2907.25 of the Revised Code and to a specification of the type described in section 2941.1421 of the Revised Code and if the court imposes a prison term on the offender for the felony violation, the court may impose upon the offender an additional prison term as follows:

(i) Subject to division (H)(2)(a)(ii) of this section, an additional prison term of one, two, three, four, five, or six months;

(ii) If the offender previously has been convicted of or pleaded guilty to one or more felony or misdemeanor violations of section 2907.22, 2907.23, 2907.24, 2907.241, or 2907.25 of the Revised Code and also was convicted of or pleaded guilty to a specification of the type described in section 2941.1421 of the Revised Code regarding one or more of those violations, an additional prison term of one, two, three, four, five, six, seven, eight, nine, ten, eleven, or twelve months.

(b) In lieu of imposing an additional prison term under division (H)(2)(a) of this section, the court may directly impose on the offender a sanction that

requires the offender to wear a real-time processing, continual tracking electronic monitoring device during the period of time specified by the court. The period of time specified by the court shall equal the duration of an additional prison term that the court could have imposed upon the offender under division (H)(2)(a) of this section. A sanction imposed under this division shall commence on the date specified by the court, provided that the sanction shall not commence until after the offender has served the prison term imposed for the felony violation of section 2907.22, 2907.24, 2907.241, or 2907.25 of the Revised Code and any residential sanction imposed for the violation under section 2929.16 of the Revised Code. A sanction imposed under this division shall be considered to be a community control sanction for purposes of section 2929.15 of the Revised Code, and all provisions of the Revised Code that pertain to community control sanctions shall apply to a sanction imposed under this division, except to the extent that they would by their nature be clearly inapplicable. The offender shall pay all costs associated with a sanction imposed under this division, including the cost of the use of the monitoring device.

(I) At the time of sentencing, the court may recommend the offender for placement in a program of shock incarceration under section 5120.031 of the Revised Code or for placement in an intensive program prison under section 5120.032 of the Revised Code, disapprove placement of the offender in a program of shock incarceration or an intensive program prison of that nature, or make no recommendation on placement

of the offender. In no case shall the department of rehabilitation and correction place the offender in a program or prison of that nature unless the department determines as specified in section 5120.031 or 5120.032 of the Revised Code, whichever is applicable, that the offender is eligible for the placement.

If the court disapproves placement of the offender in a program or prison of that nature, the department of rehabilitation and correction shall not place the offender in any program of shock incarceration or intensive program prison.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison, and if the offender is subsequently placed in the recommended program or prison, the department shall notify the court of the placement and shall include with the notice a brief description of the placement.

If the court recommends placement of the offender in a program of shock incarceration or in an intensive program prison and the department does not subsequently place the offender in the recommended program or prison, the department shall send a notice to the court indicating why the offender was not placed in the recommended program or prison.

If the court does not make a recommendation under this division with respect to an offender and if the department determines as specified in section 5120.031 or 5120.032 of the Revised Code, whichever is applicable, that the offender is eligible for placement in a program or prison of that nature, the department shall screen the offender and determine if there is an available program of shock incarceration or an

intensive program prison for which the offender is suited. If there is an available program of shock incarceration or an intensive program prison for which the offender is suited, the department shall notify the court of the proposed placement of the offender as specified in section 5120.031 or 5120.032 of the Revised Code and shall include with the notice a brief description of the placement. The court shall have ten days from receipt of the notice to disapprove the placement.

(J) If a person is convicted of or pleads guilty to aggravated vehicular homicide in violation of division (A)(1) of section 2903.06 of the Revised Code and division (B)(2)(c) of that section applies, the person shall be sentenced pursuant to section 2929.142 of the Revised Code.

