IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	**:**	
Plaintiff-Appellee,	**:**	
-vs-	**:**	**Case No. 2020-1496**
CHRISTOPHER P. HACKER,	**:**	
Defendant-Appellant.	**:**	

Merit Brief of Christopher P. Hacker

Logan County Prosecutor's Office

Eric C. Stewart (0071094)
Logan County Prosecuting Attorney
Email: estewart@logancountyohio.gov

117 E. Columbus Avenue, Suite 200
Bellefontaine, Ohio 43311
Telephone: 937-599-7272
Facsimile: 937-599-7271

Attorney for Appellee State of Ohio

Triplett McFall Wolfe Law, LLC

Tina M. McFall (0082586)
Email: mcfall@tmwlawyers.com
Counsel of Record

Marc S. Triplett (0021222)
Email: triplett@tmwlawyers.com

332 South Main Street
Bellefontaine, Ohio 43311
Telephone: 937-593-6591
Facsimile: 937-593-2867

Attorneys for Appellant
Christopher P. Hacker

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

Cases

Constitutional Provisions

Statutes

INTRODUCTION

Christopher Hacker faces the real prospect of having his sentence increased, not by the trial judge, but by the Department of Rehabilitation and Corrections. The increase will not be based on information the trial judge had considered, but information exclusively in the possession of the Department. The trial judge will have no role in the decision to increase Mr. Hacker's sentence.

The Department will have countless number of reasons available to it to rationalize the increase in his sentence, some very minor and insignificant. If the Department elects to increase his sentence, Mr. Hacker will be afforded a hearing which offers him little due process. He will not have the benefit of counsel, compulsory process, or the right to confrontation. Furthermore, the Department will not be required to establish by proof beyond a reasonable doubt that the basis for increasing his sentence is warranted.

The Department will act as both prosecutor and judge.

STATEMENT OF THE FACTS

I. Procedure

Trial Court Proceedings

On June 11, 2019, the Logan County Grand Jury returned a three-count indictment against Christopher P. Hacker. R. 2.[1] The first two counts charged Mr. Hacker with the offense of aggravated burglary, first degree felonies in violation of R.C. 2911.11(A), each with a three-year gun specification attached. The two counts involved the same facts but were charged pursuant to alternative sections of R.C. 2911.11(A). The third count charged Mr. Hacker with aggravated menacing, a first degree misdemeanor in violation of R.C. 2903.21(A). *Id.*

[1]The Court below consecutively numbered the documents the trial and appellate court records. Mr. Hacker will reference the documents by the following "R. __."

On December 20, 2019, Mr. Hacker filed objections to the imposition of the indefinite sentencing provisions contained in R.C. 2967.271. R. 51. He attached to the objections a copy of the decision in *State v. O'Neal,* Ham. C.P. No. B 1903562 (November 20, 2019, Memorandum of Decision) in which the Hamilton County Common Pleas Court found R.C. 2967.271 unconstitutional. *Id.*

On December 20, 2019, Mr. Hacker, pursuant to a plea agreement, pled guilty to count one of the indictment and an amended firearm specification. The prosecution dismissed counts two and three. R. 54, p. 2.

On January 27, 2020, the trial court conducted the sentencing hearing. It imposed an indefinite sentence of six to nine years on the aggravated burglary a definite sentence of one year on the firearm specification and a fine of ten thousand dollars. Appendix A-24 to A-26 p. 2.

Appellate Court Proceedings

On February 7, 2000, Mr. Hacker timely filed his notice of appeal. R. 77. On May 11, 2020, Mr. Hacker filed his merit brief. R. 113. Mr. Hacker raised three assignments, two which challenged the Reagan Tokes Act and the third the trial court's imposition of the ten thousand dollar fine. *Id.* On June 15, 2020, the State filed its brief. R. 20. On July 2, 2020, Mr. Hacker filed his reply brief. R. 125. On October 26, 2020, the court of appeals rendered its decision affirming the judgment of the trial court. Appendix. A-5 to A-23. On the same date the court issue its judgment entry. Appendix A-4.

Proceedings in this Court

On December 20, 2020, Mr. Hacker timely filed his notice of appeal. Appendix. A-2 to A-3. He raised two propositions of law, the first proposition challenged the constitutionality of the Reagan Tokes Act and the second proposition challenged the trial court's imposition of the ten

thousand dollar fine without first making an explicit finding that Mr. Hacker had the means to pay the fine. *Id.* On March 2, 2020, the Court accepted the appeal but only as to the first proposition of law. It further ordered the appeal held for the decision in *State v. Maddox,* No. 2020-1266.

On April 1, 2022, the Court ordered that the appeal no longer be held for the decision in *State v. Maddox, supra.* The stay in the briefing scheduled lifted, and the Clerk ordered that the record be certified and transmitted.

On April 12, 2022, the record was filed. On May 11, 2022, the parties stipulated that the time for the filing of Mr. Hacker's merit brief be extended to June 13, 2022.

II.Facts

The Offense

The present case involves a domestic dispute. Mr. Hacker saw his spouse in the residence with another man. 1.27.20, Tr. 14.[2] Mr. Hacker entered the victim's residence only to threaten the victim. *Id.*. While Mr. Hacker had a loaded firearm (for which he possessed a license) he did not discharge the firearm. *Id.*. Mr. Hacker immediately after the incident sent a text apologizing to the victim. *Id.*. He turned himself in the authorities. *Id.* at p. 15.

Sentencing

Mr. Hacker had never spent a day in jail in his life. *Id.* at Tr. 13. His previous "criminal offenses" were limited to speeding tickets. *Id.*. Mr. Hacker suffered from a series of debilitating injuries. At the age of eighteen he fell out of his employer's truck and suffered post-concussive syndrome, scalp and head contusions, and a traumatic brain injury. He experienced comprehension and problem solving issues from the accident. R. 56, p. 3. In 2018, he had emergency surgery after

[2] The record contains two transcripts, the first from the December 20, 2019 guilty plea and the second from the January 27, 2020 sentencing hearing. Mr. Hacker will reference the two transcript by "date Tr__."

fourteen inches of his intestine ripped open. 1.27.20, Tr. 16. In 2018 he also had back surgery. In 2019, he suffered anaphylactic shock caused by and allergic reaction to shellfish. In 2019 he again had back surgery R. 56, p. 4. His marriage failed. *Id.* at Tr. 16.

Mr. Hacker suffers from major depression. 1.27.20, Tr. 11, 17. His mental health issues are attributable to his physical issues.

Prior to the sentencing, Mr. Hacker's spouse wrote the court a letter in which she admitted to not making herself available to help him address his physical issues. She reported that prior to the date of the offense she never saw him "in any manner that would be threatening." R. 59.

Quala, Mr. Hacker's employer, wrote a letter to the trial court describing Mr. Hacker as a "role model" and critical employee. He worked for the company for nearly nine years as a supervisor and made $4,400 a month. Quala was willing to keep a job open for him if the trial court imposed a lesser sentence. 1.27.20, Tr. 18-19. "He led by example and always showed courteous to his fellow employees and customers alike. Chris is a valuable asset to our company." R. 56. A fellow employee, Kenneth K. Holycross wrote that Mr. Hacker "is not only an impeccable co-worker but also the type of friend you feel lucky to have." R. 57.

Mr. Hacker had a support system that includes his parents, brother, sister, and friends. 1.27.20, Tr. 18. They submitted letters on his behalf to the court. R. 57.

Mr. Hacker immediately took responsibility for his actions. Immediately after the offense, he turned himself in to the authorities. 1.27.20, Tr. 14-15. He pled guilty. He told the author of the presentence investigation that "I feel horrible about what happened. I wish it never happened seeing that I am not this kind of person. I wish I could take it all back." R. 56, p. 5.

The presentence report found him a low risk to recidivate. 1.27.29, Tr. 19.

PROPOSITION OF LAW

As Amended By The Reagan Tokes Act, The Revised Code's Sentences For First And Second Degree Qualifying Felonies Violate the United States and Ohio Constitutions.

In 2019, the Ohio Legislature enacted R.C. 2967.271, which is commonly referred to as the "Reagan Tokes Act." The Act created a presumptive date for the Department of Rehabilitation and Corrections ("DRC") to release individuals serving indefinite sentences on first and degree felonies not involving life sentences: "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).

The statute creates a procedure for DRC to rebut the presumption to retain individuals beyond the presumptive date. R.C. 2967.271(C)-(E). The statute also creates a procedure for DRC to rebut the presumption to permit the release of individuals prior to the presumptive date. R.C. 2967.271(F).

The Reagan Tokes Act violates the separation of powers doctrine and defendant's right to a jury trial and due process. Because the facial unconstitutionality of a statute concerns a matter of law, the Court reviews the issue *de novo*. *Crutchfield Corp. v. Testa*, 151 Ohio St.3d 278, 2016-Ohio-7760, 88 N.E.3d 900, ¶ 16.

Statutes are presumed to be constitutional. *Wood v. Telb,* 89 Ohio St.3d 504, 510-511, 733 N.E.2d 1103 (2000); R.C. l.47(A). "[T]his presumption of constitutionality is rebuttable." *State v Mole,* 149 Ohio St3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 10. "The presumption of constitutionality is rebutted when it appears beyond a reasonable doubt that the statute and the Constitution are clearly incompatible." *Id.* at ¶ 11. "When incompatibility is clear, a reviewing

court has the duty to declare the statute unconstitutional." *Cincinnati City School Dist. Bd. of Edn. v. Walter*, 58 Ohio St. 2d 368, 383, 390 N.E.2d 813 (1979).

Mr. Hacker can meet his burden to establish that the indeterminate prison sentencing scheme is unconstitutional on its face beyond a reasonable doubt.

I. The Reagan Tokes Act Violates the Separation of Powers Because The Ohio Department of Rehabilitation and Corrections Determines the Length of an Individual's Sentence.

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 government." *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 134, 729 N.E.2d 359 (2000), quoting *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 158-159, 503 N.E.2d 136 (1986); *State v. Warner*, 55 Ohio St.3d 31, 43-44, 564 N.E.2d 18 (1990).

The purpose of the separation of powers doctrine is to ensure that powers belonging to one branch not be "directly and completely administered" by another and to prevent one branch from "possess[ing] 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 (1929); *see also State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 44. "The United States Supreme Court stated 'it is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be

permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.'" *Bodyke,* at ¶¶ 39-40 "internal citation omitted."

"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." *State ex rel. Johnston v. Taulbee,* 66 Ohio St 2d 417, 423 N.E.2d 80 (1981), at paragraph one of the syllabus. Under the Ohio Constitution, Article IV, Section l, the judicial power of the state is vested solely in the state courts. "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. *Bray,* 89 Ohio St.3d 132,. "The reason the legislative, executive, and judicial powers are separate and balanced is to protect the people, not to protect the various branches of government." *Id.* at 135. "Courts . . . condemn legislative encroachments that violate the separation of powers by vesting officials in the executive branch with the power to review judicial decisions or by commanding that the courts reopen final judgments." *Bodyke*, ¶53. "[T]rying, convicting, and sentencing inmates for crimes committed while in prison is not an exercise of executive power." *Bray,* 89 Ohio St.3d at 136.

Both provisions contained in the Reagan Tokes Act, the authority to retain an individual in prison after the presumptive date and that authority to release an individual from prison prior to the presumptive date, violate the separation of powers doctrine.

A. The Reagan Tokes Act impermissibly permits the Department of Rehabilitation and Corrections to lengthen an individual's sentence.

The statutory exception for detaining an individual beyond the presumptive sentence violates the separation of powers doctrine because the sentencing court has *no* role in the process. The statute permits DRC to unilaterally detain the individual beyond the presumptive sentence.

The statutory exception provides that DRC may detain the individual past the minimum sentence "if the Department at a hearing determines that one or more of the following apply:"

> (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).

DRC can continue to hold an individual beyond the presumptive date for an "additional period of incarceration" for "a reasonable period determined by the Department" R.C. 2967.271(D)(1). After the individual serves his or her "reasonable" additional period of incarceration, DRC can continue to hold the individual if DRC makes yet another reasonable determination pursuant to R.C. 2967.271(C). *See* R.C. 2967.271(D)(2). The number or length of "reasonable" additional periods of incarceration that DRC can impose is only limited by what DRC finds to be a "reasonable" additional period and the individual's maximum sentence. *Id.* The individual has no right of appeal from DRC's determination(s) as to whether additional periods of incarceration are warranted pursuant or the length of the additional periods of incarceration that DRC imposes.

1. This Court has previously addressed this exact issue in *State ex rel. Bray*.

The statute in question, R.C. 2967.11(A), permits the parole board to extend an individual's sentence to a maximum of ninety days if the individual while incarcerated committed an act that constituted a criminal offense regardless of whether the individual was convicted of the offense. *See* former R.C. 2967.11 (repealed in Am.Sub.H.B. No. 130, 2008 Ohio Laws 173). This Court declared that the statute "enable[d] the executive branch to prosecute an inmate for a crime, to determine whether a crime ha[d] been committed, and to impose a sentence for that crime." *Bray*. 89 Ohio St.3d at 135. In so doing, this Court found that the law impermissibly shoehorned the executive branch into the roles of prosecutor, judge, and jury. *Id.* The statute violated the separation of powers because 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." *Id.* at 136. The *Bray* Court acknowledged that prison administration is rightly tasked with prison discipline. *Id.* at 136. Nonetheless, "trying, convicting, and sentencing inmates for crimes committed while in prison is not an exercise of executive power." *Id.* Accordingly, the Court held that the "bad time" statute violated the separation of powers doctrine. *Id.*

This Reagan Tokes Act violates separation of powers in two fundamental ways: (1) by allowing DRC to extend the sentence imposed by a trial court, the executive branch interferes with and amends a final judgment of a trial court, thereby impinging upon the judiciary's inherent authority to sentence and to issue final judgments; and (2) by allowing DRC to charge, judge, convict, and sentence for the commission of a new act, the executive branch performs the inherently judicial functions of trial, verdict, and sentence. These conflicts readily overcome the presumed constitutionality of the Reagan Tokes Law beyond a reasonable doubt. The absence of judicial involvement is fatal to DRC's ability to foist an extended term of incarceration upon an inmate.

In *State v. Hursey,* Franklin C.P. No. 20 CR 004459, 2021 Ohio Misc. LEXIS 101, *7-*14 (Aug. 6, 2021) the Court found that Reagan Tokes violates the separation of powers doctrine. The Court concluded:

> More to the point, the prophylactic caution that the sentencing court provides on the front end about S.B. 201's indeterminate sentencing mechanism in no way meaningfully involves a judge in the eventual subsequent imposition of a longer-than-minimum sentence. To begin with, the Court exercises no discretion about any part of the initial sentence aside from setting that original minimum sentence. The maximum sentence the court recites is determined solely as a function of mathematics, and under the current law, the court has no discretion whether any part of that longer sentence might be imposed or avoided, in whole or in part, on the facts before it at sentencing of the original crime. Nor, obviously, is the Court able to give any meaningful consideration to whatever additional alleged violations or crimes might someday be used by the executive to add years of additional sentencing later on facts that have not yet transpired. All the Court is doing in that colloquy is acknowledging that under S.B. 201, some part of the executive branch might unilaterally intrude into a core judicial function on facts not yet known, and not then subject to judicial review.
>
> In effect, the Court is merely apprising the defendant that under S.B. 201, a Separation of Powers violation may someday occur for any alleged violation or crime to which the Defendant is subsequently accused while incarcerated. Nothing about such a notice could possibly cure the violation when it later happens.

Id. at *12-*13.[3]

The Hamilton County Common Pleas Court reached the same decision, finding Reagan Tokes violates the separation of powers. *State v. O'Neal,* Ham. C.P. No. B-1903562 (Nov. 20, 2019). Appendix A-34 to A-42.[4]The Court premised its decision on this Court's holding in *Bray. Id.* at A-40 to A-41. The Court concluded, "[a]llowing the DRC to conduct a hearing to determine the guilt of an alleged criminal offense, and then give an additional sentence based on that frail determination clearly violates the separation of powers doctrine." *Id.* at A-39.

