No. 23-7094

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

BRIEF IN OPPOSITION

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QUESTIONS 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?

LIST OF PARTIES

All parties appear in the caption of the cover page.

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INTRODUCTION

The question presented is misleading. The question suggests that Ohio's sentencing scheme is unconstitutional because it permits a prison administrator to "use their own post-conviction factual findings as the basis for affirmatively extending a defendant's incarceration[.]" But that is not precisely how Ohio's sentencing scheme works.

The Reagan Tokes Law consists of 50 statutory amendments and four new statutory enactments. See Ohio Rev. Code § 2901.011. Defendants across the State of Ohio, like Tyshawn Shepard, have challenged the constitutionality of the Reagan Tokes Law. The Reagan Tokes Law in Ohio was named for an Ohio State University senior who had been killed by Brian Golsby, a convicted rapist who had been released from prison after serving a definite six-year prison sentence.[1] Golsby had 50 institutional violations in five prisons during this course of incarceration. The Regan Tokes Law returned Ohio to a form of indefinite sentencing for high level felonies. See also *State v. Delvallie,* 185 N.E.3d 536, 542-545 (Ohio Ct. App. 2022) (explaining background of Ohio felony sentencing laws).

Ohio courts have found that the sentencing scheme does not offend the Sixth Amendment as understood through *Apprendi v. New Jersey,* 530 U.S. 466 (2000) because under the Reagan Tokes Law, the Ohio Department of Rehabilitation and

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[1] See *Back to the Future, The Reagan Tokes Law (SB 201) and Ohio's Return to Indefinite Sentencing,* available at https://www.supremecourt.ohio.gov/docs/Boards/Sentencing/resources/SB201/backToFutureSCG.pdf; see also *SB201/Reagan Tokes Law Resources* available at https://www.supremecourt.ohio.gov/criminal-br-sentencing/resources-for-practitioners/ (last accessed April 29, 2024).

Corrections merely authorize the Ohio Department of Rehabilitation and Corrections to maintain an inmate's incarceration within the sentencing parameters ordered by the court. In other words, Ohio law authorizes a trial court to impose an indefinite prison term for qualifying felonies. A judge must impose an indefinite prison term based on Ohio Rev. Code § 2929.14 and Ohio Rev. Code § 2929.144. Once the defendant serves the minimum term, the defendant may be released or be required to serve beyond the minimum. Ohio Rev. Code § 2967.271 sets forth the criteria in which Ohio's prisons may "maintain" an offender's incarceration. This criterion requires prisons to look at the offender's disciplinary record, security classification level and housing assignment. See Ohio Rev. Code § 2967.271(C).

The Supreme Court of Ohio has found the sentencing scheme constitutional. The question presented is misleading. The Petitioner has not identified a question of national interest or an important conflict. This Court should deny the Petition.

JURISDICTION

The petitioner is seeking review, pursuant to 28 U.S.C. § 1257(a) of his conviction which was affirmed on appeal on August 11, 2022. *State v. Shepard,* 2022 Ohio App. LEXIS 2622, 2022 WL 3270476 (Ohio Ct. App. Aug. 11, 2022). Petitioner's convictions were affirmed by the Supreme Court of Ohio on September 26, 2023. *Cases Held for State v. Hacker,* LEXIS 2143, 2023 WL 7028390 (Ohio Sep. 26, 2023).