(K)

(1) The court shall impose an additional mandatory prison term of two, three, four, five, six, seven, eight, nine, ten, or eleven years on an offender who is convicted of or pleads guilty to a violent felony offense if the offender also is convicted of or pleads guilty to a specification of the type described in section 2941.1424 of the Revised Code that charges that the offender is a violent career criminal and had a firearm on or about the offender's person or under the offender's control while committing the presently charged violent felony offense and displayed or brandished the firearm, indicated that the offender possessed a firearm, or used the firearm to facilitate the offense. The offender shall serve the prison term imposed under this division consecutively to and prior to the prison term imposed for the underlying offense. The prison term shall not be reduced pursuant to section 2929.20, division

(A)(2) or (3) of section 2967.193 or 2967.194, or any other provision of Chapter 2967. or 5120. of the Revised Code. A court may not impose more than one sentence under division (B)(2)(a) of this section and this division for acts committed as part of the same act or transaction.

(2) As used in division (K)(1) of this section, "violent career criminal" and "violent felony offense" have the same meanings as in section 2923.132 of the Revised Code.

(L) If an offender receives or received a sentence of life imprisonment without parole, a sentence of life imprisonment, a definite sentence, or a sentence to an indefinite prison term under this chapter for a felony offense that was committed when the offender was under eighteen years of age, the offender's parole eligibility shall be determined under section 2967.132 of the Revised Code.

APPENDIX F

Ohio Revised Code Section 2929.144

Determination of maximum prison term for qualifying felonies of the first or second degree

(A) As used in this section, "qualifying felony of the first or second degree" means a felony of the first or second degree committed on or after the effective date of this section .

(B) The court imposing a prison term on an offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree shall determine the maximum prison term that is part of the sentence in accordance with the following:

(1) If the offender is being sentenced for one felony and the felony is a qualifying felony of the first or second degree, the maximum prison term shall be equal to the minimum term imposed on the offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code plus fifty per cent of that term.

(2) If the offender is being sentenced for more than one felony, if one or more of the felonies is a qualifying felony of the first or second degree, and if the court orders that some or all of the prison terms imposed are to be served consecutively, the court shall add all of the minimum terms imposed on the offender under division

(A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree that are to be served consecutively and all of the definite terms of the felonies that are not qualifying felonies of the first or second degree that are to be served consecutively, and the maximum term shall be equal to the total of those terms so added by the court plus fifty per cent of the longest minimum term or definite term for the most serious felony being sentenced.

(3) If the offender is being sentenced for more than one felony, if one or more of the felonies is a qualifying felony of the first or second degree, and if the court orders that all of the prison terms imposed are to run concurrently, the maximum term shall be equal to the longest of the minimum terms imposed on the offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree for which the sentence is being imposed plus fifty per cent of the longest minimum term for the most serious qualifying felony being sentenced.

(4) Any mandatory prison term, or portion of a mandatory prison term, that is imposed or to be imposed on the offender under division (B), (G), or (H) of section 2929.14 of the Revised Code or under any other provision of the Revised Code, with respect to a conviction of or plea of guilty to a specification, and that is in addition to the sentence imposed for the underlying offense is separate from the sentence being imposed for the qualifying first or second degree felony committed on or after the effective date of this section and shall not be considered or included in determining a maximum prison term for the offender under divisions (B)(1) to (3) of this section.

(C) The court imposing a prison term on an offender pursuant to division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree shall sentence the offender, as part of the sentence, to the maximum prison term determined under division (B) of this section. The court shall impose this maximum term at sentencing as part of the sentence it imposes under section 2929.14 of the Revised Code, and shall state the minimum term it imposes under division (A)(1)(a) or (2)(a) of that section, and this maximum term, in the sentencing entry.

(D) If a court imposes a prison term on an offender pursuant to division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree, section 2967.271 of the Revised Code applies with respect to the offender's service of the prison term.

APPENDIX G

Ohio Revised Code Section 2967.271

Presumptions related to sentence to non-life felony indefinite prison term

(A) As used in this section:

(1) "Offender's minimum prison term" means the minimum prison term imposed on an offender under a non-life felony indefinite prison term, diminished as provided in section 2967.191 or 2967.193 of the Revised Code or in any other provision of the Revised Code, other than division (F) of this section, that provides for diminution or reduction of an offender's sentence.

