



# OHIO

CRIMINAL SENTENCING COMMISSION

## Appellate Report: Adult Sentencing 2022 To 2024

This report is the culmination of numerous externs and staff members reviewing appellate decisions that were made between 2022 and 2024 that concerned sentencing issues. The report includes several charts that break down the number of appeals, the appeals with sentencing issues and whether error was found. This report uses a broad definition of “error found” to include all cases that are reversed or remanded back to the trial court. This report also discusses the assignments of error that resulted in cases being reversed or remanded.

Based on the overall number of criminal appeals compared with those with sentencing issues, sentencing courts are more often getting it done correctly. Looking at the number of sentencing-based appeals compared to those cases that are reversed/remanded, there are areas that can be identified for improvement. This report highlights the assignments of error that indicate what the courts are getting wrong.

**Ohio Criminal Sentencing Commission**

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## Ohio Criminal Sentencing Commission

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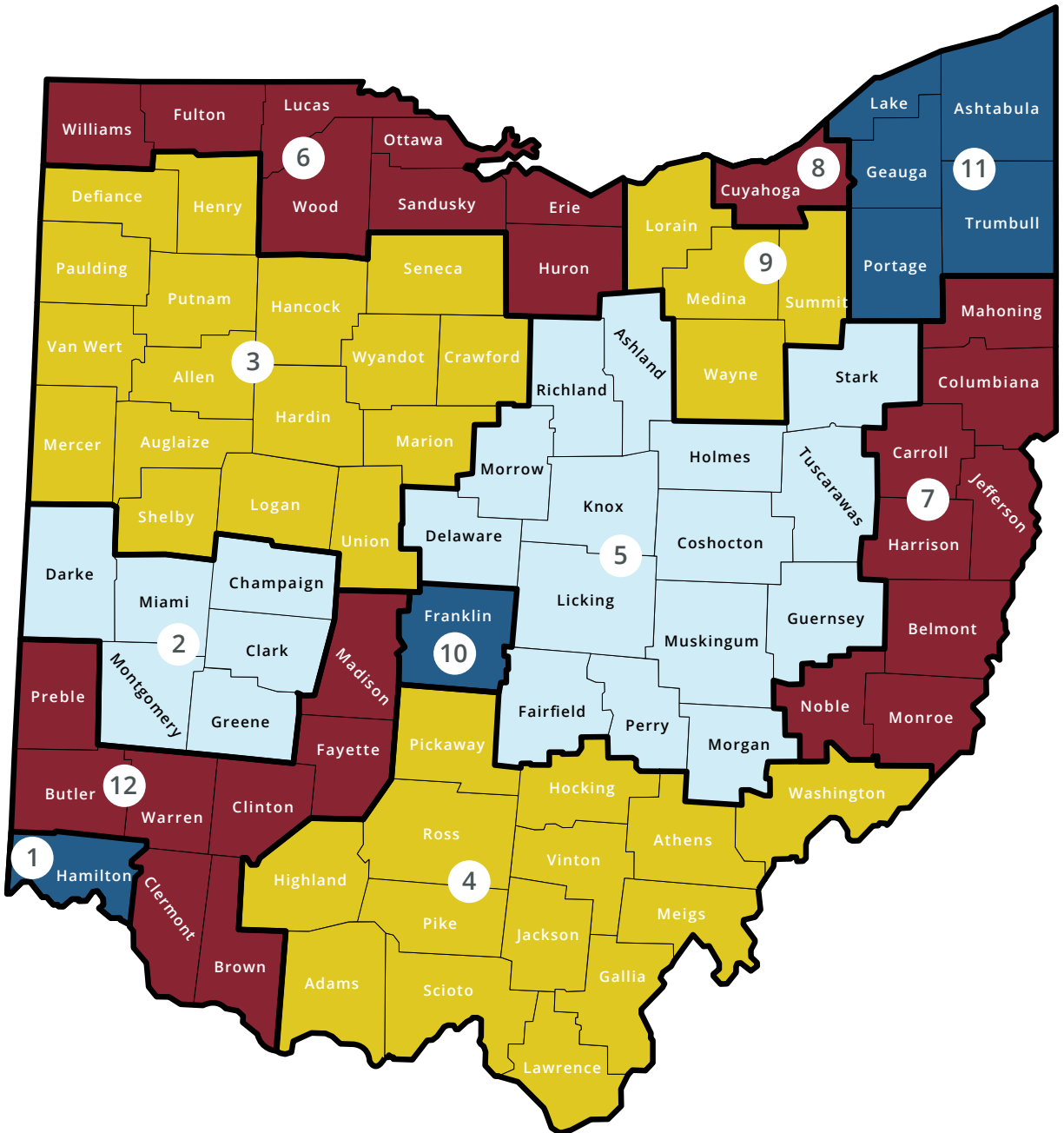
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# Appellate Districts





## Analysis

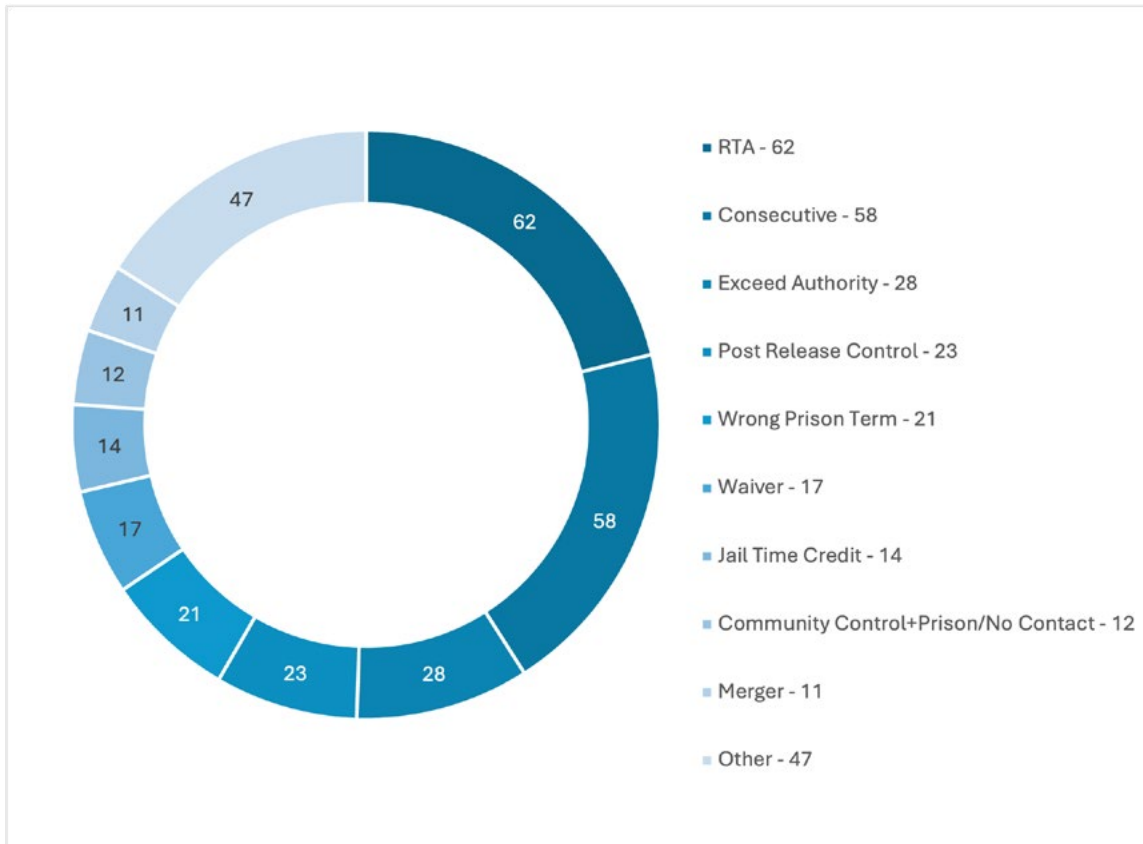
Upon review of the appeals with sentencing issues between 2022 and 2024, table 1 lists the assignments of error that resulted in reversal of a case in order from most to least. Figure 1 illustrates the top nine errors with a tenth category of “other” which encompasses the remaining errors. Under each subtopic, the assignments of error are broken down further into what the appellate decisions were reversing for and why it fell under that particular subtopic. Appellate decisions by year and district are included in Appendix A.