CONSTITUTIONAL PROVISIONS

United States Constitution, Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Fourteenth Amendment

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

The Cuyahoga County Grand Jury returned several indictments against Petitioner, resulting in multiple criminal cases. Petitioner was charged in Cuyahoga County CR-20-653555 with two counts Receiving Stolen Property in violation of Ohio Rev. Code § 2913.51(A), Drug Trafficking in violation of Ohio Rev. Code § 2925.03(A)(2), and Drug Possession in violation of Ohio Rev. Code § 2925.11(a). The drug offenses were felonies of the first-degree and involved fentanyl. Petitioner pleaded guilty to an inferior degree of Drug Possession resulting in a prison sentence of eight to twelve years. Petitioner's other convictions and associated sentences do not implicate the Reagan Tokes Law sentencing scheme but were described in the opinion of the Ohio Court of Appeals. The Ohio Court of Appeals for Cuyahoga County, Ohio summarily rejected Petitioner's claim based on its earlier en banc

opinion. The focus of *State v. Delvallie*, 185 N.E.3d 536 (Ohio Ct.App. 2022) was on a limited portion of what is known as Reagan Tokes Law, specifically Ohio Rev. Code § 2967.271(B)-(D). Petitioner appealed to the Supreme Court of Ohio and the convictions were affirmed based on the Supreme Court of Ohio's own decision in *State v. Hacker*, 229 N.E. 3d 38 (Ohio 2023). See *Cases Held for State v. Hacker*, LEXIS 2143, 2023 WL 7028390 (Ohio Sep. 26, 2023).

OPINIONS BELOW

The Supreme Court of Ohio's opinion in *State v. Hacker* is now published at 229 N.E.3d 38. Petitioner's case was adjudicated by the Supreme Court of Ohio in *Cases Held for State v. Hacker* available online as 2023-Ohio-3863. The decision of the Ohio Court of Appeals is not published in a regional reporter but available at 2023-Ohio-3863. The Ohio Court of Appeals related opinion is reported at 185 N.E.3d 536.

REASONS FOR DENYING THE WRIT

Petitioner invokes the Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Alleyne v. United States*, 570 U.S. 99 (2013), and *United States v. Haymond*, 139 S. Ct. 2369 (2019) and a need to explore the bounds of *Haymond* as a basis for granting the Petition.

To adequately address Petitioner's constitutional challenges, it is necessary to understand the provisions of Am.Sub.S.B. No. 201, 2018 Ohio Laws 157. Effective March 22, 2019, the General Assembly provided in Am. Sub. S.B. 201, otherwise known as the Reagan Tokes Law, states that first-degree and second-degree felonies

not already carrying a life sentence will be subject to indefinite sentencing. The following relevant statutory terms help calculate the prison term:

Ohio Rev. Code § 2929.01(EE) "Sentence" means the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense.

Ohio Rev. Code § 2929.01(FFF) "Non-life felony indefinite prison term" means a prison term imposed under division (A)(1)(a) or (2)(a) of Ohio Rev. Code § 2929.14 and Ohio Rev. Code § 2929.144 of the Revised Code for a felony of the first or second degree committed on or after [March 22, 2019].

Ohio Rev. Code § 2929.144(A) "qualifying felony of the first or second degree" means a felony of the first or second degree committed on or after [March 22, 2019].

When imposing prison terms, Ohio Rev. Code § 2929.14 requires that the sentencing court impose an indefinite sentence with a minimum term selected by the judge and an accompanying maximum term, calculated under a statutory formula under Ohio Rev. Code § 2929.144. The trial court also provides sentencing notifications under Ohio Rev. Code § 2929.19(B)(2)(c), related to the presumption and the ability of the ODRC to rebut the presumption. There is a presumption that the defendant will be released after serving the minimum term under Ohio Rev. Code § 2967.271(B). The law, collectively known as the Reagan Tokes Law, consists of amendments to 50 sections of the Ohio Revised Code and the enactment of four sections of the Ohio Revised Code, according to Ohio Rev. Code § 2901.011.

