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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The State of Ohio's Brief in Response gets one thing right: "To adequately address [Shepard]'s constitutional challenges, it is necessary to understand the provisions of [S.B.] 201." Resp. Br. at 4. Indeed, S.B. 201's constitutional infirmity is cast in stark relief by the operation of two statutory provisions: one which entitles defendants to a presumption of release at the end of their presumptive minimum sentence; and another which limits the length of presumptive minimum sentences that courts can impose. *See* Ohio Rev. Code §§ 2967.271(B), 2929.14(A)(1)(a), (2)(a). A proper understanding of these provisions demonstrate both why the opinion below was wrong and where other courts are split on the application of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2002). Similarly, understanding the practical operation of S.B. 201 sheds light on how the State's two key* arguments opposing certiorari elide the relevant questions and ultimately reach the wrong result.

I. The State's Argument On The Merits Gets The Wrong Result By Reading S.B. 201 Backwards.

The State defends the constitutionality of S.B. 201's sentencing system by drawing comparisons to parole, supervised release, and other forms of early release that are meted out without the involvement of juries. But the S.B. 201 system is the exact opposite of early release. Defendants enter early release proceedings in the hopes of being cloaked in a reprieve from the full sentence the court had legislative authority to impose. Conversely, defendants are pulled into S.B. 201 proceed-

* As set forth in Section III, the State's severance argument is at best unrelated to the decision to grant certiorari in this case.

ings—proceedings which threaten to strip away defendants' existing entitlement to release granted by the General Assembly, potentially exposing them to a longer term of incarceration than the trial court could have imposed under its own power. Thus, while early release proceedings are not necessarily subject to *Apprendi*, S.B. 201 is the opposite of such a proceeding and the opposite result applies.

Under S.B. 201, a trial court can never incarcerate a defendant found guilty of an applicable second-degree felony, without more, for more than eight years. At sentencing, trial courts cannot impose a minimum presumptive term exceeding eight years for such an offense, have no power to impose incarceration beyond the minimum presumptive term. Ohio Rev. Code §§ 2967.271(B), 2929.14(2)(a). Yet post-trial factual findings can nonetheless subject an S.B. 201 defendant to additional incarceration beyond what the trial court could have imposed on its own—up to 12 years total for a second-degree felony. Ohio Rev. Code § 2929.144(B)(1). Thus, as set forth in the Petition, those findings plainly "expose the defendant to a greater punishment" than what "a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Apprendi*, 530 U.S. at 494; *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (emphasis in original). Such facts must be found by a jury. *Id.*

The State's argument avoids addressing this dynamic by effectively ignoring how S.B. 201 operates. For example, the State asserts that "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." Resp. Br. at 9. These arguments invoke "pa-

role release decisions," "revo[cations] [of] supervised release," and other decisions about "whether an inmate should be released from prison" as a general matter. Resp. Br. at 9, 11. Relying on these analogies, the State claims incredulity at the notion that "a jury should be empanel[l]ed . . . to determine whether an inmate should be released from prison." Resp. Br. at 11.

The State's approach seeks to imbue S.B. 201 with the features that can make juryless early release proceedings constitutional. The common thread in such systems is, unsurprisingly, that they all address *early* releases *shortening* the period of incarceration imposed by the trial court. No jury is required in such cases because "the defendant receives a term of supervised release thanks to his initial offense, and whether that release is later revoked or sustained, it constitutes a part of the final sentence for his crime." *United States* v. *Haymond*, 139 S.Ct. 2369, 2380 (2019) (citing *Johnson* v. *United States*, 529 U.S. 694, 700 (2000)) (plurality op.). Conversely, a "jury must find any facts that trigger a *new*" period of incarceration. *Id.* (emphasis added).

But unlike early release proceedings, the question in an S.B. 201 proceeding is not whether a defendant should be "released" or their incarceration should be "maintained." Resp. Br. at 11. Quite the opposite. Standing alone, the terms of a trial court's sentencing order under S.B. 201 only authorize a defendant to be held until the end of the presumptive minimum sentence, after which he "shall be released from service of the sentence." Ohio Rev. Code § 2967.271(B). Thus, the de-

termination at issue is whether to impose *more* incarceration after the original sentence has *ended*.

The distinction between "maintain[ing]" an existing term of incarceration and imposing an additional term undercuts the State's claimed incredulity at the notion that a jury is required here. Tellingly, when the State describes how juries are typically not faced with making the types of findings which can trigger additional incarceration under S.B. 201, it omits one finding in particular: a finding that an inmate "committed a violation of law that was not prosecuted." Ohio Rev. Code § 2967.271(C)(1)(a); *see also* Resp. Br. at 11 (characterizing Ohio Rev. Code § 2967.271(C) as contemplating "discipline decisions, security level classifications, and housing assignments.") It is axiomatic that juries are both equipped and required to evaluate whether a defendant "committed a violation of law" and should thus be incarcerated. Ohio Rev. Code § 2967.271(C)(1)(a). Far from being "unheard-of," Resp. Br. at 11, this is an elementary feature of American courts.

