IN THE SUPREME COURT OF OHIO

SCT NO.

| | | |
|---|---|---|
| STATE OF OHIO | : | |
| Appellee | : | On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of |
| vs. | : | Appeals, CA: 110809 |
| JOHN BOYD | : | |
| Appellant | : | |

# MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT

CULLEN SWEENEY
Cuyahoga County Public Defender
BY:
NOELLE A. POWELL (Reg. No. 0076950)
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113
(216) 443-7583
(216) 443-3632 FAX
COUNSEL FOR APPELLANT, JOHN BOYD

MICHAEL C. O'MALLEY
Cuyahoga County Prosecutor
The Justice Center – 9th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800
COUNSEL FOR APPELLEE, THE STATE OF OHIO

TABLE OF CONTENTS

PAGES

**EXPLANATION OF WHY THIS CASE RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS A MATTER OF GREAT GENERAL AND GREAT PUBLIC INTEREST**

Defendant-Appellant, John Boyd, asks this Court to accept this appeal to determine the constitutionality of indeterminate sentencing that went into effect pursuant to S.B. 201, the "Reagan Tokes Law." R.C. 2901.011. Recognizing that there are a number of these appeals being filed, Mr. Boyd is not opposed to having this case held for a previously filed case should the Court decide to address the constitutional questions raised herein in that other case.

This Court has already accepted and ordered briefing in two S.B. 201 cases: *State v. Hacker*, Case No. 2020-1496 and *State v. Simmons*, Case No. 2021-0532. The instant case can be held for *Hacker* and/or *Simmons.* Defendant notes that *State v. Travon Whetstone*, Case No. 2022-0328 is a case pending before this Court where the briefing and decision below comprehensively addressed all of the propositions of law propounded in the within appeal, and also involves a sentence long enough that the issue will remain viable throughout this Court's decision-making process. The Cuyahoga County Prosecutor has waived his response to Mr. Whetstone's memorandum in support of jurisdiction. Should *Whetstone* also be accepted for briefing, the instant case could be held for *Whetstone.* The within memorandum parrots the arguments made in Mr. Whetstone's memorandum in support of jurisdiction.

Turning to the underlying issues presented herein, this Court should accept jurisdiction over an S.B. 201 case. S.B. 201 transformed first- and second-degree felony sentencing and has returned wide-spread indeterminate sentencing for first- and second-degree felonies (as opposed to the limited number of indeterminate sentences available since S.B. 2 went into effect in 1996). In traditional indeterminate sentencing, a jury's verdict enables a judge to impose an indeterminate sentence. An executive branch parole board then has virtually unfettered discretion

to shorten the service of that sentence. But S.B. 201 has implemented a different scheme. Under S.B. 201, the jury's verdict triggers the judge's initial indeterminate sentence, but the executive branch parole board is required by law to release the defendant at the end of the minimum indeterminate term unless the parole board makes one of several statutorily-prescribed findings necessary to trigger any portion of the "tail."

Those statutorily-prescribed findings, all of which concern a defendant's conduct after the original sentencing, are what causes S.B. 201 indeterminate sentences to be unconstitutional for four reasons:

1. The finding necessary to trigger the tail is not made by a jury. (addressed below in Proposition of Law I).
2. The finding necessary to trigger the tail is not made within judicial proceedings. (addressed below in Proposition of Law II).
3. The finding necessary to trigger the tail is one that can be so easily manipulated by the parole board that a defendant cannot meaningfully conduct themself so as to be certain of not extending their sentence beyond the presumptive minimum. (addressed below in Propositions of Law III and IV).
4. S.B. 201 provides no guarantee that a defendant will be able to meaningfully litigate the question of whether the presumptive sentence should be extended, i.e. to challenge whether any of the statutory findings should be made. (addressed below in Proposition of Law V).