(2) "Offender's presumptive earned early release date" means the date that is determined under the procedures described in division (F) of this section by the reduction, if any, of an offender's minimum prison term by the sentencing court and the crediting of that reduction toward the satisfaction of the minimum term.

(3) "Rehabilitative programs and activities" means education programs, vocational training, employment in prison industries, treatment for substance abuse, or other constructive programs developed by the department of rehabilitation and correction with specific standards for performance by prisoners.

(4) "Security level" means the security level in which an offender is classified under the inmate classification level system of the department of rehabilitation and correction that then is in effect.

(5) "Sexually oriented offense" has the same meaning as in section 2950.01 of the Revised Code.

(B) When an offender is sentenced to a non-life felony indefinite prison term, there shall be a presumption that the person shall be released from service of the sentence on the expiration of the offender's minimum prison term or on the offender's presumptive earned early release date, whichever is earlier.

(C) The presumption established under division (B) of this section is a rebuttable presumption that the department of rehabilitation and correction may rebut as provided in this division. Unless the department rebuts the presumption, the offender shall be released from service of the sentence on the expiration of the offender's minimum prison term or on the offender's presumptive earned early release date, whichever is earlier. The department may rebut the presumption only if the department determines, at a hearing, that one or more of the following applies:

(1) Regardless of the security level in which the offender is classified at the time of the hearing, both of the following apply:

(a) During the offender's incarceration, the offender committed institutional rule infractions that involved compromising the security of a state correctional institution, compromising the safety of the staff of a state

correctional institution or its inmates, or physical harm or the threat of physical harm to the staff of a state correctional institution or its inmates, or committed a violation of law that was not prosecuted, and the infractions or violations demonstrate that the offender has not been rehabilitated.

(b) The offender's behavior while incarcerated, including, but not limited to the infractions and violations specified in division (C)(1)(a) of this section, demonstrate that the offender continues to pose a threat to society.

(2) Regardless of the security level in which the offender is classified at the time of the hearing, the offender has been placed by the department in extended restrictive housing at any time within the year preceding the date of the hearing.

(3) At the time of the hearing, the offender is classified by the department as a security level three, four, or five, or at a higher security level.

(D)

(1) If the department of rehabilitation and correction, pursuant to division (C) of this section, rebuts the presumption established under division (B) of this section, the department may maintain the offender's incarceration in a state correctional institution under the sentence after the expiration of the offender's minimum prison term or, for offenders who have a presumptive earned early release date, after the offender's presumptive earned early release date. The department may maintain the offender's incarceration under this division for an additional period of incarceration determined by the department. The additional period of incarceration shall be a

reasonable period determined by the department, shall be specified by the department, and shall not exceed the offender's maximum prison term.

(2) If the department maintains an offender's incarceration for an additional period under division (D)(1) of this section, there shall be a presumption that the offender shall be released on the expiration of the offender's minimum prison term plus the additional period of incarceration specified by the department as provided under that division or, for offenders who have a presumptive earned early release date, on the expiration of the additional period of incarceration to be served after the offender's presumptive earned early release date that is specified by the department as provided under that division. The presumption is a rebuttable presumption that the department may rebut, but only if it conducts a hearing and makes the determinations specified in division (C) of this section, and if the department rebuts the presumption, it may maintain the offender's incarceration in a state correctional institution for an additional period determined as specified in division (D)(1) of this section. Unless the department rebuts the presumption at the hearing, the offender shall be released from service of the sentence on the expiration of the offender's minimum prison term plus the additional period of incarceration specified by the department or, for offenders who have a presumptive earned early release date, on the expiration of the additional period of incarceration to be served after the offender's presumptive earned early release date as specified by the department.

The provisions of this division regarding the establishment of a rebuttable presumption, the department's rebuttal of the presumption, and the department's

maintenance of an offender's incarceration for an additional period of incarceration apply, and may be utilized more than one time, during the remainder of the offender's incarceration. If the offender has not been released under division (C) of this section or this division prior to the expiration of the offender's maximum prison term imposed as part of the offender's non-life felony indefinite prison term, the offender shall be released upon the expiration of that maximum term.

