

In the  
**Supreme Court of Ohio**

STATE OF OHIO,	:	Case No. 2024-0005
	:	
Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
AARIN CLINKSCALE,	:	
	:	Court of Appeals
Appellee.	:	Case No. 22AP-708

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**MERIT BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL  
DAVE YOST IN SUPPORT OF APPELLANT STATE OF OHIO**

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## INTRODUCTION

Aarin J. Clinkscale was involved in an armed robbery of a Dollar General store that ended in two fatalities. He pleaded guilty to several violent crimes committed during this robbery. Some of these crimes—specifically, the two first-degree felony counts of involuntary manslaughter and a first-degree felony count of aggravated robbery—carry nonmandatory terms of imprisonment. And he was charged with a firearm specification with the aggravated robbery, which carries a mandatory term of imprisonment. He was sentenced to fourteen years in prison. The first three years on the mandatory term were to be served first and consecutive to the remaining eleven years for the nonmandatory terms. Before his plea and sentencing, Clinkscale was incarcerated for over two years (762 days) which were credited to him against his fourteen-year sentence.

Under Ohio law, prisoners serving sentences with nonmandatory prison terms, like Clinkscale, can seek early release from imprisonment after serving a portion of their prison term. *See* R.C. 2929.20(B), (C). Taking advantage of this privilege, Clinkscale sought, and was granted, judicial release in October 2022, six years after he entered prison and about three years after completing the mandatory three-year term of his sentence. Critical to this case, the trial court determined that Clinkscale’s jail-time credit counted toward his judicial-release eligibility. On this basis, the trial court concluded that Clinkscale could serve a shorter portion of his prison sentence than what is required under Ohio’s judicial-release statutes before seeking such release.

But Clinkscale's judicial release was nearly two years premature under Ohio law. Because Clinkscale's sentence includes at least one mandatory term, he had to wait a fixed five years after serving the three-year mandatory term *before* seeking judicial release. His jail-time credit simply does not factor into this waiting time.

The plain text of the judicial-release statute makes this clear. These statutes establish various waiting periods based on a combination of their "aggregated nonmandatory prison term or terms" and whether their sentence includes mandatory terms. R.C. 2929.20(C). Based on the length of Clinkscale's aggregated nonmandatory sentence, his judicial-release eligibility ultimately turns on the waiting periods established in R.C. 2929.20(C)(1)(d).

R.C. 2929.20(C)(1)(d), in turn, establishes two different waiting periods for two types of sentences: those without any mandatory terms and those with one or more mandatory terms. Prisoners serving purely nonmandatory sentences can apply for judicial release "not earlier than the date on which the offender has served five years of the offender's stated prison term." *Id.* This five-year waiting period can vary based on jail-time credit because it depends on the prisoner's "stated prison term," which "includes any credit received by the offender for time spent in jail awaiting trial," or "sentencing." R.C. 2929.01(FF)(1); *see* R.C. 2967.191. But prisoners serving sentences with at least one mandatory term must wait "five years after the expiration of all mandatory prison terms." R.C. 2929.20(C)(1)(d). Unlike the waiting period for the first category

which is connected to the “stated prison term” and thus varies with jail-time credit, the five-year waiting period for the latter category is fixed and thus cannot be modified by jail-time credit.

The lower court erred multiple times over in affirming Clinkscale’s early release. For one thing, it flipped the presumption of strict construction in construing judicial-release statutes by reasoning that nothing in R.C. 2929.20(C)(1)(d) precludes application of jail-time credit toward Clinkscale’s five-year waiting period after completion of his mandatory period. And it doubly erred in relying on the *absence* of qualifying language when the statute clearly and unambiguously requires prisoners serving sentences with mandatory terms to wait “five years after the expiration of all mandatory prison terms,” and not a day less, before seeking judicial release. Last, the trial court erred in tying the waiting periods for *both* types of sentences—sentences composed of purely nonmandatory terms and sentences with at least one mandatory term—to the prisoner’s “stated prison term.” Although the stated prison term—which varies with jail-time credit—modifies the waiting period for sentences composed of only nonmandatory terms, R.C. 2929.20(C)(1)(d) specifically omits reference to “stated prison term” when defining the waiting period for sentences with one or more mandatory terms. That exclusion is especially poignant when the General Assembly included reference to “stated prison term” in the first half of the sentence but omitted it in the latter half.