[3] The State appealed this decision. *State v. Hursey,* 10th Dist. No. 21AP00038. That court has stayed the appeal pending this Court decisions in this case and *State v. Simmons,* No. 2021-0532.
[4] The State appealed this decision. *State v. O'Neal,* 1st Dist. No. C-1900736. That appeal remains pending.

2. This Court has struck down several other statutory provisions that violate the separation of powers doctrine.

In *S. Euclid v. Jemison,* 28 Ohio St.3d 157, 503 N.E.2d 136 (1986) the statute then in effect, R.C. 4509.101(B)(2)(b), gave the Bureau of Motor Vehicles the authority to lift a license suspension imposed by the trial court if the Bureau determined with or without a hearing that the facts did not support the license suspension that the trial court imposed. This Court ruled that the statute violated the separation of powers doctrine because it "allows appellate review [of the trial court's decision] by the registrar, as well as "grants the registrar the ability to terminate a court-ordered suspension." *Id.* at 161.

This Court addressed a similar issue in *State v. Hochhausler,* 76 Ohio St.3d 455, 668 N.E.457 (1996). The statue at issue, R.C. 4511.191 gave the motor vehicle register the authority to suspend an individual's driver's or commercial license on receipt of the sworn statement of the arresting officer that the individual operated a motor vehicle whose blood or breath test demonstrated that the individual operated a motor vehicle while intoxicated. The statute precluded trial court's staying the Bureau's license suspension. This Court found "the part of R.C. 4511.191(H)(1) that prevents 'any court' from granting a stay [of the license suspension imposed by the Bureau] violates the doctrine of separation of powers and is unconstitutional." *Id.* at 464.

This Court addressed the separation of powers issue in the context of registration of convicted sexual offenders in *State v. Bodyke,* 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753. The Ohio Legislature adopted a revised system for classifying sexual offenders (the Adam Walsh Act). It authorized the Ohio Attorney General to reclassify sex offenders who trial courts previously classified under the prior law. This Court ruled that the Adam Walsh "provisions governing the reclassification of sex offenders already classified by judges under Megan's Law

violate the separation-of-powers doctrine for two related reasons: the reclassification scheme vests the executive branch with authority to review judicial decisions and interferes with the judicial power by requiring the reopening of final judgments." *Id.* at ¶ 55.

3. Conclusion: The Reagan Tokes provision that permits DRC to increase an individual's decision violates the separation of powers doctrine.

The Court's decision in *Bray* as well as its decisions in *Jemison, Hochhausler, and Bodyke*, compel this Court to strike down the provisions of the Reagan Tokes Law that allow the executive branch, DRC, to unilaterally extend a person's prison term. *Bray,* 89 Ohio St.3d at 135–36. The statutory grant of authority to DRC to engage in factfinding for the purpose of extending an individual's prison term encroaches on the authority of the judicial branch.

B. The Reagan Tokes Act impermissibly limits the trial court's authority to release an individual prior to the presumptive date.

A sentencing court's authority to release an individual prior to the presumptive date is contingent on DRC making an application to the sentencing court. Without an application, the sentencing court lacks any authority to order the early release of an individual. R.C. 2967.271(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.

In *State v. Sterling,* 113 Ohio St.3d 255, 2007-Ohio-1790, 864 N.E.2d 630, this Court faced a statute remarkably similar. There, the statute dictated that the granting of an inmate's application for DNA testing—when that inmate pled guilty or no contest to a felony—was contingent on the

prosecution's conceding that testing was warranted. *Sterling* at ¶ 31-34. The prosecution's opposition was fatal to the application and not appealable. Without the prosecution's agreement the sentencing court could not order DNA testing. *Id*. This Court ruled that the statute violated the separation of powers doctrine, saying "those portions of the statute that make the prosecuting attorney's disagreement final, and not appealable to any court, and that deprive the court of its ability to act without the prosecutor's agreement interferes with the court's function in determining guilt, which is solely the province of the judicial branch of government." *Sterling* at ¶ 35.

The Fourth Appellate District recently reached a similar decision concerning Ohio's arson registration statute. *State v. Dingus,* 4th Dist. No. 16CA3525, 2017-Ohio-2619, 81 N.E.3d 513. Arson offenders are required to register with their county sheriff, and reregister annually, until their death. R.C. 2909.15(A)-(D). The only exception to this lifetime registration requirement is that:

> The judge may limit an arson offender's duty to reregister at an arson offender's sentencing hearing to not less than ten years if the judge receives a request from the prosecutor and the investigating law enforcement agency to consider limiting the arson offender's registration period.

R.C. 2909.15(D)(2)(b). Absent these dual requests authorizing a judge to review and shorten the registration period, a judge cannot limit the registration term, and a defendant must register for life. The Fourth District Court of Appeals concluded "[a]ccordingly, the portion of R.C. 2909.15(D)(2)(b) that limits the trial court's discretion to reduce an arson offender's mandatory lifetime registration period only upon the request of the prosecutor and the investigating law enforcement agency violates the separation of powers doctrine and is therefore unconstitutional." *Dingus* at ¶ 33.

Like the statute in *Sterling and Dingus*, here the only potential avenue the individual has for serving less than the presumptive sentence is totally contingent on the recommendation of

DRC. Like the statute in *Sterling,* the individual has no appeal from DRC's decision not to recommend the serving of less than the presumptive sentence. The sentencing judge cannot, by statute, decrease the presumptive sentence absent authorization from the executive branch department. As the Supreme Court ruled, sentencing a defendant is a matter for the judiciary. *Bray*, 89 Ohio St.3d at 136.

The provision contained in R.C. 2967.271(F)(1) that makes the sentencing court's authority to approve service of less than the presumptive sentence contingent on the assent of the executive branch violates the separation of powers doctrine. The provision undermines the judiciary's authority, independence and authority. It permits the executive branch's encroachment into sentencing matters properly carried out by the judicial branch.

II. The Reagan Tokes Act Violates Mr. Hacker's Constitutional Right To A Trial By Jury Because DRC As Opposed To A Jury Makes The Necessary Findings To Increase A Presumptive Sentence.

The right to trial by jury is protected by the Sixth Amendment and Article I, Section 5 of the Ohio Constitution. *Duncan v. Louisiana,* 391 U.S. 145, 161-62, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. l 068, 25 L.Ed.2d 368 (1970).

A. The United States Supreme Court has consistently ruled that judicial fact-finding for purpose of sentencing violates a defendant's right to a jury trial.

The right to a jury trial includes the determination of all facts necessary for the imposition of punishment, and postconviction facts used to elevate that punishment. *Apprendi v. New Jersey,* 530 U.S. 466, 476, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000). In *Apprendi* the defendant pled guilty to possession of a fireman for an unlawful purpose (among other crimes), which ordinarily carries a ten-year maximum sentence under New Jersey law. However, at sentencing, the judge found that Apprendi possessed the firearm with a "biased purpose." This finding doubled the statutory maximum sentence under state law, even though no jury ever found this fact beyond a reasonable

doubt. On appeal, the Supreme Court overturned Apprendi's enhanced sentence. The court ruled that all facts that raise the statutory maximum sentence constitute elements of the charged crime. The Court held that "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" must be submitted to a jury and established by proof beyond a reasonable doubt."

In *Blakely v. Washington* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) the Court clarified that, while *Apprendi* may have factually dealt with punishments that exceeded the *statutory* maximum, the Sixth Amendment's guarantee was actually much greater and prohibited a judge from making *any finding necessary* for the imposition of a particular sentence, unless that finding was reflected in the jury's verdict. *Id.* at 304(" When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation omitted] and the judge exceeds his proper authority.").

The Supreme Court revisited the issue in *Alleyne v, United States,* 570 U.S. 99, 103, 133 S. Ct 2151, 186 L. Ed. 2d 314 (2013). "*Apprendi's* definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor" for purpose of sentencing *Id.* at 108. "[T]he principle applied in *Apprendi* applies with equal force to facts increasing the mandatory minimum." *Id.* at 111-112. It is an "obvious truth that the floor of a mandatory range is as relevant to wrongdoers as the ceiling." *Id* at 112-113. "[I]t is impossible to dispute that facts increasing the legally prescribed floor *aggravate* the punishment" *Id.* at 113,

In *United States v. Hammond*, 139 S. Ct. 2369, 204 L. Ed.2d 897 (2019) the Court addressed an issue very similar to the issue before this Court. A jury convicted the defendant of possessing child pornography. The sentencing range for the conviction was zero to ten years of

imprisonment and supervised release from five years to life. The district court imposed a sentence of imprisonment of thirty-eight months followed by ten years of supervised release. The district court subsequently found that defendant violated the terms of his supervised release by possessing additional child pornography. Under 18 U.S.C. Section 3583(k) the judge was required to impose an additional term of imprisonment from five years to life without regard to the sentence authorized by the defendant's initial conviction if the judge found by a preponderance of the evidence one of several factors including the possession of child pornography. The judge imposed an additional sentence of five years after finding that the prosecution proved by a preponderance of the evidence that the defendant possessed more pornography after his release from prison. The Court held as to the additional five year sentence, "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government. Yet in this case a congressional statute compelled a federal judge to send a man to prison for a minimum of five years without empaneling a jury of his peers or requiring the government to prove his guilt beyond a reasonable doubt. As applied here, we do not hesitate to hold that the statute violates the Fifth and Sixth Amendments." *Id.* at 2373.

B. This Court has also consistently ruled that judicial fact-finding for purpose of sentencing violates a defendant's right to a jury trial.

This Court addressed *Apprendi-Blakely's* application to Ohio's sentencing procedures in *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. At that time, Chapter 2929 contained provisions that required trial courts at sentencing to make certain findings to impose sentences of imprisonment beyond the minimum and maximum prison terms for felonies for which a definite prison term was authorized. This Court held that that because a finding to overcome the minimum sentence was being made by a judge - as opposed to a jury - this provision was unconstitutional under *Blakely. Id.* at 61.

This Court revisited this issue in *State v. Bowers,* 163 Ohio St.3d 28, 2020-Ohio-5167, 167 NE.3d 947. The defendant was convicted of rape of a child under the age of thirteen. The jury found the defendant guilty of the specification that the victim was under the age of thirteen. No other specification was included in the indictment or submitted to the jury. If the trial court elected not to impose a sentence of life without parole, it had three sentencing options: terms of imprisonment of ten years to life, fifteen years to life or twenty-five years to life. To impose the twenty-five year sentencing option, a finding needed to be made that offender caused serious harm to the victim. The trial court sentenced the defendant to twenty-five years to life. This Court found that the sentence violated the holdings in *Apprendi*, *Alleyne*, and *Haymond* because the trial court as opposed to the jury made the required finding that the offender caused serious harm to the victim. *Id.* at ¶ 17. This Court concluded, "Therefore, a finding that the victim was compelled to submit by force or that one of the other factors under subsection (B)(1)(c) is present increases the mandatory minimum sentence that the defendant is required to serve from 15 to 25 years in prison. *Alleyne* requires that such a finding be made by a jury. The imposition of a sentence under subsection (B)(1)(c) without a jury finding one of the predicate facts violates the Sixth Amendment." *Id.* at 21.

C. Reagan Tokes involves fact finding for purpose of sentencing that violates a defendant's right to a jury trial.

Applying the Supreme Court's and this Court's precedent barring non-jury fact finding for purpose of sentencing, the Reagan Tokes hybrid sentencing procedures similarly violate a defendant's right to a jury trial. Once again, the jury's verdict alone is not enough to trigger an increased term of imprisonment sentence beyond the presumptive sentence. Any increase in punishment beyond the presumptive sentence is dependent upon

and triggered by one or more findings that are made by DRC as prescribed by R.C. 2967.271(D), and not by the jury as prescribed by the Sixth Amendment.

R.C. 2967.27l(C) provides that DRC rebuts the presumptive release date if it finds any of the following at a hearing:

> (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(D) permits DRC to retain the individual in prison past the presumptive release date if DRC has made one of these required factual findings. Ascribing this role to DRC to make the findings that increase an individual's sentence violates the individual's right to a jury trial.

Apprendi and its progeny, *Foster,* and *Bowers* all contain a factual scenario that is not present in the Reagan Tokes statutory scheme. In those cases, the constitutional right to a jury tria1 was violated at the time of sentencing when the trial court made additional findings of fact that increased the defendant's sentence beyond what the relevant statute permitted. Under the Reagan Tokes statutory scheme, the findings of fact are made long after the sentencing hearing and are

made by DRC as opposed to the trial judge. Despite this difference, the result is the same. In both scenarios the statutes permit increases in the actual punishment to be served if other facts that do not constitute the crime charged are found. The individual's right to a jury trial is violated under both factual scenarios.

What *Blakely* said in invalidating the Washington sentencing guidelines is equally applicable to the Reagan Tokes Act:

> The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbors," *4 *Blackstone*, *supra*, at 343, rather than a lone employee of the State.

Blakely, 542 U.S. at 313-14.

III. The Reagan Tokes Act Violates Mr. Hacker's Constitutional Right To Due Process Because It Fails to Provide Him With Adequate Notice and a Fair Hearing.

"Procedural due process * * * requires the government to implement any action that deprives a person of life, liberty or property in a fair manner, even if the governmental action survives substantive due-process scrutiny." *State v. Aalim*, 150 Ohio St.3d 463, 2016-Ohio-8278, 83 N.E.3d 862, ¶ 51 (French, J., dissenting), citing *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). The core components of procedural due process are notice and the opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Not just any hearing will do; rather, the accused must be afforded a "meaningful" and "appropriate" hearing. *Bell v. Burson*, 402 U.S. 535, 541-42, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).

The Court in *Apprendi* and *Blakely* addressed who must be the appropriate fact-finder within the trial process - the jury or the judge. But, at least in those cases, the statutes kept the sentencing decision within the trial court and thus within the judicial branch of government. The

Reagan Tokes Act takes an even more radical step by removing the sentencing enhancement from the prerogative of the judicial branch and transferring it to the executive branch - DRC than decides whether the individual's sentence will be increased.

The Reagan Tokes Act violates due process under the Fourteenth Amendment and Article I, Section 16 of the Ohio Constitution. It does so in several ways.

A. Reagan Tokes Does Not Provide Adequate Notice.

The Act does not provide Mr. Hacker (and others like him) adequate notice as to what conduct will trigger an increase in his sentence pursuant to R.C. 2967.271(A)(l):

> (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)(l)(a) of this section, demonstrate that *the offender continues to pose a threat to society***.**

Id., (Emphasis added).

Simply put, on its face the statute fails to give adequate notice of what triggers the additional prison time. Prison terms may be extended under the Reagan Tokes Law for: (a) institutional rule infractions, (b) violations of law, (c) security level or (d) past placement in restrictive housing. The sheer number of possibilities for rule infractions and violations of the law paves the way for pervasive abuse of process in extending the individual's prison terms under the enactment. Ohio Administrative Code 5120-9-06 alone sets forth sixty-one "acts that constitute an immediate and direct threat to the security or orderly operation of the institution, or to the safety of its staff, visitors and inmates, * * * as well as other violations of institutional or departmental

rules and regulations." Appendix. A-28 to A-33. These include but are not limited to: assault and related acts; threats; sexual misconduct; riot, disturbances, and unauthorized group activity; resistance to authority; unauthorized relationships and disrespect; lying and falsification; escape and related conduct; weapons; drugs and related matters; gambling, dealing, and related offenses; property and contraband-related violations; fire violations; telephone, mail, and visitation-related rules; tattooing and self-mutilation. *Id.* Add to this list anything that can be considered a "violation of law" and the possibilities for extending prison terms grows exponentially.

The standards of "not been rehabilitated" and "pose a threat to society" are amorphous at best.

> "* * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.

City of Columbus v. Thompson, 25 Ohio St.2d 26, 30-31, 266 N.E.2d 571 (1971) (citations omitted.