The ODRC provides notifications to the now inmate regarding SB 201 when the defendant is conveyed to its custody. ODRC Policy 52-RCP-01, available at https://drc.ohio.gov/about/resource/policies-and-procedures/3-policies-and-procedures (last visited April 29, 2024). Once the inmate has served the minimum term, the ODRC may rebut the presumption of release under Ohio Rev. Code § 2967.271(C). The provision states:

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 establish 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. Suppose the ODRC finds that the presumption is rebutted. In that case, the ODRC can maintain the offender in custody for a reasonable period not to exceed the maximum prison term. Ohio Rev. Code § 2967.271(D)(1). The presumption of release will apply at the next continued release date, and the presumption can be rebutted at the following date. Ohio Rev. Code § 2967.271(D)(2).

Further, the ODRC has established guidelines and procedures to follow in conducting a hearing to rebut the presumption of release. For example, the ODRC has a policy governing the maximum term hearing. ODRC Policy 105-PBD-15, available at https://drc.ohio.gov/about/resource/policies-and-procedures/3-policies-and-procedures (last visited April 29, 2024).

And this Court should be cognizant that the reasons an inmate might be maintained beyond the minimum term depends on an inmate's prison record. The mechanisms upon which an inmate is disciplined, assigned a security classification, and assigned housing is guided by the Ohio Administrative Code and Ohio Department of Rehabilitations and Corrections. See Ohio Admin. Code §5120-9-06 through 5120-9-11 (disciplinary procedure and housing assignment procedure) and Ohio. Admin. Code § 5120-9-52 through 5120-9-53 (classification of inmates). See also Ohio Department of Rehabilitation & Corrections Policies & Procedures available at https://drc.ohio.gov/about/resource/policies-and-procedures/3-policies-and-procedures (last accessed April 29, 2024).

Even if one provision of S.B. 201 is unconstitutional, that does not make the entire bill unconstitutional. It would be difficult to argue that an indefinite sentence, proscribed by the legislature, is unconstitutional. Ohio law requires severability. Ohio Rev. Code § 1.50.

I. Ohio courts have correctly rejected the Sixth Amendment challenge.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a...trial, by an impartial jury of the State and district where in the crime shall have been committed."

The United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, (2000) held that except for a prior conviction, any fact that increases the defendant's punishment above the statutory maximum punishment must be submitted to a jury and proven beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296 (2004), the Supreme Court found the State of Washington's sentencing system unconstitutional because it gave judges authority to increase sentences based on their own determination of facts rather than facts found by the jury. In *United States v. Booker*, the Supreme Court held that all facts that increase a defendant's punishment beyond the federal guidelines applicable to the offense had to be proven to a jury beyond a reasonable doubt. Shepard cites no case that stands for the authority that *Apprendi* and its progeny applies in a parole context.

We turn back to *Apprendi* where this Court held that the jury-trial right includes the right to have a jury find every "element" of the crime of conviction. According to this Court, "facts that expose a defendant to a punishment greater than

that otherwise legally" permitted are "by definition 'elements' of a separate legal offense." *Id.* at 483 n. 10. Therefore, as stated above, except for a prior conviction, any fact that increases the defendant's punishment above the statutory maximum punishment must be submitted to a jury. The principle also applies when a jury must find a fact that increases the statutory minimum sentence to which a defendant is subject. *Alleyne v. United States,* 570 U.S. 99, 117 (2013).

More recently, in *United States v. Haymond,* 139 S.Ct. 2369 (2019), the Court invalidated 18 U.S.C. 3583(k) finding it unconstitutional as it required a judge to sentence a defendant for a minimum of five years when the defendant on supervised release. But while Petitioner suggests that *Haymond* permits an expansion of the Sixth Amendment to post-sentencing provisions, the statutes at issue are distinct from the ones here. Federal appellate courts have recognized the government's ability to revoke supervised release based on its own factual findings. *See. E.g., United States v. Henderson,* 998 F.3d 1071, 1072-077 (9th Cir. 2021); *United States v. Salazar*, 987 F.3d 1248, 1261 (10th Cir. 2021); *United States v. Doka,* 955 F.3d 290-297 (2nd Cir. 2020). And the Ohio statutes do not permit the prison to extend an inmate's prison term beyond that which was authorized by the trial court's sentence.

