Supreme Court of Ohio Clerk of Court - Filed August 30, 2022 - Case No. 2021-0532

IN THE SUPREME COURT OF OHIO

SCT NO. 2021-0532

STATE OF OHIO	:	
Appellee	:	On Appeal From 8th Dist. Cuyahoga Case No. 109476
vs.	:	
DANAN L. SIMMONS, JR	:	
Appellant		

REPLY BRIEF OF APPELLANT

CULLEN SWEENEY #0077187
(COUNSEL OF RECORD)
Cuyahoga County Public Defender
JOHN T. MARTIN #0020606
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113
(216) 443-7583
csweeney@cuyahogacounty.us
jmartin@cuyahogacounty.us
COUNSEL FOR APPELLANT
DANAN L. SIMMONS, JR

MICHAEL C. O'MALLEY #0059592
Cuyahoga County Prosecutor
(COUNSEL OF RECORD)
DANIEL T. VAN #0084614
(COUNSEL OF RECORD)
Assistant Prosecuting Attorney
The Justice Center – 9th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800
dvan@prosecutor.cuyahogacounty.us
COUNSEL FOR APPELLEE
THE STATE OF OHIO

DAVE YOST #0056290
Ohio Attorney General
BENAMIN FLOWERS #0095284
(COUNSEL OF RECORD)
Solicitor General
MICHAEL J. HENDERSHOT
#0081842
Chief Deputy Solicitor General
DIANE R. BREY #0040328
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980
benjamin.flowers@ohioago.gov
COUNSEL FOR AMICUS CURIAE
OHIO ATTORNEY GENERAL

STEVEN L. TAYLOR #0043876
(COUNSEL OF RECORD)
Legal Research and Staff Counsel
Ohio Prosecuting Attorneys Assoc.
196 E. State Street, Suite 200
Columbus, Ohio 43215
(614(221-1266
taylor@ohiopa.org
COUNSEL FOR AMICUS CURIAE
OHIO PROSECUTING
ATTORNEYS ASSOCIATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY 1

I. THE FUNDAMENTAL DISAGREEMENT: IS S.B. 201 SIMPLY ANOTHER VERSION OF TRADITIONAL PAROLE? 1

II. THIS COURT SHOULD ADOPT THE PROPOSITIONS OF LAW 3

In reply in support of Proposition of Law I: The Reagan Tokes Act violates the Sixth Amendment as it permits the imposition of additional punishment for conduct not admitted by the defendant or found by the jury 3

In reply in Support of Propostion of Law II: The Reagan Tokes Act violates the doctrine of separation of power because, as with bad time, it conferred judicial power to the executive branch 6

In reply in support of Proposition of Law III: The Reagan Tokes Act violates due process by failing to provide adequate notice, by inadequately confinding executive branch discretion, by lacking adequate guarantees for a fair hearing 8

III. Severance Is Not a Viable Remedy 12

CONCLUSION 14

SERVICE 14

TABLE OF AUTHORITIES

CASES

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) --- 4, 5, 6
Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) ----- 4, 5, 6
Harris v. United States, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) ---------- 4
Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). ----------- 10, 11
Ring v. Arizona, 536 U.S. 5843, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) --------------- 4, 5
State ex rel. Bray v. Russell, 89 Ohio St.3d 132, 729 NE.2d 359, 2000-Ohio-116 ------ 7, 8
State ex rel. Sands v. Culotta, 165 Ohio St.3d 172, 176 N.E.3d 735, 2021-Ohio-1137 ---------- 3
State v. Delvallie, 2022-Ohio-470, 185 N.E.3d 536 (8th Dist.) (en banc) ---------- 4, 11, 12
State v. Guyton, 1st Dist. No. 190657, 2022-Ohio-2962 ¶¶ 71-84 ---------------------- 10, 11
Swarthout v. Cooke, 562 U.S. 216, 131 S.Ct. 859, 178 L.Ed.2d 732 (2011) ---------------- 10
West v. Bode, 162 Ohio St.3d 293165 N.E.3d 298, 2020-Ohio-547 ------------------------ 4
Wilkinson v. Austin, 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005) -------- 10
Woods v. Telb, 89 Ohio St.3d 504, 733 N.E.2d 1103, 2000-Ohio-171 --------------------- 8