Table 1. Assignments of Error Resulting in Reversal, 2022 - 2024

Assignments of Error	2022	2023	2024	TOTAL
Indefinite Sentencing (RTA)	35	17	10	62
Consecutive Sentences	23	21	14	58
Exceed Authority	2	9	17	28
Post Release Control	11	6	6	23
Wrong Prison Term	9	2	10	21
Waiver	4	7	6	17
Jail Time Credit	5	5	4	14
Community Control/Prison	8	3	1	12
Merger	3	3	5	11
Appointed Counsel Fees	1	5	1	7
Violent Offender Database	2	2	2	6
Felony instead of Misdemeanor	1	4	0	5
Not Follow SC Mandate	2	1	1	4
Restitution	2	1	1	4
Firearm Spec - Mandatory	1	1	1	3
Failure To Control – Mandatory	1	1	1	3
Post Conviction	2	0	1	3
Promise by Court	1	1	1	3
SORN	2	1	0	3
Min Sent Reduction Elig.	1	1	0	2
Unreas. Delay	1	1	0	2
NO PV Notice	1	0	0	1
Youth Mitigation	0	1	0	1
<b>TOTALS</b>	<b>118</b>	<b>93</b>	<b>82</b>	<b>293</b>



Figure 1. Total Assignments of Error by Category, 2022 - 2024



### Indefinite Sentencing (Reagan Tokes Act) = 62

During the period of this report, 2022-2024, the most reversed cases were for assignments of error arising out of the Reagan Tokes Act which went into law in 2019. During this period, the Supreme Court found that the Reagan Tokes Act was constitutional (see *State v. Hacker* – Appendix E). Most Appellate courts were upholding the constitutionality of the act and reversing trial courts that sentenced based on definite sentencing and not the newly enacted indefinite sentencing scheme. The Appeals courts also reversed for sentencings that did not give a strict reading of the notifications required by R.C. 2929.19(B)(2)(c). Cases have also been reversed for miscalculations of the aggregate minimum and maximum sentences.

With the constitutionality of the law on its face having been decided, the Ohio Supreme Court left open the door for an as applied challenge to be made. Looking forward, a future report will address if and when that challenge is made.

The Ohio Criminal Sentencing Commission created a Uniform Sentencing Entry (USE), that is hosted on the Ohio Supreme Court website as well as a Felony Sentencing Reference Guide. Both of these documents can be of help to sentencing courts. Attached to this report as Appendix B is the language from the USE.



## Consecutive Sentences = 58

Consecutive Sentence errors include cases where the sentencing court has failed to make the findings required by R.C. 2929.14(C)(4), those cases where the findings were made but not put in the entry or cases where the calculation of the consecutive sentence was done incorrectly. Beyond the findings necessary and entry issues, sentencing court's also erred by imposing consecutive sentence on a state case to a federal case where the sentence had not been imposed on the federal case. Multiple sentencing court's imposed consecutive sentence on a misdemeanor to a felony count.

Sample language from the USE is attached as Appendix C. The language can help guide a sentencing judge through the findings as well as insuring the proper language finds its way into the sentencing entry.

## Exceed Authority = 28

This category encompasses all the cases where the court exceeded its authority in a multitude of ways. Sentencing courts have denied mitigation being presented, acted vindictive, failed to recuse when clear bias, imposed sentence out of the presence of the defendant and ordered a Federal Sentence to run concurrent to a state sentence.

## Post Release Control = 23

The majority of cases that were reversed for a Post Release Control (PRC) issue were done so for lack of notice being given to the defendant. Other errors that fall under this section include sentencing court's imposing PRC on the record, but not in the entry, modifying PRC without holding a hearing, imposing the wrong minimum term of PRC or applying PRC to charges (Murder) that are not statutorily authorized to have PRC.

## Wrong Prison Term = 21

This category primarily deals with courts who imposed the wrong prison term or advised the defendant incorrectly about the prison term on their case. Sentencing courts committed error by misinforming the defendant of maximum sentence, imposing a 10-year term on a Felony of the Second Degree (maximum 8 years), and imposing firearm specifications when no specifications were charged.

## Waiver = 17

These cases dealt with situations where the sentencing court moved forward without counsel being present as well as situations where no waiver was ever made by the defendant.



## Jail Time Credit = 14

Sentencing courts struggled with calculating proper jail time credit as well as including in the sentencing entry. Cases were reversed for court's attempting to reduce jail time credit with a nunc pro tunc entry, during resentencing not calculating the local jail time awaiting to be resentenced, attempting to recalculate jail time credit after losing jurisdiction due to an appeal being filed, and general miscalculation of the days. The Sentencing Commission worked with the Judicial College to present an in-person training at the 2024 Winter session of the Common Pleas Judges Association Meeting as well as a webinar.

## Community Control/Prison = 12

The most common error in imposing sentence that included both Community Control and Prison, was a no contact order, which is considered a community control sanction and thus cannot be imposed with a prison sentence.

## Merger = 11

Statutorily defined as Allied Offenses of Similar Import, R.C. 2941.25. Merger cases were overturned where the Sentencing Court did not merge charges into one. During the three-years of this report, no cases were reversed for merging of counts.

## Other = 47

The other category covers assignments of error that are in the single digits. In looking at Table 1, the errors include Violent Offender Database, Appointed Counsel Fees, Mandatory time for Failure to Control and Restitution as examples.