Mr. Hacker would violate 2967.271(A)(l) by committing any violation of law which indicates a lack of rehabilitation. This is necessarily too vague. For example, if he argues verbally with a guard and thus slows the guard's progress in making a mid-day inmate count, he has arguably "hamper[ed] or imped[ed] a public official in the performance of the public official's lawful duties" in violation of R.C. 2921.31 If Mr. Hacker fails to clean up a spilled cup of coffee in the mess hall which created a risk of physical harm to someone who might slip, he has arguably

he engaged in disorderly conduct in violation of R.C. 2917.11(A)(5). If, in response to a written questionnaire during a therapy session, he writes that he is innocent of the crime and disagrees with the jury's verdict, he has arguably he falsified a government writing in violation of R.C. 2913.42(A)(l), (B)(4). And how does he know which of his actions could be interpreted a lack of rehabilitation, the second prong of subsection (A)(l), and a "threat to society," as required by (A)(2)?

Moreover, subsections (A)(2) and (A)(3) create a triggering event for a longer sentence, if the offender was placed in restrictive housing or was designated at a security level of 3 or above:

> (1) 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.
>
> (2) 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.

These types of decisions by DRC are virtually unreviewable: *Bell v. Wolfish*, 441 U.S. 520, 562, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Reynolds v. State*, 14 Ohio St.3d 68, 70, 471 N.E.2d 776 (1984). While it may, as a matter of prison administration, be acceptable to give this type of unfettered discretion to the executive branch, it violates due process when the executive's ability to make whatever judgment calls it deems appropriate, without sufficient guidance, results in an increased criminal penalty.

As the court concluded in *O'Neal* concerning the almost endless bases that DRC can employ to an individual's sentence:

> The Inmate Rules of Conduct lists 61 rules for issues concerning situations like assault, unauthorized relationships, and even "being out of place." However, neither O.A.C. 5120-9-06, nor S.B. 201 provide a hierarchy of misconduct to

> determine which infractions should be reasonably considered in deciding whether to extend an offender's prison sentence. Without some sort of hierarchy or ranking, the parole board holds unfettered discretion to consider minor infractions when deciding to extend an offender's sentence.
>
> Additionally, S.B. 201 fails. to provide a guideline as to how each consideration shall be weighed to determine whether a sentence should be extended. It is fair to believe that many of the institutional violations may simply relate to the many hardships of prison life, as their purpose is to provide punishment of incarcerated prisoners under a disciplinary regime imposed by prison officials. Indeed, prison discipline falls within the realm of the DRC. Nevertheless, it becomes rather problematic when the consideration of a modest sanction may inevitably affect the duration of an offender's sentence without the necessary due process protections, like a fair and impartial hearing before the sentencing judge.

Id. at A-41.

B. The Reagan Tokes Act Does Not Provide For A Fair Hearing.

While R.C. 2967.271 provides for a hearing before DRC imposes additional prison time, the statute provides no structure regarding the manner in which the hearing will be conducted or what rights the defendant will have at a hearing. R.C. 2967.271(C) and (D) require DRC to conduct a "hearing" to determine whether the presumptive sentence is rebutted. The parameters thereof or procedure therefor are not defined by the enactment. R.C. 2967.271(E) directs that "[t]he 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. 2967.12 and R.C. Chapter 2930, in turn, specify that the presiding judge, prosecutor, and victim are to receive notice of the hearing. The statute does not reference the inmate.

"One of the circumstances that gives the DRC permission to extend a prison sentence is when an offender commits a crime, or 'violation of law.' Thus, this determination should take place before the sentencing judge, as '[i]t is a fundamental tenet of due process that the decision

to restrict an individual's freedom can only be made by a neutral magistrate, not by law enforcement officials.'" O'Neal, Appendix. A-39 to A-40.

The Fourteenth Amendment due process provision as well as the Sixth Amendment and Article I, Section 10 of the Ohio Constitution recognize certain core rights as fundamental to the trial process. At the hearing where DRC seeks to lengthen the sentence imposed by the trial court Mr. Hacker will not have the benefit of the following fundamental rights:

> To counsel. *Gideon v. Wainwright*, 372 U.S. 335, 343, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), quoting *Johnson v. Zerbst*, 304 U.S. 458, 462, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). *See also* Article I, Section 10, Ohio Constitution; Sixth Amendment to the U.S. Constitution.
>
> To confront witnesses and compel attendance of witnesses. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Washington v. Texas*, 388 U.S. 14, 18, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). *See also* Article I, Section 10, Ohio Constitution; Sixth Amendment to the U.S. Constitution.
>
> To not incriminate himself. *Miller v. Fenton*, 474 U.S. 104, 110, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). *See also* Article I, Section 10, Ohio Constitution; Fifth Amendment to the U.S. Constitution.
>
> To have DRC establish his guilt by proof beyond a reasonable doubt *In re Winship*, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) Fourteenth Amendment to the U.S. Constitution

Finally, the Reagan Tokes Law does not provide for judicial review of DRC's entirely internal administrative determination that the presumptive release was clearly and convincingly rebutted by DRC. Indeed, without a judicial order underlying said determination, appellate courts lack jurisdiction to hear such an appeal. *See* Article IV, Section 3, Ohio Constitution; Article III, U.S. Constitution. *See also State ex rel. Leis v. Kraft*, 10 Ohio St.3d 34, 35, 460 N.E.2d 1372 (1984); *Marbury v. Madison*, 5 U.S. 137, 175, 2 L.Ed. 60 (1803).

Considering that the extended deprivation of a person's liberty is at stake, the "process" attendant to the Reagan Tokes Law falls far short of "meaningful" or "appropriate." Simply put,

administrative discipline for violating prison rules is one thing; continued incarceration for doing so with incestuous "process" as the sole safeguard is quite another. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) ("If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further.").

Accordingly, the Reagan Tokes Law violates the Due Process Clauses of the Ohio Constitution and of the United States Constitution.

CONCUSION

This Court should hold that Reagan Tokes violates the separation of powers and the Federal and Ohio constitutional rights to a jury trial and procedural due process and vacate that portion of Mr. Hacker's sentence that the trial court imposed pursuant to Reagan Tokes.

Respectfully submitted,

Triplett McFall Wolfe Law, LLC

/s/ Tina M. McFall
Tina M. McFall (0082586
Counsel of Record
mcfall@tmwlawyers.com

Marc S. Triplett (0021222)
triplett@tmwlawyers.com

332 South Main Street
Bellefontaine, Ohio 43311
Telephone: 937-593-6591
Facsimile: 937-593-2867

Attorneys for Christopher P. Hacker

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Merit Brief of Appellant Christopher P Hacker* was served by email upon Eric C. Stewart (estewart@logancountyohio.gov), Logan County Prosecuting Attorney, Office of the Logan County Prosecutor, 117 E. Columbus, Avenue, Suite 200, Bellefontaine, Ohio 43311 on this the 13th day of June 2022.

/s/ Tina M. McFall
Tina M. McFall (0082586)
Trial Counsel for Christopher P. Hacker

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	**:**	
Plaintiff-Appellee,	**:**	
-vs-	**:**	**Case No. 2020-1496**
CHRISTOPHER P. HACKER,	**:**	
Defendant-Appellant.	**:**	

Appendix to Merit Brief of Christopher P. Hacker

INDEX TO APPENDIX

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
-vs-	:	**Case No.**
CHRISTOPHER P. HACKER,	:	
Defendant-Appellant.	:	

On Appeal from the Court Of Appeals, Third Appellate District, Logan County, Ohio, App. No. CA-8-20-01

Notice of Appeal of Appellant Christopher P. Hacker

Logan County Prosecutor's Office

Eric C. Stewart
Logan County Prosecutor
Logan County Prosecutor's Office
117 E. Columbus Ave., Suite 200
Bellefontaine, Ohio 43311
Telephone: 937-599-7272
Fax: 937-599-7271
Email: Eric@pros.co.logan.oh.us

Attorney for Appellee State of Ohio

Triplett McFall Wolfe Law, LLC

Tina M. McFall (0082586)
Counsel of Record:
Email: mcfall@tmwlawyers.com

Marc S. Triplett (0021222)
Email: triplett@tmwlawyers.com
Triplett McFall Wolfe Law, LLC
332 South Main Street
Bellefontaine, Ohio 43311
Telephone: 937-593-6591
Facsimile: 937-593-2867

Attorneys for Christopher P. Hacker

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
-vs-	:	**Case No.**
CHRISTOPHER P. HACKER,	:	
Defendant-Appellant.	:	

On Appeal from the Court Of Appeals, Third Appellate District, Logan County, Ohio, App. No. CA 8-20-01

Notice of Appeal of Appellant Christopher P. Hacker

Appellant Christopher P. Hacker gives notice of appeal to the Supreme Court of Ohio from the opinion and judgment entry of the Logan County Court of Appeals, Third Appellate District in Court of Appeals Case No. CA-8-20-01, issued on October 26, 2020.

This appeal is taken from the Court of Appeals' decision affirming the sentence that the trial court imposed. This case involves substantial constitutional questions, felony, and questions of public or great general interest. *See* Sup. Ct. R. Prac. Sections 5.02(A) (1) (2) and (3).

Respectfully submitted,

Triplett McFall Wolfe Law, LLC

/s/ Tina M. McFall
Tina M. McFall (0082586)
Counsel of Record
Email: mcfall@tmwlawyers.com

Marc S. Triplett (0021222)
Email: triplett@tmwlawyers.com
Triplett McFall Wolfe Law, LLC
332 South Main Street
Bellefontaine, Ohio 43311

Telephone: 937-593-6591
Facsimile: 937-593-2867

Attorneys for Christopher P. Hacker

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Notice of Appeal of Appellant Christopher P. Hacker* was served upon Eric C. Stewart, Logan County Prosecuting Attorney, Office of the Logan County Prosecutor, 117 E. Columbus, Avenue, Suite 200, Bellefontaine, Ohio 43311 on this the 10th day of December, 2020.

/s/ Tina M. McFall
Tina M. McFall (0082586)
Trial Counsel for Christopher P. Hacker

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
LOGAN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 8-20-01**

v.

CHRISTOPHER P. HACKER, **JUDGMENT ENTRY**

DEFENDANT-APPELLANT.

For the reasons stated in the opinion of this Court, the assignments of error are overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellant for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

JUDGE

JUDGE

JUDGE

DATED: OCT 26 2020

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
LOGAN COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 8-20-01**

v.

CHRISTOPHER P. HACKER, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Logan County Common Pleas Court
Trial Court No. CR 19 06 0192

Judgment Affirmed

Date of Decision: October 26, 2020

APPEARANCES:

Marc S. Triplett **for Appellant**

Eric C. Steward **for Appellee**

ZIMMERMAN, J.

{¶1} Defendant-appellant, Christopher P. Hacker ("Hacker"), appeals the January 28, 2020 judgment entry of sentence of the Logan County Court of Common Pleas. We affirm.

{¶2} This case stems from Hacker's trespass into the victim's home (while the victim and Hacker's wife were present), and Hacker's threats toward the victim while brandishing a deadly weapon. (Doc. No. 18).

{¶3} On June 11, 2019, the Logan County Grand Jury indicted Hacker on the following criminal charges: Count One of aggravated burglary in violation of R.C. 2911.11(A), (B), a first-degree felony with a three-year firearm specification under R.C. 2941.145(A); Count Two also for aggravated burglary in violation of R.C. 2911.11(A)(2), (B), a first-degree felony with a three-year firearm specification under R.C. 2941.145(A); and Count Three of aggravated menacing in violation of R.C. 2903.21(A), (B), a first-degree misdemeanor. (Doc. No. 1).

{¶4} Hacker appeared for arraignment on June 14, 2019 and entered pleas of not guilty. (Doc. No. 13). However, on December 20, 2019, Hacker withdrew his pleas of not guilty and entered guilty pleas under a negotiated plea agreement. (Doc. No. 54). In exchange for his guilty pleas to Count One and the firearm specification (amended from a three-year to a one-year specification under R.C. 2941.141(A)), the State agreed to dismiss Counts Two and Three. (*Id.*); (Dec. 20, 2019 Tr. at 3-5,

20-22). The trial court conducted a Crim.R. 11 colloquy, accepted Hacker's guilty plea, and ordered a presentence investigation report ("PSI") be prepared. (*Id.*); (*Id.* at 6-22). Important to appellant's appeal, prior to his sentencing hearing, Hacker filed an objection to the imposition of indefinite-sentencing provisions under the Reagan Tokes Law, Am.Sub.S.B. 201, 2018 Ohio Laws 157 ("S.B. 201"). (Doc. No. 51).

{¶5} On January 27, 2020, the trial court sentenced Hacker to serve an indefinite prison term with a minimum prison term of six years and a maximum prison term of nine years under Count One and a mandatory definite prison term of one year under the firearm specification.[1] (Doc. No. 60). The indefinite prison term under Count One was ordered to be served consecutively to the mandatory definite prison term under the firearm specification.[2] (*Id.*). Then, the trial court imposed a $10,000 fine and ordered Hacker to pay court costs, the costs of prosecution, and fees under R.C. 2929.18. (*Id.*).

{¶6} On February 7, 2020, Hacker filed a notice of appeal. (Doc. No. 77). He raises three assignments of error for our review, which we will address together.

---

[1] Hacker's gun specification could not be used to increase the maximum prison term as to Count One. *See* R.C. 2929.144(B)(4). R.C. 2929.144 is silent as to the impact of his gun specification on the minimum prison term as to Count One. The trial court in this instance was required to impose the gun specification (a mandatory definite prison term) separately, and to order it to be served prior to and consecutive to the stated minimum term as to Count One. *See* R.C. 2929.14(C)(1)(a).

[2] Hacker was given 11 days' jail-time credit. (Doc. No. 60).

Assignment of Error I

The Trial Court Erred When It Did Not Sustain Mr. Hacker's Objections to the Sentencing Provisions Contained in R.C. 2967.271 [sic] (1.27.20. Tr. 25).

Assignment of Error II

As Amended By The Reagan Tokes Act, The Revised Code's Sentences For First and Second Degree Qualifying Felonies Violate The United States And Ohio Constitutions. (1.27.20. Tr. 25).

Assignment of Error III

The Trial Court Erred When It Imposed a Fine of Ten Thousand Dollars (1.27.20, [sic] Tr. 27).

{¶7} In his first and second assignment of error, Hacker asserts that the trial court erred in sentencing him under the Reagan Tokes Law because it violates his rights to a trial by jury and due process of law, and the constitutional requirement of separation of powers rendering his sentence contrary to law. In his third assignment of error, Hacker argues that the trial court erred when it failed to consider Hacker's ability to pay the financial sanction imposed under R.C. 2929.19(B)(5), which is also contrary to law.[3]

Standard of Review

{¶8} Under R.C. 2953.08(G)(2), an appellate court will reverse a sentence "only if it determines by clear and convincing evidence that the record does not

[3] While Hacker references R.C. 2929.18(B)(5) throughout his brief, it is apparent the ultimate question he is seeking to answer directs us to R.C. 2929.19(B)(5).

support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to law." *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, ¶ 1. Clear and convincing evidence is that "'which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'" *Id.* at ¶ 22, quoting *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

Reagan Tokes Law

{¶5} The Reagan Tokes Law, enacted in 2018 and effective on March 22, 2019, "'significantly altered the sentencing structure for many of Ohio's most serious felonies' by implementing an indefinite sentencing system for those non-life felonies of the first and second degree, committed on or after the effective date." *State v. Polley*, 6th Dist. Ottawa No. OT-19-039, 2020-Ohio-3213, ¶ 5, fn. 1, quoting The Ohio Criminal Sentencing Commission, *SB 201-The Reagan Tokes Law Indefinite Sentencing Quick Reference Guide*, July 2019 and citing R.C. 2929.144(A). Under the Reagan Tokes "[L]aw, qualifying first- and second-degree felonies committed on or after March 22, 2019 are now subject to the imposition of indefinite sentences." *State v. Barnes*, 2d Dist. Montgomery No. 28613, 2020-Ohio-4150, ¶ 28. These indefinite prison terms will consist of a stated minimum prison term selected by the trial court from a range of prison terms set forth in R.C. 2929.14(A) and a maximum prison term for qualifying first- and second-degree

felonies as determined by the trial court from formulas set forth in R.C. 2929.144. *Id.*

{¶10} Moreover, the Reagan Tokes Law establishes a presumptive-release date at the end of the offender's minimum prison term imposed. R.C. 2967.271(B). Nevertheless, the Ohio Department of Rehabilitation and Correction ("ODRC") may rebut that presumption and keep the offender in prison for an additional period not to exceed the maximum prison term imposed by the trial court. R.C. 2967.271(C). In order to rebut the presumption, ODRC must conduct a hearing and determine whether one or more of the following factors are applicable:

> (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)(1), (2), and (3).