Confronted with constitutional issues attendant to felony sentencing in the past, this Court acted quickly to accept jurisdiction and resolve the constitutionality of Ohio's felony sentencing. Following the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296,

124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), this Court decided *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856, and held that findings necessary to trigger more than minimum or consecutive sentences violated the Sixth Amendment right to trial by jury. Prior to that time, this Court held in *State ex rel Bray v. Russell*, 89 Ohio St.3d 132, 729 N.E.2d 359, 2000-Ohio-116, that Ohio's bad time provision, which allowed the executive branch parole board to extend sentences beyond their presumptive end-date, violated separation of powers. Addressing the constitutionality of S.B. 201 indeterminate sentencing is consistent with this Court's having accepted *Foster* and *Russell.* Simply put, if virtually every first- and second-degree felony sentence being meted out in this State is unconstitutional, this Court needs to look into it. This Court has recently determined that constitutional challenges to S.B. 201 indeterminate sentences are ripe for review. *State v. Maddox,* Slip Opinion No. 2022-Ohio-764. The time to take on the substantive questions has arrived.

## STATEMENT OF THE CASE AND FACTS

The relevant facts to the S.B. 201 issue are found in the Opinion Below.

> {¶ 4} In July 2021, Boyd entered into a plea agreement with the state and pleaded guilty to burglary, a felony of the second degree, with a one-year firearm specification and a forfeiture specification, as amended in Count 1 of the indictment; attempted felonious assault, a felony of the third degree, with a forfeiture specification, as amended in Count 3 of the indictment; grand theft, a felony of the fourth degree, with a forfeiture specification, as amended in Count 5 of the indictment; having weapons while under disability, a felony of the third degree, with a forfeiture specification, as charged in Count 6 of the indictment; petty theft, a misdemeanor of the first degree, with a forfeiture specification, as charged in Count 9 of the indictment; and disrupting public service, a felony of the fourth degree, with a forfeiture specification, as amended in Count 10 of the indictment. The remaining counts and specifications were dismissed.
>
> {¶ 5} At sentencing, the trial court imposed an aggregate five-year term of imprisonment. Relevant to this appeal, the court declined to impose a sentence on Boyd's second-degree felony offense in accordance with S.B. 201, the Reagan Tokes Law, stating:

> *Since May of 2021, this court has not imposed Reagan Tokes. And the reason for that is because it has been found to be unconstitutional. The Eighth District Court of Appeals in State of Ohio versus Bradley Delvallie did in fact indicate * * * that it is, in fact, unconstitutional. Prior to that time, the court was imposing it. Since that time, the court has not imposed it. And so I want to make sure that everybody understands that. (Tr. 63.)*

*State v. Boyd*, 8th Dist. Cuyahoga No. 110809, 2022-Ohio-1588.

The State of Ohio appealed raising the following assignment of error:

> The trial court erred when it found S.B. 201 to be unconstitutional and did not impose an indefinite sentence pursuant to S.B. 201.

The Eighth District affirmed the S.B. 201 indeterminate sentence on the basis of its en banc decision in *State v. Delvallie*, 8th Dist. Cuyahoga No. 109315, 2022-Ohio-470. In *Delvallie,*, the Eighth District, en banc, held that the S.B. 201 indeterminate sentence imposed was not shown by Delvallie to be unconstitutional. In this part of the opinion only, the lead opinion (Gallagher, S., Celebrezze, O'Sullivan, JJ.) was concurred in by three other members of the court (Gallagher, E.A., Keough, Sheehan, JJ.) and concurred in judgment only by a seventh member of the court. (Boyle, J., concurring in part with separate opinion). Five members of the court dissented on the basis that the sentence violated due process (Forbes, Kilbane, Gallagher, E.T., Mays, Groves, JJ.) and three of those dissenters on the additional basis that the sentence also violated the right to trial by jury and the doctrine of separation of powers ( Mays, Kilbane, Groves, JJ.).

As a result of the decision in *Delvallie*, the Eighth District reversed and remanded the instant case.

## ARGUMENT
### Introduction

This introduction is incorporated by reference into each of the five propositions of law.