## STATEMENT OF *AMICUS* INTEREST

The Attorney General is Ohio’s chief law officer and “shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested.” R.C. 109.02. He is interested in supporting courts throughout the State as they review applications for judicial release consistent with state law and the interests of justice. The Attorney General also sometimes serves as special counsel in cases of significant importance. In those cases, the Attorney General is directly involved in the application of Ohio’s statutes including the judicial-release statutes at issue in this case.

## STATEMENT OF THE CASE AND FACTS

### **I. Ohio law allows eligible offenders to seek early release from their prison terms in certain circumstances.**

Ohio law allows “eligible offender[s]”—that is, any person “serving a stated prison term that includes one or more nonmandatory prison terms” after April 2009—to seek reduction of their prison term through judicial release. R.C. 2929.20(A)(1)(a), (B). They can make such requests after serving a portion of their prison term. The waiting period before a prisoner becomes eligible first depends on his “aggregated nonmandatory prison term or terms.” R.C. 2929.20(C). There are five such eligibility periods under the statute.

For aggregated nonmandatory prison terms of “less than two years, the eligible offender ... may” seek judicial release:

“at any time after the offender is delivered to a state correctional institution or, if the prison term includes a mandatory prison term or terms, at any time after the expiration of all mandatory prison terms.”

R.C. 2929.20(C)(1)(a). For aggregated nonmandatory prison terms of “at least two years but less than five years, the eligible offender ... may” seek judicial release:

not earlier than one hundred eighty days after the offender is delivered to a state correctional institution or, if the prison term includes a mandatory prison term or terms, not earlier than one hundred eighty days after the expiration of all mandatory prison terms.

R.C. 2929.20(C)(1)(b). For aggregated nonmandatory prison terms of “five years, the eligible offender ... may” request judicial release:

not earlier than the date on which the offender has served four years of the offender’s stated prison term or, if the prison term includes a mandatory prison term or terms, not earlier than four years after the expiration of all mandatory prison terms.

R.C. 2929.20(C)(1)(c). For aggregated nonmandatory prison terms “more than five years but not more than ten years, the eligible offender ... may” seek judicial release:

not earlier than the date on which the offender has served five years of the offender’s stated prison term or, if the prison term includes a mandatory prison term or terms, not earlier than five years after the expiration of all mandatory prison terms.

R.C. 2929.20(C)(1)(d). And when the aggregated nonmandatory prison terms exceeds “ten years, the eligible offender ... may” seek judicial release:

not earlier than the later of the date on which the offender has served one-half of the offender’s stated prison term or the date specified in [R.C. 2929.20](C)(1)(d).

R.C. 2929.20(C)(1)(e). That means, when one-half of the offender’s stated prison term comes earlier than the date of judicial-release eligibility calculated under R.C.

2929.20(C)(1)(d), he can either apply for judicial release after serving five years of his “stated prison term” or, “if the prison term includes a mandatory prison term or terms” only “five years after the expiration of all mandatory prison terms.” *Id.* (After the defendant was sentenced in this case, R.C. 2929.20(C)(1)–(5) (effective in 2016) were renumbered to R.C. 2929.20(C)(1)(a)–(e) but remain otherwise unchanged. This brief uses the current numbering for ease of reference.)