STATUTES

R.C. 2967.271 ---------- 9, 10, 11
R.C. 2971.03 ---------- 13

ADMINISTRATIVE POLICIES

ODRC Policy 105-PBD-15 ---------- 11

CONSTITUTIONAL PROVISIONS

Sixth Amendment to the United States Constitution ---------- 3, 6

MISCELLANEOUS PROVISIONS

Blackstone, *Commentaries of the Laws of England* (1769) ---------- 6
S.B. 201, Reagan Tokes Act, 132nd General Assembly ---------- passim

ARGUMENT IN REPLY

I. THE FUNDAMENTAL DISAGREEMENT: IS S.B. 201 SIMPLY ANOTHER VERSION OF TRADITIONAL PAROLE?

At the heart of the disagreement between Simmons and the State and its Amici is whether S.B. 201's sentencing scheme is indistinguishable from traditional parole. The State and its amici answer this question in the affirmative, arguing that both involve indeterminate sentences imposed by a judge and authorized by the jury's verdict. For the State and its amici, that answers the question. The State goes so far as to suggest that Mr. Simmons is arguing against his own best interests by challenging the presumptive release date that, under S.B. 201, is the minimum term of the indefinite sentence.

But, respectfully, the arguments of the State and its amici miss a fundamental distinction between S.B. 201 and traditional parole; namely, what happens when the executive branch does nothing? Under S.B. 201, if the Department of Rehabilitation and Correction (DRC) fails to take action, the prison gate opens on the minimum date -- the judge's sentence does not authorize one more day of imprisonment absent executive branch action to keep the prison gate locked. It is immaterial whether the action taken by the executive branch to prevent him from walking out the prison gate is characterized as extending the prison term or "maintain[ing] custody of a prisoner." (Brief of Amicus Attorney General at 15). The bottom line is that if he sits one day beyond the minimum term, Mr. Simmons does so because the executive branch did something, i.e. took affirmative action, to make that happen -- "extending" vs. "maintaining" is an Orwellian distinction and not one recognized by the Constitution.

On the other hand, under traditional parole, if DRC does nothing by the end of the minimum term, the prison gate stays shut -- the judge's sentence authorizes the maximum sentence in the absence of executive branch action to open the gate. The executive branch must do something, i.e. take affirmative action, to shorten the time the inmate is in prison. Here, the executive branch, as enforcer, acts within its traditional role of being able to mitigate punishment, a role that extends beyond parole, to include good-time reductions in sentence and commutations of punishment by the Governor. The executive tempers the judicial sentence, but does not enhance it.

Assume Danan Simmons finds himself sitting in prison beyond five years, and is in a cell with a traditional parolee who is still serving time past his minimum sentence, Danan will explain that he is in prison because DRC thought he did something bad. His cellmate will explain that he is in prison because DRC did not think he did enough good. At the heart of many, if not most, constitutional issues is the question of "who decides?" For Danan Simmons, DRC decided that he is in that cell when they took action to overcome his presumption of release at the end of his minimum term. For his cellmate, the judge decided that the cellmate is in the cell when the judge imposed the original sentence premised upon the jury's verdict alone; all the DRC did was fail to intervene.

Thus, when the State of Ohio argues that Mr. Simmons is challenging his presumptive minimum sentence, the State is missing the mark. Mr. Simmons is not challenging the presumptive minimum. He is challenging the mechanism by which he will or will not walk past the prison gates when that minimum date occurs -- a challenge that is premised:

First, on who is making that decision,

Second, under what criteria, and

Third, under what procedures.

Each of these challenges is discussed below. Also discussed below is whether this Court should remedy the constitutional violations by attempting to sever S.B. 201 or whether any statutory remediation is best left to the General Assembly.

II. THIS COURT SHOULD ADOPT THE PROPOSITIONS OF LAW

In reply in support of Proposition of Law I: The Reagan Tokes Act violates the Sixth Amendment as it permits the imposition of additional punishment for conduct not admitted by the defendant or found by a jury.