Figure 2 shows the total number of sentencing related appeals for each year by district. Figure 3 then shows, of those sentencing related appeals, how many errors found, by district for each year

Figure 2. Sentencing Related Appeals by District, 2022 – 2024

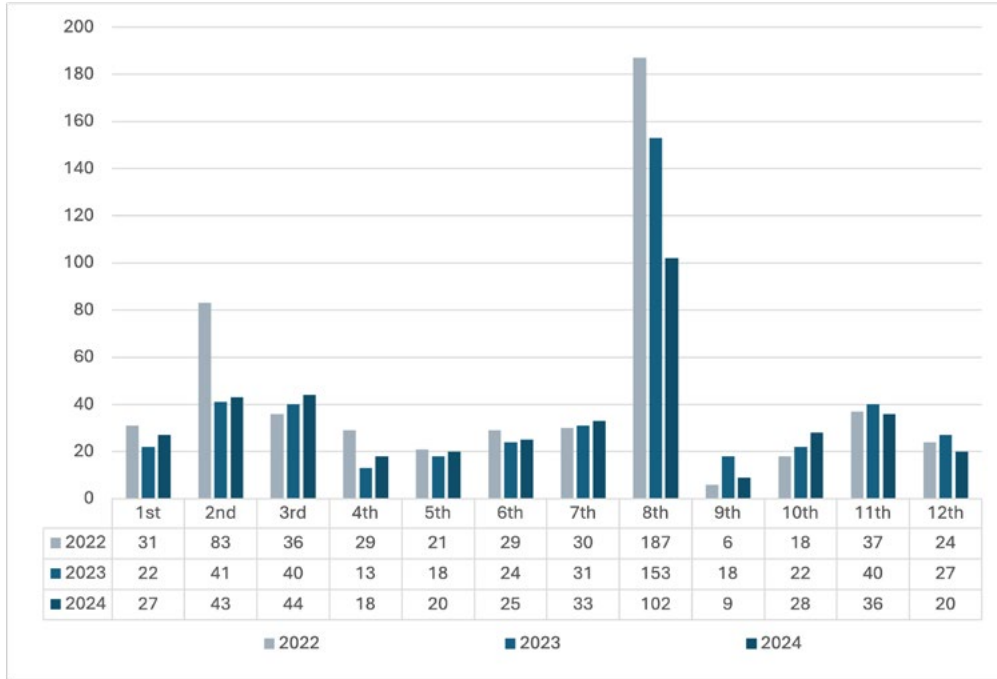
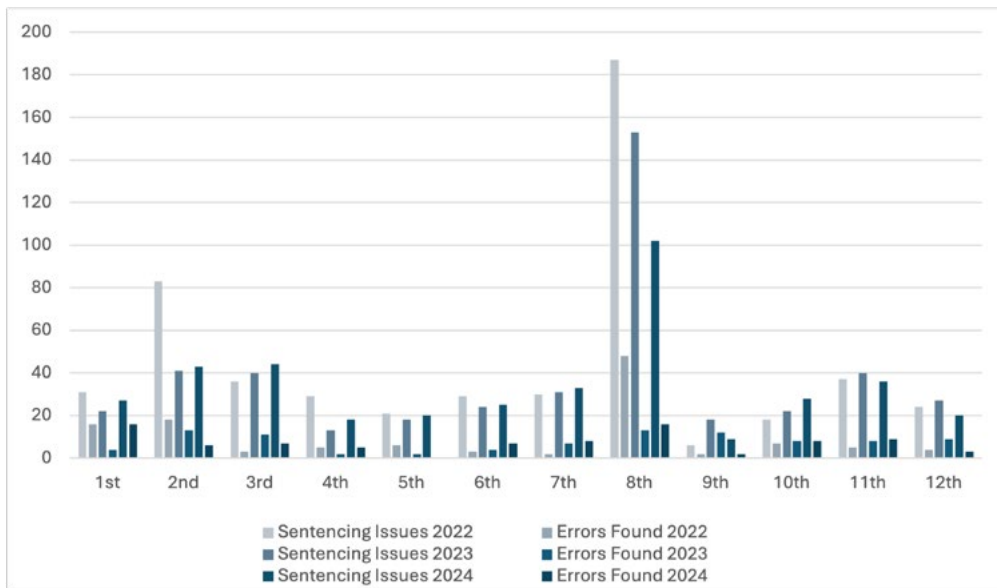


Figure 3. Sentencing Related Appeals Compared to Errors Found by District, 2022 – 2024





## Supreme Court Decisions

### ***State v. Gwynne, 2023-Ohio-3851***

The Ohio Supreme Court ruled that the Fifth District had been correct in *Gwynne III* by upholding the sentence imposed by the trial court. For further analysis of all the *Gwynne* decisions see Appendix D.

### ***State v. Hacker, 2023-Ohio-2535***

The Ohio Supreme Court held that the Reagan Tokes Act on its face is constitutional. For further analysis see Appendix E.

### ***State v. Schilling, 2022-Ohio-1773***

The Ohio Supreme Court ruled that Tier I classification was active during the time that the defendant was living in a different state.

### ***State v. Beatty, 2022-Ohio-2329***

The Ohio Supreme Court held that prison terms for multiple firearm specifications must be run concurrent after imposition of the mandatory prison term on the two most serious specifications (R.C. 2929.14(B)(1)(g)).

### ***State v. Glover, 2024-Ohio-5195***

The Ohio Supreme Court ruled that the Court of Appeals judgement reducing appellee's consecutive prison terms reversed and consecutive sentences imposed by trial court reinstated.



## APPENDIX A

Criminal Appeals = Incoming Criminal Appeals for a given year.

Sentencing Issues = Using search terms identifying sentencing cases

No Error = Case Affirmed or Dismissed

Error = Reversed or Remanded for trial court to do something

### Appeals in 2022

District	Incoming Criminal Appeals	Sentencing Issues	No Error	Error Found
1ST	173	31	15	16
2ND	284	83	65	18
3RD	276	36	33	3
4TH	135	29	24	5
5TH	406	21	15	6
6TH	286	29	26	3
7TH	116	30	28	2
8TH	476	187	129	48
9TH	184	6	4	2
10TH	290	18	11	7
11TH	189	37	32	5
12TH	180	24	20	4
<b>TOTALS</b>	<b>2995</b>	<b>531</b>	<b>412</b>	<b>119</b>

### Appeals in 2023

District	Incoming Criminal Appeals	Sentencing Issues	No Error	Error Found
1ST	191	22	18	4
2ND	259	41	28	13
3RD	294	40	29	11
4TH	167	13	11	2
5TH	337	18	16	2
6TH	241	24	20	4
7TH	135	31	24	7
8TH	485	153	140	13
9TH	208	18	6	12
10TH	308	22	14	8
11TH	172	40	32	8
12TH	168	27	18	9
<b>TOTALS</b>	<b>2965</b>	<b>449</b>	<b>356</b>	<b>93</b>



Appeals in 2024

District	Incoming Criminal Appeals	Sentencing Issues	No Error	Error Found
1ST	209	27	11	16
2ND	244	43	37	6
3RD	268	44	37	7
4TH	166	18	13	5
5TH	424	20	20	0
6TH	285	25	13	7
7TH	119	33	25	8
8TH	405	102	86	16
9TH	211	9	7	2
10TH	213	28	20	8
11TH	182	36	27	9
12TH	166	20	17	3
<b>TOTALS</b>	<b>2892</b>	<b>405</b>	<b>313</b>	<b>79</b>