Prisoners do not have a constitutional or inherent right to be released by the courts before the end of their sentence. *State v. Moore*, 154 Ohio St. 3d 94, 2018-Ohio-3237, ¶29; *State v. Ware*, 141 Ohio St. 3d 160, 2014-Ohio-5201, ¶12. Rather, judicial release “is an act of *grace* by the court.” *Moore*, 2018-Ohio-3237, ¶29 (citation omitted and emphasis added); *Ware*, 141 Ohio St. 3d 160, ¶12. On the other hand, prisoners do have a *right* to receive credit for pre-conviction and pre-sentencing confinement. *See* R.C. 2967.191. This right “has its roots in the Equal Protection Clauses of the Ohio and United States Constitutions.” *State v. Fugate*, 117 Ohio St. 3d 261, 2008-Ohio-856, ¶7. But prisoners do not have a constitutional right to *full use* of jail-time credit if, for example, they are released from their prison term through the grant of other relief, such as judicial release. *See Moore*, 2018-Ohio-3237, ¶¶27–29.

The right to receive jail-time credit has been codified by the General Assembly in R.C. 2967.191. That statute directs “the department of rehabilitation and correction” to “reduce [a] prison term,” including any “stated prison term,” “by the total number of

days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced, including confinement in lieu of bail while awaiting trial[.]” R.C. 2967.191(A)–(B). (After the defendant was sentenced in this case, R.C. 2967.191 was reordered. Because the reordering did not materially change the statute, this brief will refer to the current version for ease of reference.) Confirming this further, Ohio law specifies that a “[s]tated prison term” “includes any credit received by the offender for time spent in jail awaiting trial, sentencing, or transfer to prison for the offense[.]” R.C. 2929.20(FF)(1).

**II. Aarin Clinkscale sought and obtained judicial release three years after completing the three-year mandatory portion of his prison term.**

In September 2016, Defendant-Appellee Aarin J. Clinkscale pleaded guilty to two first-degree felony counts of involuntary manslaughter and one first-degree felony count of aggravated robbery with a three-year gun specification. *State v. Clinkscale*, 2023-Ohio-4146, ¶2 (10th Dist.) (“App.Op.”). Initially, he was sentenced to mandatory three years’ imprisonment for the firearm specification, nonmandatory terms of three years’ imprisonment on each involuntary manslaughter charge, and four years’ imprisonment on the aggravated robbery, all to be served consecutively for a total of thirteen years. *Id.* Five days later, the trial court corrected its judgment, ordering four-year terms for each involuntary murder charge and a three-year term for the aggravated robbery. State App. Br.1. The Court again ordered that the terms be served consecutively. In total, Clinkscale was sentenced to a fourteen-year term of imprisonment. Before his plea and sentencing,

Clinkscale was incarcerated for 762 days, or a little more than two years. App.Op.¶2. The Court awarded those days as jail-time credit against Clinkscale's sentence. *Id.*

On June 4, 2020, Clinkscale applied for judicial release *pro se*. App.Op.¶3. The State opposed, arguing that Clinkscale's motion was premature under R.C. 2929.20(C). *Id.* According to the State, Clinkscale would not be eligible for judicial release "until October 2022 at the earliest." *Id.* (quoting State's Response). The trial court agreed and denied Clinkscale's motion as premature. *Id.*

Clinkscale reapplied for judicial release in October 2022. App.Op.¶4. The State opposed his request arguing that it was still premature and corrected its prior representation that Clinkscale could apply for judicial release in October 2022. *Id.* at ¶5. According to the State, under R.C. 2929.20(C)(1)(d) (then R.C. 2929.20(C)(4)) Clinkscale would be eligible for judicial release only five years after he had finished serving the mandatory three-year term on the firearm specification, that is, in November 2024. *Id.* Clinkscale argued that his jail-time credit should be applied toward the five-year waiting period after the expiration of his mandatory term, thus shortening his wait time to seek judicial release under R.C. 2929.20(C). App.Op.¶6. And he argued he has an equal-protection right to have jail-time credit applied toward the waiting time to seek judicial release. *Id.*

The trial court granted Clinkscale's motion for judicial release. App.Op.¶7. Clinkscale was placed on five years of community control sanctions. *Id.* The State

appealed. App.Op.¶8. On appeal, the State argued that Clinkscale’s jail-time credit should not be applied toward hastening his judicial-release eligibility. App.Op.¶¶8–9.