There are two questions of "who decides?" in this case. Proposition of Law I addresses whether the "who" must be the jury or can be a government employee. Proposition of Law II addresses whether, if a jury need not decide, whether the government employee must be a judge or can be an executive branch employee at the DRC.

The State[1] maintains that this issue was not preserved below and thus forfeited. This is simply incorrect. The trial court found S.B. 201 indefinite sentences to be unconstitutional, and the State appealed. In defense of the trial court's correct ruling, Mr. Simmons raised the same Sixth Amendment right to jury trial issues contained within Proposition of Law I. This was entirely appropriate because, on appeal, the prevailing party below can argue that a lower court's decision should be affirmed for reasons that go beyond the lower court's rationale. *See, e.g., State ex rel. Sands v. Culotta*, 165 Ohio St.3d 172, 176 N.E.3d 735, 2021-Ohio-1137. While the Eighth District did not address the right to trial by jury in its decision, this does not constitute forfeiture

---

[1] The term "State" refers to the prosecutor in this case, the Cuyahoga County Prosecutor. The Ohio Attorney General is referenced as "the Attorney General" or "General" and is abbreviated in citation as "AG."

by Mr. Simmons. Moreover, in this case, the Court does not need the jury trial question to percolate in the Eighth District before being addressed by this Court. The Eighth District, en banc, rejected the issues presented in Proposition of Law I in *State v. Delvallie,* 2022-Ohio-470, 185 N.E.3d 536 (8th Dist.), a case which the State cited extensively in its Merit Brief in this case and which undoubtedly would be the analysis the Eighth District would apply should Mr. Simmons' case be remanded to consider the ignored issue. Finally, it should be noted that any forfeiture is on the part of the State, who failed to raise the question of forfeiture by Mr. Simmons in the Eighth District and now brings that question to this Court in the first instance. *See, West v. Bode,* 162 Ohio St.3d 293165 N.E.3d 2982020-Ohio-5473.

Turning to the merits of Proposition of Law I, it is well-established that the defendant may not serve a sentence beyond what is authorized by the jury's verdict or admitted by the defendant. *Blakely v. Washington* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The key question for this case is what does it mean to be authorized by the jury's verdict or admissions by the defendant? The State and its amici maintain that it is adequate, for Sixth Amendment purposes, for the jury's verdict to be necessary (albeit not sufficient) for the maximum sentence to be served. That position, however, was squarely rejected by United States Supreme Court in *Blakely,* which described the right to trial by jury in the following terms:

> Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. See *Ring, supra*, at 602, 122 S.Ct. 2428 (" 'the maximum he would receive if punished according to the facts reflected in the jury verdict alone' " (quoting *Apprendi, supra*, at 483, 120 S.Ct. 2348)); *Harris v. United States*, 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002) (plurality opinion) (same); cf. *Apprendi, supra*, at 488, 120 S.Ct. 2348 (facts admitted by the defendant).

Blakely, 542 U.S. at 303, citing *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

In *Blakely,* the defendant pled guilty to a violation of Washington's second-degree kidnapping charge which carried a statutory penalty of up to ten years. The Washington sentencing guidelines provided a range of punishment or the offense of between 49 and 53 months. At sentencing, the judge found that the offense was committed with deliberate cruelty, a statutory aggravating factor, and imposed a ninety month sentence. The Court held that the sentence violated the right to trial by jury because the "deliberate cruelty" aggravator was neither admitted by the defendant as part of the plea (which is a form of jury waiver) nor found by a jury. That Blakely's sentence was still within the ten-year statutory range for the kidnapping offense was of no moment -- "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." *Id.* at 304.

Blakely's recognition that the jury's fact-finding must be "solely" the basis for the time to be served by the defendant undermines the Attorney General's argument that S.B. 201 comports with the Sixth Amendment. Under the S.B 201 sentencing scheme, if Danan Simmons serves a sentence beyond the presumptive minimum is not *solely* due to the jury's verdict or his omissions; accordingly, because S.B. 201 is unconstitutional because it authorizes "greater punishment than that permitted by the jury verdict." Just as in *Blakely* there was no jury finding of deliberate cruelty to extend the sentence, in

Mr. Simmons situation, there can be no jury finding of any of the post-verdict factors that can be used to extend Mr. Simmons' prison term beyond five years.