Assignments of Error in 2022

Assignments of Error	1ST	2ND	3RD	4TH	5TH	6TH	7TH	8TH	9TH	10TH	11TH	12TH	TOTAL
Appointed Counsel Fees	0	1	0	0	0	0	0	0	0	0	0	0	1
Community Control/Prison	4	0	0	0	0	0	0	3	0	1	0	0	8
Consecutive Sentences	1	1	1	0	1	0	0	13	1	3	1	1	23
Exceed Authority	0	0	0	0	0	0	0	0	0	1	1	0	2
Firearm Spec – Mandatory	0	1	0	0	0	0	0	0	0	0	0	0	1
Felony instead of Misdemeanor	1	0	0	0	0	0	0	0	0	0	0	0	1
Failure To Control – Mandatory	0	0	0	0	0	0	0	0	1	0	0	0	1
Waiver	0	1	0	0	1	0	0	0	0	1	1	0	4
Jail Time Credit	1	1	0	0	0	0	0	1	0	0	1	1	5
Merger	0	0	0	1	0	0	0	1	0	0	1	0	3
Minimum Sentence Reduction Elig.	0	0	0	0	0	0	1	0	0	0	0	0	1
NO PV Notice	0	0	0	0	1	0	0	0	0	0	0	0	1
Not Follow SC Mandate	0	2	0	0	0	0	0	0	0	0	0	0	2
Post Conviction	1	0	0	0	1	0	0	0	0	0	0	0	2
Post Release Control	1	2	1	2	1	1	1	1	0	1	0	0	11
Promise by Court	0	1	0	0	0	0	0	0	0	0	0	0	1
Restitution	0	0	1	0	0	0	0	1	0	0	0	0	2
Indef. Sent (RTA)	3	6	0	1	0	1	0	22	0	0	0	2	35
SORN	1	0	0	0	0	1	0	0	0	0	0	0	2
Unreas. Delay	0	0	0	0	1	0	0	0	0	0	0	0	1
Violent Offender Database	2	0	0	0	0	0	0	0	0	0	0	0	2
Wrong Prison Term	1	2	0	1	0	0	0	6	0	0	0	0	9
Youth Mitigation	0	0	0	0	0	0	0	0	0	0	0	0	0



Assignments of Error in 2023

Assignments of Error	1ST	2ND	3RD	4TH	5TH	6TH	7TH	8TH	9TH	10TH	11TH	12TH	TOTAL
Appointed Counsel Fees	0	0	4	0	0	1	0	0	0	0	0	0	5
Community Control/Prison	1	0	0	0	0	0	0	0	1	1	0	0	3
Consecutive	0	1	1	0	0	0	4	3	2	2	4	4	21
Exceed Authority	0	0	2	0	0	1	0	2	2	0	1	1	9
Firearm Spec - Mandatory	0	1	0	0	0	0	0	0	0	0	0	0	1
Fel instead of M	1	2	0	0	0	0	0	1	0	0	0	0	4
Failure To Control - Mandatory	0	0	0	0	0	0	0	0	0	0	0	1	1
Waiver	0	0	0	0	1	0	1	0	1	3	1	0	7
Jail Time Credit	1	2	0	0	0	0	0	1	0	0	1	0	5
Merger	0	0	0	0	0	0	0	0	2	0	0	1	3
Min Sent Reduction Elig.	0	1	0	0	0	0	0	0	0	0	0	0	1
NO PV Notice	0	0	0	0	0	0	0	0	0	0	0	0	0
Not Follow SC Mandate	0	0	1	0	0	0	0	0	0	0	0	0	1
Post Conviction	0	0	0	0	0	0	0	0	0	0	0	0	0
Post Release Control	1	1	0	0	0	1	0	0	1	1	0	1	6
Promise by Court	0	0	1	0	0	0	0	0	0	0	0	0	1
Restitution	0	0	0	0	0	0	0	0	1	0	0	0	1
Indef. Sent (RTA)	0	5	1	0	1	1	1	5	1	1	1	0	17
SORN	0	0	0	1	0	0	0	0	0	0	0	0	1
Unreas. Delay	0	0	0	0	0	0	1	0	0	0	0	0	1
Violent Offender Database	0	0	0	1	0	0	0	0	0	0	0	1	2
Wrong Prison Term	0	0	0	0	0	0	0	1	1	0	0	0	2
Youth Mitigation	0	0	1	0	0	0	0	0	0	0	0	0	1



Assignments of Error in 2024

Assignments of Error	1ST	2ND	3RD	4TH	5TH	6TH	7TH	8TH	9TH	10TH	11TH	12TH	TOTAL
Appointed Counsel Fees	0	0	1	0	0	0	0	0	0	0	0	0	1
Community Control/Prison	0	0	0	1	0	0	0	0	0	0	0	0	1
Consecutive	1	2	1	2	0	1	1	4	0	0	1	1	14
Exceed Authority	4	1	2	1	0	0	1	4	0	2	1	1	17
Firearm Spec - Mandatory	0	0	0	0	0	0	0	0	1	0	0	0	1
Fel instead of M	0	0	0	0	0	0	0	0	0	0	0	0	0
Failure to Control - Mandatory	1	0	0	0	0	0	0	0	0	0	0	0	1
Waiver	0	0	1	0	0	0	2	0	0	2	1	0	6
Jail Time Credit	0	1	0	0	0	0	1	0	0	1	1	0	4
Merger	0	1	0	1	0	1	0	2	0	0	0	0	5
Min Sent Reduction Elig.	0	0	0	0	0	0	0	0	0	0	0	0	0
NO PV Notice	0	0	0	0	0	0	0	0	0	0	0	0	0
Not Follow SC Mandate	0	0	0	0	0	0	1	0	0	0	0	0	1
Post Conviction	0	0	0	0	0	1	0	0	0	0	0	0	1
Post Release Control	3	0	0	0	0	1	0	1	0	0	0	1	6
Promise by Court	0	0	0	0	0	1	0	0	0	0	0	0	1
Restitution	0	0	0	0	0	0	0	0	0	1	0	0	1
Indef. Sent (RTA)	2	0	1	0	0	2	1	1	0	2	1	0	10
SORN	0	0	0	0	0	0	0	0	0	0	0	0	0
Unreas. Delay	0	0	0	0	0	0	0	0	0	0	0	0	0
Violent Offender Database	0	0	0	0	0	0	0	2	0	0	0	0	2
Wrong Prison Term	1	1	1	0	0	0	1	2	1	0	3	0	10
Youth Mitigation	0	0	0	0	0	0	0	0	0	0	0	0	0



## APPENDIX B

### 31- [NON-LIFE FELONY INDEFINITE SENTENCING]

For cases involving non-life felony indefinite sentencing qualifying offenses (F1 and F2 offenses committed after March 22, 2019) use the following language to clearly state the maximum term involved in the case, as well as language indicating the defendant has been advised of indefinite sentencing procedures on the record as required by law. For additional information on non-life felony indefinite sentencing, see the Sentencing Commission’s SB201 Indefinite Sentencing Quick Reference Guide.

#### ( ) [NON-LIFE FELONY INDEFINITE SENTENCING]

Counts [NUMBER] are qualifying offenses subject to indefinite sentencing and the defendant has been sentenced to a minimum term on each qualifying count as detailed above.

#### ( ) [NON-LIFE FELONY INDEFINITE TERM SUMMATION] [Single Count]

Having imposed the minimum term[s] on Count [NUMBER] the Court further sentences the defendant to a maximum term of [THAT MINIMUM TERM + 50% of ITSELF] pursuant to R.C. 2929.144(B)(1).

#### ( ) [NON-LIFE FELONY INDEFINITE TERM SUMMATION] [Multiple Counts / Indefinite terms run Concurrently]

Having imposed the minimum term[s] on Count[s] [NUMBER]

#### ( ) and definite terms on Count[s] [NUMBER]

and having ordered all prison terms in the case to run concurrently, the Court further sentences the defendant to a maximum term of imprisonment in this case of [THE LONGEST MINIMUM TERM IMPOSED FOR THE MOST SERIOUS QUALIFYING FELONY + 50% OF THAT TERM] pursuant to R.C. 2929.144(B)(3).