**The S.B. 201 indeterminate sentence framework.**

S.B. 201 codified indeterminate prison terms for first- and second-degree felonies, which are referenced as "indeterminate" terms under the statute. R.C. 2901.011 (eff. March 22, 2019); R.C. 2919.14(A). Under S.B. 201, it is presumed that the offender will be released at the expiration of the minimum term. However, the Department of Rehabilitation and Correction (DRC) -- an executive branch agency -- may rebut the presumption and hold the offender up to the maximum term. R.C. 2929.14(A), R.C. 2929.144, R.C. 2967.271. Essentially, DRC can impose additional prison time for a prisoner who DRC determines has not progressed satisfactorily while incarcerated.

To rebut the "presumptive earned early release date," DRC holds an administrative hearing and makes specific findings to justify keeping the offender beyond the presumptive release date. R.C. 2967.271 (C). One or more of the following three conditions must be present at the time of a hearing to determine if the tail will be imposed.

> (1) While imprisoned, the offender committed a rule infraction that compromised security of the institution or safety of the prison staff, or threatened or caused harm to an inmate; and DRC evaluates the defendant's behavior while incarcerated as demonstrating a threat to society should the offender be released.
>
> (2) The offender has been in extended restrictive housing during the previous year.
>
> (3) The offender is classified at a security level of 3 or higher.

R.C. 2967.271(C).

If DRC finds that at least one of the conditions outlined in subsection (C) applies, DRC may deny the offender's release and may impose a term of additional imprisonment for what DRC determines is a "reasonable period," up to the maximum term of imprisonment. R.C. 2967.271(D).

**Issues Presented**

Four questions arise for any offender being sentenced under S.B. 201's indeterminate sentences:

1. Before the State of Ohio increases actual incarceration beyond the presumptive minimum, will the State have to prove to a jury and beyond a reasonable doubt the basis for keeping the defendant in prison longer, i.e. the circumstance that has triggered the extension of the prison sentence? (Proposition of Law I).
2. If a jury is not going to decide whether DRC has a valid basis, will the defendant at least have the benefit of a judge making the decision regarding a sentence increase? (Proposition II).
3. Does S.B. 201 provide adequate notice of what conduct or conditions could trigger the tail, and can a defendant ensure by their own good behavior that they will not be subject to those conditions? (Propositions III and IV).
4. Will a defendant be presumed innocent, be present at the hearing, have an attorney, be able to confront witnesses, be able to subpoena witnesses on his behalf, and be able to testify on their own behalf? (Proposition V).

S.B. 201 answers each of these questions with a "no." The Constitution says "yes."

**Proposition of Law I:**

> **The S.B. 201 indeterminate sentencing scheme violates the Sixth Amendment and Article I, Section 5 of the Ohio Constitution because a defendant's imprisonment is dependent upon a factual finding not made by the jury beyond a reasonable doubt.**

The right to trial by jury is protected by the Sixth Amendment and Article I, Section 5 of the Ohio Constitution. In *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), the

United States Supreme Court held that, in order to sentence a defendant to a term of imprisonment in excess of the statutory maximum, the Sixth Amendment demands that the factual circumstances justifying the enhanced sentence be found by the jury to exist beyond a reasonable doubt. *Ring* followed and held that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt. *Ring*, 536 U.S. at 602, citing *Apprendi*, 530 U.S. at 482-83. *Blakely v. Washington* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) clarified that, while *Apprendi* and *Ring* 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 304-05.

In 2006, this Court addressed *Apprendi-Blakely's* application to Revised Code Chapter 2929. *State v. Foster*, 109 Ohio St.3d 1, 845 N.E.2d 470, 2006-Ohio-856. At that time, Chapter 2929 contained provisions that required trial courts at sentencing to make certain findings in order to impose sentences of imprisonment for certain low-level felonies, beyond the minimum stated prison term for felonies for which a definite prison term was authorized, or to the maximum prison term for felonies for which a definite prison term was authorized. *Foster*, at ¶¶ 43-44. Of those various provisions, the one that most closely resembles S.B. 201 was then-R.C.2929.14(B)'s requirement that offenders sentenced to prison who had not previously been imprisoned would receive the minimum term of imprisonment in the absence of specific findings. *Foster* unanimously held that, because a finding to overcome the minimum sentence

was being made by a judge, as opposed to being made by a jury, this provision was unconstitutional under *Blakely*. *Foster, at* ¶ 61.