The State argues that the Sixth Amendment has not been violated because S.B. 201 involves fact-finding by the executive branch DRC and not by the judiciary. The State's argument in this regard is essentially one that says it is alright for a government employee to decide facts essential to punishment so long as the employee does not wear a judicial robe. *But cf. Blakely* ("the State should suffer the modest inconvenience of submitting its accusation to “the unanimous suffrage of twelve of his equals and neighbours,” *314 4 Blackstone, supra, at 343, rather than a lone employee of the State.'). The State misses the big picture: The Sixth Amendment is concerned with ensuring that the jury be on the only fact-finder of that which is essential to the length of a prison sentence:

> “[T]o guard against a spirit of oppression and tyranny on the part of rulers,” and “as the great bulwark of [our] civil and political liberties,” 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that “*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours....” 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (hereinafter Blackstone) (emphasis added).

Apprendi, at 477.

In reply in support of Proposition of Law II: The Reagan Tokes Act violates the doctrine of separation of powers because, as with bad time, it conferred judicial power to the executive branch.

Even if S.B. 201 could constitutionally remove the jury from the fact-finding necessary to keep the prison gate locked, it gave the key to the wrong branch of government when it afforded DRC the authority to determine whether to extend Mr. Simmons' prison term beyond its judicially-stated and legislatively-presumed

minimum. The branch of government "who decides" must be the judicial branch in this regard.

While acknowledging that the judicial branch's power to determine guilty cannot be invaded by either of the other two branches of government (AG Amicus at 7), the Attorney General argues that, because an S.B. 201 sentence (with its presumptive minimum that can only be overcome by DRC findings) was imposed by a judge, there can be no separation of powers problem. But if it were that simple, then *State ex rel. Bray v. Russell,* 89 Ohio St.3d 132, 729 N.E.2d 359, 2000-Ohio-116, striking down Ohio's bad-time provision, would have been decided differently. The bad-time provision was statutory, just as is S.B. 201. The judge's sentence included the possibility of bad-time, just as an S.B. 201 sentence includes the possibility of serving time beyond the presumptive minimum. The executive branch determined if bad time would be imposed, just as the executive branch determines if S.B. 201 time-beyond-the-presumptive minimum will be imposed. The two are indistinguishable.

Contrary to the Attorney General's argument, *Bray* did not question that bad-time was part of the original sentence. What was important to the five-justice majority in *Bray* was the fact that the bad-time statute "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. This is no less than the executive branch's acting as judge, prosecutor, and jury." *Bray* at 135. *Bray* explicitly rejected a view of Ohio's separation of powers doctrine that would permit the executive branch to yield quasi-judicial power so long as the executive did not interfere with what was authorized by legislative branch and imposed by the judicial branch. Instead, *Bray* viewed separation of powers as requiring each branch of government to stay in its own lane at all times, not

just when required to avoid a collision. In other words, one branch of government cannot assume another branch of government's power even if asked to do so. "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.* Applying these principles to bad-time, this Court found that the bad-time statute "intrudes well beyond the defined role of the executive branch as set forth in our Constitution." *Id.* at 135.

This need for each branch to stay in its own lane explains why *Bray* and *Woods v. Telb,* 89 Ohio St.3d 504, 733 N.E.2d 1103, 2000 -Ohio- 171, can co-exist. Both bad-time and post-release control are part of the judicially imposed sentence. The distinction between the two is that "[t]he post-release control sanctions are sanctions aimed at behavior modification in the attempt to reintegrate the offender safely into the community, not mere punishment for an additional crime, as in bad time." *Woods,* 89 Ohio St.3d at 512. Put a different way, this Court recognized that the executive branch left its lane when, under the guise of enforcement, it crossed from imposing remedial sanctions to punitive sanctions. And just as the bad-time statute's incremental ability to increase prison time went "well beyond the defined role of the executive branch," so too does S.B. 201.

In reply in support of Proposition of Law III: The Reagan Tokes Act violates due process by failing to provide adequate notice, by inadequately confining executive branch discretion, by lacking adequate guarantees for a fair hearing.

Having examined the question of "who decides," this reply now addresses what is being decided and how it is being decided.