#### ( ) [NON-LIFE FELONY INDEFINITE TERM SUMMATION] [Multiple Counts / Indefinite terms run Consecutively]

Having imposed the minimum term[s] on Count[s] [NUMBER]

#### ( ) and definite terms on Count[s] [NUMBER]

And having ordered Counts [NUMBER] to be run consecutively, the Court further sentences the defendant to an aggregate minimum term of [SUM OF ALL CONSECUTIVE MINIMUM AND DEFINITE TERMS] and a maximum term of [THE SUM OF ALL CONSECUTIVE MINIMUM AND DEFINITE TERMS + 50% OF THE LONGEST MINIMUM OR DEFINITE TERM IMPOSED FOR THE MOST SERIOUS FELONY BEING SENTENCED] pursuant to R.C. 2929.144.



[NON-LIFE INDEFINITE SENTENCING NOTIFICATIONS] (MANDATORY IF OPTION ABOVE IS SELECTED)

R.C. 2929.19(B)(2)(c) requires Courts to notify defendants sentenced to a non-life felony indefinite term of the procedures of indefinite sentencing and the fact that the defendant was notified should be memorialized in the sentencing entry with the following language. Also note that R.C. 2929.19(B)(2)(c)(i) as written contains language that may be confusing to defendants who are facing a mandatory term on the defendant’s 2019 Am.Sub.S.B. No. 201 qualifying offense. Mandatory terms and sexually oriented offenses are not eligible for earned reduction of the minimum prison term, and that language in (B)(2)(c)(i) relating to the “presumed earned early release date” should be omitted in those circumstances.

[NON-LIFE FELONY INDEFINITE TERM SUMMATION]

Pursuant to R.C. 2929.19(B)(2)(c), having imposed a non-life felony indefinite prison term, the Court advised the defendant on the record of the indefinite sentencing procedures. The Court explained on the record that:

(i) It is rebuttably presumed that the offender will be released from service of the sentence on the expiration of the minimum prison term imposed as part of the sentence or on the offender’s presumptive earned early release date (if applicable), as defined in

R.C. 2967.271, whichever is earlier;

(ii) That the department of rehabilitation and correction may rebut the presumption described in R.C. 2929.19(B)(2)(c)(i) if, at a hearing held under R.C. 2967.271, the department makes specified determinations regarding the offender’s conduct while confined, the offender’s rehabilitation, the offender’s threat to society, the offender’s restrictive housing, if any, while confined, and the offender’s security classification;

(iii) That if, as described in R.C. 2929.19(B)(2)(c)(ii), the department at the hearing makes the specified determinations and rebuts the presumption, the department may maintain the offender’s incarceration after the expiration of that minimum term or after that presumptive earned early release date for the length of time the department determines to be reasonable, subject to the limitation specified in R.C. 2967.271;

(iv) That the department may make the specified determinations and maintain the offender’s incarceration under the provisions described in R.C. 2929.19(B)(2)(c)(i) and (ii) more than one time, subject to the limitation specified in R.C. 2967.271;

(v) That if the offender has not been released prior to the expiration of the offender’s maximum prison term imposed as part of the sentence, the offender must be released upon the expiration of that term.



## APPENDIX C

### 4- [MULTIPLE COUNTS – CONSECUTIVE / CONCURRENT SENTENCING]

#### [MANDATORY CONSECUTIVE SENTENCES – COUNTS]

Several felony offenses (e.g. R.C. 2921.331 Failure to Comply), while not mandatory prison terms, are required be run consecutive to other counts by operation of law when a prison term is imposed. These are listed under “Sentencing Considerations & Advisements – Section E. Consecutive Prison Terms” in the Sentencing Commission’s Felony Sentencing Quick Reference Guide. Use the following language with regard to these offenses:

( ) [MANDATORY CONSECUTIVE SENTENCES – COUNTS](REPEAT AS NECESSARY)

The Court finds that pursuant to [R.C. 2929.14(C)(2)] / [R.C. 2929.14(C)(3)] that the prison term imposed on Count(s) [NUMBER(s)] shall be served consecutively by operation of law.

#### [JOINTLY RECOMMENDED / AGREED UPON CONSECUTIVE SENTENCES - COUNTS]

Pursuant to State v. Sergeant, 148 Ohio St.3d 94, 2016-Ohio-2696 Courts are not required to make the R.C. 2929.14(C)(4) findings when consecutive sentences have been jointly recommended by the parties.

( ) [JOINT RECOMMENDATION FOR CONSECUTIVE SENTENCES – COUNTS]

Pursuant to the joint recommendation of the parties, the prison term(s) imposed on Count(s) [NUMBER]

shall be served consecutively to the prison term(s) on Count(s) [NUMBER]. (REPEAT AS NEEDED)

( ) [AGREED UPON SENTENCE FOR CONSECUTIVE SENTENCES - COUNTS]

Pursuant to the agreed upon sentence, the prison term(s) imposed on Count(s) [NUMBER] shall be served consecutively to the prison term(s) on Count(s) [NUMBER]. (repeat as needed)

#### [DISCRETIONARY CONSECUTIVE SENTENCE FINDINGS]

If the sentencing court wishes to order that counts within the indictment be served consecutively, use the following language to make the requisite findings in the entry, selecting those statutory factors that apply. Courts may supplement this language with further explanation.

( ) [DISCRETIONARY CONSECUTIVE SENTENCE FINDINGS]

Pursuant to R.C. 2929.14(C)(4) the court orders that consecutive sentences are made necessary to protect the public from future crime or to punish the defendant, and that consecutive sentences are not disproportionate to the seriousness of the defendant’s conduct and to the danger the defendant poses to the public, and because:



( ) The defendant committed one or more of the offenses while awaiting trial or sentencing or was under a sanction imposed pursuant to R.C. 2929.16, 2929.17, or 2929.18, or was under post-release control for a prior offense.

( ) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the defendant's conduct.

( ) The defendant's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the defendant.



## APPENDIX D

### *State v. Gwynne, (2023-Ohio-3851)*

#### I. Facts

In January 2016, three residents of a senior living facility reported that their rooms had been entered into and their property was stolen. 2017-Ohio-7570, ¶ 2. Video surveillance showed Gwynne, dressed in scrubs, entering their room with an empty handbag and leaving with it full. 2017-Ohio-7570, ¶ 2. A GPS was placed on Gwynne’s car that allowed police officers to catch Gwynne in the act of stealing from another senior living facility while presenting herself to be a nurse. 2017-Ohio-7570, ¶ 4. After police officers searched Gwynne’s home, they found 3,000 stolen items that belonged to 46 identifiable victims. 2017-Ohio-7570, ¶ 5-6. “It was further determined that the items were stolen from at least 12 different nursing homes and assisted living facilities in both Delaware and Franklin counties over the course of eight years.” 2017-Ohio-7570, ¶ 6. During this time period, Gwynne was fired from her job as a nurse for suspicion of theft but continued to dress as a nurse’s aide in order to steal from vulnerable people. 2017-Ohio-7570, ¶ 7.