The Tenth District Court of Appeals disagreed. App.Op.¶¶12–17. First, the Court noted that the State’s argument rested primarily on *State v. Moore*, 2018-Ohio-3237, which held that jail-time credit recognized under R.C. 2967.191 could not shorten *mandatory* time being served for a firearm specification under R.C. 2941.145. App.Op.¶¶9–10. The Court distinguished *Moore* for two reasons. The Court first noted that the question presented in this case—whether jail-time credit can shorten *nonmandatory* portions of a sentence—was a different question than the one presented in *Moore*—whether jail-time credit can shorten a *mandatory* sentence for a firearm specification. App.Op.¶¶9–11. And the Court explained that *Moore* rested on express language in Ohio law that forbids courts from applying jail-time credit toward, or granting judicial release for, mandatory firearm specification terms. App.Op.¶12 (discussing R.C. 2929.14(B)(1)(b)); see App.Op.¶15 (citing R.C. 2929.13(F)(8) as confirming R.C. 2929.14(B)(1)(b)).

On the other hand, the lower court reasoned, Ohio law has no such prohibition on applying jail-time credit toward nonmandatory terms. App.Op.¶16. Without a specific prohibition to the contrary, the Court reasoned that the judicial-release statutes are most naturally read to allow application of jail-time credit toward the judicial-release waiting period for nonmandatory terms. App.Op.¶¶12–14. The court also reasoned that the provision governing Clinkscale’s judicial-release eligibility mentions his “stated prison

term” — which “includes any credit received by the offender for time spent in jail awaiting trial,” R.C. 2929.01(FF)—so his jail-time credit should be applied toward the time he has to wait before becoming eligible for judicial release. App.Op. ¶¶12–14. In other words, he had to wait only five years *minus the 762 days of jail-time credit*, rather than the full five years, after completing his three-year mandatory term to become judicial-release eligible. The court thus upheld the timeliness of Clinkscale’s request for judicial release.

The State timely appealed, raising a single proposition of law: whether jail-time credit should be applied toward determining judicial-release eligibility for sentences that have mandatory prison terms when R.C. 2929.20(C)(1)(a)–(d) requires offenders serving such sentences to wait a fixed period of time “after expiration of all mandatory prison terms.” This Court accepted that proposition for review. *03/19/2024 Case Announcements*, 2024-Ohio-984.

## ARGUMENT

The judicial-release provision applicable to Clinkscale’s sentence—R.C. 2929.20(C)(1)(d)—establishes two different waiting periods for two types of sentences: those without any mandatory terms, and those with at least one. Prisoners serving the former, purely nonmandatory sentences, may apply for judicial release after serving “five years of the offender’s stated prison term.” *Id.* This waiting period varies with the length of the offender’s “stated prison term” which “includes any credit received by the offender for time spent in jail awaiting trial,” or “sentencing.” R.C. 2929.01(FF)(1); *see* R.C.

2967.191. In other words, jail-time credit can be applied toward shortening the five-year waiting period to become judicial-release eligible.

That is not so for sentences that fall into the latter category: sentences with one or more mandatory terms. Prisoners serving those sentences must wait “five years after the expiration of all mandatory prison terms.” R.C. 2929.20(C)(1)(d). Thus, unlike prisoners serving sentences composed of purely nonmandatory terms, prisoners serving sentences with one or more mandatory terms must wait a *fixed* five years, a period that cannot be modified by jail-time credit, after completion of the mandatory terms. Because Clinkscale is serving a sentence that falls into this latter category, his jail-time credit cannot be applied toward shortening the five-year waiting period after serving his mandatory term to become judicial-release eligible.