"What constitutes a violation?" Excessive executive branch discretion.

Absent from the State's brief and the briefs of its amici is an answer to the argument that due process is violated when the presumption of release can be overcome by restrictive housing in the year preceding release or by a security designation higher than 2 -- determinations over which executive branch discretion is virtually unfettered. It should be remembered that either of these criteria are all that is needed to rebut the presumption of release -- unlike the criteria involving rules infractions, no further evaluation that the offender poses a threat to society is needed under R.C. 2967.271. The Attorney General attempts to sidestep this critical issue by asserting – without any factual basis in the record that – “most” rebuttals of the minimum sentence will “rest on the third exception” which “relies on prison-misconduct findings made by the Rule Infraction Board.” (AG Brief at 2 and 27). Constitutional questions cannot be so conveniently avoided.

The law cannot comport with due process when, as discussed in Mr. Simmons' merit brief, on one hand, the law recognizes that housing decisions and security level designations are part of the executive branch's discretionary power to regulate prison operations and then, on the other hand, also permit that discretionary decision to trigger additional prison time. DRC has the ability to manipulate any prisoner's release eligibility via either of these two discretionary actions.

Inadequacy of the Procedure.

While the procedural guarantee of a jury trial has already been discussed in Proposition of Law I, there are other procedural guarantees that are also being violated by S.B. 201.

In determining, the level of procedure due to Mr. Simmons, two questions must be asked: 1) Is there a liberty interest; and 2) are the procedures commensurate with that interest? *See, Swarthout v. Cooke,* 562 U.S. 216, 131 S.Ct. 859, 178 L.Ed.2d 732 (2011).

The first question is whether Mr. Simmons has a liberty interest at stake with respect to a decision to keep him in prison beyond his presumptive release date. While the answer to that questions seems fairly self-evident, the Attorney General says "no" because the decision to keep Simmons beyond his presumptive release date is left to DRC's discretion. (AG at 32). Such an argument does not square with the statutory and judicially-imposed presumption that Simmons will be released at the conclusion of his minimum term. Simmons expectation that he will be released at the conclusion of his minimum term, unless the presumption has been rebutted, establishes a protected liberty interest. Liberty interests can emanate "from an expectation or interest created by state laws or policies." *Wilkinson v. Austin,* 545 U.S. 209, 221, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005). On its face, S.B. 201 carries a presumption of release at the minimum term. R.C. 2967.21(B). This presumption confers with it an expectation on Mr. Simmons' part that he will be released at that time. Put a different way, if the statute expects Mr. Simmons will be released at the minimum term, then so does Mr. Simmons.

The question then becomes "how much process is due?" While the Ohio Prosecuting Attorneys Association (OPAA) maintains that Mr. Simmons' liberty interest is akin to that of a prisoner applying for parole, the more appropriate standard is that for parole revocation, a standard controlled by *Morrissey v. Brewer,* 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). *See, State v. Guyton,* 1st Dist. No. 190657, 2022-

Ohio-2962 ¶¶ 71-84 (Bergeron, J. concurring in part and dissenting in part) (collecting cases and concluding that *Morrissey* standard is most closely aligned with interest created by S.B. 201).

Applying the *Morrissey* standard reveals the inadequacy of S.B. 201. First, on its face, R.C. 2967.271 provides notice to a number of stakeholders in the system, including the sentencing court, the prosecutor, any victim(s) and certain law enforcement agencies. Conspicuously absent from that litany is the defendant. *Expressio unius est exlusio alterius.*

Second, R.C. 2967.271 prescribes a hearing but does not provide adequate procedures attendant to that hearing. *State v. Delvallie,* 2022-Ohio-470, 185 N.E.3d 536 ¶ 153 (Forbes, J.) ("R.C. 2967.271(C) . . . does not require that the hearing be meaningful."). "The only guidance the statute gives is (a) the DRC may rebut the presumption of release, and (b) the DRC decides whether it has done so." *Id.*

Moreover, the DRC policy promulgated in an attempt to fill the statute's procedural omissions -- Policy No. 105-PBD-15(E)(2)(d) -- is inadequate in two respects. First, it does not enjoy the force of law because it is nonbinding internal document. *See, Guyton* (Bergeron J., concurring in part and dissenting in part).

