In The Supreme Court of Ohio

State of Ohio	)	
	)	
Appellee,	)	
	)	On Appeal from the Third District
vs.	)	Court of Appeals, Case No. CA-8-20-01
	)	
Christopher P. Hacker,	)	
	)	
Appellant	)	
	)	
	)	

BRIEF OF AMICUS CURIAE EDWARD MADDOX IN SUPPORT OF APPELLANT

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STATEMENT OF EDWARD MADDOX'S INTEREST

Mr. Maddox prevailed in *State v. Maddox*, 2022-Ohio-764, which held that the current challenges to the statutory scheme ripen before the prison department actually imposes "an additional period of incarceration" upon an inmate under R.C. 2967.271(D). This case will decide if the General Assembly can force common pleas court judges to pre-impose punishment for *future* considerations left to be resolved unilaterally by prison officials in the executive branch. Because Black citizens like Maddox historically disproportionately shoulder the negative consequences of power concentrated in the executive branch, he's naturally interested in this case.

FACTS

Scholarly literature often refers to this as the "Prison Industrial Complex" era because America is detaining more of its own population—2.3 million—than any other country in the world.[1] Ohio's prison population in 2018 ranked 5th in the nation; behind Texas, California, Florida, and Georgia. We accounted for 3.6% of the national population but 3.9% of the national prison population. Our imprisonment rate, as

[1] Perez, *No Luck for the Accused: How Sb 262 Keeps the Presumption of Guilt for Many Arrestees*, 53 U. Pac. L. Rev 381, 389 (2022), Understanding and Confronting the Prison-Industrial Complex, ARABELLA ADVISORS 10-11 (Oct. 2018), https://www.arabellaadvisors.com/wp-content/uploads/2018/11/Understanding-and-Confronting-the-Prison-Industrial-Complex.pdf.

measured by the number of prisoners per 100,000 state population, is 431, the 18th highest state rate.[2]

Against this backdrop, the General Assembly has codified a regime requiring judges in certain felony cases to impose hybrid prison terms consisting of "minimum" and "maximum" terms. But only the minimum term is imposed for the convicted and judicially adjudicated conduct: the "maximum" amounts to pre-imposed punishment for *future* considerations adjudicated by the prison department alone. Indeed, the presumption under R.C. 2967.271(B) is that the offender "shall be released" upon completion of the minimum term. Serving time past the minimum and toward the maximum hinges upon unilateral prison-department pronouncements about the department "rebutting" the presumption of release due to an inmate's supposed behavior in prison or other events mentioned in R.C. 2967.271(C). The convicted conduct itself is therefore *never* a basis for serving time beyond the minimum term.

Because this law would allow the prison system to decide for *itself* whether it has "rebutted" the statutory presumption of release, whenever prison bureaucrats impose an "additional period of incarceration" under R.C. 2967.271(D)(1)-(2), no judicial review exists. For all intents and purposes then, the prison department *is* the law here. Under this absolutist approach, this state's prison department could keep inmates locked up

[2] https://www.lsc.ohio.gov/documents/reference/current/ohiofacts/2020/JusticeandPublicSafetySystems.pdf

for wholly bogus or retaliatory reasons *under the guise of statutory reasons*—precisely because there's no judicial review. The legislature is thus inching toward making judges a cog in a system that jettisons the courts from meaningful involvement.

If this court affirms, then nothing would curb the General Assembly from enacting a hypothetical Hybrid Law 2.0 that says, for example:

1. Certain felonies are punishable by one day to twenty years of imprisonment;

2. Trial courts shall impose one day as the "minimum term" and twenty years as a "maximum term," and

3. The prison department alone will then decide if any additional period of incarceration (and if so, how long) beyond the minimum will be served.

"This is no less than the executive branch's acting as judge, prosecutor, and jury." *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 135, (2000). In *Bray*, this court struck the former "bad time" regime and should similarly do so here.

ARGUMENT

"The first, and defining, principle of a free constitutional government is the separation of powers." *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶39. The concept of the separation of powers flows from the constitutional diffusion of powers across our tripartite system of government. "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." *Kilbourn v.*

Thompson, 103 U.S. 168, 190, 26 L.Ed. 377 (1880). "There can be no debate that pursuant to Section 1, Article IV of the Ohio Constitution, the judicial power resides exclusively in the judicial branch…" *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶117. Concentrated power is a corrupting influence that threatens liberty. "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." *State ex rel. Bray v. Russell*, 89 Ohio St.3d at 135. This court has thus warned that "vigilance" is necessary "to avoid the evils that would flow from legislative encroachments" upon the judicial power. *Norwood* at ¶117.

Yet, the legislative branch would arrogate judicial power here and cede it to the executive branch by statutorily mandating that judges (1) impose minimum terms for convicted conduct and then (2) pre-impose punishment—i.e., the "maximum" term—for potential *future* issues unrelated to the judicially adjudicated offense. This creates a power imbalance that will compound inequities within our criminal-justice system.

The details of this statutory scheme matter. For example, it says that the prison department alone can impose an additional period of incarceration just because it placed an offender "in extended restrictive housing at any time" within a year of expiration of the minimum term, or because it classified someone at a "security level three, four, or five, or at a higher security level." See R.C. 2967.271(C)-(D).

History shows that these provisions will almost for sure be unequally applied.