Constitutionality Analysis

{¶11} Hacker argues that the presumptive-release provisions of R.C. 2967.271 violates his right to a trial by jury and due process of law, and further violates the constitutional requirement of separation of powers. Put more plainly—Hacker argues R.C. 2967.271 is unconstitutional on its face.

{¶12} We review the determination of a statute's constitutionality de novo. *State v. Hudson*, 3d Dist. Marion, 2013-Ohio-647, ¶ 27, citing *Akron v. Callaway*, 9th Dist. Summit No. 22018, 2005-Ohio-4095, ¶ 23 and *Andreyko v. Cincinnati*, 1st Dist. Hamilton No. C-020606, 2003-Ohio-2759, ¶ 11. "De novo review is independent, without deference to the lower court's decision." *Id.*, citing *Ohio Bell Tel. Co. v. Pub. Util. Comm. of Ohio*, 64 Ohio St.3d 145, 147 (1992).

{¶13} "'It is difficult to prove that a statute is unconstitutional.'" *State v. Stoffer*, 2d Dist. Montgomery No. 26268, 2015-Ohio-352, ¶ 8, quoting *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 25. "'All statutes have a strong presumption of constitutionality. * * * Before a court may declare unconstitutional an enactment of the legislative branch, "it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly

incompatible."'" *Id.*, quoting *Arbino* at ¶ 25, quoting *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142 (1955), paragraph one of the syllabus. "[I]f at all possible, statutes must be construed in conformity with the Ohio and United States Constitutions." *State v. Collier*, 62 Ohio St.3d 267, 269 (1991), citing *State v. Tanner*, 15 Ohio St.3d 1 (1984) and R.C. 1.47.

{¶14} "A statute may be challenged as unconstitutional on the basis that it is invalid on its face or as applied to a particular set of facts." *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶ 17. The distinction between the two types of constitutional challenges is important because the standard of proof is different for the two types of challenges. *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, ¶ 20. "To prevail on a facial constitutional challenge, the challenger must prove the constitutional defect, using the highest standard of proof, which is also used in criminal cases, proof beyond a reasonable doubt." *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, ¶ 21, citing *State ex rel. Dickman* at paragraph one of the syllabus. Conversely, "[t]o prevail on a constitutional challenge to the statute as applied, the challenger must present clear and convincing evidence of the statute's constitutional defect." *Id.*, citing *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329 (1944), paragraph six of the syllabus.

{¶15} "A facial challenge alleges that a statute, ordinance, or administrative rule, on its face and under all circumstances, has no rational relationship to a legitimate g overnmental purpose." *Wymsylo* at ¶ 21, citing *Jaylin Invest., Inc. v. Moreland*, 107 Ohio St.3d 339, 2006-Ohio-4, ¶ 11. "Facial 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." *Id.*, citing *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095 (1987). "If a statute is unconstitutional on its face, the statute may not be enforced under any circumstances." *Id.* "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." *Id.*, citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184 (2008).

{¶16} "In an as-applied challenge, the challenger 'contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, [is] unconstitutional.'" *Lowe* at ¶ 17, quoting *Ada v. Guam Soc. of Obstetricians & Gynecologists*, 506 U.S. 1011, 113 S.Ct. 633 (1992) (Scalia, J., dissenting). The practical impact of holding that a statute is unconstitutional as applied to the challenger is to prevent its future application in a similar context, "'but not to render it utterly inoperative.'" *Yajnik v. Akron Dept. of Health, Hous.*

Div., 101 Ohio St.3d 106, 2004-Ohio-357, ¶ 14, quoting *Ada*, 506 U.S. at 1011, 113 S.Ct. at 633 (Scalia, J. dissenting). "[W]here statutes are challenged on the ground that they are unconstitutional as applied to a particular set of facts, the party making the challenge bears the burden of presenting clear and convincing evidence of a presently existing set of facts that make the statutes unconstitutional and void when applied to those facts." *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶ 38 (2005), citing *Beldon*, 143 Ohio St. 329, at paragraph six of the syllabus.

{¶17} We begin by addressing Hacker's argument that the presumptive-release provisions of R.C. 2967.271 violates his right to a trial by jury in that it permits ODRC (and not the jury) to engage in fact-finding increasing the offender's minimum prison term, a right protected by the Sixth Amendment of the United States Constitution applicable to the states through the due process clause of the Fourteenth Amendment of the United States Constitution and also guaranteed by Article I, Section 5 of the Constitution of the State of Ohio. "The question of constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution this means in the trial court." *State v. Awan*, 22 Ohio St.3d 120, 122 (1986), limited by, *In re M.D.*, 38 Ohio St.3d 149 (1988), syllabus, citing *State v. Woodards*, 6 Ohio St.2d 14 (1966). If a party fails to object to a constitutional issue at trial, an appellate court need not consider the objection for the first time on appeal. *Id.*, paragraph one of the syllabus. Importantly, a review

of the record reveals Hacker did not raise this argument before the trial court and now raises this argument for the first time on appeal. We conclude that Hacker has waived this argument, and therefore we decline to address it.[4] *See State v. Pritt*, 3d Dist. Seneca No. 13-14-39, 2015-Ohio-2209, ¶ 15, citing *State v. Bagley*, 3d Dist. Allen No. 1-13-31, 2014-Ohio-1787, ¶ 71, citing *State v. Rowland*, 3d Dist. Hancock No. 5-01-28, 2002-Ohio-1417, 2002 WL 479163, *1 (Mar. 29, 2002). *See also Barnes*, 2020-Ohio-4150, at ¶ 37.

{¶18} Next we turn to Hacker's assertions that the Reagan Tokes Law violates due process and the doctrine of separation of powers. First, Hacker argues that the Reagan Tokes Law does not provide him adequate notice of the conduct that triggers ODRC to maintain the offender's incarceration after the expiration of the offender's minimum prison term and it does not provide a structure as to the hearing to rebut the presumption established under division (B). Secondly, and as it relates to the separation-of-powers doctrine, Hacker argues that Reagan Tokes Law is unconstitutional because it permits ODRC (rather than the trial court) to make factual determinations as to whether the offender is eligible for a reduction of the offender's minimum prison term (his presumptive-release date) or to maintain

[4] "Waiver is the intentional relinquishment or abandonment of a right, and waiver of a right 'cannot form the basis of any claimed error under Crim.R. 52(B).'" *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 23 quoting *State v. McKee*, 91 Ohio St.3d 292, 299, fn. 3, (Cook, J. dissenting) and citing *United States v Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 1777 (1993). Forfeiture, on the other hand, "is a failure to preserve an objection * * *." *Id.*, citing *Olano* at 733. Forfeiture does not extinguish an appellant's claim "of plain error under Crim.R. 52(B)." *Id.*, citing *McKee* at 299, fn. 3.

the offender's incarceration after the expiration of the offender's minimum prison term for a period not exceeding the offender's maximum prison term. His arguments are based on the holdings in *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132 (2000) and *State v. Oneal*, Hamilton C.P. No. 1903 562 (Nov. 20, 2019).

{¶19} In *Bray*, the Supreme Court of Ohio addressed the constitutionality of R.C. 2967.11 (which has since been repealed). *Bray*, 89 Ohio St.3d at 132; R.C. 2967.11, repealed in A.m.Sub.H.B. No. 130, 2008 Ohio Laws 173. R.C. 2967.11, stated in pertinent part, that:

> [a]s 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 term is extended under this section, the time by which it is so extended shall be referred to as 'bad time.'

R.C. 2967.11(B), repealed in A.m.Sub.H.B. No. 130, 2008 Ohio Laws 173. 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." R.C. 2967.11(A), repealed in A.m.Sub.H.B. No. 130, 2008 Ohio Laws 173. Other sections in R.C. 2967.11 articulated the procedures that were followed to determine whether a "violation" (a crime) had been committed. *Bray* at 135.

{¶20} The Court in *Bray* held, "[i]n short, R.C. 2967.11(C), (D), and (E) enable[d] the executive branch to prosecute an inmate for a crime, to determine

whether a crime has been committed, and to impose a sentence for that crime." *Id.* The Court in *Bray* further held that the statute improperly permitted the executive branch to act "as judge, prosecutor, and jury * * * [and thereby] intrude[] well beyond the defined role of the executive branch as set forth in our Constitution." *Id.* Consequently, the Court in *Bray* concluded the statute unconstitutional because it violated the doctrine of separation of powers. *Id.* at 136.

{¶21} The trial court in *Oneal* (relying on *Bray*) concluded the Reagan Tokes Law is unconstitutional because it surrenders judicial powers to the executive branch. The trial court noted, "[t]he conditions that the [O]DRC may consider in determining whether an offender should not be released upon the end of [his] minimum prison term may include a 'violation of law'" which, like the bad time statute "is synonymous with a criminal offense." *Oneal*, Hamilton C.P. No. 1903 562, at *5. Moreover, *Oneal* determined that Reagan Tokes Law violates procedural-due process because it does not provide for a judicial hearing prior to the extension of a prison term beyond the minimum term. *Id.* at *6.

{¶22} Here, Hacker's reliance on *Bray* and *Oneal* is flawed because there is a significant distinction between the imposition of "bad time" (as was permitted under R.C. 2967.11) and the structure for extension of a prison term beyond the minimum term under the Reagan Tokes Law. Unlike *Bray*, the Reagan Tokes Law does *not* permit ODRC (the executive branch) to maintain Hacker beyond the

maximum prison term imposed by the trial court. Therefore, we cannot conclude that *Bray* and *Oneal* lead us to the conclusion that the Reagan Tokes Law violates the doctrine of separation of powers. *Barnes*, 2020-Ohio-4150, ¶ 36, (concluding "that *Bray* and *Oneal* do not compel the conclusion that the Reagan Tokes Law violates the separation of powers doctrine.")

{¶23} Accordingly, we cannot conclude that Hacker has met his burden in demonstrating that the Reagan Tokes Law is unconstitutional on its face with proof beyond a reasonable doubt and thus, we cannot conclude that Hacker's sentence is clearly and convincingly contrary to law.

{¶24} Hacker's first and second assignment of error are overruled.

Financial-Sanction (Fine) Analysis

{¶25} Now, we turn to Hacker's argument that the trial court failed to consider his ability to pay the financial sanction imposed. We review the imposition of a financial sanction under the same standard of review as we would apply toward any other felony sentence. *See State v. McCants*, 1st Dist. Hamilton No. C-190143, 2020-Ohio-3441, ¶ 10, citing *State v. Owen*, 1st Dist. Hamilton No. C-170413, 2018-Ohio-1853, ¶ 5. An appellate court "may modify or vacate a felony sentence only if we clearly and convincingly find that the record does not support the trial court's findings under relevant statutes or that the sentence is otherwise contrary to

law." *Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, at ¶ 1, citing R.C. 2953.08(G)(2).

{¶26} As an initial matter, Hacker never objected to the imposition of a financial sanction (i.e., a fine) by the trial court at his sentencing hearing, which he now raises for the first time on appeal. (Jan. 27, 2020 Tr. at 27-29); (Doc. No. 85). An appellant's failure to raise an issue with the trial court constitutes a forfeiture of that issue absent plain error. *State v. Kiser*, 3d Dist. Seneca No. 13-16-25, 2017-Ohio-4222, ¶ 21 (applying the plain-error standard to a case involving a fine where no discussion or objection to the imposition of the financial sanction was lodged).

{¶27} Crim.R. 52(B) governs plain error in criminal cases. The Supreme Court of Ohio has held that "'the plain error rule is to be invoked only in exceptional circumstances to avoid a miscarriage of justice.'" *State v. Long*, 53 Ohio St.2d 91, 95 (1978), quoting *United States. v. Rudinsky*, 439 F.2d 1074, 1076 (6th Cir.1971), citing *Eaton v. United States*, 398 F.2d 485, 486 (5th Cir.1968). Because Hacker did not object to the imposition of this financial sanction, we apply the plain-error rule to the facts before us.

{¶28} Our review is not without limitation. The Supreme Court of Ohio has previously concluded that there are limitations on an appellate court's decision to review and correct an error under Crim.R. 52(B). *State v. Barnes*, 94 Ohio St.3d

21, 27 (2002). "First, there must be an error, i.e., a deviation from a legal rule." *Id.* citing *State v. Hill*, 92 Ohio St.3d 191, 200 (2001), citing *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 1776 (1993). "Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings." *Id.*, citing *State v. Sanders*, 92 Ohio St.3d 245, 257, (2001), citing *State v. Keith*, 79 Ohio St.3d 514, 518 (1997) and *Olano*, 507 U.S. at 734, 113 S.Ct. at 1777. "Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." *Id.*, citing *Hill*, 92 Ohio St.3d at 205, *State v. Moreland*, 50 Ohio St.3d 58, 62 (1990), and *Long*, 53 Ohio St.2d at 91, paragraph two of the syllabus. Thus, Hacker is "required to demonstrate a reasonable probability that the error resulted in prejudice—the same deferential standard for reviewing ineffective assistance of counsel claims." *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, ¶ 22, citing *United States v. Dominguez Benitez*, 542 U.S. 74, 81-83, 124 S.Ct. 2333 (2004). That is—an appellate court addressing the failure to object to the imposition of a financial sanction "must review the facts and circumstances of each case objectively and determine whether the defendant demonstrated a reasonable probability that had [Hacker's trial] counsel moved to waive [or objected to the imposition of the financial sanction], the trial court would have granted that motion." *See State v. Davis*, 159 Ohio St.3d 31, 2020-Ohio-309,

¶ 14 (applying the prejudiced prong on ineffective-assistance-of-counsel analysis to the waiver of court costs); *see also State v. Thompson*, 3d Dist. Allen No. 1-19-30, 2020-Ohio-723, ¶ 19, citing *Davis* at ¶ 14.

{¶29} R.C. 2929.19(B)(5) requires the trial court "[b]efore imposing a financial sanction under section 2929.18 * * * [to] consider the offender's present and future ability to pay the amount of the sanction * * *." "[T]here are no express factors that must be taken into consideration or findings regarding the offender's ability to pay that must be made on the record." *State v. Williams*, 9th Dist. Summit No. 26014, 2012-Ohio-5873, ¶ 17, quoting *State v. Martin*, 140 Ohio App.3d 326, 327 (4th Dist.2000). However, the record must reflect that the trial court actually considered a defendant's ability to pay. *Williams* at ¶ 17, citing *Martin* at 327; *State v. Lewis*, 2d Dist. Greene No. S-11-028, 2012-Ohio-4858, ¶ 9; *State v. McQuillen*, 5th. Dist. Ashland No. 12CA014, 2012-Ohio-4953, ¶ 11; and *State v. Dahms*, 6th Dist. Sandusky No. S-11-025, 2012-Ohio-3181, ¶ 16. We "look to the totality of the circumstances to see if this requirement has been satisfied." *State v. Barker*, 8th Dist. Cuyahoga No. 93574, 2010-Ohio-4480, ¶ 12, citing *State v. Lewis*, 8th Dist. Cuyahoga No. 90413, 2008-Ohio-4101, ¶ 12, citing *State v. Henderson*, 4th Dist. Vinton No. 07CA659, 2008-Ohio-2063, ¶ 7; *State v. Smith*, 4th Dist. Ross No. 06CA2893, 2007-Ohio-1884, ¶ 41-42; and *State v. Ray*, 4th Dist. Scioto No. 04CA2965, 2006-Ohio-853, ¶ 26.