Applying this precedent to S.B. 201, the indeterminate sentences are similarly unconstitutional. Once again, the jury's verdict, alone, is not enough to trigger a 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 being made by DRC as prescribed by R.C. 2967.271(D) – not by the jury as prescribed by the Sixth Amendment. What *Blakely* said regarding the Washington sentencing guidelines is equally applicable here:

> 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 neighbours," *4 Blackstone, supra, at 343, rather than a lone employee of the State.

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

**How the Eighth District erred.** The *Delvallie* plurality determined that the S.B. 201 indeterminate sentencing scheme did not violate the Sixth Amendment, reasoning that the jury's verdict, alone, enabled the sentencing judge to impose the indeterminate sentence. *Delvallie,* at ¶¶ 44-45. But the Eighth District misses the critical point: The factual circumstance that triggers the tail is something that is going to have to happen *after* the jury's verdict, e.g., a rules infraction in prison. Who is going to decide if that circumstance actually exists? S.B. 201 leaves that determination to DRC. But the Sixth Amendment requires that the factfinder be the jury.

In this regard, *Foster* is instructive. Even though the jury's verdict opened the door to a sentencing range, to receive more than the minimum sentence or consecutive sentences, findings apart from the jury's verdict used to be required under the Revised Code. Relying on *Blakely*, *Foster* unanimously concluded that this violated the right to trial by jury.

**Proposition of Law II:**

**The S.B. 201 indeterminate sentencing scheme violates separation of powers by delegating to the executive branch discretion to keep the defendant in prison beyond the judicially-imposed presumptive minimum sentence.**

*Apprendi-Blakely* addresses who must be the appropriate fact-finder within the trial process – the jury or the judge. In those cases the unconstitutional sentencing scheme kept the sentencing decision within the trial court and thus within the judicial branch of government. S.B. 201 takes an even more radical step and removes the sentencing enhancement from the prerogative of the judicial branch and transfers it to the executive branch – DRC decides if the sentence will be enhanced. DRC is presumptively required to turn the key and let the defendant out of prison when the minimum term has expired -- unless DRC, in its sole discretion, decides it does not have to. This proposition addresses this constitutional violation.

This Court's decision in *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 729 N.E.2d 359, 2000-Ohio-116, dictates that S.B. 201 violates the separate of powers doctrine. In *Russell*, this Court addressed the "bad time" statute, R.C. 2967.11, under which an offender could be punished with additional prison time for any "violation," or crime, whether or not the offender was prosecuted for that violation. This Court held:

> In our constitutional scheme, the judicial power resides in the judicial branch. Section 1, Article IV of the Ohio Constitution. 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.
>
> * * *
>
> Prison discipline is an exercise of executive power and nothing in this opinion should be interpreted to suggest otherwise. However, trying, convicting, and sentencing inmates for crimes committed while in prison is not an exercise of executive power. Accordingly, we hold that R.C. 2967.11 violates the doctrine of separation of powers and is therefore unconstitutional.

*Russell*, 89 Ohio St.3d at 136.

For purposes of *Russell,* the bad time provision in former R.C. 2967.11 is indistinguishable from S.B. 201. Both provisions provide for the executive branch prison system to tell an inmate that the sentence imposed by the judge is not enough and that the inmate will be serving a longer sentence as a result of an executive agency's determination. *Russell* recognized that, when this occurs, separation of powers is violated.