In sum, *Apprendi* and its progeny is a prohibition against judges making certain findings. It is not a prohibition against executive branch officials from making decisions such as parole release decisions. Although the trial court did not impose an indefinite sentence, there is no prohibition against a judge imposing an indefinite

sentence within the statutory range. And as succinctly stated by the Supreme Court of Ohio:

> [H]ere, 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.

State v. Hacker, 229 N.E.3d 38 at ¶ 28 (Ohio 2023).

Examining the structure of the indefinite sentencing scheme under Ohio Rev. Code § 2929.14(A)(1)(a), Ohio Rev. Code § 2929.14(A)(2)(a), and Ohio Rev. Code § 2929.144 confirms that it does not defy *Apprendi* and its progeny. The statutory maximum is determined based on the minimum term selected by the trial court. As it relates to Petitioner, he pleaded guilty to a qualifying felony of the second degree. For that count, Ohio Rev. Code § 2929.14(A)(2)(a) authorized the trial court to impose an indefinite sentence consisting of a minimum term of 2, 3, 4, 5, 6, 7, or 8 years and a maximum sentence determined by Ohio Rev. Code § 2929.144. The trial court imposed a indefinite sentence of eight to twelve years. The statutory maximum is determined by the applicable formula under Ohio Rev. Code § 2929.144, which does not require judicial fact-finding.

Also important is a basic understanding how prisons in Ohio operate. Once a defendant has been sentenced, he is conveyed to prison and placed under the custody of the ODRC. See Ohio Rev. Code § 5120.01. If the presumption of release is met, the

ODRC is not adding "additional time" to the sentence. It is not "extending" the time beyond the statutory maximum. And it is not a "sentencing enhancement." No matter how Shepard would like to characterize the effect of Ohio Rev. Code § 2967.271(C), the rebuttal of the presumption of release maintains an inmate's incarceration within the statutory indefinite sentence that was imposed and journalized by the trial court judge. To accept the Shepard's argument would result in an unheard-of application of *Apprendi* – that a jury should be empaneled, years after a conviction has become final, and determine whether an inmate should be released from prison based on the inmate's infraction record, whether the inmate's security classification level, and whether the inmate has been in restricted housing. And as referenced above, discipline decisions, security level classifications, and housing assignments are decisions made at the prison and are governed by prison policy and provisions of the Ohio Administrative Code. Ohio Rev. Code § 2967.271(C) is simply a process in which an inmate may be denied release based on the inmate's prison record and permit the continued incarceration of that defendant within the parameters of the indefinite sentence imposed by the trial court judge. And again, that indefinite prison term is determined by a statutory calculation and not factfinding.

II. Petitioner fails to identify a conflict justifying granting the Petition.

The State of Ohio next responds to Petitioner's contention that the states are divided on the application of *Apprendi*. Petitioner first identifies "presumptive probation" systems and claims states apply *Apprendi* in this context. See Petition at pg. 12 citing *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). But the schemes in these cases are different from Ohio's Reagan Tokes Law. First, consider the issue in the Minnesota case: a sentencing guideline that presumptively required a definite "42 months, stayed," however, the Minnesota Supreme Court found that the trial court's judicial fact-finding to impose a "42 month, executed" sentence was in violation of the Sixth Amendment. *Allen,* 706 N.W.2d at 42, paragraph one of syllabus. Second, consider the issue decided by the Oregon court in *Frinell* also involved a sentencing scheme that presumed probation but allowed the trial court to depart from that. *Frinell,* 414 P.3d at 432. The Ohio sentencing scheme is obviously different from a "presumptive probation" system. As explained above, the Reagan Tokes Law applies to the high level felonies in Ohio. As to Ohio law, in the event the trial court imposes a prison sentence it must impose the indefinite sentence as determined by Ohio Rev. Code § 2929.14 and Ohio Rev. Code § 2929.144. And indeed, under Ohio law a prison sentence is presumed for felonies of the first and second degrees. See generally Ohio Rev. Code § 2929.13(D)(2).