{¶30} Here, the record reveals that trial court considered Hacker's ability to pay, when the trial court stated that it had "also considered defendant's written sentencing memorandum that was filed January 4, 2020." (Jan. 27, 2020 Tr. at 21); (Doc. No. 85). Importantly, contained within that sentencing memorandum is information regarding Hacker's long-term-employment history where he was considered a "valued employee" with income in the amount of $4,400 per month.[5] (*See* Doc. No. 56). Thereafter, the trial court stated "[i]n addition to this prison sentence, the defendant is also assessed a $10,000 fine." (Jan. 27, 2020 Tr. at 27); (Doc. No. 85). Thus, because the record before us is not silent as to whether the trial court considered Hacker's ability to pay the fine before imposing the financial sanction, the trial court could not commit plain error. *See Williams* at ¶ 19, quoting *State v. Andrews*, 1st Dist. Hamilton No. C110735, 2012-Ohio-4664, ¶ 32. While it certainly facilitates appellate review when a trial court affirmatively states on the record that it considered a criminal defendant's ability to pay, we cannot say that the record in this case does not meet the threshold of R.C. 2929.19(B)(5), as a matter of law. *See Barker* at ¶ 14, (concluding that a cursory reference in the record to the trial court's consideration of all factors required by law, the ordering of a PSI, and the plain-error analysis were sufficient to meet the threshold of R.C.

[5] It is not clear from our review of the record whether this was Hacker's gross or net income. (*See* Doc. No. 56).

2929.19(B)(6)).[6] Consequently, and after reviewing the totality of the circumstances, we cannot conclude that the trial court deviated from some legal rule, with an obvious defect in the proceeding, that affected Hacker's substantial rights. Accordingly, we find no plain error exists which has caused a manifest miscarriage of justice. *See Long*, 53 Ohio St.2d at 95.

{¶31} For these reasons, Hacker's third assignment of error is overruled.

{¶32} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

PRESTON and WILLAMOWSKI, J.J., concur.

/jlr

[6] R.C. 2929.19 was amended by Am.Sub.H.B. 86, 2011 Ohio Laws File 29, effective September 30, 2011, renumbering the division addressing the trial court's consideration of the offender's ability to pay financial sanctions under R.C. 2929.18 or a fine under R.C. 2929.32 from division (B)(6) to division (B)(5).

IN THE COMMON PLEAS COURT
OF LOGAN COUNTY, OHIO
GENERAL DIVISION

STATE OF OHIO,	:	
Plaintiff,	:	
-vs-	:	**CASE NO. CR 19 06 0192**
CHRISTOPHER P HACKER **DOB: 08/24/1988**	:	**JUDGMENT ENTRY/SENTENCING**
Defendant.	:	

On January 27, 2020, Defendant's sentencing hearing was held pursuant to R.C. 2929.19. The Defendant was present and represented by Attorney Marc S. Triplett and Tina M. McFall, and was afforded all rights pursuant to Criminal Rule 32. Assistant Logan County Prosecutor Eric C. Stewart appeared on behalf of the State of Ohio.

The Court has considered the record, oral statements, any victim impact statement and pre-sentence report prepared, as well as the principles and purposes of sentencing under R.C. 2929.11 and 2929.12. The Court has also considered the need for deterrence, incapacitation, rehabilitation and restitution. The Court has given no consideration to the Defendant's race, gender, ethnic origin or religious belief.

The Court **FINDS** that the **Defendant CHRISTOPHER P HACKER** has been convicted of **COUNT ONE, AGGRAVATED BURGLARY,** in violation of R.C. 2911.11(A), 2911.11(B), a felony of the first degree.

The Court **FINDS** that a prison term is consistent with the purposes and principles of sentencing in R.C. 2929.11 and R.C. 2929.12. The Court informed Defendant that his offense of aggravated burglary in the first degree is subject to an indefinite prison term. It is, therefore, **ORDERED, ADJUDGED and DECREED** by the Court that Defendant

CHRISTOPHER P. HACKER SHALL serve **an indefinite prison term with a Minimum Prison Term of Six (6) years and a Maximum Prison Term of Nine (9) years** under **COUNT ONE, AGGRAVATED BURGLARY,** in violation of R.C. 2911.11(A), 2911.11(B), a felony of the first degree; and a **definite prison term of One (1) year** under the **Specification for Forfeiture of a Gun** pursuant to R.C. 2941.1417(A). The indefinite prison term for aggravated burglary, a felony of the first degree, shall be served consecutively to the definite prison term for the firearms specification as mandated by Ohio law.

The Court informed Defendant as follows:

- Defendant may earn good-time credit, which is "earned reduction" for "exceptional conduct" of 5-to-15% off the Minimum Term.
- It is rebuttably presumed Defendant will be released from service of the sentence on the expiration of the Minimum Term of 6 years or on Defendant's presumptive earned early release date, whichever is earlier.
- The Department of Rehabilitation and Correction may rebut the presumption if, at a hearing, the Department makes specified determinations regarding Defendant's conduct while confined, Defendant's rehabilitation, Defendant's threat to society, Defendant's restrictive housing, if any, while confined, and Defendant's security classification.
- If the Department makes the specified determinations at the hearing and rebuts the presumption, the Department may maintain Defendant's incarceration after the expiration of the Minimum Term or after the presumptive earned early release date for the length of time the Department determines to be reasonable.
- The Department may make the specified determinations and maintain Defendant's incarceration more than one time.
- If Defendant has not been released prior to the expiration of the Defendant's Maximum Term, Defendant must be released upon the expiration of the Maximum Term.

The Court further informed Defendant that the absolute maximum amount of prison time he may be required to serve is **Ten 10 years**, which would be served as one (1) year on the firearms specification plus nine (9) years on the maximum term on the aggravated burglary, a felony of the first degree.

The Court also imposed a **fine of ten thousand dollars ($10,000.00)** as part of Defendant's sentence on aggravated burglary, a felony of the first degree.

Defendant is **HEREBY CONVEYED** to the custody of the Ohio Department of Rehabilitation and Corrections. **Jail time credit for 11 days** is **GRANTED** as of this hearing date, along with future custody days while Defendant awaits transportation to the appropriate state institution.

The Court informed the defendant that upon release from prison the defendant will be subject to five years of Post-Release Control. Said post-release control will be administered by the Adult Parole Authority pursuant to R.C. 2967.28. If post-release control is violated, the Adult Parole Authority or Parole Board can impose a more restrictive or longer control sanction or may return Defendant to prison for up to nine months for each violation, but not more than ½ of the stated prison term. If the Defendant is convicted of a felony committed while under post-release control, in addition to any prison term imposed for the new offense, the Defendant may be returned to prison under this case for a term of twelve months or the time remaining on post-release control, whichever is greater. The additional periods of time imposed by another court because of a felony committed while under post-release control in this case or by the Parole Board for violations in this case while on post-release control are part of the sentence in this case.

In accordance with Ohio law, Defendant **SHALL SUPPLY A SAMPLE OF HIS DNA** to the Ohio Department of Rehabilitation & Corrections or the Adult Parole Authority.

Defendant shall pay all court costs, costs of prosecution, and fees permitted by 2929.18 for which judgment is hereby rendered against you. If there is insufficient money

to pay the expenses out of your bail, then you will be responsible to pay these costs and expenses. You are notified as required by R.C. 2947.23 that:

- If you fail to pay the judgment or fail to timely make payments towards the judgment under a payment schedule toward that judgment approved by the court, the court may order you to perform community service until the judgment is paid or until the court is satisfied that you are in compliance with the approved payment schedule.

- If the court orders you to perform community service, you will receive credit upon the judgment at the specified hourly credit rate per hour of community service performed, and each hour performed will reduce the judgment by that amount.

The Court HEREBY notifies the Defendant of the right to appeal; that if the Defendant is unable to pay the cost of an appeal, the Defendant has the right to appeal without payment; that if the Defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost; that if Defendant is unable to pay the costs of documents necessary to an appeal, said documents will be provided without cost and that the Defendant has the right to have a notice of appeal timely filed.

Kevin P. Braig
Judge Kevin P. Braig

ENDORSEMENT REGARDING NOTICE OF JUDGMENT

To the Clerk:

You are hereby directed to serve upon all parties Notice of Judgment and the date on which it was journalized pursuant to Civil Rule 58(B).

Kevin P. Braig
Judge Kevin P. Braig

XC: Prosecutor
Marc S. Triplett and Tina M. McFall
Logan County Sheriff
Ohio Department of Rehabilitation and Corrections

Ohio Administrative Code 5120-9-06(C).

(A) The disciplinary violations defined by this rule shall address acts that constitute an immediate and direct threat to the security or orderly operation of the institution, or to the safety of its staff, visitors and inmates, (including the inmate who has violated the rule,) as well as other violations of institutional or departmental rules and regulations.

(B) Dispositions for rule violations are defined in rules 5120-9-07 and 5120-9-08 of the Administrative Code.

(C) Rule violations: Assault and related acts, rules 1 through 7; threats, rules 8 through 10; sexual misconduct, rules 11 through 14; riot, disturbances and unauthorized group activity, rules 15 through 19; resistance to authority, rules 20 through 23; unauthorized relationships and disrespect, rules 24 through 26; lying and falsification, 27 and 28; escape and related conduct, rules 29 through 35; weapons, rules 36 through 38; drugs and other related matters, rules 39 through 43; gambling, dealing and other related offenses, rules 44 through 47; property and contraband, rules 48 through 51; fire violations, rules 52 through 53; telephone, mail and visiting, rules 54 through 56; tattooing and self-mutilation, rules 57 through 58; general provisions, rules 59 through 61 as follows:

(1) Causing, or attempting to cause, the death of another.

(2) Hostage taking, including any physical restraint of another.

(3) Causing, or attempting to cause, serious physical harm to another.

(4) Causing, or attempting to cause, physical harm to another.

(5) Causing, or attempting to cause, physical harm to another with a weapon.

(6) Throwing, expelling, or otherwise causing a bodily substance to come into contact with another.

(7) Throwing any other liquid or material on or at another.

(8) Threatening bodily harm to another (with or without a weapon.)

(9) Threatening harm to the property of another, including state property.

(10) Extortion by threat of violence or other means.

(11) Non-consensual sexual conduct with another, whether compelled:

(a) By force,

(b) By threat of force,

(c) By intimidation other than threat of force, or,

(d) By any other circumstances evidencing a lack of consent by the victim.

(12) Non-consensual sexual contact with another, whether compelled:

(a) By force;

(b) By threat of force,

(c) By intimidation other than threat of force, or,

(d) By any other circumstances evidencing a lack of consent by the victim.

(13) Consensual physical contact for the purpose of sexually arousing or gratifying either person.

(14) Seductive or obscene acts, including but not limited to:

(a) Non-exhibitionist seductive or obscene acts,

(b) Indecent exposure, exhibitionistic masturbation, or exhibitionist obscene acts, including but not limited to masturbating while watching an individual or any act of intentional aggression towards another person in an attempt to cause threat, harm or humiliation,

(c) Unwelcome sexual advances, requests for sexual favors, or verbal comments, gestures, or actions of a derogatory or offensive sexual nature by an inmate toward another person.

(15) Rioting or encouraging others to riot.

(16) Engaging in or encouraging a group demonstration or work stoppage.

(17) Engaging in unauthorized group activities as set forth in paragraph (B) of rule 5120-9-37 of the Administrative Code.

(18) Encouraging or creating a disturbance.

(19) Fighting - with or without weapons, including instigation of, or perpetuating fighting.

(20) Physical resistance to a direct order.

(21) Disobedience of a direct order.

(22) Refusal to carry out work or other institutional assignments.

(23) Refusal to accept an assignment or classification action.

(24) Establishing or attempting to establish a personal relationship with an employee, without authorization from the managing officer, including but not limited to:

(a) Sending personal mail to an employee at his or her residence or another address not associated with the department of rehabilitation and correction,

(b) Making a telephone call to or receiving a telephone call from an employee at his or her residence or other location not associated with the department of rehabilitation and correction,

(c) Giving to, or receiving from an employee, any item, favor, or service,

(d) Engaging in any form of business with an employee; including buying, selling, or trading any item or service,

(e) Soliciting sexual conduct, sexual contact or any act of a sexual nature with an employee.

(f) For purposes of this rule "employee" includes any employee of the department and any contractor, employee of a contractor, or volunteer.

(25) Intentionally grabbing, or touching a staff member or other person without the consent of such person in a way likely to harass, annoy or impede the movement of such person.

(26) Disrespect to an officer, staff member, visitor or other inmate.

(27) Giving false information or lying to departmental employees.

(28) Forging, possessing, or presenting forged or counterfeit documents.

(29) Escape from institution or outside custody (e.g. transport vehicle, department transport officer, other court officer or law enforcement officer, outside work crew, etc.) As used in this rule, escape means that the inmate has exited a building in which he was confined; crossed a secure institutional perimeter; or walked away from or broken away from custody while outside the facility.

(30) Removing or escaping from physical restraints (handcuffs, leg irons, etc.) or any confined area within an institution (cell, recreation area, strip cell, vehicle, etc.)

(31) Attempting or planning an escape.

(32) Tampering with locks, or locking devices, window bars; tampering with walls floors or ceilings in an effort to penetrate them.

(33) Possession of escape materials; including keys or lock picking devices (may include maps, tools, ropes, material for concealing identity or making dummies, etc.)

(34) Forging, possessing, or obtaining forged, or falsified documents which purport to effect release or reduction in sentence.

(35) Being out of place.

(36) Possession or manufacture of a weapon, ammunition, explosive or incendiary device.

(37) Procuring, or attempting to procure, a weapon, ammunition, explosive or incendiary device; aiding, soliciting or collaborating with another person to procure a weapon, ammunition, explosive or incendiary device or to introduce or convey a weapon, ammunition, explosive or incendiary device into a correctional facility.

(38) Possession of plans, instructions, or formula for making weapons or any explosive or incendiary device.

(39) Unauthorized possession, manufacture, or consumption of drugs or any intoxicating substance.

(40) Procuring or attempting to procure, unauthorized drugs; aiding, soliciting, or collaborating with another to procure unauthorized drugs or to introduce unauthorized drugs into a correctional facility.

(41) Unauthorized possession of drug paraphernalia.

(42) Misuse of authorized medication.

(43) Refusal to submit urine sample, or otherwise to cooperate with drug testing, or mandatory substance abuse sanctions.

(44) Gambling or possession of gambling paraphernalia.

(45) Dealing, conducting, facilitating, or participating in any transaction, occurring in whole or in part, within an institution, or involving an inmate, staff member or another for which payment of any kind is made, promised, or expected.

(46) Conducting business operations with any person or entity outside the institution, whether or not for profit, without specific permission in writing from the managing officer.

(47) Possession or use of money in the institution.

(48) Stealing or embezzlement of property, obtaining property by fraud or receiving stolen, embezzled, or fraudulently obtained property.

(49) Destruction, alteration, or misuse of property.

(50) Possession of property of another.

(51) Possession of contraband, including any article knowingly possessed which has been altered or for which permission has not been given.

(52) Setting a fire; any unauthorized burning.

(53) Tampering with fire alarms, sprinklers, or other fire suppression equipment.

(54) Unauthorized use of telephone or violation of mail and visiting rules.

(55) Use of telephone or mail to threaten, harass, intimidate, or annoy another.

(56) Use of telephone or mail in furtherance of any criminal activity.

(57) Self-mutilation, including tattooing.

(58) Possession of devices or material used for tattooing.

(59) Any act not otherwise set forth herein, knowingly done which constitutes a threat to the security of the institution, its staff, other inmates, or to the acting inmate.

(60) Attempting to commit; aiding another in the commission of; soliciting another to commit; or entering into an agreement with another to commit any of the above acts.

(61) Any violation of any published institutional rules, regulations or procedures.

(D) No inmate shall be found guilty of a violation of a rule of conduct without some evidence of the commission of an act and the intent to commit the act.

(1) The act must be beyond mere preparation and be sufficiently performed to constitute a substantial risk of its being performed.

(2) "Intent" may be express, or inferred from the facts and circumstances of the case.

(E) Definitions: The following definitions shall be used in the application of these rules.