On September 21, 2016, following negotiations with the state, Gwynne plead guilty to “17 counts of burglary, felonies of the second degree, 4 counts of theft, felonies of the third degree, 10 counts of theft, felonies of the fourth degree, and 15 counts of receiving stolen property, misdemeanors of the first degree.” 2017-Ohio-7570, ¶ 9. The State agreed to dismiss the remaining 55 counts. 2017-Ohio-7570, ¶ 9. At the plea hearing, Gwynne admitted that she had been stealing since 2004 and blamed her cocaine addiction. 2017-Ohio-7570, ¶ 10.

“After considering all of the applicable sentencing statutes, and making all of the required findings, the trial court imposed a sentence of three years for each of the 15 second degree felony burglaries, 12 months for each of the third-degree felony thefts, 12 months for each of the fourth-degree felony thefts, and 180 days for each first-degree misdemeanor receiving stolen property. The court ordered appellant to serve the felony sentences consecutively, and the misdemeanor sentences concurrently for an aggregate of 65 years incarceration.” 2017-Ohio-7570, ¶ 12.

#### II. The Appellate Process

##### **Fifth District Court of Appeals (2017-Ohio-7570)— “Gwynne I”**

After Gwynne was sentenced to 65 years, she appealed to the Fifth District. ¶ 14. Gwynne argued on appeal that the sentencing court’s seriousness and recidivism findings did not support her sentence of 65 years under R.C. 2929.11 and R.C. 2929.12 (the principles and purposes of felony sentencing). ¶ 17. The Fifth District agreed with Gwynne and modified her sentence to an aggregate term of 15 years to reflect their findings under R.C. 2929.11 and R.C. 2929.12. ¶ 37.

The Fifth District applied the standard of review set forth in R.C. 2953.08(G)(2). ¶ 18. “That section specifies that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds that



‘the record does not support the sentencing court’s findings under (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code’ or ‘the sentence is otherwise contrary to law.’” ¶ 18.

The Fifth district relied on *State v. Marcum*, 2016-Ohio-1002, to supplement the fact that R.C. 2929.11 and R.C. 2929.12 were not mentioned in R.C. 2953.08(G)(2). ¶ 19. In *State v. Marcum*, the Supreme Court stated, “we note that some sentences do not require the findings that R.C. 2953.08(G) specifically addresses. Nevertheless, it is fully consistent for appellate courts to review those sentences that are imposed solely after consideration of the factors in R.C. 2929.11 and 2929.12 under a standard that is equally deferential to the sentencing court.” ¶ 19.

The Fifth District found by clear and convincing evidence that the sentencing court’s record did not support the 65-year sentence. ¶ 30. The Fifth District applied the factors listed in R.C. 2929.11 and R.C. 2929.12 to Gwynne’s aggregate sentence of 65 years and found it in violation of the principles and purposes of felony sentencing. ¶ 25. The Fifth District described the sentence as “plainly excessive” for a non-violent, first-time offender. ¶ 30. The Fifth District modified the sentencing court’s sentences so that counts were to be served consecutively and concurrently, for an aggregate term of 15 years. ¶ 33-7. The Fifth District found 15 years to be consistent with the purposes and principles of felony sentencing. ¶ 37. The Fifth District remanded the case to the sentencing court to modify Gwynne’s sentence in accordance with the opinion. ¶ 39.

#### **a. Supreme Court (2019-Ohio-4761)— “Gwynne II”**

The State of Ohio appealed the Fifth District’s ruling to the Ohio Supreme Court. ¶ 1. The State proposed that R.C. 2953.08(G)(2) does not permit an appellate court to review a sentencing court’s consecutive sentence findings under R.C. 2929.11 and 2929.12. ¶ 1. The Supreme Court agreed with the State and reversed the Fifth District’s decision. ¶ 2.

The Supreme Court reasoned that *State v. Marcum*, 2016-Ohio-1002, relied on by the Fifth District, has no application to Gwynne’s case. ¶ 15. The defendant in *Marcum* was challenging the length of their single sentence. ¶ 15. The Court stated that Gwynne’s case requires a different analysis since she is challenging the length of her multiple consecutive sentences. ¶ 15. The Court stated that 2929.11 and 2929.12 apply only to individual sentences. ¶ 17.

The Court stated that Gwynne was required to make an argument for appellate review under R.C. 2953.08(G)(2)(a), which allows for review of consecutive sentences only under R.C. 2929.14(C)(4). ¶ 16. The Court stated that the legislature intended R.C. 2929.14(C)(4) to be the only review of consecutive sentences, as it is specifically mentioned in R.C. 2953.08(G)(2)(a). ¶ 16.

The Court reads the Fifth District opinion to mean that while Gwynne conceded that the sentencing court made the requisite findings under R.C. 2929.14(C)(4) to impose consecutive sentences, she was contesting whether the record supported those findings. ¶ 19. The Court remanded the case to the Fifth District to consider Gwynne’s assignment of error using the standard of review set forth under R.C. 2953.08(G)(2)—to determine if the record does not clearly and convincingly support consecutive sentence findings under R.C. 2929.14(C)(4). ¶ 20.

**b. Fifth District Court of Appeals (2021-Ohio-2378)— “Gwynne III”**

The Supreme Court directed the Fifth District to determine if the sentencing court’s record does not clearly and convincingly support Gwynne’s consecutive sentence findings pursuant to R.C. 2953.08(G)(2)(a). ¶ 15. The required findings to impose consecutive sentences are set forth in R.C. 2929.14(C)(4). ¶ 17. Applying the standard set forth in the previous Supreme Court opinion, the Fifth District overruled Gwynne’s assignment of error. ¶ 26.

Since the sentencing court made the required findings under R.C. 2929.14(C)(4), the Fifth District found that the consecutive sentences were correctly imposed. ¶ 24. The required findings were made on the record and included within the sentencing entry. ¶ 24. The sentencing court has no obligation to include the reasons for its findings to impose consecutive sentences under R.C. 2929.14(C)(4). ¶ 18. The Fifth District stated that the sentencing court made the correct findings to impose consecutive sentences under R.C. 2929.14(C)(4). ¶ 24.

The Fifth District found that the sentencing court’s record clearly and convincingly supported consecutive sentences under R.C. 2953.08(G)(2)(a). ¶ 26. The Fifth District noted that the standard is deferential and that it prohibits appellate courts from substituting their judgment with that of trial judges. ¶ 25. Gwynne’s assignment of error was overruled, and the consecutive sentences, an aggregate of 65 years, reaffirmed. ¶ 26.

**c. Supreme Court (2022-Ohio-4607) — “Gwynne IV”**

Gwynne appealed the Fifth District opinion reaffirming the 65-year sentence to the Ohio Supreme Court. ¶ 1. The Supreme Court agreed with Gwynne. ¶ 1. The Court ruled that sentencing courts must consider the combined aggregate prison term to be imposed when making the consecutive-sentence findings under R.C. 2929.14(C)(4). ¶ 1. Additionally, the Court found that the standard of review under R.C. 2953.08(G)(2) “requires appellate courts to review the record de novo and decide whether the record clearly and convincingly does not support the consecutive-sentence findings.” ¶ 1.

The Court stated that sentencing courts must consider the combined aggregate sentence when making consecutive sentence findings under 2929.14(C)(4). ¶ 12. R.C. 2929.14(C)(4) requires the sentencing court to make specific findings. ¶ 10. “Specifically, the trial court must find that ‘the consecutive service is necessary to protect the public from future crime or to punish the offender.’ It must also find that ‘consecutive sentences are not disproportionate to the seriousness of the offender’s conduct and to the danger the offender poses to the public.’” ¶ 10.