Next, Petitioner generally cites to state courts that "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 concluded by jury. See Petition, pg. 12-13 citing *State v. Grate,* 106 A.3d 466, 475-76 (N.J. 2015), *People v. Lockridge*, 870 N.W. 2d 502, 516 (Mich. 2015), and *State v. Soto*, 322 P.3d 334, 344, 348-49 (Kan. 2014). The New Jersey case examined a statute that required judicial factfinding to impose a period of parole ineligibility. *Grate,* 106 A.3d at 471.

The Michigan case examined Michigan sentencing guidelines that allowed judges to increase the mandatory minimum punishment through judicial fact finding. *Lockridge,* 870 N.W. 2d at 373-374. The Kansas case involved the state's "hard 50 sentencing scheme" a statutory provision that permitted judges to find aggravating facts to increase a mandatory minimum sentence to 50 years by a preponderance of the evidence. *Soto,* 322 P.3d at 120-121. Together, these cases involved statutory schemes wherein a judge engaged in fact finding to increase a minimum sentence. Petitioner fails to explain that nearly two decades ago, the Supreme Court of Ohio found unconstitutional Ohio's sentencing scheme that required judges to engage in fact finding to impose a "sentence greater than the maximum term authorized by a jury verdict or admission of the defendant," and severed the offending statutes. See *State v. Foster,* 109 Ohio St. 3d 1 (Ohio 2006). Presumptively, the Ohio legislature was aware of the *Foster* decision when the Reagan Tokes Law was enacted. Collectively the decisions in *Grate, Lockridge,* and *Soto* generally involve a statutory scheme that permitted judicial fact finding for a judge to impose a sentence that was greater than the mandatory minimum authorized by a jury verdict or admission of guilt. In Ohio, Ohio Rev. Code § 2929.14(A)(1)(a) and (A)(2)(a) gives a trial court complete discretion in selecting the minimum term. The statutory provision does not provide a mandatory minimum.

The decision below, and the decisions in *Fogleman v. State,* 283 So. 3d 685 (Miss. 2019) and *People v. Barnes,* 90 N.E.3d 1117 (Ill. 1st App. 2017) do not conflict with *Allen, Frinell, Grate, Lockridge,* and *Soto* in any significant way. Nor does this

case concern a presumptive probation scheme that was at issue in *State v. Carr,* 53 P.3d 843 (Kan. 2002) and *State v. Anderson,* 867 N.W.2d 718 (S.D. 2015). These collective cases merely represent how states have examined their own sentencing and parole schemes under the Court's guidance. Petitioner does not identify a single sentencing scheme that shares features with Ohio's Reagan Tokes Law. And when considering that the indefinite sentence has been imposed by the trial court without judicial fact-finding, unlike those statutes in *State v. Bowers,* 167 N.E.3d 947 (Ohio 2020) (holding unconstitutional provisions that required judicial fact-finding for the trial court to depart from 15 years to life to 25 years to life) the claimed conflict is dubious.

III. Petitioner's argument ignores severances.

The Ohio courts were well equipped to decide the constitutional question presented. And it did so correctly. Even so, Petitioner's argument ignores the implications of severance required under Ohio law and a probable remedy under *United States v. Booker* 543 U.S. 220 (2005). And the State suggest that severance would simply remove the provision Petitioner complains of – Ohio Rev. Code §2967.271(C).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Daniel T. Van, counsel of record for Respondent and a member of the Bar of this Court, hereby certify that on April 29, 2024 he served a copy of the Brief in Opposition to Petition for Writ of Certiorari to Thomas Lapman, Assistant Public Defender, 310 Lakeside Ave., Suite 200, Cleveland, Ohio 44113 and via electronic mail.

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