There is another aspect of S.B. 201 that further aggravates the separation of powers problem. The prerequisites for an extended sentence all relate to determinations previously made by DRC during the term of imprisonment, *e.g.,* an evaluation that the defendant is a threat to society, or the circumstance that the defendant is classified at higher than a security level 2. Thus, DRC, at the administrative hearing to determine whether to increase the sentence, is evaluating its own previous work and then using that evaluation as a basis for deciding whether to increase the sentence. What *Russell* said about then-R.C. 2967.11, which also provided for a bad time enhancement if DRC determined that the prisoner committed a new crime while in prison, is equally applicable here:

> This 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.

*Russell,* 89 Ohio St.3d at 135.

**How the Eighth District erred.** The *Delvallie* plurality viewed the S.B. 201 indeterminate sentence as indistinguishable from a conventional indeterminate sentence where the judge imposes an indeterminate sentence and where, after the minimum portion of the sentence has been served, the executive branch parole board determines when release will actually occur. *Delvallie,* at ¶ 38. This is a false analogy.

Unlike conventional parole, where a defendant has no guarantee that they will be released before their sentence is served in full, an S.B. 201 indeterminate sentence comes with a limited

guarantee of release at the end of the minimum term -- a guarantee that can only be overcome by executive branch action in the form of keeping the defendant in prison. Traditional parole enables the executive branch to shorten the maximum sentence, which is consistent with the traditional ability of the executive branch to commute sentences. But when the executive is able to act so as to extend the time that would otherwise be served, then the separation of powers is unconstitutionally traversed, as this Court recognized in *Russell.*

**Proposition of Law III:**

> **The S.B. 201 indeterminate sentencing scheme violates due process because it fails to provide a defendant with adequate notice of what conduct can enable the Department of Rehabilitation and Correction (DRC) to keep the defendant in prison beyond the presumptive minimum term.**

**Proposition of Law IV:**

> **The S.B. 201 indeterminate sentencing scheme violates due process because it allows the Department of Rehabilitation and Correction to keep a defendant in prison beyond the presumptive minimum sentence on the basis of prison housing and classification decisions that need not be the result of any misconduct by the defendant while in prison.**

S.B. 201 violates due process under the Fourteenth Amendment and Article I, Section 16 of the Ohio Constitution. It does so in several ways.

*a. Lack of Notice*

First, defendants are not under adequate notice as to what conduct on their part will rebut the presumption and trigger an increase in his sentence under subsection (A)(1) of R.C. 2967.271:

> (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.**

*Id.*, (emphasis added).

Simply put, on its face the statute fails to give adequate notice of what it takes to trigger the additional prison time. The standards of "not been rehabilitated" and "pose a threat to society" are amorphous at best. *City of Columbus v. Thompson*, 25 Ohio St.2d 26, 30-31, 266 N.E.2d 571 (1971) ("Basic to any penal enactment is the requirement that it be sufficiently clear in defining the activity proscribed . . . 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.").

Here, a defendant can satisfy subsection (A) by committing any violation of law which indicates a lack of rehabilitation. This is too vague. If, for example, a prisoner argues verbally with a guard and thus slows the guard's progress in making a mid-day inmate count, has the prisoner "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 the prisoner fails to clean up a spilled cup of coffee in the mess hall, thus creating a risk of physical harm to someone who might slip, has the prisoner engaged in disorderly conduct under R.C. 2917.11(A)(5)? If, in response to a written questionnaire during a therapy session, the prisoner writes that the prisoner is innocent of the crime and disagrees with the jury's verdict, has the prisoner falsified a government writing under R.C. 2913.42(A)(1), (B)(4)? And, how does the prisoner know that what was done indicates a lack of rehabilitation, the second prong of subsection (A)(1), and a "threat to society," as required by (A)(2)? The bottom line is that the prisoner is uncertain about what conduct could trigger the tail. This violates due process.

*b. Inadequate Parameters on Executive Branch Discretion*

Moreover, subsections (A)(2) and (A)(3) make it a triggering event that the offender was placed in restrictive housing or was designated at a security level of 3 or above. These are decisions

outside of the defendant's prerogative. Moreover, these are decisions that are virtually unreviewable. *Williams v. Ohio Department of Rehabilitation and Corrections,* 67 Ohio Misc.2d 1, 3, 643 N.E.2d 1182 (Ct. Claims 1993) ("this court will not interfere with prison officials' decision on where an inmate is placed within the institution.").