The Court stated that the language within R.C. 2929.14(C)(4) does not reveal on its face the meaning of “consecutive service” and “consecutive sentences” and is ambiguous. ¶ 13. The Court reasoned that the terms could be reasonably understood to mean either “the service of more than one individual sentence,” in the abstract, or the actual sentence imposed in the aggregate. ¶ 13. The Court stated that the terms should be read to mean the actual sentence imposed in the aggregate. ¶ 14. The Court reasoned that the length of the overall prison term is necessary to the court’s analysis under R.C. 2929.14(C)(4) of whether the sentence is “necessary to protect the public... or punish the offender” and “not disproportionate to the seriousness of the conduct and danger to the public.” ¶ 14-5.



Secondly, the Court stated that R.C. 2953.08(G)(2) requires a de novo review of the record to decide whether the record clearly and convincingly does not support consecutive sentence findings. The Court stated that “clear and convincing” is an evidentiary standard of proof, indicating that the legislature intended appellate courts “to act as a second fact-finder in reviewing the trial court’s consecutive-sentence order.” ¶ 20. The Court stated that R.C. 2953.08(G)(2) does not require deference to the trial court’s findings under R.C. 2929.14(C)(4). ¶ 31.

The Supreme Court ruled in favor of Gwynne, and reversed the previous judgment made by the Fifth District. ¶ 31. The Court remanded the case to the Fifth District to determine if the record does not clearly and convincingly support the sentencing court’s findings when Gwynne’s sentence is considered in the aggregate. ¶ 31.

### III. The Holding of *Gwynne V (2023-Ohio-3851)*

The State of Ohio filed a motion for reconsideration after the Supreme Court reversed and remanded the Fifth District opinion affirming the 65-year sentence. ¶ 3. The State maintained that the de novo standard of review under R.C. 2953.08(G)(2) misstates the law and that the case was decided on an issue not raised by either party. ¶ 3. In a plurality opinion, the Court granted the motion for reconsideration, vacated the decision in *Gwynne IV*, and affirmed the judgment of the Fifth District (*Gwynne III*). ¶ 5.

Firstly, the Court stated that the standard of review required under R.C. 2953.08(G)(2) is deferential. ¶ 16. The standard is written in the negative, that “an appellate court may increase, reduce, or otherwise modify consecutive sentences only if the record does not ‘clearly and convincingly’ support the trial court’s consecutive sentence findings.” ¶ 13. The Court stated that R.C. 2953.08(G)(2) does not require that the appellate court have a firm belief or conviction that the record supports the consecutive sentence findings. ¶ 15. The Court stated that, “this language is plain and unambiguous and expresses the General Assembly’s intent that appellate courts employ a deferential standard to the trial court’s consecutive-sentence findings.” ¶ 15. The Court reasoned that the legislature is express when a reviewing court is meant to employ a de novo standard of review which is not the case in R.C. 2953.08(G)(2). ¶ 16.

Second, applying a deferential standard under R.C. 2953.08(G)(2), the Court found that “the record in this case does not clearly and convincingly fail to support the trial court’s findings; in other words, it does not overwhelmingly support a contrary result concerning the imposition of consecutive sentences.” ¶ 18.

Finally, the Court determined that, in response to the dissent since the issue was not raised by either party, the terms “consecutive sentence” and “consecutive service” are unambiguous. ¶ 19-21. The Court stated that the terms have only one relevant meaning, “the running of two or more sentences one right after the other.” ¶ 21. The Court relied on the definition of the terms in *Black’s Law Dictionary*. ¶ 21. The Court stated that the terms are not synonymous with “aggregate sentence” which means “the total sentence imposed for multiple convictions.” ¶ 21.

The Court concluded that the Fifth District correctly applied the standard of review required under R.C. 2953.08(G)(2) in *Gwynne III*. ¶ 26. The Court vacated their decision in *Gwynne IV* and reaffirmed the Fifth District opinion affirming the 65-year sentence. ¶ 26.



## APPENDIX E

### *State v. Hacker, (2023-Ohio-2535)*

#### I. Introduction

The Supreme Court consolidated cases from the 3rd, *State v. Hacker, 2023-Ohio-2535*, and 8th District, *State v. Simmons, 2021-Ohio-939*, on the constitutionality of Reagan Tokes. *Id.* at ¶ 1. The appellants raised three issues. First, whether Reagan Tokes violates the Separation of Powers doctrine. *Id.* at ¶ 12. Second, whether the Reagan Tokes Act violates the right to jury trial right. *Id.* at ¶ 26. Third, whether the Reagan Tokes Act violates due process. *Id.* at ¶ 29. The Supreme Court upheld the appellate courts and found that Reagan Tokes is constitutional. *Id.* at ¶ 41.

#### II. 3rd District *State v. Hacker* (“3rd Dist. Hacker”)

On December 20, 2019, Christopher Hacker pled guilty in the Logan County Court of Common Pleas to aggravated burglary with a one-year firearm specification. *State v. Hacker, 2020-Ohio-5048, ¶ 3* (3rd Dist.) (“3rd Dist. Hacker”). Defendant filed an objection to the Reagan Tokes Act’s constitutionality at this hearing. *Id.* at ¶ 4. On January 27, 2020, Defendant was sentenced to a minimum term of six years and a maximum term of nine years on Count One, with the firearm specification to be served first and consecutively. *Id.* at ¶ 5. On February 7, 2020, Defendant raised three issues on appeal to the Third District. *Id.* at ¶ 6. Defendant on the first two issues argued that the Reagan Tokes Act violated his right to jury trial and due process, as well as the separation of powers doctrine. *Id.* at ¶ 11. The right to jury trial argument was deemed not raised at the trial court level, and the appellate court declined to address it. *Id.* at ¶ 17. The third issue relates to a fine that was levied at trial and is not related to Reagan Tokes. *Id.* at ¶ 25. The third issue will not be part of this memo.

The Defendant’s arguments for violating due process and separation of powers were based on the Ohio Supreme Court’s holding in *Bray* and the Hamilton County Court of Common Pleas decision in *O’Neal*. See *State ex rel. Bray v. Russell, 89 Ohio St.3d 132* (2000); *State v. O’Neal, C.P. No. 1903 562* (Nov. 20, 2019). In *Bray*, the Ohio Supreme Court found a statute unconstitutional where a parole board was able to unilaterally extend an inmate’s prison sentence. *Bray* at 135. This was due to the parole board being able to determine a prison sentence without jury findings. *Id.* In *O’Neal*, the trial court found that the Reagan Tokes Act gives power traditionally of the judicial branch to the executive branch with the parole board being able to keep the inmate in prison. *O’Neal* at ¶ 5. Lastly, the trial court also found that Reagan Tokes violates procedural due process due to not providing a judicial hearing. *Id.* at ¶ 6.