**Amicus Curiae’s Proposition of Law:**

*R.C. 2929.20(C)(1)(d) requires that prisoners serving sentences with mandatory prison terms wait a fixed “five years after the expiration of all mandatory prison terms” to become judicial-release eligible and does not allow jail-time credit to be applied toward that five-year waiting period.*

- I. Clinkscale’s motion for judicial release was premature because he has not yet served five years in prison after completing the mandatory term of his imprisonment.**
  - A. For sentences composed of one or more mandatory terms, R.C. 2929.20(C)(1)(d) imposes an invariable five-year waiting period after serving all mandatory prison terms, that cannot be shortened by jail-time credit, before the prisoner becomes eligible for judicial release.**

To determine when a prisoner becomes eligible for judicial release under R.C. 2929.20(C)(1)(d), our “starting point,” as always, “is the statute’s text.” *Spencer v. Freight*



*Handlers, Inc.*, 131 Ohio St. 3d 316, 2012-Ohio-880, ¶16. When the text “is clear and unambiguous,” it must be applied “as written” without “inserting or deleting words.” *State v. Ireland*, 155 Ohio St. 3d 287, 2018-Ohio-4494, ¶30 (citations omitted).

Turn now to the text. The relevant statute, R.C. 2929.20(C)(1)(d), states in relevant part that eligible offenders

may file the motion not earlier than the date on which the offender has served five years of the offender’s stated prison term or, if the prison term includes a mandatory prison term or terms, not earlier than five years after the expiration of all mandatory prison terms.

*Id.* Breaking this provision down further, it addresses two types of sentences: sentences that have no mandatory terms, and sentences that include at least one mandatory term. Begin with sentences that are composed wholly of nonmandatory terms. Prisoners serving those sentences become eligible for judicial release after serving “five years of [their] stated prison term.” *Id.* Stated prison terms, in turn, must be “reduce[d]” by any jail-time credit earned by the offender while awaiting conviction and sentencing. R.C. 2967.191. Thus, a “stated prison term” is adjusted to reflect “any credit received by the offender for time spent in jail awaiting trial, sentencing, or transfer to prison for the offense.” R.C. 2929.01(FF)(1). That means the judicial-release waiting period for sentences composed of only nonmandatory terms incorporates, and thus varies with, any jail-time credit due to the defendant. Put another way, jail-time credit may be applied toward the judicial-release waiting period on sentences composed only of nonmandatory terms.

The same is not so for the second category of sentences contemplated by R.C. 2929.20(C)(1)(d): sentences that include at least one mandatory term. For those sentences, prisoners may seek judicial release “not earlier than five years *after* the expiration of all mandatory prison terms.” R.C. 2929.20(C)(1)(d) (emphasis added). This language is clear and unambiguous: prisoners serving sentences that include mandatory terms must wait “five years after” the last day of service on the last mandatory term, without further qualification. That means prisoners cannot reduce their waiting time by applying jail-time credit toward that time.

Several reasons confirm that the General Assembly intended to treat sentences with mandatory terms differently from those without for the purpose of determining judicial-release eligibility.

*First*, if the legislature intended to treat both sentences with and without a mandatory term the same, it could have done so in one of two ways. The General Assembly could have expressly included an exception for the application of jail-time credit, for example, by modifying the second clause “not earlier than five years after the expiration of all mandatory prison terms” to read “not earlier than five years, *less any time earned by the offender while awaiting conviction and sentencing under R.C. 2967.191*, after the expiration of all mandatory prison terms.” Or, as it did with sentences that have no mandatory terms at all, the General Assembly could have connected the judicial-release waiting period for sentences with mandatory terms to the “stated prison term” which is

a term of art that incorporates jail-time credit. *See* R.C. 2967.191; R.C. 2929.01(FF)(1). That the legislature tied sentences with purely nonmandatory terms to the “stated prison term” but did not do the same *in the same subsection* and *the same sentence* for sentences with mandatory terms is powerful proof that the General Assembly intended to make jail-time credit inapplicable to the waiting time for judicial release on the latter. After all, the legislature “is generally presumed to act intentionally and purposely when it includes particular language in one section of a statute but omits it in another.” *NACCO Indus., Inc. v. Tracy*, 79 Ohio St. 3d 314, 316, 1997-Ohio-368. That presumption of intentionality is at its height when the legislature includes language that it later omits, *in the same sentence*.

