IN THE SUPREME COURT OF OHIO
2022

State of Ohio, Plaintiff-Appellee, -vs- Christopher P. Hacker, Defendant-Appellant.	Case No. 20-1496 On Appeal from the Logan County Court of Appeals, Third Appellate District Court of Appeals No. CA 8-20-01

BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLEE

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STATEMENT OF AMICUS INTEREST

Founded in 1937, the Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission is to assist county prosecuting attorneys to pursue truth and `justice as well as promote public safety. OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and serve as legal counsel to county and township authorities. Further, OPAA sponsors continuing legal education programs and facilitates access to best practices in law enforcement and community safety.

In light of these considerations, OPAA has a strong interest in the present case, which will address the constitutionality of the indefinite-sentencing framework created by the Reagan Tokes Act ("RTA") as to first-degree and second-degree felony offenders. These are amongst the most-serious and most-violent offenders in the state, who are most likely to have difficulty being rehabilitated and most likely to pose the greatest danger of reoffense. Judged in this context, the constitutional challenges border on the frivolous, and none of them demonstrate that RTA indefinite sentencing is unconstitutional beyond a reasonable doubt. Pursuant to a long tradition of indefinite sentencing in Ohio, and consistent with the wide latitude afforded legislators in setting up parole-release mechanisms under due process standards, RTA indefinite sentencing easily passes constitutional muster.

Accordingly, in the interest of aiding this Court's review herein, amicus curiae OPAA offers the present amicus brief in support of the appellee and in support of the Third District's decision.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history set forth in the State's brief and in paragraphs two through six of the Third District's decision.

ARGUMENT

> **Amicus Proposition of Law**: The indefinite-sentencing framework established by the Reagan Tokes Act complies with separation of powers and is consistent with the right to jury trial. First-degree and second-degree felons who are subject to the law will receive due process when the ODRC is deciding whether to keep them in prison beyond their presumptive minimum-term release date.

Defendant stands convicted on one count of F-1 aggravated burglary with a one-year firearm specification. He received a one-year sentence for the firearm, to run consecutively to the indefinite prison term of six to nine years imposed pursuant to the RTA. Defendant is challenging the validity of the RTA sentencing framework.

Effective March 22, 2019, the General Assembly provided in Am.Sub.S.B. 201, otherwise known as the RTA, that first-degree and second-degree felonies not already carrying a life sentence would be subject to indefinite sentencing. When imposing prison, the RTA requires that the sentencing court impose an indefinite sentence with a minimum term selected by the judge and an accompanying maximum term, which is determined by the judge pursuant to a statutory formula.

Relying on the common pleas decision in *State v. Oneal*, 2019 WL 7670061, defendant contends that the indefinite-sentencing provisions are unconstitutional as violating separation of powers and due process. The supposed constitutional flaw found in *Oneal* arises because the ODRC, as opposed to the sentencing judge, will be applying

the statutory standard in deciding whether to delay the defendant's prison release beyond the presumptive minimum-term release date. *Oneal* equates the indefinite-sentencing framework to the unconstitutional "bad time" provisions under Senate Bill 2, under which the Parole Board could extend the prisoner's stay in prison beyond the sentence imposed by the sentencing judge.

But *Oneal* missed an important difference between the "bad time" mechanism and the RTA provisions allowing the ODRC to "rebut" the presumptive minimum-term release date. Under "bad time", the bad-time extension truly extended the amount of prison time beyond what was imposed by the sentencing court. In contrast, under the RTA, there is no "extension", as the RTA provides that the sentencing court *itself* will have imposed the sentence with the maximum-term provision allowing the defendant to be kept in prison up to the maximum term.

RTA sentencing is like the system of indefinite sentencing and parole that existed for most felonies prior to Senate Bill 2 and which still exists for indefinite sentencing related to "life" felonies under existing law. The *Oneal* court simply failed to address or acknowledge this history of indefinite sentencing and parole that has been long upheld. The leading cases are *Woods v. Telb*, 89 Ohio St.3d 504 (2000), and *State ex rel. Attorney General v. Peters*, 43 Ohio St. 629 (1885), and the *Oneal* court did not address them.

Defendant also claims that the RTA violates his right to a jury trial. But the Third District found that the jury-trial challenge was not raised in the common pleas court. In any event, the jury-trial challenge fails for many of the same reasons that the separation-of-powers and due process arguments fail.

A. Background

Under the RTA, the General Assembly provides for indefinite sentencing in regard to first-degree and second-degree felonies committed on or after the effective date of March 22, 2019, that did not already carry a life sentence.

This is a change in Ohio law but not anything new. Before Senate Bill 2 took effect in 1996, Ohio law provided for indefinite sentencing for many felonies so that the offender would receive an indefinite sentence of, e.g., 10 years to 25 years, but, with "good time", he would be eligible for parole after just 7 years, and the parole board would have broad discretion to deny parole, or to grant it, during that 18-year range. For prisoners who were dangers, the board could continue to deny parole and keep the defendant in prison up to the expiration of the 25-year "tail".

Sentencing under Senate Bill 2 lacked this public-protection feature because, once the defendant was done serving his definite Senate Bill 2 sentence, he walked out the door of the prison, whether or not he is a danger. To be sure, Senate Bill 2 also provided for post-release control (PRC) after such release, but the offender walking the streets under PRC supervision still posed greater dangers to the public than keeping the defendant in prison, as the notorious facts underlying the aggravated murder of Reagan Tokes showed. See 10 Investigates, *Failure to Protect: The violent past of Reagan Tokes' accused killer (Part 1)* (June 16, 2017), https://www.10tv.com/article/news/investigations/10-investigates/failure-protect-violent-past-reagan-tokes-accused-killer/530-903693df-a2e6-424a-a038-ee1d53f80693 (last viewed 7-28-22) (while in prison for robbery and attempted rape "[h]is prison time was also riddled with trouble-making. He was shuffled to five different prisons because he was constantly getting in

trouble. Some of his 52 infractions included" fighting, contraband, stealing, refusal to obey orders, and creating a disturbance).

The RTA restores indefinite sentencing for non-life F-1 and F-2 offenses, giving room to the ODRC to delay the release of such offenders.

B. Overview of the Operation of the RTA as to Single Offense

An indefinite sentence is a sentence having a minimum and a maximum. In the earlier example of the 10-25 sentence, the minimum was the "10" and the maximum was "25". Under the pre-Senate Bill 2 sentencing framework, the "25" maximum was set by law, and the sentencing court picked the bottom "minimum" number from an available range of 5, 6, 7, 8, 9, or 10 years when it would impose the 10-25 sentence.