(1) "Physical harm to persons" means any injury, illness or other physiological impairment, regardless of its gravity or duration.

(2) "Serious physical harm to persons" means any of the following:

(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

(b) Any physical harm that carries a substantial risk of death;

(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

(3) "Sexual conduct" means vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal cavity of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(4) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the

person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(5) "Possession" means either actual or constructive possession and may be inferred from any facts or circumstances that indicate possession, control or ownership of the item, or of the container or area in which the item was found.

(6) "Unauthorized drugs," for the purposes of this rule, refers to any drug not authorized by institutional or departmental policy including any controlled substance, any prescription drug possessed without a valid prescription, or any medications held in excess of possession limits.

(7) "Extortion," as used in these rules, means acting with purpose to obtain any thing of benefit or value, or to compel, coerce, or induce another to violate a rule or commit any unlawful act.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO	:	**CASE No. B 1903562**
Plaintiff.	:	**JUDGE TOM HEEKIN**
-vs-	:	
WILLIAM ONEAL [redacted] **D127258497**	:	**MEMORANDUM OF DECISION STRIKING INDEFINITE SENTECNING PROVISIONS OF SENATE BILL 201**
Defendant.	:	

This cause came before this Court on November 20, 2019, for the Sentencing Hearing of Defendant William Oneal. Upon the arguments of counsel for the Defendant and the State of Ohio, the Court being full advised in the premises and after due consideration, find the sentencing provisions of Senate Bill 201, or the Reagan Tokes Act, to be unconstitutional. Therefore, this Court will not impose the indefinite sentencing provisions of the abovementioned statute.

I. INTRODUCTION

On March 22, 2019, the Reagan Tokes Act ("S.B. 201") was enacted, returning indefinite sentencing to Ohio. The law covers 435 pages, amends 75 existing O.R.C. sections, and enacts 5 new O.R.C sections. However, S.B. 201 presents an indeterminate sentencing scheme with unconstitutional provisions. Specifically, this enactment forces the sentencing judge to pass a core judicial function of sentencing to the state's parole board, while violating the minimal due process protections afforded to offenders. In the end, S.B. 201 falls short of creating a balance for making parole determinations and presents crucial issues that cannot be ignored.

II. SEPARATION OF POWERS

Sentencing and parole are "two sides of the same coin. Both involve figuring out how much risk the individual poses to the public, and then deciding how much time the person should serve."[1] "The reason the legislative, executive, and judicial powers are separate and balanced is to protect the people, not protect the various branches of government."[2]

The United States was developed with the notion that the executive, legislative, and judiciary branches would function independently of one another.[3] Most importantly, each branch is limited

---

[1] Kimberly Thomas et al., *From Grace to Grids: Rethinking Due Process Protection for Parole*, 107 J. Crim. L. & Criminology 213, 214 (2017).
[2] *State ex rel. Bray v. Russell*, 89 Ohio St.3d, 132 (2000)
[3] See Stephanie Weaver, *Will Bad Times Get Worse? The Problems with Ohio's Badtime Statute*, 17 N.Y.L. Sch. J. Hum. Rts. 341, 350 (2000), citing Erwin Chimerinsky, Constitutional Law Principles and Policies 1 (1997)

in scope to avoid infringing upon the powers of the other branches.[4] "The principle of separation of powers is embedded in the constitutional framework of our state government. The Ohio Constitution applies the principle in defining the nature and scope of the powers designated to the three branches of the government."[5] Thus, separation of powers denies the executive branch the ability to adjudicate cases, as this responsibility solely belongs to the judicial branch.[6]

A. The "Bad Time" Statute

On July 1, 1996, the Ohio Legislature enacted Ohio Revised Code 2967.11.[7] This sentencing scheme is often referred to as the "Bad Time" statute. The purpose of the "Bad Time" statute was to increase an offender's sentence based on violations committed while incarcerated. If a violation had been committed, the amount of time added to an offender's sentence could not exceed one-half of their originally stated sentence.[8] Section 2967.11(B) 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. If a prisoner's stated term is extended under this section, the time by which it is so extended shall be referred to as "badtime."[9]

Furthermore, a "violation" was defined as "an act that is a criminal offense under the law of this state of the United States."[10]

The "Bad Time" statute incorporated procedures to be followed to determine whether a violation had been committed by an offender.[11] First, an institutional investigator reported the alleged violation to the Rules Infraction Board ("RIB").[12] The RIB would then conduct a hearing to allow the accused offender the right to testify and be assisted by a member of the institution's staff in presenting a defense.[13] Subsequently, the warden reviewed the report of the RIB hearing.[14] If the warden found by clear and convincing evidence a violation was committed and the prison term should be extended, a written recommendation was provided to the Parole Board.[15] Ultimately, the Parole Board was to make the final decision, and would consider factors such as "the nature of the violation, other conduct of the prisoner while in prison, and any other evidence relevant to

---

(explaining that "the division of powers among the branches was designed to create a system of checks and balances and lessen the possibility of tyrannical rule").

[4] See *Ohio v. Hochhausler*, 668 N.E.2d 457, 465-6 (1996).

[5] *Id.*

[6] See generally *White*, 1999 WL 587976, at 4 (holding that the Bad Time statute violates the doctrine of separation of powers because a parole board, an executive agency, infringes on the power of the court to sentence people to serve time in jail).

[7] [Repealed]

[8] R.C. 2967.11(B) [Repealed] (meaning if a prisoner is originally sentenced to six years, the maximum amount of aggregate Bad Time that can be imposed is three years).

[9] R.C. 2967.11 [Repealed].

[10] R.C. 2967.11(A) [Repealed].

[11] *See* R.C. 2967.11 [Repealed].

[12] R.C. 2967.11(C) [Repealed].

[13] *Id.* [Repealed].

[14] R.C. 2967.11(D) [Repealed].

[15] *Id.* [Repealed].

maintaining order in the institution" to conclude how much time should be added.[16] Similar to the warden, the Parole Board made their determination based on clear and convincing evidence.[17]

B. The "Bad Time" Statute and Violation of Separation of Powers

The Department of Rehabilitation and Corrections ("DRC") is an executive agency[18]—the governor chooses members and the legislature enacts the rules that the department must follow.[19] The DRC chooses the parole board, which consists of up to twelve civil members.[20] Consequently, allowing an executive agency to act as a judiciary is a violation of the separation of powers doctrine. "A department of corrections, as an executive agency, generally has no power to change sentences, or to add or remove sentencing conditions . . .; these powers are vested with the sentencing court."[21] In *State ex rel. Bray v. Russell*, the Ohio Supreme Court held that the "Bad Time" statute improperly ceded to the executive branch the authority to try, convict, and add bad time to offenders' sentences, and thus, violated the separation of powers doctrine.[22] Specifically, the "Bad Time" statute presented an unlawful encroachment on the judicial branch by an executive agency.[23]

In 1997, Gary Bray was charged with and convicted of drug possession and sentenced to an eight-month prison term.[24] While serving his sentence, Bray allegedly assaulted a prison guard.[25] Pursuant to R.C 2967.11(B), the Ohio Parole Board imposed an additional ninety-days to his original term.[26]

The Court found that permitting the executive branch to "prosecute a prisoner for a crime, to determine whether a crime has been committed, and to impose a sentence for that crime, is no less than the executive branch's acting as judge, prosecutor, and jury. R.C. 2967.11 intrudes well beyond the defined role of the executive branch as set forth in our Constitution."[27] "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."[28]

III. THE INDETERMINATE SENTENCING SCHEME OF S.B. 201, ALSO KNOWN AS THE REAGAN TOKES ACT

On March 22, 2019, the Ohio Legislature enacted the Reagan Tokes Act, or Senate Bill 201 ("S.B. 201"). S.B. 201 was enacted to give indefinite prison terms for first and second degree felonies

---

[16] R.C. 2967.11 (E) [Repealed] (requiring the Parole Board to make a decision within 60 days of the RIB hearing).
[17] *Id.* [Repealed].
[18] *South Euclid v. Jemison*, 28 Ohio St.3d 157 (1986).
[19] See Ohio Department of Rehabilitation and Correction at https://drc.ohio.gov/parole-board (last visited Sept. 27, 2019).
[20] *Id.*
[21] 16 C.J.S. Constitutional Law § 463, citing Com. v. Ellsworth, 2014 PA Super 167, 97 A.3d 1255 (2014); Detar v. Beard, 898 A.2d 26 (Pa. Commw. Ct. 2006).
[22] See *State ex rel. Bray v. Russell*, 89 Ohio St.3d, 132 (2000).
[23] *Id.* at 136.
[24] *Id.* at 133.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 135.
[28] *Id.* at 136.

with a "presumptive earned early release date" at the end of a minimum sentence term, while also allowing the Department of Rehabilitation and Correction ("DRC") to either reduce the minimum term for exceptional conduct, or rebut the presumed early release and maintain the offender in prison up to the maximum term if special circumstances apply.[29]

S.B. 201 categorizes offenses as either "qualifying" or "non-qualifying"[30] and creates formulas for the sentencing court to establish the minimum and maximum terms for the indeterminate sentence. R.C. 2929.144 sets forth the formulas for determining the minimum and maximum terms for an indefinite prison term being imposed by the court: (1) for an individual qualifying offense; (2) for a series of non-qualifying offenses being sentenced consecutively; and (3) for a series of qualifying offenses being sentenced concurrently.[31] In each instance, the formulas for determining the minimum and maximum terms are slightly different.

To rebut the "presumptive earned early release date," the DRC holds an administrative hearing and makes specific findings to justify keeping the offender beyond the presumptive release date.[32] One or more of the following three conditions must be present:

> (1) During the offender's incarceration, the offender committed institutional rule infractions that involved compromising a prison's security, compromising the safety of a prison's staff or inmates, or physical harm or the threat of physical harm to a prison's 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, and the offender's behavior while incarcerated, including, but not limited to the infractions and violations specified in clause (1) of this paragraph, demonstrate that the offender continues to pose a threat to society.
>
> (2) The second condition that, if found, may rebut the presumption is that, regardless of the security level in which the offender is classified at the time of the hearing, DRC placed the offender in extended restrictive housing at any time within the year preceding the date of the hearing.
>
> (3) The third condition that, if found, may rebut the presumption is that, at the time of the hearing, the offender is classified by DRC as a security level three, four, or five, or at a higher security level.[33]

If the DRC finds one of the conditions to apply, it may deny the offender's release and may maintain the offender for a "reasonable period" as specified by the DRC up to the maximum term of imprisonment.[34]

---

[29] CRIMES AND OFFENSES—INDEFINITE PRISON TERMS, 2018 Ohio Laws File 157 (Am. Sub. S.B. 201).
[30] The offenses that are categorized as "non-qualifying" are subject to the same definite terms as they presently are under current law. A "qualifying" felony is any felony of the first or second degree committed on or after March 22, 2019 that is not subject to life imprisonment. See R.C. 2929.144.
[31] See R.C. 2929.144(B)(1), R.C. 2929.144(B)(2), and R.C. 2929.144(B)(3).
[32] See R.C. 2967.271(C).
[33] *Id.*
[34] See R.C. 2967.271(D).

S.B. 201 also adds a provision for "earned reduction of minimum prison term" ("ERMPT") and identifies "exceptional conduct or adjustment to incarceration" as the basis for awarding the reduction.[35] If the DRC decides to reduce the offender's minimum term, the DRC must seek approval from the court or sentencing judge.[36] The DRC must notify the sentencing judge in writing 90 days prior of its intent to award the ERMPT credit.[37] The sentencing judge will be required to schedule a hearing on all ERMPT requests and will notify the prosecutor, who will then notify the victim (if applicable).[38] Like Marcy's Law, the victim has the right to participate.[39] Prior to the hearing, there is the presumption that the court will grant the recommended reduction of the offender's sentence.[40] For the sentencing judge to rebut the presumption of release, the judge must find at least one of five factors, pursuant to R.C.2967.271(F)(4).[41] Following the hearing, the sentencing judge must notify the DRC in writing of its decision to either grant or deny the ERMPT within 60 days after receipt of the notice of the request for ERMPT.[42] The statute is unclear as to whether the trial court's decision is appealable.

A. S.B. 201 Violates the Separation of Powers Doctrine

The conditions that the DRC may consider in determining whether an offender should not be released upon the end of their minimum prison term may include a "violation of law." Similar to the unconstitutional "Bad Time" statute, "violation of law" is synonymous with a criminal offense. Regardless of whether criminal prosecution is formally pursued, S.B. 201 allows the DRC to increase an offender's prison sentence based on a crime committed while incarcerated, in clear violation of the separation of powers doctrine.

Ohio Administrative Code § 5120-9-08 provides procedure for the DRC to determine whether an institutional infraction or "violation of law" has been committed. Similar to the procedure of the "Bad Time" statute, the RIB holds a hearing to determine guilt before it is reviewed by a managing

---

[35] R.C.2967.271(F)(1).
[36] *Id.*
[37] *Id.*
[38] R.C.2967.271(F)(3).
[39] *Id.*
[40] R.C.2967.271(F)(1)(d).
[41] See R.C.2967.271(F)(4) (Factor's include: (1) 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 prison, compromising 26 the safety of a prison's staff or its inmates, or physical harm or the threat of physical harm to a prison's staff 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. (2) The offender's behavior while incarcerated, including, but not limited to, the infractions and violations specified in paragraph (1), above, demonstrates that the offender continues to pose a threat to society. (3) At the time of the hearing, the offender is classified by DRC as a security level 3, 4, or 5, or at a higher security level. (4) During the offender's incarceration, the offender did not productively participate in a majority of the "rehabilitative programs and activities" recommended by DRC 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 ones in which the offender participated. As used in this provision, "rehabilitative programs and activities" means education programs, vocational training, employment in prison industries, treatment for substance abuse, or other constructive programs developed by DRC with specific standards for performance by prisoners. (5) After release, the offender will not be residing in a halfway house, reentry center, or licensed community residential center and, after release, does not have any other place to reside at a fixed residence address).
[42] R.C.2967.271(F)(5).

officer or designees.[43] Allowing the DRC to conduct a hearing to determine the guilt of an alleged criminal offense, and then give an additional sentence based on that frail determination clearly violates the separation of powers doctrine. It has been previously held that an executive agency may not act as a judge, prosecutor, and jury.[44] This familiar use of "bad time" is not based upon the original crime, but based on a new crime tried by an administrative board. Therefore, it cannot be denied that this indeterminate statutory scheme is a second attempt to "depriv[e] the judiciary of its exclusive authority to prosecute criminal offense[s],"[45] determine whether a crime has been committed, and ultimately impose a sentence.

S.B. 201 forges the idea that judges are ill equipped to determine how much punishment is enough at sentencing. The judicial branch holds such powers because judges possess the necessary judicial discretion unrelated to moral or retributive judgements.[46] A judge's fact-finding power originates from his or her role as an experienced and astute analyst of what sentence might best preserve public safety and rehabilitate an individual offender.[47] A statute may not disregard a judge's power and experience by allowing an executive agency to indirectly supersede the powers of the judicial branch.

B. Violation of Due Process

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[48] "'[D]ue process' has never been, and perhaps can never be, precisely defined."[49] Instead, due process is "a flexible concept that varies depending on the importance attached to the interest at stake and the particular circumstances under which the deprivation may occur."[50] "Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness."[51] "The fundamental requirement[s] of due process [are notice and] the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[52]

S.B. 201 deprives an offender of adequate procedural due process. As previously noted, one of the circumstances that gives the DRC permission to extend a prison sentence is when an offender commits a crime, or "violation of law." Thus, this determination should take place before the sentencing judge, as "[i]t is a fundamental tenet of due process that the decision to restrict an individual's freedom can only be made by a neutral magistrate, not by law enforcement officials

---

[43] See O.A.C. 5120-9-08.
[44] See *State ex rel. Bray*, 89 Ohio St.3d at 135.
[45] *White v. Konteh*, at 5.
[46] David Ball, *Heinous, Atrocious, & Cruel: Apprendi, Indeterminate Sentencing, & the Meaning of Punishment*, 109 Colum. L. Rev. 893, 926 (2009).
[47] *Id.*
[48] *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).
[49] *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 24 (1981).
[50] *State v. Aalim*, 150 Ohio St.3d 489, ¶22, citing *Walters v. Natl. Assn. of Radiation Survivors*, 473 U.S. 305, 320 (1985).
[51] *California v. Trombetta*, 467 U.S. 479, 485 (1984).
[52] *Eldridge*, 424 U.S. at 333, see *Wilkinson v. Austin*, 545 U.S. 209, 225–226 (2005) (explaining that "notice of the factual basis leading to" the deprivation "and a fair opportunity for rebuttal" "are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations").

whose primary purpose is to place offenders in jail."[53] Because the decision to restrict an offender's freedom is made by an administrative body acting as a judge and prosecutor, S.B. 201 requires a greater standard of procedural due process.