*Second*, this result was confirmed by this Court in *Moore*. In *Moore*, the Court considered whether the defendant’s 283 days of jail-time credit could be applied toward the mandatory four-year term he was serving on a firearm specification. The defendant was serving an aggregate prison term of eight years and eleven months which included two mandatory firearm specifications totaling four years’ time served first and consecutive to the remaining terms. *Moore*, 2018-Ohio-3237, ¶2. Because the defendant, Moore, had been sentenced to a nonmandatory prison term of between two and five years, he was eligible to seek judicial release “one hundred eighty days after the expiration of all mandatory prison terms.” *Id.* at ¶3 (quoting then R.C. 2929.20(C)(2), now renumbered as R.C. 2929.20(C)(1)(b)). The defendant’s theory of applying the jail-time

credit to his four-year mandatory sentence, however, would hasten the date of his judicial-release eligibility which would come “one hundred eighty days after” the last day of the mandatory time served on the firearm specifications. *Id.* at ¶¶2–3 (quoting current R.C. 2929.20(C)(1)(b)). In other words, on his theory, Moore could have applied for release three years and nine months into his sentence if the jail-time credit was applied toward shortening the mandatory four-year terms rather than four years plus the one-hundred-eighty days required by statute. *See id.* at ¶3. This Court disagreed with Moore, holding both that jail-time credit cannot be applied to mandatory firearm-specification sentences under R.C. 2929.14(B)(1)(b), and that this result did not violate Moore’s equal-protection rights. *Id.* at ¶¶7–15, 27–31.

Critical here, however, the Court confirmed that jail-time credit is inapplicable when the statute directs the offender to wait a fixed time “after the expiration of all mandatory prison terms” to become judicial-release eligible, as it does in R.C. 2929.20(C)(1)(d). Like the provision at issue in this case, the relevant provision in *Moore* R.C. 2929.20(C)(1)(b) required Moore to wait a set amount of time—there, 180 days—“after the expiration of all mandatory prison terms.” This Court treated that 180-day waiting period as invariable. It calculated that Moore would have to wait another six months (one hundred and eighty days) after serving his mandatory sentence without regard to his jail-time credit. And, because the Court held that Moore’s jail-time credit cannot be applied to shorten his mandatory four-year term, this Court calculated that he

would have to wait six months after serving those four years to be eligible for judicial release. *See id.* at ¶3. Had the Court viewed jail-time credit as applicable to this 180-day waiting period, the 283 days of jail-time credit would have swallowed it whole. In other words, Moore would have only had to serve the four-year mandatory term and not a single day of his nonmandatory term before becoming eligible for judicial release.

*Third*, treating sentences with mandatory terms differently from those without furthers the legislature’s considered policy goals. Mandatory prison terms are reserved for serious crimes. *See id.* at ¶31; *State v. Johnson*, 116 Ohio St. 3d 541, 2008-Ohio-69, ¶3; R.C. 2929.14(B)(1)(a); *see also State v. Bollar*, 171 Ohio St. 3d 678, 2022-Ohio-4370, ¶¶5, 25. Requiring offenders who commit more serious crimes to complete a fixed portion of their nonmandatory prison term before becoming eligible to seek judicial release emphasizes the seriousness of these crimes and provides courts with a prison track record from which they can determine whether the offender is truly release-worthy. And treating serious crimes this way promotes the “traditional aims of punishment”—“retribution and deterrence.” *See State v. Jarvis*, 167 Ohio St. 3d 118, 2021-Ohio-3712, ¶12. “[T]hose who might be tempted” to commit a serious crime that carries a mandatory term of imprisonment will think twice. *Moore*, 2018-Ohio-3237, ¶31. Allowing defendants who have committed serious crimes to a-textually shorten that mandatory waiting period would frustrate these goals.

In sum, prisoners serving sentences with mandatory terms are eligible for judicial release under R.C. 2929.20(C)(1)(d) only “five years after” finishing the mandatory terms of their sentence. Because “five years after” means “five years after” and not a day sooner, jail-time credit cannot be applied to shorten that five-year waiting period.