Under the RTA, the length of the minimum term is still selected by the sentencing court. But now the "maximum" is determined by a formula related to the minimum-term number selected by the court. In other words, the sentencing judge selects the minimum term, and such selection is the prime determinant in computing the applicable maximum term.

Before the RTA, the definite-sentence options for F-1s had been 3, 4, 5, 6, 7, 8, 9, 10, or 11 years. For F-2s, the definite-sentence options had been 2, 3, 4, 5, 6, 7, or 8 years. Under the RTA, the court chooses amongst these options in deciding what the minimum term of the defendant's indefinite sentence will be. As an example, if the court decides to pick an 8-year sentence for an F-1, then 8 years will be the minimum term for the indefinite sentence.

Under R.C. 2929.144, the maximum is then determined by a formula that is 50% of the minimum term selected by the court. The court having picked an 8-year minimum

term, the maximum would add on an additional 50% -- 4 years -- to arrive at a maximum term of 12 years. Based on the court's setting of an 8-year minimum term, the indefinite sentence would be 8 years to 12 years. R.C. 2929.144(B)(1). At the other end of the spectrum, if the court chooses a 3-year sentence as the minimum term, then adding 50% would result in a maximum term of 4.5 years, for an indefinite sentence of 3 years to 4.5 years. In defendant Hacker's case, the court chose a six-year minimum term, which resulted in a maximum term of nine years.

As can be seen, the RTA gives the sentencing judge greater control over the maximum term than had existed under pre-Senate Bill 2 law. Before Senate Bill 2, the maximum term was set as a matter of law. Under the RTA now, the maximum term is determined by direct reference to the minimum term chosen by the judge.

C. Overview as to Multiple Offenses

RTA sentencing gets more complicated when there are multiple offenses being sentenced, and R.C. 2929.144 sets forth two frameworks for figuring out the maximum term in such cases.

When the court is sentencing concurrently. If one of the offenses is a qualifying non-life F-1 or F-2 offense, and if the court is imposing all of the sentences concurrently, then the maximum term will be determined by adding 50% to the longest of the minimum terms imposed for a qualifying offense, with the 50% amount being determined in relation to the minimum that was imposed for the most-serious qualifying felony being sentenced. R.C. 2929.144(B)(3).

When the court is sentencing consecutively. If one or more of the offenses is a qualifying F-1 or F-2 offense, and if the court is imposing some or all of the sentences

consecutively. then the maximum term will be determined by adding the consecutive sentences together and by then adding an amount equal to 50% of the longest minimum term or longest definite term for the most serious felony being sentenced.

It is unnecessary here to address what the math would be in particular cases. Defendant Hacker's RTA sentence resulted from a single offense and therefore does not implicate these more-complicated formulas. Upon review of the single-offense and multiple-offense formulas, however, it becomes apparent that the sentencing judge determines the key variables in the sentencing. The *judge* decides whether to impose prison at all (unless prison is otherwise mandatory). The *judge* decides what the minimum term will be. The *judge* decides whether the sentences will be consecutive or concurrent and therefore what sentencing formula will apply. And then the *judge* pronounces and imposes the indefinite sentence based on the selected minimum term and the resulting maximum term.

D. Rebutting the Presumptive Release Date

Although indefinite sentencing gives ODRC the ability to hold the prisoner past the minimum term of the indefinite sentence, the General Assembly has limited that authority by creating a presumption that the prisoner will be released upon serving the minimum term. R.C. 2967.271(B). The ODRC can "rebut" the presumption if it determines at a hearing that, inter alia, the prisoner has violated prison rules or the law in prison, thereby demonstrating that the prisoner has not been rehabilitated or poses a threat to society, or the prisoner has been placed in restrictive housing in the past year, or is classified in security level three or higher. R.C. 2967.271(C). If the ODRC finds that the presumption is rebutted, the ODRC can maintain the offender in custody for a

reasonable period of time not to exceed the maximum prison term. R.C. 2967.271(D)(1). The presumption of release will apply at the next continued release date, and the presumption can be rebutted at the next date too. R.C. 2967.271(D)(2).

At the time of sentencing, the court is required to advise the defendant of the existence of the presumptive minimum-term release and the possibility of rebuttal. R.C. 2929.19(B)(2)(c).

In giving the ODRC the statutory authority to make this release decision administratively, the RTA was not forging any new ground. Parole decisions have been made administratively by prison/parole officials for over a century in Ohio, and the making of those decisions administratively has been upheld against separation-of-powers and due-process challenges. Indeed, this release decision aligns perfectly with "parole" concepts, since it determines when the prisoner will begin serving his mandatory period of PRC, and PRC is recognized to have replaced the prior system of parole as to these F-1 and F-2 non-life offenders. *State v. Thomas*, 148 Ohio St.3d 248, 2016- Ohio-5567, ¶ 10 ("replacing parole with postrelease control, which is a postprison period during which the Adult Parole Authority would supervise offenders").

E. Burden to Prove Unconstitutionality Beyond a Reasonable Doubt

Defendant faces a heavy burden in challenging the RTA on constitutional grounds.

> [A]ll enactments enjoy a strong presumption of constitutionality, and before a court may declare the statute unconstitutional, it must appear beyond a reasonable doubt that the legislation and constitutional provision are clearly incapable of coexisting. *State ex rel. Dickman, v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus. Further, doubts regarding the validity of a legislative enactment are to be resolved in favor of the statute. *State, ex rel. Swetland, v. Kinney* (1982), 69 Ohio

St.2d 567.

State v. Gill, 63 Ohio St.3d 53, 55 (1992) (parallel citations omitted).

Courts must be extremely certain of unconstitutionality before they overturn laws. This is because the General Assembly has broad legislative power and "may pass any law unless it is specifically prohibited by the state or federal Constitutions." *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas*, 9 Ohio St.2d 159, 162 (1967).

> "In determining whether an act of the Legislature is or is not in conflict with the Constitution, it is a settled rule, that the presumption is in favor of the validity of the law. The legislative power of the state is vested in the General Assembly, and *whatever limitation is placed upon the exercise of that plenary grant of power must be found in clear prohibition by the Constitution*. The legislative power will generally be deemed ample to authorize the enactment of a law, unless the legislative discretion has been qualified or restricted by the Constitution in reference to the subject matter in question. If the constitutionality of the law is involved in doubt, that doubt must be resolved in favor of the legislative power. The power to legislate for all the requirements of civil government is the rule, while a restriction upon the exercise of that power in a particular case is the exception."