"In 1980, Eric Poole and Robert Regoli published a groundbreaking statistical analysis of the role of race in prison disciplinary decisions in a medium security Southern prison. Their analysis demonstrated that the race of an inmate was correlated with the disciplinary decisions of correctional officers." [3] "The study found that 'black and white inmates were equally likely to engage in rule-breaking activity,' yet 'they were not equally likely to be reported for rule infractions.'"[4]

At home here in Ohio as of April of 2022, our total prison population was 43,315—including 19,340 Black inmates.[5] So, 45% of Ohio's inmates are Black—but per the 2020 census, only 12% of the state's population is Black. As just shown, Black citizens are overrepresented in Ohio prison populations by a factor of four. They will thus bear the brunt of the prison department's newfound supremacy to "self-rebut" the presumption of release. Indeed, a recent Yale study showed that, in 2019, Black males were doubly overrepresented in Ohio: they comprised 46.5% of Ohio's prison population and made up a whopping 54.9% of the restrictive-housing population.[6]

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[3] Armstrong, *Race, Prison Discipline, & the Law*, 5 UC Irvine L. Rev. 759, 761 (2015), citing Eric D. Poole & Robert M. Regoli, *Race, Institutional Rule Breaking, and Disciplinary Response: A Study of Discretionary Decision Making in Prison*, 14 LAW & SOC'Y REV. 931 (1980).

[4] Lobel, *Mass Solitary & Mass Incarceration: Explaining the Dramatic Rise in Prolonged Solitary in Am.'s Prisons*, 115 Nw. U.L. Rev. 159, 185 (2020).

[5] https://drc.ohio.gov/Portals/0/April%202022%20%281%29.pdf

[6] https://law.yale.edu/sites/default/files/area/center/liman/document/time-in-cell_2019.pdf

Elsewhere in the Midwest, when Wisconsin opened its supermax prison, of its first 215 inmates, approximately 60% were African-American, with Hispanics constituting almost all of the rest.[7] At the time, 46% of Wisconsin's prison inmates were African-American and 17% were Hispanic—but only 5% of the state's population was African-American and less than 2% was Hispanic.

Even pandemic prison-release programs in Illinois exposed how the criminal-justice system treats racial minorities differently.[8] Less than half (46%) of inmates released early were Black, even though Black inmates make up 54% of Illinois' prison population. Meanwhile, 43% of inmates who were released early were white, even though whites make up only 32% of the prison population.[9]

This is all consistent with the observations of one scholar who has noted that "researchers have shown that implicit bias influences teachers' decisions about how to discipline students, police officers' decisions about whether to shoot suspects, and

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[7] Lobel, supra, citing Jerry R. DeMaio, Comment, *If You Build It, They Will Come: The Threat of Overclassification in Wisconsin's Supermax Prison*, 2001 WIS. L. REV. 207, 229.

[8] Roberts, *Expanding Compassion Beyond the Covid-19 Pandemic*, 18 Ohio St. J. Crim. L. 575, 591 (2021), ("the systemic racism that pervades the criminal legal system is exposed in the release context as well, thereby resulting in disproportionately fewer individuals of color being released during the pandemic"), citing Emily Hoerner & Carlos Ballesteros, *Illinois Released White Inmates at Disproportionately High Rates Amid Pandemic, Report Shows*, INJUSTICEWATCH (June 17, 2020), https://www.injusticewatch.org/news/2020/covid-release-disparity (explaining the racial distribution of COVID-19-related releases in Illinois).

[9] https://www.restorejustice.org/early-releases-exacerbate-racial-inequity/

judges' and juries' decisions in the courtroom."[10] It thus "seems a reasonable inference that if teachers', police officers', judges', and juries' decisions about whom and how to punish are influenced by implicit racial bias, so too are prison officials' decisions about disciplinary infractions." *Id*.[11] This is not to malign prison officials or to say that most decisions in the prison system are made for perverse purposes. But our constitutional system of divided powers exists precisely because of our recognition of our own human shortcomings, which are tempted most by concentrated power.

A system of diffuse powers with checks and balances guards against implicit and explicit bias, and, ultimately, unlawful restraints on liberty.

CONCLUSION

It was no answer in *Bray* for the prosecution to say that "bad time" was part of the underlying sentence.[12] Ergo, it should make no difference here that this regime requires judges to pre-impose punishment for future goings-on umpired by corrections personnel. This statutory scheme says that the prison department may execute "an

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[10] Becker, *Race & Prison Discipline: A Study of N. Carolina State Prisons*, 43 N.C. Cent. L. Rev. 175, 192–93 (2021).

[11] The North Carolina study concluded that, "There are racial disparities in the disciplinary process in North Carolina prisons. Black and Indigenous people receive more write-ups than their white counterparts. As a result, Black and Indigenous people receive sanctions--like disciplinary segregation--more frequently than their white counterparts do." 43 N.C. Cent. L. Rev. 175, 195.

[12] *See former* R.C. 2967.11(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. * * * 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.'")

additional period of incarceration," thus illustrating that legislators see this for what it is: a sweeping grant of power upon the prison system to levy prison time beyond the period imposed for the underlying conviction itself. This is merely a difference in degree, rather than in kind, from the bad-time statute (which enabled additional *days* to be imposed). Consider a world where prison officials can inflict an additional period of incarceration of several *years* without *any* judicial review. It takes little imagination to see how such a raw and unchecked power would expose inmates to all manner of potential exploitation, manipulation, and injustices.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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