1. S.B. 201 creates a protected liberty interest.

A procedural due process analysis begins by examining "whether there exists a liberty or property interest of which a person has been deprived."[54] "[A]n individual claiming a protected interest must have a legitimate claim of entitlement to it."[55] If the person has been deprived of a protected liberty or property interest, the question becomes "whether the procedures followed by the State were constitutionally sufficient."[56]

S.B. 201 creates an expectation of release, thereby creating a liberty interest to establish an offender's right to procedural due process. In the case of *Greenholtz v. Nebraska Penal Inmates*, a Nebraskan statute required release by the parole authority unless one of four conditions negating parole was found to exist.[57] The Court provided that the expectancy of release in the Nebraskan statute "is entitled to some measure of constitutional protection . . . whether any other state statute provides a protectable entitlement must be decided on a case-by-case basis."[58] Ultimately, the expectation of parole invokes due process protections.

R.C. 2967.271 provides "[w]hen 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 use of the word "shall" creates a presumption that parole release will be granted, creating a legitimate expectation of release absent a finding of rebuttal by the DRC.[59] Therefore S.B. 201's presumption that parole will be issued invokes due process. While it is true that offenders are provided notice that a hearing will take place, S.B. 201 unjustly restricts the involvement of the sentencing judge to conduct a hearing in a meaningful manner, thus, causing S.B. 201 to be constitutionally insufficient.

2. *Procedural due process will protect offenders from an erroneous and subjective decision-making process.*

The purpose of due process protections is to minimize erroneous decision making.[60] Under S.B. 201, there is a lack of due process to minimize errors associated with the DRC's subjective decision-making process. And the lack of due process combined with subjective decision-making causes S.B. 201 to appear far worse than the previous "Bad Time" statute.

---

[53] *White v. Konteh*, at 5.
[54] *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011).
[55] *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989); see *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972) (holding that adequate procedural protections are required only when an individual has been deprived of a liberty or property interest).
[56] Swarthout, 562 U.S. at 219.
[57] *Greenholtz v. Inmates of the Nebraska Penal & Corr. Complex*, 442 U.S. 1, 3 (1979); See also *Wagner v. Gilligan*, 609 F.2d 866 (6th Cir.1979), see also *State ex rel. Blake v. Shoemaker*, 4 Ohio St.3d 42 (1983).
[58] *Id.* at 12.
[59] See *Id.*
[60] *Greenholtz*, 442 U.S. at 8.

The "Bad Time" statute only allowed for the consideration of "violations of law." Under S.B. 201, the parole board is not only permitted to consider "violations of law," but may also consider institutional rule infractions and whether an offender has experienced placement in restrictive housing. Allowing such overly broad and uncategorized misconduct not only affects an offender's liberty interest, but also leaves reasonable opportunity for error.

The Inmate Rules of Conduct lists 61 rules for issues concerning situations like assault, unauthorized relationships, and even "being out of place."[61] However, neither O.A.C. 5120-9-06, nor S.B. 201 provide a hierarchy of misconduct to determine which infractions should be reasonably considered in deciding whether to extend an offender's prison sentence. Without some sort of hierarchy or ranking, the parole board holds unfettered discretion to consider minor infractions when deciding to extend an offender's sentence.

Additionally, S.B. 201 fails to provide a guideline as to how each consideration shall be weighed to determine whether a sentence should be extended. It is fair to believe that many of the institutional violations may simply relate to the many hardships of prison life, as their purpose is to provide punishment of incarcerated prisoners under a disciplinary regime imposed by prison officials.[62] Indeed, prison discipline falls within the realm of the DRC. Nevertheless, it becomes rather problematic when the consideration of a modest sanction may inevitably affect the duration of an offender's sentence without the necessary due process protections, like a fair and impartial hearing before the sentencing judge.

3. *S.B. 201 deprives an offender of a fair hearing before the sentencing judge.*

"The failure to accord a fair hearing violates even the minimal standards of due process".[63] Under S.B. 201, a fair hearing is not provided for offender's when the parole board is being permitted to rebut a release. And because a due process right has been invoked, we must turn to the issue as to what process is due.

Surprisingly, S.B. 201 provides an example of what due process should be afforded to an offender who is being recommended for release. Although it is the director who provides a recommendation to the sentencing judge that an offender be released upon the completion of their minimum term, it is the judge who becomes the "trier of fact", while considering relevant factors to rebut the presumptive release at a scheduled hearing. Under S.B. 201, it is presumed that the sentencing judge will follow the recommendation of the DRC.

There is no definitive reason for a statute to require a court to submit to the actions of a parole board. To protect against unnecessary errors, the presence of the sentencing judge should be expected at each presumptive release hearing. A fair hearing is not promised when an executive agency has such broad discretion in determining whether an offender should remain imprisoned; our impartial judges are better suited for that determination. Further our judges are equipped to objectively consider the most important and relevant information pertaining to offenders and their sentence. The Legislature's erroneous attempt to regulate a sentencing judge's involvement or

---

[61] *See* O.A.C. 5120-9-06 (For example, rules 29 through 35 include "escape and related conduct". Specifically, rule 35 prescribes "being out of place").
[62] *Sandin*, 515 U.S., at 487.
[63] *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

submission to a parole board is only more evidence of an indeterminate sentencing scheme that is unconstitutional. Under these circumstances, we should welcome a sentencing judge's involvement, not limit their purposeful abilities.

IV. CONCLUSION

It is important that our criminal justice system never neglects the goal of rehabilitation. It is apparent that S.B. 201 is a great attempt to enforce that fact. However, we must not forget the existence and purpose of the separation of powers doctrine, and that offenders are afforded minimal measures of due process while incarcerated.

Procedure afforded under S.B. 201 creates an erroneous and unnecessary risk of error. In the end, it is nothing more than an unconstitutional indeterminate sentencing scheme.

Date: 11-20-19

JUDGE TOM HEEKIN

UNITED STATES CONSTITUITON, ARTICLE 3

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State, between Citizens of different States, between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

FIFTH AMENDMENT, UNITED STATES CONSTITUTION

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

SIXTH AMENDMENT, UNITED STATES CONSTITUTION

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 defence.

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or

emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this

ARTICLE I: § 5 OHIO CONSTITUTION

The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than threefourths of the jury.

ARTICLE I: § 10, OHIO CONSTITUTION

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

ARTICLE I, § 16, OHIO CONSTITUTION

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Article IV, SECTION 3, OHIO CONSTITUION

(A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)

(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district, except that courts of appeals shall not have jurisdiction to review on direct appeal a judgment that imposes a sentence of death. Courts of appeals shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article. No judgment resulting from a trial by jury Shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

OHIO REVISED CODE SECTION 1.47

In enacting a statute, it is presumed that:
(A) Compliance with the constitutions of the state and of the United States is intended;
(B) The entire statute is intended to be effective;
(C) A just and reasonable result is intended;
(D) A result feasible of execution is intended.

OHIO REVISED CODE SECTION 2909.15

(A) Each arson offender who has received notice pursuant to section 2909.14 of the Revised Code shall register personally with the sheriff of the county in which the arson offender resides or that sheriff's designee within the following time periods:

(1) An arson offender who receives notice under division (A)(1) of section 2909.14 of the Revised Code shall register within ten days after the arson offender is released from a jail, workhouse, state correctional institution, or other institution, unless the arson offender is being transferred to the custody of another jail, workhouse, state correctional institution, or other institution. The arson offender is not required to register with any sheriff or designee prior to release.

(2) An arson offender who receives notice under division (A)(2) of section 2909.14 of the Revised Code shall register within ten days after the sentencing hearing.

(B) Each out-of-state arson offender shall register personally with the sheriff of the county in which the out-of-state arson offender resides or that sheriff's designee within ten days after residing in or occupying a dwelling in this state for more than three consecutive days.

(C)

(1) An arson offender or out-of-state arson offender shall register personally with the sheriff of the county in which the offender resides or that sheriff's designee. The registrant shall obtain from the sheriff or designee a copy of a registration form prescribed by the attorney general that conforms to division (C)(2) of this section, shall complete and sign the form, and shall return to the sheriff or designee the completed and signed form together with the identification records required under division (C)(3) of this section.

(2) The registration form to be used under division (C)(1) of this section shall include or contain all of the following for the arson offender or out-of-state arson offender who is registering:

(a) The arson offender's or out-of-state arson offender's full name and any alias used;

(b) The arson offender's or out-of-state arson offender's residence address;

(c) The arson offender's or out-of-state arson offender's social security number;

(d) Any driver's license number, commercial driver's license number, or state identification card number issued to the arson offender or out-of-state arson offender by this or another state;
(e) The offense that the arson offender or out-of-state arson offender was convicted of or pleaded guilty to;
(f) The name and address of any place where the arson offender or out-of-state arson offender is employed;
(g) The name and address of any school or institution of higher education that the arson offender or out-of-state arson offender is attending;
(h) The identification license plate number of each vehicle owned or operated by the arson offender or out-of-state arson offender or registered in the arson offender's or out-of-state arson offender's name, the vehicle identification number of each vehicle, and a description of each vehicle;
(i) A description of any scars, tattoos, or other distinguishing marks on the arson offender or out-of-state arson offender;
(j) Any other information required by the attorney general.

(3) The arson offender or out-of-state arson offender shall provide fingerprints and palm prints at the time of registration. The sheriff or sheriff's designee shall obtain a photograph of the arson offender or out-of-state arson offender at the time of registration.

(D)

(1) Each arson offender or out-of-state arson offender shall reregister annually, in person, with the sheriff of the county in which the offender resides or that sheriff's designee within ten days of the anniversary of the calendar date on which the offender initially registered. The registrant shall reregister by completing, signing, and returning to the sheriff or designee a copy of the registration form prescribed by the attorney general and described in divisions (C)(1) and (2) of this section, amending any information required under division (C) of this section that has changed since the registrant's last registration, and providing any additional registration information required by the attorney general. The sheriff or designee with whom the arson offender or out-of-state arson offender reregisters shall obtain a new photograph of the offender annually when the offender reregisters. Additionally, if the arson offender's or out-of-state arson offender's most recent registration or reregistration was with a sheriff or designee of a sheriff of a different county, the offender shall provide

written notice of the offender's change of residence address to that sheriff or a designee of that sheriff.

(2)

(a) Except as provided in division (D)(2)(b) of this section, the duty of an arson offender or out-of-state arson offender to reregister annually shall continue until the offender's death.

(b) The judge may limit an arson offender's duty to reregister at an arson offender's sentencing hearing to not less than ten years if the judge receives a request from the prosecutor and the investigating law enforcement agency to consider limiting the arson offender's registration period.

(3) The official in charge of a jail, workhouse, state correctional institution, or other institution shall notify the attorney general in accordance with rules adopted by the attorney general pursuant to Chapter 119. of the Revised Code if a registered arson offender or out-of-state arson offender is confined in the jail, workhouse, state correctional institution, or other institution.

(E)

(1) After an arson offender or out-of-state arson offender registers or reregisters with a sheriff or a sheriff's designee pursuant to this section, the sheriff or designee shall forward the offender's signed, written registration form, photograph, fingerprints, palm prints, and other materials to the bureau of criminal identification and investigation in accordance with forwarding procedures adopted by the attorney general under division (G) of this section. The bureau shall include the information and materials forwarded to it under this division in the registry of arson offenders and out-of-state arson offenders established and maintained under division (E)(2) of this section.

(2) The bureau of criminal identification and investigation shall establish and maintain a registry of arson offenders and out-of-state arson offenders that includes the information and materials the bureau receives pursuant to division (D)(1) of this section. The bureau shall make the registry available to the fire marshal's office, to state and local law enforcement officers, and to any firefighter who is authorized by the chief of the agency the firefighter serves to review the record through the Ohio law enforcement gateway or its successor. The registry of arson offenders and out-of-state arson offenders maintained by the bureau is not a public record under section 149.43 of the Revised Code.

(F) Each sheriff or sheriff's designee with whom an arson offender or out-of-state arson offender registers or reregisters under this section shall collect a registration

fee of fifty dollars and an annual reregistration fee of twenty-five dollars from each arson offender or out-of-state arson offender who registers or reregisters with the sheriff or designee. By the last day of March, the last day of June, the last day of September, and the last day of December in each year, each sheriff who collects or whose designee collects any fees under this division in the preceding three-month period shall send to the attorney general the fees collected during that period. The fees shall be used for the maintenance of the registry of arson offenders and out-of-state arson offenders. A sheriff or designee may waive a fee for an indigent arson offender or out-of-state arson offender.

(G) The attorney general shall prescribe the forms to be used by arson offenders and out-of-state arson offenders to register, reregister, and provide notice of a change of residence address under divisions (A) to (D) of this section. The attorney general shall adopt procedures for sheriffs to use to forward information, photographs, fingerprints, palm prints, and other materials to the bureau of criminal identification and investigation pursuant to division (E)(1) of this section.

(H) Whoever fails to register or reregister as required by this section is guilty of a felony of the fifth degree. If an arson offender or out-of-state arson offender is subject to a community control sanction, is on parole, is subject to one or more post-release control sanctions, or is subject to any other type of supervised release at the time of the violation, the violation shall constitute a violation of the terms and conditions of the community control sanction, parole, post-release control sanction, or other type of supervised released.

OHIO REVISED CODE SECTION 2913.42

(A) No person, knowing the person has no privilege to do so, and with purpose to defraud or knowing that the person is facilitating a fraud, shall do any of the following:

(1) Falsify, destroy, remove, conceal, alter, deface, or mutilate any writing, computer software, data, or record;

(2) Utter any writing or record, knowing it to have been tampered with as provided in division (A)(1) of this section.

(B)

(1) Whoever violates this section is guilty of tampering with records.

(2) Except as provided in division (B)(4) of this section, if the offense does not involve data or computer software, tampering with records is whichever of the following is applicable:

(a) If division (B)(2)(b) of this section does not apply, a misdemeanor of the first degree;

(b) If the writing or record is a will unrevoked at the time of the offense, a felony of the fifth degree.

(3) Except as provided in division (B)(4) of this section, if the offense involves a violation of division (A) of this section involving data or computer software, tampering with records is whichever of the following is applicable:

(a) Except as otherwise provided in division (B)(3)(b), (c), or (d) of this section, a misdemeanor of the first degree;

(b) If the value of the data or computer software involved in the offense or the loss to the victim is one thousand dollars or more and is less than seven thousand five hundred dollars, a felony of the fifth degree;

(c) If the value of the data or computer software involved in the offense or the loss to the victim is seven thousand five hundred dollars or more and is less than one hundred fifty thousand dollars, a felony of the fourth degree;

(d) If the value of the data or computer software involved in the offense or the loss to the victim is one hundred fifty thousand dollars or more or if the offense is committed for the purpose of devising or executing a scheme to defraud or to obtain property or services and the value of the property or services or the loss to the victim is seven thousand five hundred dollars or more, a felony of the third degree.

(4) If the writing, data, computer software, or record is kept by or belongs to a local, state, or federal governmental entity, a felony of the third degree.