Jackman, 9 Ohio St.2d at 162, quoting *State, ex rel., v. Jones, Auditor*, 51 Ohio St. 492, 503, 504 (1894) (emphasis in *Jackman*).

In *Dickman*, this Court quoted with approval the following principles and propositions of law from many cases:

- A legislative act is *presumed in law to be within the constitutional power* of the body making it, whether that body be a municipal or a state legislative body.

- That presumption of validity of such legislative enactment cannot be overcome unless it appear that there is a *clear conflict* between the legislation in question and some particular provision or provisions of the Constitution.

- The question, whether a law be void for its repugnancy to the Constitution, is, at all times, *a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case*. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels *a clear and strong conviction of their incompatibility* with each other.

- *Every possible presumption* is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.

- To repeat what has been so often suggested by courts of justice, that when called upon to pronounce the invalidity of an act of legislation * * * [they will] never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, *beyond reasonable doubt*.

- But while the right and duty of interference in a proper case, are thus undeniably clear, the principles by which a court should be guided, in such an inquiry, are equally clear, both upon principle and authority * * * and *it is only when manifest assumption of authority, and clear incompatibility between the Constitution and the law appear, that the judicial power can refuse to execute it*. Such interference can never be permitted in a doubtful case.

- If under any possible state of facts the sections [of the law] would be constitutional, this court is bound to presume that such facts exist.

Dickman, 164 Ohio St. at 147-49 (emphasis added; quoting several cases).

A court's power to invalidate a statute "is a power to be exercised only with great

caution and in the clearest of cases." *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357, ¶ 16. Laws are entitled to a "strong presumption of constitutionality," and any party challenging the constitutionality of a law "bears the burden of proving that the law is unconstitutional beyond a reasonable doubt." Id.

F. *Maddox* Points Toward Facial Constitutionality

In *State v. Maddox*, ___ Ohio St.3d ___, 2022-Ohio-764, the defendant was arguing that the law allowing ODRC to keep him in prison beyond the presumptive minimum term violates separation of powers and his rights to a trial by jury and due process. *Maddox* concluded that such challenges are ripe for review on direct appeal, thereby rejecting the appellate court's conclusion to the contrary.

> {¶ 11} In short, the statute provides that an offender must be released on his or her presumptive release date unless DRC rebuts the presumption and extends the period of incarceration, not to exceed his or her maximum prison term. We hold that Maddox's challenge to the statute's constitutionality is ripe for review on direct appeal because (1) he has been sentenced under the statute, (2) no further factual development is necessary for a court to analyze the challenge, and (3) delaying review would result in duplicative litigation, forcing Maddox and similarly situated people to endure potential violations of their constitutional rights in order to challenge the law. *See Abbott Laboratories* at 149.
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> {¶ 16} * * * Maddox and other defendants who have been sentenced under the Reagan Tokes Law have received the entirety of their sentences and the sentences have been journalized. Therefore, a direct appeal is the appropriate way to challenge the constitutionality of the provisions at issue. *See State v. Patrick*, 164 Ohio St.3d 309, 2020-Ohio-6803, 172 N.E.3d 952, ¶ 22 (holding that an appeal of an indefinite sentence on constitutional grounds is permitted under Ohio law).

> * * *
> {¶ 19} As demonstrated by the appellate courts that have already considered the constitutionality issue, we hold that a challenge to the constitutionality of R.C. 2967.271 is fit for review on a defendant's direct appeal of his or her conviction and prison sentence, because no additional factual development is necessary, *see Abbott Laboratories*, 387 U.S. at 149, 87 S.Ct.1507, 18 L.Ed. 681, thus satisfying the first prong of the prudential-ripeness test. We further hold that to refrain from reviewing whether R.C. 2967.271 is constitutional would cause hardship to Maddox and others who are similarly situated, thus satisfying the second prong of the prudential-ripeness test. *See Abbott Laboratories* at 149.
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> * * *
> {¶ 21} We conclude that a defendant's challenge to the provisions of the Reagan Tokes Law is fit for judicial review on the defendant's direct appeal of his or her conviction and prison sentence, and we further conclude that withholding judicial consideration of the issue will cause hardship to such a defendant. We therefore hold that the issue of the constitutionality of an indeterminate sentence imposed under R.C. 2967.271 ripens at the time of sentencing and that the law may be challenged on direct appeal.

While *Maddox* concluded that the constitutional challenges are ripe for review, two of the premises for that ruling actually reinforce the constitutionality of the law. In concluding that defendants who have been sentenced under the RTA already "have received the entirety of their sentences and the sentences have been journalized", *Maddox* helps to negate the claim that RTA sentencing violates the separation of powers and the right to jury trial by giving an administrative body the ability to add to the sentence. Instead, as *Maddox* recognizes, the sentencing court *itself* imposes the "entirety" of the indefinite sentence, including the minimum and maximum. Under long-standing case law addressing parole decisionmaking by administrative bodies, it does not violate the

separation of powers to have Executive Branch officials decide how long the prisoner will serve within the indefinitely-sentenced range between the minimum and maximum.

Moreover, as the Eighth District has recognized in its en banc decision in *State v. Delvallie*, 2022-Ohio-470, 185 N.E.3d 536 (8th Dist.) (en banc), "[t]he defendants' claims depend solely on the belief that ODRC 'extends' or 'imposes' a prison term under R.C. 2967.271(C) and (D) beyond the maximum sentence imposed by the sentencing court. *To the contrary*, R.C. 2929.144(B) provides that *the sentencing court must determine* the maximum term of imprisonment based on a mathematical formula as applied to the minimum term of imprisonment imposed under R.C. 2929.14(A)(1)(a) and (A)(2)(a). *The sentencing court must then impose* that maximum sentence as part of the final conviction under the unambiguous language of R.C. 2929.144(C) * * *." *Delvallie*, ¶ 23 (citation omitted; emphasis added). "[I]t is the judicial branch that imposes the statutorily required sentence * * *." Id. ¶ 31.