Moreover, the fact that S.B. 201 imposes additional incarceration for post-conviction crimes offers another illustration of how the State's rationalizations turn the law on its head. It is true that a narrow exception to *Apprendi* allows a defendant's *prior conviction* for a separate crime to trigger additional considerations *at sentencing* without putting the existence of that conviction to a jury. *See United States* v. *Almendarez-Torres*, 523 U.S. 224 (1998). By contrast, S.B. 201 imposes additional incarceration *after sentencing* because of a defendant's *subsequent crime*, but only if the defendant was *not convicted* or indeed even prosecuted for it.

Ohio Rev. Code § 2967.271(C)(1)(a). Thus, as with the State's analogies to parole and similar systems, examining the mechanics of S.B. 201 reveals the exact opposite of what *Apprendi* and the Sixth Amendment allow.

Ultimately, the facts of Shepard's case lay bare the flaws with the State's arguments and the underlying statutes. The trial court gave Shepard an eight-year presumptive minimum sentence for a second-degree felony, the most it could possibly have imposed. App. 64a-66a. By the terms of that order, Shepard will go free in eight years. Ohio Rev. Code § 2967.271(B). Yet S.B. 201 also exposes Shepard to the risk of additional incarceration if the Department concludes certain additional facts are present—facts which potentially did not even exist at the time Shepard was sentenced. Thus, the Sixth Amendment requires Shepard have the opportunity for such factual questions to be given to a jury.

II. The State Relies On A Distinction Without A Difference To Sidestep A Tacitly Acknowledged Split In Authority Governing Presumptive Sentences.

In its effort to downplay the need for guidance from this Court on these questions, the State again ignores the presumption of release that is central to S.B. 201's sentencing scheme. The State offers the conclusory statement that there is no conflict between the decision below and seven other cases cited in Shepard's petition. Resp. Br. 13 (citing *State* v. *Allen*, 706 N.W.2d 40, 46 (Minn. 2005); *State* v. *Frinell*, 414 P.3d 430, 433 (Ore. App. 2018)).

While the State's bare denial of a broader split is incorrect as a general matter—for the reasons set forth in Shepard's petition, *see* Pet. Br. at 12-15—it is telling that the cases it acknowledged in its very next sentence were specifically omit-

ted from this denial. Indeed, the only two cases which the State mentions but excludes from its "no conflict" claim both addressed the same question: whether *Apprendi* applies to factfinding used to rebut a presumption that a defendant will receive probation rather than jail time. *See* Resp. Br. at 13-14 (citing *State* v. *Carr*, 53 P.3d 843 (Kan. 2002); *State* v. *Anderson*, 867 N.W.2d 718 (S.D. 2015)).

Ultimately, the State does not dispute that there is a split of authority on the "presumptive probation" question. *See* Resp. Br. at 12-14. Understandably so, as the results in different courts are squarely contradictory. Minnesota and Oregon courts view *Apprendi* as requiring juries to find any fact which triggers an "upward dispositional departure" from "a defendant's presumptive sentence," including rebutting the presumption that a defendant will serve probation. *Allen*, 706 N.W.2d at 46 (Minn. 2005); *see also, e.g.*, *Frinell*, 414 P.3d at 433. Courts in Kansas and South Dakota reached the opposite result, concluding that "the core concern of *Apprendi* . . . is not implicated" by considerations which "do[] not alter the range of years of imprisonment that a court may impose for a particular offense." *Anderson*, 867 N.W.2d at 724; *see also Carr*, 53 P.3d at 850 ("Probation and parole are dispositions alternate to the serving of a sentence, and neither probation nor parole increase or decrease the sentence required to be imposed by statute.").

To distance S.B. 201 from this stark split, the State offers that presumptive probation systems are "obviously different" on the theory that S.B. 201 applies to "high level felonies." Resp. Br. at 12. But this is a false distinction. In each system, there is a statutory presumption that the defendant's sentence will be lim-

ited—either to probation or to a defined term of incarceration within the permissible range. That presumption controls until it is rebutted, and it may only be rebutted by additional factual findings.

To be sure, none of these sentencing systems are identical to S.B. 201, but that is not to say they do not "share[] features with Ohio's" sentencing system. *Cf.* Resp. Br. at 14. Each system requires findings of fact before departing from the presumption that a more lenient sanction would be imposed. And where courts have upheld such systems against *Apprendi* challenges, they have done so by concluding—incorrectly—that departing from the presumption does not "change the range of penalties prescribed by the legislature." Resp. Br. at 10 (quoting App. 16a); *see also Carr*, 53 P.3d at 850.

Thus, the dispute over how such findings are made and who must make them cuts across the board—and requires this Court's guidance to resolve.

III. The State's Severability Argument Offers No Rationale For Denying Review.

The Response concludes with a *non sequitur*. The State asserts that Shepard's "argument ignores severances [*sic*]," and goes on to "suggest that severance would simply remove the provision Petitioner complains of—[Ohio Rev. Code] § 2967.271(C)." Resp. Br. at 14. To be clear, severing and striking the subsection which empowers the Department to impose additional prison time would resolve the constitutional issue Shepard has raised, and Shepard has never argued otherwise.

More to the point, the State fails to explain how its severance suggestion could or should impact this Court's decision to hear this case. If anything, the availability of a direct and limited remedy—as expressly acknowledged by the

State—only reinforces this case's suitability for resolving the questions looming in this Court's Sixth Amendment jurisprudence. But at a minimum, nothing the State says about severance rehabilitates the decision below or obviates the need this Court's guidance to resolve these important questions.

CONCLUSION

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

Respectfully submitted.

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