The Third District drew distinctions between *Bray* and *O’Neal*. 3rd Dist. *Hacker* at ¶ 22. Under Reagan Tokes, the Third District found that the parole board is acting within the limits set up by the trial court. *Id.* This is very different from *Bray*, where the statute allowed the parole board to make a new sentencing decision. *Bray* at 136. This led the appellate court in finding that Reagan Tokes is constitutional under separation of powers. 3rd Dist. *Hacker* at ¶ 22. The Court also found that procedural due process was not violated since the sentence did not go beyond the sentence to which the Defendant had judicial notice for from the sentencing hearing. *Id.*



### III. *State v. Simmons*

The other case that was part of the Supreme Court’s hearing in *Hacker* was *State v. Simmons*. *Hacker*, 2023-Ohio-2535 at ¶ 1; *State v. Simmons*, 2021-Ohio-939 (8th Dist.). In *Simmons*, the Defendant pled guilty to the following: weapons under disability, a third-degree felony; one count drug trafficking with a firearm specification, a second-degree felony; and one count of drug possession, a fifth degree felony. *Simmons* at ¶ 2. During sentencing, the trial court found that the Reagan Tokes Act was unconstitutional as it violated the separation of powers doctrine and procedural due process. *Id.* at ¶ 3. The State subsequently filed an appeal, bringing one assignment of error. *Id.* at ¶ 5.

#### a. Separation of Powers

The Eighth District divided the argument into multiple sections. The Court started with the separation of powers doctrine. *Id.* at ¶ 10. The Court looked at *Bray* similar to the Third District’s analysis, but the 8th District also looked at constitutional challenges to post release control. *Id.* at ¶ 12,14. The Ohio Supreme Court has ruled that the parole board having “absolute discretion” over post-release control and being able to impose sanctions does not violate separation of powers, since it was imposed at the trial court level. *Id.*, citing *Woods v. Telb*, 89 Ohio St.3d 504,512 (2000).

The Eighth District distinguished *Bray* and *O’Neal* in a similar manner to the Third District. *Simmons* at ¶ 13. The Eighth district noted how the DRC in Reagan Tokes is not able to extend the sentence beyond the initial sentence provided by the trial court. *Id.* This makes Reagan Tokes closer to post-release control found in *Woods* rather than the statute in *Bray*. *Id.* at ¶ 13-14. Therefore, the Court concluded that Reagan Tokes was constitutional based on separation of powers. *Id.* at ¶ 14.

#### b. Procedural Due Process

The second issue the Eighth District looked at was whether Reagan Tokes violated procedural due process. *Id.* at ¶ 16. The Eighth District analogized the due process afforded in parole hearings to the due process found in parole hearings. *Id.* at ¶ 20-22. The Court analyzed Ohio and United States Supreme Court case law and stated that the standard for procedural due process is prior notice and the opportunity to be heard. *Id.* at ¶ 20, citing *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1,16 (1979); *Woods* at 513.

The Eighth District then found that inmates are given notice of hearings. *Simmons* at ¶ 21. Inmates are given notice of conduct that will lead to infractions. *Id.* Inmates are given a hearing in front of the board and the right to appeal. *Id.* Based on these findings, the Eighth District ruled that the Reagan Tokes Act does not violate procedural due process. *Id.* at ¶ 21-22.



#### IV. *State v. Hacker*, 2023-Ohio-2535 (2023)

The Third and Eighth District cases culminated in *State v. Hacker*. There were three assignments of error brought to the Ohio Supreme Court: whether the Reagan Tokes Act violates the separation of powers doctrine; whether the Reagan Tokes Act violates procedural due process; and whether the Reagan Tokes Act violates the right to a jury trial. *Hacker*, 2023-Ohio-2535, at ¶ 12.

##### a. Separation of Powers

The first issue the court addressed was the separation of powers doctrine. The Supreme Court rejected the argument by *Hacker* stating that the Reagan Tokes Act violates separation of powers due to the executive branch taking away the power of the judiciary. *Id.* at ¶ 13, 18-19. Similar to the Eighth District, the Supreme Court rooted their analysis in *Woods*, as the court found the statute in *Woods* analogous to the Reagan Tokes Act. *Id.* at ¶ 19-22; See *Woods v. Telb*, 89 Ohio St.3d 504, 511-513 (2000). The executive branch's power under Reagan Tokes is subject to what has been ordered by the trial court and is not a new punishment. *Hacker* at ¶ 23. This led the Ohio Supreme Court to find that there was no violation of separation of powers. *Id.*

*Hacker* also challenged under separation of powers that the DRC's ability to release inmates prior to the minimum sentence creates a separation of powers issue. *Id.* at ¶ 24. The court declined to address this argument due to a lack of standing. *Id.* The Court further noted that *Hacker* would only be able to benefit from this provision rather than be harmed. *Id.*

##### b. Right to Jury Trial

The next issue was raised by *Simmons* and implicated the right to a jury trial. *Id.* at ¶ 26-27. *Simmons* argued that based on U.S. Supreme Court precedent, jury findings are required to extend an inmate's stay. *Id.*, citing *Apprendi v. New Jersey*, 530 U.S. 466, 491-495 (2000). The Ohio Supreme Court rejected this argument, stating the trial court already made the findings required and that the trial court sentenced the defendant to the appropriate guidelines. *Hacker* at ¶ 28. Nothing that happens in prison will change the possible sanctions that the defendants currently face. *Id.*

##### c. Vagueness and Procedural Due Process

*Hacker* and *Simmons* make two different arguments under due process. First, they allege that the Reagan Tokes Act is vague as facially applied. *Id.* at ¶ 30. Second, they argue that the Reagan Tokes Act violates their procedural due process. *Id.* at ¶ 35. The court rejects both arguments. *Id.* at ¶ 40.

Under vagueness, *Hacker* and *Simmons* argue that the Reagan Tokes Act does not give them notice of what could extend their incarceration time. *Id.* at ¶ 31. They argue this gives the DRC "unfettered discretion". *Id.* at ¶ 33. The Court rejects this argument, as the court states that the language of Reagan Tokes does give inmates notice of what DRC may use to extend their time. *Id.* at ¶ 32.

Lastly, both *Simmons* and *Hacker* present hypothetical situations to the Court. *Id.* at ¶ 34. The Court did not entertain these arguments, as these challenges would go towards a vagueness as applied challenge rather than a facial vague challenge that is present in this case. *Id.* This means that inmates who have stayed in prison as a result of the Reagan Tokes Act may be able to sustain a vagueness as applied challenge.



The last issue under due process is whether the Reagan Tokes Act violates procedural due process. *Hacker* and *Simmons* were bringing a facial challenge to the Reagan Tokes Act. *Id.* at ¶ 38. The Ohio Supreme Court held that under Reagan Tokes, notice and a hearing is required for procedural due process to be met. *Id.* at ¶ 36-37. Under a facial challenge, the Supreme Court noted that the “court must be careful not to exceed the statute’s actual language and speculate about hypothetical or imaginary cases.” *Id.* at ¶ 39, citing *Wymyslo v. Bartec*, 2012-Ohio-2187, ¶ 21. The Reagan Tokes Act provides both notice and a hearing. *Hacker* at ¶ 39. The Court noted that procedural due process violations as applied would be subject to the court’s review as applicable. *Id.*

## V. Conclusion

The Reagan Tokes Act is settled law regarding separation of powers, right to jury trial, and facial challenges to the Act itself. *Id.* at ¶ 25, 28, 34, 40. What is still possible regarding a Reagan Tokes challenge is whether the act is vague in how it is applied. See *Id.* at 34, 39.