As *Maddox* also emphasizes, "no additional factual development is necessary" in regard to the constitutional challenges. But, again, this undercuts the separation-of-powers and jury-trial challenges. If no further factual development is necessary, then there is no factual issue that a judge or jury would need to decide either. This effectively limits defendants on direct appeal to making a facial constitutional challenge to whether the ODRC will afford "due process" to the defendant if and when the ODRC would seek to rebut the presumptive release date and keep the defendant in prison.

Without further factual development, a defendant in a direct appeal cannot establish that the ODRC will violate procedural due process in how it handles such matters. Moreover, as discussed by the lead opinion in *Delvallie*, ¶¶ 52-82, the ODRC

has already established procedures that would satisfy procedural due process.

G. Standard for Showing Facial Unconstitutionality

Defendant cannot satisfy his burden of establishing facial constitutionality beyond a reasonable doubt.

Facial constitutional challenges rarely succeed, since the challenger must establish that no set of circumstances exists under which the provision would be valid. *East Liverpool v. Columbiana Cty. Budget Comm.*, 114 Ohio St.3d 133, 2007-Ohio-3759, ¶ 30; citing *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶ 37; citing *United States v. Salerno*, 481 U.S. 739, 745 (1987); see, also, *Ohio Renal Assn. v. Kidney Dialysis Patient Protection Amendment Commt.*, 154 Ohio St.3d 86, 2018-Ohio-3220, ¶ 26. "In order for a statute to be facially unconstitutional, it must be unconstitutional in all applications." *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*, 123 Ohio St.3d 278, 2009-Ohio-5030, ¶ 13. "The fact that a statute might operate unconstitutionally under some plausible set of circumstances is insufficient to render it wholly invalid." *Harrold*, ¶ 37.

"Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51 (2008) (internal quote marks and citations omitted). "When determining whether a law is facially invalid, a court must be careful not to exceed the statute's actual language and speculate about hypothetical or imaginary cases." *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, ¶ 21, citing *Wash.*

State Grange, 552 U.S. at 450. The constitutionality of a law is not governed by speculative "worst case scenarios." *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990).

Defendant and his amici conjure up worst-case scenarios in which the ODRC would attempt to rebut the presumptive minimum-term release date based on minor rule infractions including, possibly, a slip-and-fall scenario. (See Defense Brief, 21-22) Given defendant's other protestations that his first-degree felony was completely out of character, (see id. at 3-4), one naturally wonders whether the ODRC would even seek to initiate a hearing to rebut the presumptive release date as to defendant.

In any event, mere speculation about the ODRC pursuing rebuttal in seemingly weak cases falls far short of demonstrating that the law would be unconstitutional in all of its applications. In the universe of F-1 and F-2 offenders who are sent to prison and to which the RTA applies, it is easy to envision that there will be cases in which application of the rebuttal provision would not only be justified but also universally applauded. There is an inevitability that at least some in this group of the most-serious offenders would engage in rules violations and other behavior in prison demonstrating that they have not been rehabilitated and/or that they continue to pose a threat to society. In those cases in which the ODRC does seek to rebut, it can be expected that the justifications are serious and grave enough to provide significant grounds for that action. Defendant Hacker cannot show anything to the contrary, let alone anything that would rise to the level of demonstrating facial unconstitutionality beyond a reasonable doubt.

Equally unavailing is the speculation of defendant and his amici in asserting that his due process rights would be violated at the rebuttal hearing called for by the statute.

The statute provides for a hearing, and it would be simple for the ODRC to comply with due process standards by giving notice of the hearing and affording the defendant the opportunity to be heard. As discussed below, the due process requirements in this setting are "minimal", and defendant cannot show beyond a reasonable doubt that the ODRC will violate those requirements in *every* case. As it will be applied by the ODRC, the statute is subject to a plausible reading that authorizes the ODRC to comply with due process standards in carrying out the statutory hearing requirement. See *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303, 2009-Ohio-4872, ¶ 24 (plausible reading of statute allows the statute to avoid facial invalidation).

H. No Separation of Powers Violation

The leading Ohio Supreme Court cases supporting the constitutionality of the RTA sentencing framework are *Woods v. Telb*, 89 Ohio St.3d 504 (2000), and *State ex rel. Attorney General v. Peters*, 43 Ohio St. 629 (1885). A number of appellate decisions have upheld the constitutionality of RTA sentencing as well.

In *Woods*, the Court addressed the constitutionality of giving the parole board the discretionary power to impose PRC for lower-degree felonies. Even though the sentencing court was not itself imposing the discretionary PRC term, it was notifying the defendant of the possible applicability of PRC, and the Court recognized that the Parole Authority's decision was much like the decision to release a prisoner on parole, which has long been upheld as a decision that can be assigned to the Executive Branch officials in the ODRC to be made administratively.

> In declaring the post-release control statute unconstitutional, the court of appeals found that it violated the separation of powers doctrine because the delegation of

> the powers associated with post-release control to the executive (APA) usurped judicial authority. In so doing, the court of appeals noted that "[t]he administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, 20 O.O.3d 361, 423 N.E.2d 80, paragraph one of the syllabus.
>
> In reviewing the standard cited by the court of appeals above, we find no such impediment. Instead, we deduce that the current delegation of power to the APA through post-release control is no different in terms of the separation of powers doctrine than it was under the former system of parole.
>
> Under the prior system of parole, a sentencing judge, imposing an indefinite sentence with the possibility of parole, had limited power or authority to control the minimum time to be served before the offender's release on parole; the judge could control the maximum length of the prison sentence, but the judge had no power over when parole might be granted in between those parameters. The judge had no power to control the conditions of parole or the length of the parole supervision.

Woods, 89 Ohio St.3d at 511 (plurality).

> Although the sentencing judge has no control over the period of time an offender may serve on post-release control, nor did the sentencing judge have control over the time that an offender may have served on parole. But, we observe that for as long as parole has existed in Ohio, the executive branch (the APA and its predecessors) has had absolute discretion over that portion of an offender's sentence. See *State ex rel. Atty. Gen. v. Peters* (1885), 43 Ohio St. 629, 4 N.E. 81.

Woods, 89 Ohio St.3d at 512 (plurality).

The plurality distinguished the "bad time" decision in *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132 (2000), concluding that the problem with "bad time" was that the added "bad time" was not a part of the original judicially-imposed sentence, whereas

the discretionary PRC term is a part of the sentence and "the powers delegated to the executive branch (APA) are no more than were granted under the prior system of parole." *Woods*, 89 Ohio St.3d at 512. This Court's decision in *Maddox* likewise distinguishes *Bray* on the basis that "Maddox and other defendants who have been sentenced under the Reagan Tokes Law have received the entirety of their sentences and the sentences have been journalized." *Maddox*, ¶ 16.