(E) The department shall provide notices of hearings to be conducted under division (C) or (D) of this section in the same manner, and to the same persons, as specified in section 2967.12 and Chapter 2930. of the Revised Code with respect to hearings to be conducted regarding the possible release on parole of an inmate.

(F)

(1) The director of the department of rehabilitation and correction may notify the sentencing court in writing that the director is recommending that the court grant a reduction in the minimum prison term imposed on a specified offender who is serving a non-life felony indefinite prison term and who is eligible under division (F)(8) of this section for such a reduction, due to the offender's exceptional conduct while incarcerated or the offender's adjustment to incarceration. If the director wishes to recommend such a reduction for an offender, the director shall send the notice to the court not earlier than ninety days prior to the date on which the director wishes to credit the reduction toward the satisfaction of the offender's minimum prison term. If the director recommends such a reduction for an offender, there shall be a presumption that the court shall grant the recommended reduction to the

offender. The presumption established under this division is a rebuttable presumption that may be rebutted as provided in division (F)(4) of this section.

The director shall include with the notice sent to a court under this division an institutional summary report that covers the offender's participation while confined in a state correctional institution in rehabilitative programs and activities and any disciplinary action taken against the offender while so confined, and any other documentation requested by the court, if available.

The notice the director sends to a court under this division shall do all of the following:

(a) Identify the offender;

(b) Specify the length of the recommended reduction, which shall be for five to fifteen per cent of the offender's minimum term determined in accordance with rules adopted by the department under division (F)(7) of this section;

(c) Specify the reason or reasons that qualify the offender for the recommended reduction;

(d) Inform the court of the rebuttable presumption and that the court must either approve or, if the court finds that the presumption has been rebutted, disapprove of the recommended reduction, and that if it approves of the recommended reduction, it must grant the reduction;

(e) Inform the court that it must notify the department of its decision as to approval or disapproval not later than sixty days after receipt of the notice from the director.

(2) When the director, under division (F)(1) of this section, submits a notice to a sentencing court that the director is recommending that the court grant a reduction in the minimum prison term imposed on an offender serving a non-life felony indefinite prison term, the department promptly shall provide to the prosecuting attorney of the county in which the offender was indicted a copy of the written notice, a copy of the institutional summary report described in that division, and any other information provided to the court.

(3) Upon receipt of a notice submitted by the director under division (F)(1) of this section, the court shall schedule a hearing to consider whether to grant the reduction in the minimum prison term imposed on the specified offender that was recommended by the director or to find that the presumption has been rebutted and disapprove the recommended reduction. Upon scheduling the hearing, the court promptly shall give notice of the hearing to the prosecuting attorney of the county in which the offender was indicted and to the department. The notice shall inform the prosecuting attorney that the prosecuting attorney may submit to the court, prior to the date of the hearing, written information relevant to the recommendation and may present at the hearing written information and oral information relevant to the recommendation.

Upon receipt of the notice from the court, the prosecuting attorney shall notify the victim of the offender or the victim's representative of the recommendation by the director, the date, time, and place of the hearing, the fact that the victim may submit to the court, prior to the date of the hearing, written information relevant to the recommendation, and the address and procedure for submitting the information.

(4) At the hearing scheduled under division (F)(3) of this section, the court shall afford the prosecuting attorney an opportunity to present written information and oral information relevant to the director's recommendation. In making its determination as to whether to grant or disapprove the reduction in the minimum prison term imposed on the specified offender that was recommended by the director, the court shall consider any report and other documentation submitted by the director, any information submitted by a victim, any information submitted or presented at the hearing by the prosecuting attorney, and all of the factors set forth in divisions (B) to (D) of section 2929.12 of the Revised Code that are relevant to the offender's offense and to the offender.