**B. Clinkscale’s motion for judicial release was premature.**

The just-discussed principles explain why Clinkscale’s motion for judicial release was premature. Clinkscale was sentenced to a total of fourteen years’ imprisonment. His sentence can be split into a mandatory three-year term for the firearm specification to be served first and consecutive with the aggregated nonmandatory eleven-year term for the underlying offenses. That means his judicial-release eligibility is governed first by R.C. 2929.20(C)(1)(e)—under which he can seek judicial release “not earlier than the later of the date on which the offender has served one-half of the offender’s stated prison term or the date specified in” R.C. 2929.20(C)(1)(d). R.C. 2929.20(C)(1)(e).

The “later of ... one-half” of his “stated prison term” and the “date specified” in R.C. 2929.20(C)(1)(d) is the date specified by the latter provision. Here is the math. Clinkscale’s stated prison term is fourteen years less the 762 days of jail-time credit he has earned—a little less than twelve years. R.C. 2929.01(FF)(1); R.C. 2967.191. “[O]ne-half” that term is just less than six years. Under R.C. 2929.20(C)(1)(d), however, Clinkscale’s sentence includes a mandatory three-year term, so he is eligible to seek judicial release “five years after the expiration of” that term. That means Clinkscale is

only eligible for judicial release five years after serving his mandatory three-year term—that is, eight years after he began his prison term. Thus he must serve eight years, which is later than six years, before becoming judicial-release eligible. But, because Clinkscale has not yet served eight years of his sentence, his request for judicial release in October 2022, and release thereafter, was premature.

**II. Although the Court should not decide this issue, equal-protection principles do not require applying jail-time credit to Clinkscale’s judicial-release waiting period.**

The State’s reading of R.C. 2929.20(C)(1)(d) does not violate Clinkscale’s equal-protection rights. Before explaining why, this brief pauses for a coda: this Court need not, and should not, reach Clinkscale’s equal-protection arguments because the court below did not pass on it, the State did not raise it as a proposition of law, and even Clinkscale urges this Court not to reach it. *See generally* State Jur. Mem.; *accord* Mem. Opp. at 10 n.1; *see also* *State ex rel. Walgate v. Kasich*, 147 Ohio St. 3d 1, 2016-Ohio-1176, ¶17 (lead op.); *Meyer v. United Parcel Serv., Inc.*, 122 Ohio St. 3d 104, 2009-Ohio-2463, ¶8 n.3.

If this Court chooses to do so, however, the equal-protection arguments that Clinkscale advanced in the court below all fail. First, he argued that his inability to have full use of his jail-time credit is an equal-protection violation under *Moore*. Appellee’s App. Br.13–15. To understand why he would be denied “full use” of his jail-time credit, recall the timeline. If R.C. 2929.20(C)(1)(d) does not allow jail-time credit to be applied toward Clinkscale’s five-year waiting period, Clinkscale would be eligible for judicial

release eight years after his sentence began. And, with jail-time credit of 762 days, he would be eligible for release for earned jail-time credit about four years after that—almost twelve years after starting his sentence. Because Clinkscale could be judicially released before his release date on jail-time credit, the argument goes that he would not obtain the benefit of his jail-time credit.

But this Court’s decision in *Moore* conclusively forecloses that argument. *Moore*, 2018-Ohio-3237, ¶¶27–31. In that case, Moore’s judicial-release eligibility date came before his jail-credit-release date, so Moore made the same argument: that he could not “reap the entire benefit of his jail-time credit” if he is judicially released at an earlier date and if his jail-time credit was not applied toward the date of his judicial-release eligibility. *Id.* at ¶27. He thus argued that jail-time credit should be applied toward shortening the wait time to seek judicial release or else his equal-protection rights would be violated.

This Court held that none of that mattered. *Id.* at ¶29. Prisoners are not constitutionally entitled to full use of their jail-time credit when judicial release offers the same relief that they “want[] from jail-time credit—not being in prison.” *Id.* Put another way, obtaining the same relief through one mechanism—judicial release—rather than the other—jail-time credit—does not unconstitutionally deprive defendants of their jail-time credit. *Id.* Indeed, if sent back to prison after being judicially released, defendants retain use of jail-time credit because they can be released early from prison on the credit owed



to them. *See id.* Because full use of jail-time credit is not required under equal-protection guarantees, Clinkscale's argument fails under *Moore*.