In *Woods*, Justice Cook and a visiting judge concurred in the conclusion that the APA's discretionary role over PRC posed no separation-of-powers problem. *Woods*, 89 Ohio St.3d at 518-19 (Cook, J., concurring). While Justice Cook concluded that PRC and "bad time" were equally a "part" of the sentence and should not be distinguished on that basis, her concurring opinion still found that there was no separation-of-powers problem in assigning parole-like decisionmaking to an administrative Executive body.

> Instead of distinguishing post-release control from bad time, I would test the post-release control statute for a separation-of-powers problem under the "pragmatic, flexible approach" advocated by the United States Supreme Court, and focus on the extent to which R.C. 2967.28 actually *impedes* the judicial branch from accomplishing its constitutionally assigned functions. *Nixon v. Admr. of Gen. Serv.* (1977), 433 U.S. 425, 442-443, 97 S.Ct. 2777, 2789-2790, 53 L.Ed.2d 867, 890-891. The judiciary fulfills its function by imposing sentence on a guilty offender. When applicable, a period of post-release control is a declared component of that judicially imposed sentence. The executive branch's supervision of a releasee within the parameters of that sentence, and the imposition of statutorily limited sanctions for violations committed during that supervisory period, do not impede the judicial function.

Woods, 89 Ohio St.3d at 518-19 (Cook, J., concurring).

As shown by *State ex rel. Attorney General v. Peters*, 43 Ohio St. 629 (1885), the

administration of a parole system by prison officials has passed constitutional muster since the late 1800's. As shown by *Peters*, it is the judiciary's function to impose sentence, but it can be the Executive's function to carry out the sentence. Courts have no inherent authority to interfere with the execution of sentence. *Municipal Court v. Platter*, 126 Ohio St. 103 (1933), paragraph three of the syllabus.

The *Oneal* court presupposed that decisionmaking by a judge would be superior in deciding whether the presumptive minimum-term release date should be rebutted. This premise could be questioned on several grounds of policy, since judges do not have the day-to-day accumulated experience of running prisons, disciplining prisoners, and administering the numerous prison programs that can help gauge the prisoner's progress (or lack of progress) toward rehabilitation. In addition, with courts facing burgeoning criminal dockets already, the General Assembly could fear the impracticalities and strains on the judicial system of assigning every release-date decision to judges.

Even if it were correct that judges are superior decisionmakers in this regard, this policy preference for judicial decisionmaking does not create a constitutional imperative under separation of powers. It is constitutionally permissible to provide for the court to sentence the defendant to an indefinite sentence and then have Executive Branch prison officials make the judgment as to whether the defendant will be released at the earliest available time or some later time within the indefinitely-sentenced range.

Notions of judicial supremacy or superiority in such matters are legally incorrect. The *Oneal* court failed to recognize that, while the imposition of sentence is a judicial function, the available length and scope of whatever sentence can, or should, or must, be imposed is ultimately a legislative matter. The legislature has broad, plenary discretion

in prescribing crimes and fixing punishments. *State v. Morris*, 55 Ohio St.2d 101, 112 (1978); see, also, *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, ¶ 12. "[A]t all times it is the power of the General Assembly to establish crimes and penalties." *Morris*, 55 Ohio St.2d at 112-13. "[T]he power to define crimes and establish penalties rests with the General Assembly *alone*." Id. at 113 (emphasis added).

This legislative prerogative includes "the power to define criminal punishments without giving the courts any sentencing discretion." *Chapman v. United States*, 500 U.S. 453, 467 (1991). "Mandatory sentencing laws enacted pursuant to this authority do not usurp the judiciary's power to determine the sentence of individual offenders." *State v. Campa*, 1st Dist. No. C-010254, 2002-Ohio-1932. Mandatory-sentencing requirements are constitutional. *State, ex rel. Owens, v. McClure*, 48 Ohio St.2d 1 (1976). "Ohio courts have continually held that mandatory sentencing legislation does not violate the separation of powers doctrine and we will not stray from that controlling precedent." *State v. Graham*, 12th Dist. No. CA2008-07-095, 2009-Ohio-2814, ¶ 80, citing *State v. Thompkins*, 75 Ohio St.3d 558 (1996); *State v. Atkinson*, 9th Dist. No. 19CA011481, 2020-Ohio-3522, ¶¶ 36-37. In short, as a matter of separation of powers, the *legislature* has the preeminent role in setting up sentencing and setting up parole and other release mechanisms, not the judiciary.

"Sentencing is an area of shared powers; it is the function of the legislature to prescribe the penalty and the manner of its enforcement, the function of the courts to impose the penalty, and the function of the executive to implement or administer the sentence, as well as to grant paroles." 16 C.J.S. Constitutional Law § 463 (footnotes omitted). As the United States Supreme Court has recognized, with the advent of parole

mechanisms, legislatures adopted a "three-way sharing" of sentencing responsibility with judges deciding the length of sentences within ranges and allowing Executive Branch parole officials to eventually determine the actual duration of imprisonment. *Mistretta v. United States*, 488 U.S. 361, 364-65 (1989). As this Court recognized in *Peters*, "it is among the admitted legislative powers to define crimes, to prescribe the mode of procedure for their punishment, to fix by law the kind and manner of punishment, and to provide such discipline and regulations for prisoners, not in conflict with the fundamental law, as the legislature deems best." *Peters*, 43 Ohio St. at 647. In regard to parole release, "[i]t cannot seriously be contended that this is an interference with the judicial functions of the court, but is rather the exercise of that guardianship and power of discipline which is vested in the state to be exercised through the legislative department for the safe-keeping, proper punishment, and welfare of the prisoner." Id. at 650.

Under the RTA, the sentencing court decides all aspects of the sentence, including selecting the minimum term and pronouncing and imposing the indefinite sentence in full, including the maximum term. At that point, the judicial function of sentencing is complete. Deciding when the defendant will be released from prison in the range of time between the minimum term and maximum term is no different than parole.

Under the RTA, the court is required to impose an indefinite sentence having the minimum term and maximum term, and it is within the range created by that judicially-imposed sentence that the ODRC will be making its decision whether to keep the defendant in prison beyond the presumptive minimum-term release date. "[T]his construction avoids any potential separation-of-powers problem". *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, ¶ 19.