OHIO REVISED CODE SECTION 2017.11

(A) No person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following:

(1) Engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior;

(2) Making unreasonable noise or an offensively coarse utterance, gesture, or display or communicating unwarranted and grossly abusive language to any person;

(3) Insulting, taunting, or challenging another, under circumstances in which that conduct is likely to provoke a violent response;

(4) Hindering or preventing the movement of persons on a public street, road, highway, or right-of-way, or to, from, within, or upon public or private property, so as to interfere with the rights of others, and by any act that serves no lawful and reasonable purpose of the offender;

(5) Creating a condition that is physically offensive to persons or that presents a risk of physical harm to persons or property, by any act that serves no lawful and reasonable purpose of the offender.

(B) No person, while voluntarily intoxicated, shall do either of the following:

(1) In a public place or in the presence of two or more persons, engage in conduct likely to be offensive or to cause inconvenience, annoyance, or alarm to persons of ordinary sensibilities, which conduct the offender, if the offender were not intoxicated, should know is likely to have that effect on others;

(2) Engage in conduct or create a condition that presents a risk of physical harm to the offender or another, or to the property of another.

(C) Violation of any statute or ordinance of which an element is operating a motor vehicle, locomotive, watercraft, aircraft, or other vehicle while under the influence of alcohol or any drug of abuse, is not a violation of division (B) of this section.

(D) If a person appears to an ordinary observer to be intoxicated, it is probable cause to believe that person is voluntarily intoxicated for purposes of division (B) of this section.

(E)

(1) Whoever violates this section is guilty of disorderly conduct.

(2) Except as otherwise provided in divisions (E)(3) and (4) of this section, disorderly conduct is a minor misdemeanor.

(3) Disorderly conduct is a misdemeanor of the fourth degree if any of the following applies:

(a) The offender persists in disorderly conduct after reasonable warning or request to desist.

(b) The offense is committed in the vicinity of a school or in a school safety zone.

(c) The offense is committed in the presence of any law enforcement officer, firefighter, rescuer, medical person, emergency medical services person, or other authorized person who is engaged in the person's duties at the scene of a fire, accident, disaster, riot, or emergency of any kind.

(d) The offense is committed in the presence of any emergency facility person who is engaged in the person's duties in an emergency facility.

(4) If an offender previously has been convicted of or pleaded guilty to three or more violations of division (B) of this section, a violation of division (B) of this section is a misdemeanor of the fourth degree.

(F) As used in this section:

(1) "Emergency medical services person" is the singular of "emergency medical services personnel" as defined in section 2133.21 of the Revised Code.

(2) "Emergency facility person" is the singular of "emergency facility personnel" as defined in section 2909.04 of the Revised Code.

(3) "Emergency facility" has the same meaning as in section 2909.04 of the Revised Code.

(4) "Committed in the vicinity of a school" has the same meaning as in section 2925.01 of the Revised Code.

OHIO REVISED CODE SECTION 2921.31

(A) No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties.

(B) Whoever violates this section is guilty of obstructing official business. Except as otherwise provided in this division, obstructing official business is a misdemeanor of the second degree. If a violation of this section creates a risk of physical harm to any person, obstructing official business is a felony of the fifth degree.

OHIO REVISED CODE 2967.11

(repealed in Am.Sub.H.B. No. 130, 2008 Ohio Laws 173)

(A) As used in this section, violation means 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.

(B) 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. The parole board may not extend a prisoner's stated prison term for a period longer than one-half of the stated prison term's duration for all violations occurring during the course of the prisoner's stated prison term, including violations occurring while the offender is serving extended time under this section or serving a prison term imposed for a failure to meet the conditions of a post-release control sanction imposed under section 2967.28 of the Revised Code. 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."

(C) The department of rehabilitation and correction shall establish a rules infraction board in each state correctional institution. When a prisoner in an institution is alleged by any person to have committed a violation, the institutional investigator or other appropriate official promptly shall investigate the alleged violation and promptly shall report the investigator's or other appropriate official's findings to the rules infraction board in that institution. The rules infraction board in that institution shall hold a hearing on the allegation to determine, for purposes of the parole board's possible extension of the prisoner's stated prison term under this section, whether there is evidence of a violation. At the hearing, the accused prisoner shall have the right to testify and be assisted by a member of the staff of the institution who is designated pursuant to rules adopted by the department to assist the prisoner in presenting a defense before the board in the hearing. The rules infraction board shall make an audio tape of the hearing. The board shall report its finding to the head of the institution within ten days after the date of the hearing. If the board finds any evidence of a violation, it also shall include with its finding a recommendation regarding a period of time, as specified in division (B) of this section, by which the prisoner's stated prison term should be extended as a result of the violation. If the board does not so find, the board shall terminate the matter.

(D) Within ten days after receiving from the rules infraction board a finding and a recommendation that the prisoner's stated prison term be extended, the head of the institution shall review the finding and determine whether the prisoner committed a violation. If the head of the institution determines by clear and convincing evidence that the prisoner committed a violation and concludes that the prisoner's stated prison term should be extended as a result of the violation, the head of the institution shall report the determination in a finding to the parole board within ten days after making the determination and shall include with the finding a recommendation regarding the length of the extension of the stated prison term. If the head of the institution does not determine by clear and convincing evidence that the prisoner committed the violation or does not conclude that the prisoner's stated prison term should be extended, the head of the institution shall terminate the matter.

(E) Within thirty days after receiving a report from the head of an institution pursuant to division (D) of this section containing a finding and recommendation, the parole board shall review the findings of the rules infraction board and the head of the institution to determine whether there is clear and convincing evidence that the prisoner committed the violation and, if so, to determine whether the stated prison term should be extended and the length of time by which to extend it. If the parole board determines that there is clear and convincing evidence that the prisoner committed the violation and that the prisoner's stated prison term should be extended, the board shall consider the nature of the violation, other conduct of the prisoner while in prison, and any other evidence relevant to maintaining order in the institution. After considering these factors, the board shall extend the stated prison term by either fifteen, thirty, sixty, or ninety days for the violation, subject to the maximum extension authorized by division (B) of this section. The board shall act to extend a stated prison term no later than sixty days from the date of the finding by the rules infraction board pursuant to division (C) of this section.

(F) If an accusation of a violation is made within sixty days before the end of a prisoner's stated prison term, the rules infraction board, head of the institution, and parole board shall attempt to complete the procedures required by divisions (C) to (E) of this section before the prisoner's stated prison term ends. If necessary, the accused prisoner may be held in the institution for not more than ten days after the end of the prisoner's stated prison term pending review of the violation and a determination regarding an extension of the stated prison term.

(G). This section does not preclude the department of rehabilitation and correction from referring a criminal offense allegedly committed by a prisoner to the

appropriate prosecuting authority or from disciplining a prisoner through the use of disciplinary processes other than the extension of the prisoner's stated prison term.

(H) Pursuant to section 111.15 of the Revised Code, the department of rehabilitation and correction shall adopt rules establishing standards and procedures for implementing the requirements of this. section and for designating state correctional institution staff members to assist prisoners in hearings conducted under division (C) of this section.

OHIO REVISED CODE SECTION 2967.12

(A) Except as provided in division (G) of this section, at least sixty days before the adult parole authority recommends any pardon or commutation of sentence, or grants any parole, the authority shall provide a notice of the pendency of the pardon, commutation, or parole, setting forth the name of the person on whose behalf it is made, the offense of which the person was convicted or to which the person pleaded guilty, the time of conviction or the guilty plea, and the term of the person's sentence, to the prosecuting attorney and the judge of the court of common pleas of the county in which the indictment against the person was found. If there is more than one judge of that court of common pleas, the authority shall provide the notice to the presiding judge. Upon the request of the prosecuting attorney or of any law enforcement agency, the authority shall provide to the requesting prosecuting attorney and law enforcement agencies an institutional summary report that covers the subject person's participation while confined in a state correctional institution in training, work, and other rehabilitative activities and any disciplinary action taken against the person while so confined. The department of rehabilitation and correction may utilize electronic means to provide this notice. The department of rehabilitation and correction, at the same time that it provides the notice to the prosecuting attorney and judge under this division, also shall post on the database it maintains pursuant to section 5120.66 of the Revised Code the offender's name and all of the information specified in division (A)(1)(c)(iii) of that section.

(B) If a request for notification has been made pursuant to section 2930.16 of the Revised Code or if division (H) of this section applies, the office of victim services or the adult parole authority also shall provide notice to the victim or the victim's representative at least sixty days prior to recommending any pardon or commutation of sentence for, or granting any parole to, the person. The notice shall include the information required by division (A) of this section and may be provided by telephone or through electronic means. The notice also shall inform the victim or the victim's representative that the victim or representative may send a written statement relative to the victimization and the pending action to the adult parole authority and that, if the authority receives any written statement prior to recommending a pardon or commutation or granting a parole for a person, the authority will consider the statement before it recommends a pardon or commutation or grants a parole. If the person is being considered for parole, the notice shall inform the victim or the victim's representative that a full board hearing of the parole board may be held and that the victim or victim's representative may contact the office of victims' services for further information. If the person being considered for parole was convicted of or pleaded guilty to a violation of section 2903.01 or 2903.02 of the Revised Code,

an offense of violence that is a felony of the first, second, or third degree, or an offense punished by a sentence of life imprisonment, the notice shall inform the victim of that offense, the victim's representative, or a member of the victim's immediate family that the victim, the victim's representative, and the victim's immediate family have the right to give testimony at a full board hearing of the parole board and that the victim or victim's representative may contact the office of victims' services for further information.

(C) When notice of the pendency of any pardon, commutation of sentence, or parole has been provided to a judge or prosecutor or posted on the database as required in division (A) of this section and a hearing on the pardon, commutation, or parole is continued to a date certain, the authority shall provide notice of the further consideration of the pardon, commutation, or parole at least sixty days before the further consideration. The notice of the further consideration shall be provided to the proper judge and prosecuting attorney at least sixty days before the further consideration, and may be provided using electronic means, and, if the initial notice was posted on the database as provided in division (A) of this section, the notice of the further consideration shall be posted on the database at least sixty days before the further consideration. If the prosecuting attorney or a law enforcement agency was provided a copy of the institutional summary report relative to the subject person under division (A) of this section, the authority shall include with the notice of the further consideration sent to the prosecuting attorney any new information with respect to the person that relates to activities and actions of the person that are of a type covered by the report and shall send to the law enforcement agency a report that provides notice of the further consideration and includes any such new information with respect to the person. When notice of the pendency of any pardon, commutation, or parole has been given as provided in division (B) of this section and the hearing on it is continued to a date certain, the authority shall give notice of the further consideration to the victim or the victim's representative in accordance with section 2930.03 of the Revised Code.

(D) In case of an application for the pardon or commutation of sentence of a person sentenced to capital punishment, the governor may modify the requirements of notification and publication if there is not sufficient time for compliance with the requirements before the date fixed for the execution of sentence.

(E) If an offender is serving a prison term imposed under division (A)(3), (B)(1)(a), (b), or (c), (B)(2)(a), (b), or (c), or (B)(3)(a), (b), (c), or (d) of section 2971.03 of the Revised Code and if the parole board terminates its control over the offender's service of that term pursuant to section 2971.04 of the Revised Code, the parole

board immediately shall provide written notice of its termination of control or the transfer of control to the entities and persons specified in section 2971.04 of the Revised Code.

(F) The failure of the adult parole authority to comply with the notice or posting provisions of division (A), (B), or (C) of this section or the failure of the parole board to comply with the notice provisions of division (E) of this section do not give any rights or any grounds for appeal or post-conviction relief to the person serving the sentence.

(G) Divisions (A), (B), and (C) of this section do not apply to any release of a person that is of the type described in division (B)(2)(b) of section 5120.031 of the Revised Code.

(H) If a defendant is incarcerated for the commission of aggravated murder, murder, or an offense of violence that is a felony of the first, second, or third degree or is under a sentence of life imprisonment, except as otherwise provided in this division, the notice described in division (B) of this section shall be given to the victim or victim's representative regardless of whether the victim or victim's representative has made a request for notification. The notice described in division (B) of this section shall not be given under this division to a victim or victim's representative if the victim or victim's representative has requested pursuant to division (B)(2) of section 2930.03 of the Revised Code that the victim or the victim's representative not be provided the notice. The notice described in division (B) of this section does not have to be given under this division to a victim or victim's representative if notice was given to the victim or victim's representative with respect to at least two prior considerations of pardon, commutation, or parole of a person and the victim or victim's representative did not provide any written statement relative to the victimization and the pending action, did not attend any hearing conducted relative to the pending action, and did not otherwise respond to the office with respect to the pending action. Regardless of whether the victim or victim's representative has requested that the notice described in division (B) of this section be provided or not be provided, the office of victim services or adult parole authority shall give similar notice to the law enforcement agency that arrested the defendant if any officer of that agency was a victim of the offense and to any member of the victim's immediate family who requests notification. If notice is to be given under this division, the office or authority may give the notice by any reasonable means, including regular mail, telephone, and electronic mail, in accordance with division (D)(1) of section 2930.16 of the Revised Code. If the notice is based on an offense committed prior to the effective date of this amendment, the notice to the victim or victim's

representative also shall include the opt-out information described in division (D)(1) of section 2930.16 of the Revised Code. The office or authority, in accordance with division (D)(2) of section 2930.16 of the Revised Code, shall keep a record of all attempts to provide the notice, and of all notices provided, under this division. Division (H) of this section, and the notice-related provisions of divisions (E)(2) and (K) of section 2929.20, division (D)(1) of section 2930.16, division (E)(1)(b) of section 2967.19, division (A)(3)(b) of section 2967.26, division (D)(1) of section 2967.28, and division (A)(2) of section 5149.101 of the Revised Code enacted in the act in which division (H) of this section was enacted, shall be known as "Roberta's Law."

(I) In addition to and independent of the right of a victim to make a statement as described in division (A) of this section or pursuant to section 2930.17 of the Revised Code or to otherwise make a statement, the authority for a judge or prosecuting attorney to furnish statements and information, make recommendations, and give testimony as described in division (A) of this section, the right of a prosecuting attorney, judge, or victim to give testimony or submit a statement at a full parole board hearing pursuant to section 5149.101 of the Revised Code, and any other right or duty of a person to present information or make a statement, any person may send to the adult parole authority at any time prior to the authority's recommending a pardon or commutation or granting a parole for the offender a written statement relative to the offense and the pending action.

(J) As used in this section, "victim's immediate family" means the mother, father, spouse, sibling, or child of the victim, provided that in no case does "victim's immediate family" include the offender with respect to whom the notice in question applies.

OHIO REVISED CODE 2967.271

(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 6 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 7 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 8 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 9 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 0 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.

18 U.S.C. 3583

(a) In general. The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b) [18 USCS § 3561(b)].

(b) Authorized terms of supervised release. Except as otherwise provided, the authorized terms of supervised release are—

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors to be considered in including a term of supervised release. The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) [18 USCS § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)].

(d) Conditions of supervised release. The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) [18 USCS § 3561(b)] that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act [34 USCS §§ 20901 et seq.], that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a

DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 [34 USCS § 40702]. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) [18 USCS § 3583(g)] when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D) [18 USCS § 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D)];

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D) [18 USCS § 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D)]; and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) [18 USCS § 3563(b)] and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) [28 USCS § 3563(b)(10)] shall be imposed only for a violation of a condition of supervised release in accordance with section 3583(e)(2) [18 USCS § 3583(e)(2)] and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of

supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act [34 USCS §§ 20901 et seq.], that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

(e) Modification of conditions or revocation. The court may, after considering the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) [18 USCS § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)]—

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone

or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions. The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing. If the defendant—

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title [18 USCS § 921], in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised release following revocation. When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) Delayed revocation. The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) Supervised release terms for terrorism predicates. Notwithstanding subsection (b), the authorized term of supervised release for any offense listed in section 2332b(g)(5)(B) [18 USCS § 2332b(g)(5)(B)] is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 [18 USCS § 1201] involving a minor victim, and for any offense under section 1591, 1594(c), 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425 [18 USCS § 1591, 1594(c), 2241, 2242, 2244(a)(1), 2244(a)(2), 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, 2423, or 2425], is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591 [18 USCS §§ 2241 et seq., 2251 et seq., 2421 et seq., 1201, or 1591], for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.