Second, it does not meet the *Morrissey* standard. The Policy does not provide adequate notice and disclosure of evidence -- there is a 30-day notice requirement that can be dispensed via prior approval of the Parole Board chair or the chair's designee. Second, as discussed previously in Mr. Simmons' merit brief, he does not have an absolute right to attend and does not have a right to counsel (which also ensures no right to confront witnesses). "The policy allows an inmate to be hailed before the board without knowing why, without any opportunity to gather information to defend himself

or to cross-examine witnesses, and he doesn't even have to be told why he's going to sit in jail longer than he would." *Guyton* at ¶ 96 (Bergeron, J., concurring in part and dissenting in part).

In response to these types of concerns, the Attorney General offers a simple response that amounts to "who cares, you can't win anyway." The Attorney General argues that, because a rules violation, security level designation or segregated housing assignment are objective considerations that are easily verifiable, and because the DRC's evaluation of whether a prisoner is a threat to society (which is a co-requisite to a rules violation) is so subjective that DRC will (almost) never be wrong, "additional hearings will not lead to a significant reduction in *wrongful* rebuttals." (AG Brief at 34, emphasis sic). So, apparently, this Court need not tether procedural due process to a liberty interest after all -- rather the prisoner's procedural rights can be measured by the likelihood that anyone will ever be able to change DRC's mind once DRC has decided to extend a sentence. And because DRC has already decided that its mind cannot be changed, there's no need to worry about protecting against any further unfairness. The AG's circular logic is hardly comforting and only amplifies the procedural shortcomings of the statute.

III. SEVERANCE IS NOT A VIABLE REMEDY

While the State and Attorney General both maintain that severance *could* be a remedy to avoid constitutionality, neither sets forth compelling reasons why severance *should* be the remedy. In this case, severing S.B. 201's presumption of release from its indefinite terms of imprisonment is inconsistent with legislative intent and therefore severance is not an appropriate remedy.

As discussed in Mr. Simmons' merit brief and as recognized throughout the State and its amici's articulation of the operation of the S.B. 201, the presumption of release was integral to the creation of S.B. 201 hybrid sentences. The General Assembly has proven it knows the difference between indefinite sentences with and without presumptions of release. At the time S.B. 201 was passed, there were already a number of codified traditional-parole sentences for various first and second-degree crimes when accompanied by codified life-tail specifications. *E.g.,* 2971.03.

That the General Assembly would include a presumption of release even though the S.B. 201 tails are never more than 5 1/2 years in length is evidence that the General Assembly did not envision the tail being triggered in most cases. If the General Assembly wanted, it could have simply increased by 50 percent the maximum sentences for first- and second-degree felonies. Instead, by keeping the maximum terms for first- and second-degree felonies to a minimum of eight and eleven years, respectively, the General Assembly demonstrated a desire to keep the *status quo ante* with the occasional increase in punishment under S.B. 201 for those whose prison conduct demonstrated a continued threat to society.

Finally in this regard, it should be remembered that not all first- and second-degree felonies, all of which are now punishable under S.B. 201 with indefinite tails, are violent crimes. Severance would subject these non-violent offenders to increased prison time as well should DRC decided to extend the inmates sentence for whatever reason it saw fit.

CONCLUSION

For these reasons, this Court should hold that S.B. 201 is unconstitutional. The sentence as originally imposed should be affirmed.

Respectfully submitted,

/s/ Cullen Sweeney
CULLEN SWEENEY (0077187)
COUNSEL OF RECORD
Cuyahoga County Public Defender
JOHN T. MARTIN (0020606)
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113
(216) 443-7583
COUNSEL FOR APPELLANT

SERVICE

I hereby certify that one true copy of the foregoing was served via electronic mail to Assistant Prosecuting Attorney Daniel T. Van, dvan@prosecutor.cuyahogacounty.us, Solictor Benjamin Flowers, benjamin.flowers@oago.gov and Steven Taylor, taylor@ohiopa.org on this 30th day of August, 2022.

/s/ John T. Martin
JOHN T. MARTIN (0020606)