At bottom, defendant is complaining about the General Assembly's decision to impose on the courts the mandatory duty to assess an indefinite sentence that includes a maximum-term component that gives room to the ODRC to delay the defendant's release. But, again, mandatory sentencing is within the General Assembly's prerogatives, and the separation of powers poses no constitutional barrier to imposing those mandatory sentencing requirements on the judicial branch.

I. No Procedural Due Process Violation

The *Oneal* court's concerns about procedural due process miss the mark as well. Though some place great focus on the presumptive nature of the minimum-term release date, the presumptive nature of that release date at most signals that the statute creates a cognizable liberty interest protected by due process. Even given the existence of a cognizable due process interest, the question would still remain what process is due in making the decision to "rebut" the presumptive release date.

"When * * * a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication * * *. In the context of parole, we have held that the procedures required *are minimal*. In *Greenholtz* [*v. Inmates of Nebraska*, 442 U.S. 1 (1979)], we found that a prisoner * * * received adequate process when he was allowed an opportunity to be heard and was provided a statement of the reasons why parole was denied. [*Greenholtz*], at 16, 99 S.Ct. 2100. 'The Constitution,' we held, 'does not require more.'" *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (emphasis added). "Even where this court has found that a parole statute establishes a liberty interest, we have held that inmates are entitled to no more than minimal procedure." *Vann v. Angelone*, 73 F.3d 519, 522 (4th Cir. 1996).

It bears emphasis that the Court in *Greenholtz* had accepted the premise that the Nebraska law created an expectancy of release, see *Greenholtz*, 442 U.S. at 12, and yet the end result was that the parole-release decision warranted no more than minimal procedure. *Swarthout*, 562 U.S. at 220. There is a "crucial distinction" between decisions regarding parole *release* of a prisoner who is not yet at liberty and decisions regarding parole *revocation* as to those already released; those two things are "quite different". *Greenholtz*, 442 U.S. at 9.

Moreover, until the presumptive date ripens into actual release, the prisoner's hope and anticipation that there will be no rebuttal remains just that, an anticipatory hope that may not pan out as events in prison unfold. "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom" as "there is a human difference between losing what one has and not getting what one wants." *Greenholtz*, 442 U.S. at 10 (internal quote marks omitted). Procedural due process would focus on the RTA release decision as being comparable to parole *release*, not parole revocation.

With the statute's requirement of a hearing and the ODRC's adoption of its policy directive, Policy 105-PBD-15, the ODRC has indicated that it will provide more-than-sufficient due process to the prisoners whom it would consider for rebuttal. The offender is notified at initial reception of the possibility of rebuttal. Policy 105-PBD-15(VI)(A). The offender will receive notice of the hearing at least 30 days in advance, see Policy 105-PBD-15(VI)(E)(2)(d), will be able to attend the hearing, see Policy 105-PBD-15(VI)(F)(5) & (F)(6), and will be specifically informed of the ability to present

mitigating information. See Policy 105-PBD-15(VI)(F)(8). The hearing officer must ensure that "all relevant information is reviewed during" the hearing, see Policy 105-PBD-15(VI)(F)(7), which plainly acknowledges the prisoner's ability to provide relevant information in that regard. The hearing officer issues a written decision and reviews it with the prisoner, see Policy 105-PBD-15(VI)(F)(12), (F)(14), who is notified of the new release date if the presumptive date was rebutted. See Policy 105-PBD-15(VI)(G)(4).

This ODRC policy is a lawful order respecting the duties of its employees, amounting to an "instruction manual" as to how to carry out the hearing process required by R.C. 2967.271. See *O'Neal v. State*, ___ Ohio St.3d ___, 2021-Ohio-3663, ¶¶ 49-50 ("protocol amounts to an instruction manual on how to perform an execution. As one would expect of such a manual, nearly all of it deals with the duties of DRC personnel participating in an execution."). Such a policy need not be adopted through formal rulemaking. *Delvallie*, ¶¶ 74-75. But, even if these provisions were not set forth in a written policy, they nevertheless reflect the kind of common-sense practices that the ODRC could adopt in carrying out such hearings as required by statutory law. Such practices easily satisfy the minimal due process requirements that would apply, and, as a result, defendant Hacker cannot show facial invalidity beyond a reasonable doubt.

In regard to the issue of procedural due process, the common pleas court in *Oneal* court also erred in contending that a judge must be involved in the decision. "The granting and revocation of parole are matters traditionally handled by administrative officers." *Woods*, 89 Ohio St.3d at 514, quoting *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972). Even when there is a presumption of release, the parole-release decision can be made "largely on the basis of the inmate's files" after a hearing in which the prisoner can

appear; such hearing "adequately safeguards against serious risks of error and thus satisfies due process." *Greenholtz*, 442 U.S. at 15. *Greenholtz* recognized that greater process is necessary in the revocation context because it distinguished the initial-release decision from the decision to revoke parole for an already-released inmate, but, even in the more-demanding revocation context, the decisionmaker "need not be judicial officers or lawyers". *Morrissey*, 408 U.S. at 489. *Greenholtz* upheld the Nebraska administrative process, holding that "there simply is no constitutional guarantee that all *executive* decisionmaking must comply with standards that assure error-free determinations. This is especially true with respect to the sensitive choices presented by the *administrative* decision to grant parole release." *Greenholtz*, 442 U.S. at 7 (emphasis added; citations omitted).

The *Oneal* court erred in complaining that the ODRC will have "unfettered discretion" to assess the issues before it regarding whether to rebut the presumptive minimum-term release date. A review of the criteria for rebuttal in R.C. 2967.271(C) shows that the ability to rebut is "fettered" by fairly-high standards. In any event, as *Greenholtz* noted, "the state may be specific or general in defining the conditions for release and the factors that should be considered by the parole authority. It is thus not surprising that there is no prescribed or defined combination of facts which, if shown, would mandate release on parole." *Greenholtz*, 442 U.S. at 8. "The Constitution simply does not speak to the generality or specificity of the standards for parole eligibility adopted by a state." *Vann*, 73 F.3d at 523 (citing *Greenholtz*, 442 U.S. at 7-8). "In parole releases, * * * few certainties exist", and there is nothing improper in allowing the decision to involve "a synthesis of record facts and personal observation filtered through

the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community." *Greenholtz*, 442 U.S. at 8.