Unless the court, after considering at the hearing the specified reports, documentation, information, and relevant factors, finds that the presumption that the recommended reduction shall be granted has been rebutted and disapproves the recommended reduction, the court shall grant the recommended reduction. The court may disapprove the recommended reduction only if, after considering at the hearing the specified reports, documentation, information, and relevant factors, it finds that the presumption that the reduction shall be granted has been rebutted. The court

may find that the presumption has been rebutted and disapprove the recommended reduction only if it determines at the hearing that one or more of the following applies:

(a) Regardless of the security level in which the offender is classified at the time of the hearing, during the offender's incarceration, the offender committed institutional rule infractions that involved compromising the security of a state correctional institution, compromising the safety of the staff of a state correctional institution or its inmates, or physical harm or the threat of physical harm to the staff of a state correctional institution or its inmates, or committed a violation of law that was not prosecuted, and the infractions or violations demonstrate that the offender has not been rehabilitated.

(b) The offender's behavior while incarcerated, including, but not limited to, the infractions and violations specified in division (F)(4)(a) of this section, demonstrates that the offender continues to pose a threat to society.

(c) At the time of the hearing, the offender is classified by the department as a security level three, four, or five, or at a higher security level.

(d) During the offender's incarceration, the offender did not productively participate in a majority of the rehabilitative programs and activities recommended by the department for the offender, or the offender participated in a majority of such recommended programs or activities but did not successfully complete a reasonable number of the programs or activities in which the offender participated.

(e) After release, the offender will not be residing in a halfway house, reentry center, or community residential center licensed under division (C) of section 2967.14 of the Revised Code and, after release, does not have any other place to reside at a fixed residence address.

(5) If the court pursuant to division (F)(4) of this section finds that the presumption that the recommended reduction in the offender's minimum prison term has been rebutted and disapproves the recommended reduction, the court shall notify the department of the disapproval not later than sixty days after receipt of the notice from the director. The court shall specify in the notification the reason or reasons for which it found that the presumption was rebutted and disapproved the recommended reduction. The court shall not reduce the offender's minimum prison term, and the department shall not credit the amount of the disapproved reduction toward satisfaction of the offender's minimum prison term.

If the court pursuant to division (F)(4) of this section grants the recommended reduction of the offender's minimum prison term, the court shall notify the department of the grant of the reduction not later than sixty days after receipt of the notice from the director, the court shall reduce the offender's minimum prison term in accordance with the recommendation submitted by the director, and the department shall credit the amount of the reduction toward satisfaction of the offender's minimum prison term.

Upon deciding whether to disapprove or grant the recommended reduction of the offender's minimum prison term, the court shall notify the prosecuting attorney

of the decision and the prosecuting attorney shall notify the victim or victim's representative of the court's decision.

(6) If the court under division (F)(5) of this section grants the reduction in the minimum prison term imposed on an offender that was recommended by the director and reduces the offender's minimum prison term, the date determined by the department's crediting of the reduction toward satisfaction of the offender's minimum prison term is the offender's presumptive earned early release date.

(7) The department of rehabilitation and correction by rule shall specify both of the following for offenders serving a non-life felony indefinite prison term:

(a) The type of exceptional conduct while incarcerated and the type of adjustment to incarceration that will qualify an offender serving such a prison term for a reduction under divisions (F)(1) to (6) of this section of the minimum prison term imposed on the offender under the non-life felony indefinite prison term.

(b) The per cent of reduction that it may recommend for, and that may be granted to, an offender serving such a prison term under divisions (F)(1) to (6) of this section, based on the offense level of the offense for which the prison term was imposed, with the department specifying the offense levels used for purposes of this division and assigning a specific percentage reduction within the range of five to fifteen per cent for each such offense level.

(8) Divisions (F)(1) to (6) of this section do not apply with respect to an offender serving a non-life felony indefinite prison term for a sexually oriented offense, and no offender serving such a prison term for a sexually oriented offense is eligible to be recommended for or granted, or may be recommended for or granted, a reduction under those divisions in the offender's minimum prison term imposed under that non-life felony indefinite prison term.

(G) If an offender is sentenced to a non-life felony indefinite prison term, any reference in a section of the Revised Code to a definite prison term shall be construed as referring to the offender's minimum term under that sentence plus any additional period of time of incarceration specified by the department under division (D)(1) or (2) of this section, except to the extent otherwise specified in the section or to the extent that that construction clearly would be inappropriate.