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 results in a criminal penalty. *In re E.D.,* 194 Ohio App.3d 534, 957 N.E.2d 80, 2011-Ohio-4067, ¶ 21 ("This invites arbitrary and discriminatory enforcement and renders the ordinance unconstitutionally void for vagueness.").

**How the Eighth District erred.** The *Delvallie* plurality viewed the prison rule infraction system as an ordinary, and constitutional, part of prison life; from that, the plurality concludes that all S.B. 201 does is to look to violations of those rules as a reason for the tail to be invoked. *Delvallie,* at ¶¶ 85-88. The plurality is missing a critical point. When the prison rulemaking controls the quality of an inmate's imprisonment, due process is indulgent of executive branch discretion. But when, as here, the prison rulemaking system causes a defendant to spend more time behind bars than they could otherwise serve, the due process considerations discussed above must be triggered.

**Proposition of Law V:**

> **The S.B. 201 indeterminate sentencing scheme violates due process by allowing for the extension of a prison sentence based on finding made at a hearing where there is no statutory guarantee that the prisoner will be present, have counsel, can confront witnesses, can subpoena witnesses or have a right to offer testimony of their own.**

S.B. 201 fails to provide a defendant with anything close to the procedural protections required under due process by the Fourteenth Amendment and Article I, Section 16 of the Ohio Constitution. While R.C. 2967.271 provides for a hearing before the additional prison time is

imposed, the statute provides no structure as to how the hearing will be conducted or what rights the defendant will have at a hearing. Fourteenth Amendment due process as well as the Sixth Amendment and Article I, Section 10 of the Ohio Constitution recognize certain core rights. In addition to the right to have a jury determine beyond a reasonable doubt if a triggering circumstance occurred (Proposition of Law I), those right include:

- The right to counsel and to the appointment of counsel if indigent. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).
- The right to confront witnesses. *Crawford v. Washington*, 541 U.S. 36, 52, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).
- The right to call witnesses and require their presence via subpoena. *Washington v. Texas*, 388 U.S.14, 87 S.Ct.1920, 18 L.Ed.2d 1019 (1967).
- The right to offer testimony. *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948).

Nowhere in the statute are these rights enunciated. Moreover, while DRC may well change its administrative policies, the current policy regarding the hearings to trigger the sentence tail are woefully inadequate. ODRC Policy 105-PBD-15 provides an inmate with none of the above-enumerated rights and does not even guarantee a right to be present at the hearing.

**How the Eighth District erred.** The *Delvalllie* plurality, without opining on the adequacy of ODRC Policy 1-5-PBD-15 (which the lead opinion believes is not ripe until a hearing is conducted), maintains that any procedural omissions in the statutory scheme can be filled in via the Administrative Code. *Delvallie*, at ¶ 52ff. For the reasons set forth fully by the five-judge dissent, *Delvallie*, at ¶153 ff., the failure of the statute to do so violates due process. *See generally, Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Moreover, the

Eighth District plurality's belief that the due process concerns are not ripe is contradicted by *Maddox,* at ¶¶ 17-24.

## CONCLUSION

For these reasons, this Court should accept and exercise plenary jurisdiction over this case.

Respectfully submitted,

*/s/ Noelle A. Powell*
Noelle A. Powell (Reg. No. 0076950)
Attorney for John Boyd

## CERTIFICATE OF SERVICE

A copy of the foregoing was served electronically on the Office of the Cuyahoga County Prosecutor at the time of filing on June 20, 2022, via email to APAs Kristen Sobieski, ksobieski@prosecutor.cuyahogacounty.us and Daniel Van, dvan@prosecutor.cuyahogacounty.us.

*/s/ Noelle A. Powell*
Noelle A. Powell
Attorney for John Boyd