As for the *Oneal* court's concern that the decision can involve the consideration of other crimes, it is not "an appropriation of the judicial function" for the release decision to consider "other factors such as previous criminal behavior or behavior while incarcerated". *Larson v. Ohio Adult Parole Auth.*, 10th Dist. No. 06AP-80, 2006-Ohio-5442, ¶ 18. The release decision can consider the prisoner's overall criminal history, including crimes for which he was not convicted. *State ex rel. Lipschutz v. Shoemaker*, 49 Ohio St.3d 88 (1990). In assessing whether the defendant's rule violations and misbehavior in prison demonstrate that the prisoner is not rehabilitated or demonstrate that he continues to pose a threat to society, the ODRC of course would consider the baseline criminal history with which the defendant entered the prison system in order to gauge where the prisoner now stands in terms of rehabilitation and being a threat to society.

Finally, contrary to *Oneal*, there is no due process requirement that the statutory framework give the decisionmaker a "hierarchy of misconduct" or a "guideline" as to "how each consideration shall be weighed * * *." All-things-considered approaches are entirely consistent with due process, even in judicial matters. See, e.g., *State v. Thompson*, 92 Ohio St.3d 584, 587-88 (2001) ("does not direct the court on what weight, if any, it must assign to each factor"; "recidivism is at best an imperfect science and while the guidelines set forth potentially relevant factors", court can assess relevancy of each factor). "[T]he framework provided * * * in the statute must be broadly worded to accommodate both the most common and most exceptional cases" and allows the

decisionmaker "to accommodate for individualized assessments". *State v. Williams*, 88 Ohio St.3d 513, 534 (2000).

J. No Violation of Jury-Trial Right

Consistent with the due process case law allowing administrative decisionmaking that can keep the defendant in prison until the maximum term imposed by the sentencing judge, there is no right to jury trial or right to proof beyond a reasonable doubt on release-from-prison decisions. "*Apprendi* does not apply * * * because the parole board's decision does not increase the maximum authorized penalty." *Weatherspoon v. Mack*, 10th Dist. No. 07AP-1083, 2008-Ohio-2288, ¶ 17; *Eubank v. Ohio Adult Parole Auth.*, 10th Dist. No. 05AP-274, 2005-Ohio-4356, ¶¶ 12-13 (*Apprendi-Blakely* inapplicable to parole determinations).

Blakely itself distinguishes the jury-trial right from the role played by parole decisionmakers. *Blakely v. Washington*, 542 U.S. 296, 308-309 (2004) (judge, "like a parole board", may consider facts under indeterminate sentencing and does not invade province of jury). Parole decisionmaking "arises *after the end* of the criminal prosecution, including imposition of sentence." *Morrissey*, 408 U.S. at 480 (emphasis added); *United States v. Knights*, 534 U.S. 112, 120 (2001) (probationers "face revocation of probation, and possible incarceration, in proceedings in which the trial rights of a jury and proof beyond a reasonable doubt, among other things, do not apply"); *In re J.V.*, 134 Ohio St.3d 1, 2012-Ohio-4961, ¶ 19 (no right to jury trial on decision invoking adult sentence).

The defense arguments ignore the basic operation of the *Apprendi-Blakely* line of cases. The Court held in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that "[o]ther than

the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Id. at 490. *Apprendi* was reaffirmed in *Blakely*, which held "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*." (Emphasis *sic*) As is apparent, the appropriate reference point is what the *judge* could impose based on the jury's verdict or based on his guilty plea. *In re J.V.*, ¶ 7.

Based on his guilty plea alone, defendant Hacker faced an indefinite sentence having a minimum term of 11 years and a maximum term of 16.5 years. This was the *Apprendi-Blakely* "maximum", not the sentence actually imposed by the judge later. The indefinite sentence of six to nine years was the judge's sentence, which does *not* define the pertinent reference point to be used in deciding whether additional fact-finding is invading the province of the jury by exceeding what was authorized by the guilty verdict or guilty plea. *United States v. Haymond*, 139 S.Ct. 2369, 2384 (2019) (plurality: original available maximum 10-year term would control in determining whether original sentence and sentence imposed upon revocation of supervised release would exceed the maximum authorized by guilty verdict); id. at 2386 (controlling concurrence: total imprisonment limited by original offense of conviction).

The ODRC's actions under the RTA would *never* exceed what was authorized by the offense of conviction. The statutory maximum was 16.5 years, and here the ODRC will be unable to keep defendant in prison beyond nine years on the F-1 offense. As a matter of law, the ODRC will be unable to exceed what a jury's verdict for F-1 aggravated burglary would authorize as a maximum penalty. There is no conceivable

way that the ODRC's decision would exceed the *Apprendi-Blakely* "maximum". And, because the ODRC's possible actions under the RTA also adhere to the actual sentence imposed by the trial judge, there is no violation of separation of powers either.

K. Defendant's Flawed Challenge to Early-Release Mechanism Under RTA

R.C. 2967.271 allows the ODRC director to make a recommendation to the sentencing court to reduce the minimum term by 5% to 15% based on the offender's exceptional conduct or adjustment to incarceration. R.C. 2967.271(F). The court must grant the recommended reduction unless it finds that the presumption in favor of the recommendation has been rebutted and the court disapproves the request. R.C. 2967.271(F)(4). Only limited grounds are given to the court allowing it to disapprove the director's recommended reduction. R.C. 2967.271(F)(4).

Even though this provision creates an early-release mechanism as a *potential benefit* for defendants, defendant Hacker challenges its constitutionality on grounds that the General Assembly cannot make the ODRC director's recommendation a necessary predicate to judicial action. But this challenge is not properly before this Court. Such an issue would not even arise until, at the earliest, the offender has demonstrated the required exceptional conduct or adjustment to incarceration after reaching prison. Practically speaking, the ODRC director would not make that assessment until after the defendant has served a fair amount of the prison sentence, and the statute contemplates that the recommendation would be made no earlier than 90 days before the recommended date for early release. R.C. 2967.271(F)(1). These are not matters that fairly arise during the original sentencing or on direct appeal, and they could only arise at a later time when the early-release mechanism would be possible, i.e., as the defendant's time of service

approaches 85% to 95% of the minimum term.

Defendant Hacker is incorrect in assuming that this would be the lone early-release mechanism available. Judicial release can be available to these offenders as well. See R.C. 2929.13(F) and R.C. 2929.20(J)(1) (allowing judicial release for F-1 and F-2 offenders serving non-mandatory sentences if certain findings are made).

In any event, a separation-of-powers challenge necessarily fails. Courts have no inherent power to suspend execution of sentence. *Municipal Court v. Platter*, 126 Ohio St. 103 (1933), paragraph three of the syllabus. Statutes created by the General Assembly would be the exclusive means for a court to have the authority to grant an early release, and that statutory authority must be strictly construed. *State v. Smith*, 42 Ohio St.3d 60, 61 (1989). "The Ohio Legislature having dealt with the subject, and having made certain provisions and certain exceptions thereto, it will be presumed that the Legislature has exhausted the legislative intent, and that it has not intended the practice to be extended further than the plain import of the statutes already enacted." *Madjorous v. State*, 113 Ohio St. 427, 433 (1925).

Nor is there any general ability of criminal courts to order release based on equitable considerations. A criminal court is a court of *law*, not a court of equity. *State ex rel. Chalfin v. Glick*, 172 Ohio St. 249, 252 (1961). "Except where there is express statutory authority therefor, equity has no criminal jurisdiction * * *." Id. As stated in *State v. Ware*, 141 Ohio St.3d 160, 2014-Ohio-5201:

> {¶ 20} * * * [W]e reiterate that notions of equity do not empower courts to reopen final judgments without statutory authorization. *State ex rel. Chalfin v. Glick*, 172 Ohio St. 249, 252, 175 N.E.2d 68 (1961). "Clemency is a function of the Executive branch and the courts are without

> authority to free guilty defendants absent a specific legislative enactment." *State v. Beasley*, 14 Ohio St.3d 74, 76, 471 N.E.2d 774 (1984).

As can be seen, the General Assembly need not create any early-release mechanism to be applied by the sentencing court. To the extent the sentencing court would purport to exercise any such authority, it would do so only by grace of a statutory grant of the General Assembly through the exercise of its legislative authority. Accordingly, even when the General Assembly would create an early-release mechanism, there would be no constitutional imperative that the judicial branch be given the sole discretion to decide the issue of early release.

The General Assembly can make the issue of early release a shared responsibility between Executive Branch officials administering the prison system and the judge who then can approve the ODRC director's recommendation. The legislature in fact *honors* the separation of powers in this regard by involving both the Executive Branch and the Judicial Branch in such a decision. This is especially true in light of the ODRC's special expertise in running prisons and being able to assess what constitutes "exceptional" conduct or adjustment warranting the recommended reduction. "[W]e have never held that the Constitution requires that the three branches of Government 'operate with absolute independence.'" *Morrison v. Olson*, 487 U.S. 654, 693-694 (1988).

Even in the criminal-sentencing context, the law can require the Executive Branch's concurrence in a reduction of an otherwise-mandated length of sentence. Most relevant here, the federal courts have rejected separation-of-powers objections to the requirement under federal law that the prosecution be the party to file a motion for sentence reduction. *United States v. Stonerock*, 363 Fed.Appx. 338, 343-44 (6th Cir.

2010) (collecting cases); *United States v. Spees*, 911 F.2d 126, 127-28 (8th Cir. 1990); *United States v. Huerta*, 878 F.2d 89, 91-93 (2nd Cir. 1989); *United States v. Ayarza*, 874 F.2d 647, 652-53 (9th Cir. 1989).

Defendant Hacker relies on *State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790. But *Sterling* is fundamentally different because this Court determined that the DNA-testing provision at issue in *Sterling* related to the determination of guilt or innocence, a core judicial-branch determination. Id. ¶ 34. The early-release mechanism here is *not* related to guilt or innocence. Allowing the court to grant an early release, but only with the recommendation of the Executive Branch, is an innovation that does not violate separation of powers.

In addition, finding merit in a separation-of-powers objection would merely beg the question of whether the early-release mechanism would survive the finding of unconstitutionality. The early-release mechanism in fact would be severed in its entirety, thereby resulting in the defendant (still) being unable to obtain early release.

Defendant Hacker apparently assumes that the statute could be surgically altered to leave the court with the discretion to grant an early release. But the ODRC director's recommendation is a necessary predicate to the early release, and it is upon the authority of the ODRC's recommendation that the court would "grant" the *recommendation*. The court's statutory authority is to review and grant (or deny) the recommendation. The director's "recommendation" thus plays a central role in the operation of paragraph (F), with the word appearing 30 times in one form or another. Paragraph (F) hinges on the existence of the recommendation, and the recommendation cannot be surgically removed to leave only a shell that gives the court a freestanding discretion that the General

Assembly never intended to create.

The supposed "unconstitutional part", i.e., the "recommendation" language, would be severable only if it could "stand by itself." *Geiger v. Geiger*, 117 Ohio St. 451, 466 (1927). But the recommendation language serves as a key precondition to the court's authority to grant the recommended reduction, and it cannot be stand by itself.

Surgical severance of the recommendation language would also violate the principle barring such severance if the language is "so connected" as to be inseparable from the other language of the provision. *Geiger*, 144 Ohio St. at 466. "Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out?" Id. Here, there is an inherent (and repeated) connection between the recommendation language and the remainder of paragraph (F).

Paragraph (F) only creates a *conditional* authority on the part of the judge to reduce the minimum term pursuant to the recommendation. Removing the recommendation condition would negate the legislature's intent that such reductions should occur only with the concurrence of the key Executive Branch official who believes that such a recommendation is warranted.

In the final analysis, if paragraph (F) violates the separation of powers because it requires Executive Branch recommendation, then the entire provision allowing reduction would be severed.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA urges that this Court affirm the judgment of the Third District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on August 1, 2022, to the following counsel of record: Benjamin M. Flowers, benjamin.flowers@ohioago.gov, Office of the Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, counsel for appellee State of Ohio; Tina M. McFall, mcfall@tmwlawyers.com, Triplett McFall Wolfe Law, LLC, 332 South Main Street, Bellefontaine, Ohio 43311, counsel for appellant; Stephen P. Hardwick, stephen.hardwick@opd.ohio.gov, Office of the Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215, counsel for amicus curiae Ohio Public Defender; Andrew R. Mayle, amayle@maylelaw.com, Mayle LLC, P.O. Box 263, Perrysburg, Ohio 43552, counsel for amicus curiae Edward Maddox.

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