Clinkscale alternatively argued that his inability to spend jail-time credit in the manner he chooses violates his equal-protection rights because he could be judicially released at the same time as a defendant with the same sentence but no jail-time credit. Appellee's App. Br.14–15. But that is just another consequence of the just-discussed holding in *Moore*: that prisoners do not have a constitutional right to full use of jail-time credit when they obtain the same relief through different means. Although *Moore* did not squarely confront this argument, the scenario presented here is the same as in *Moore* and so the same conclusion applies: that a prisoner does not suffer an equal-protection violation from the possibility that he might not have full use of jail-time credit even if it means he ends up released at the same time as a prisoner without any jail-time credit. Indeed, anytime a prisoner has anything less than full use of his jail-time credit—for example, by becoming judicial-release eligible before becoming eligible for release for earned jail-time credit—he ends up in the same position as a prisoner with the same sentence, and thus the same judicial-release-eligibility date, who does not have earned jail-time credit. Thus *Moore*, like Clinkscale, was in the same position as any other defendant with the same sentence but with no jail-time credit at all. And this Court has already determined that *Moore*'s circumstance did not raise an equal-protection

violation. To determine otherwise now, this Court would have to overturn *Moore*. There is no compelling reason to do so.

### **III. The court below erred in affirming the timing of Clinkscale's judicial release.**

The court below erred by affirming Clinkscale's untimely judicial release for several reasons.

For one thing, the court erroneously inverted the standard by which courts must interpret judicial-release statutes. Recall that prisoners have no constitutional or inherent right to judicial release. *See Moore*, 2018-Ohio-3237, ¶29; *Ware*, 141 Ohio St. 3d 160, ¶12. Instead, judicial release is a privilege bestowed upon prisoners by the General Assembly. *Moore*, 2018-Ohio-3237, ¶29; *Ware*, 141 Ohio St. 3d 160, ¶12. As such, "[c]ourts have no inherent power to suspend execution of sentence, and they must strictly construe statutes allowing such relief." *Ware*, 2014-Ohio-5201, ¶12 (citation omitted). That means, when a judicial-release provision is "clear and unambiguous," it must be applied "as written" without "inserting or deleting words." *Ireland*, 2018-Ohio-4494, ¶30.

The lower court reversed this presumption. As discussed already, R.C. 2929.20(C)(1)(d) clearly and unambiguously requires prisoners to wait "five years after expiration" of the mandatory terms with no mention of reduction through jail-time credit. *See above* at 11–17. Rather than apply that inflexible waiting period strictly, the court instead concluded that jail-time credit could be applied to the waiting period because there was "no specific statutory provision *excluding*" the application of jail-time credit

toward the waiting period. App.Op.¶¶14, 13–15(emphasis added). Construing an otherwise clear statute by what the General Assembly *did not say* flips the presumption of strict construction on its head. The lower court erred by inverting this standard.

*Second*, reading an otherwise clear statute by what the General Assembly *did not say* reveals yet another problem: the lower court had an obligation to apply the statute as written without adding or deleting words. *See Ireland*, 2018-Ohio-4494, ¶30. Reading in jail-time credit where it does not exist into an otherwise fixed waiting time to seek judicial release rewrites the second clause of R.C. 2929.20(C)(1)(d) by adding the following italicized words into the statute: “not earlier than five years, *less any time earned by the offender while awaiting conviction and sentencing under R.C. 2967.191*, after the expiration of all prison terms.” In other words, “the statute says what it says,” *Cyan, Inc. v. Beaver Cty. Emps. Retirement Fund*, 583 U.S. 416, 426 (2018), that prisoners serving mandatory terms must wait “five years after the expiration of all prison terms” to seek judicial release, R.C. 2929.20(C)(1)(d). “[O]r perhaps better put here, does not say what it does not say,” *Cyan, Inc.*, 583 U.S. at 426—that the five-year waiting period can be shortened by “*any time earned by the offender while awaiting conviction and sentencing under R.C. 2967.191.*”

The court’s interpretive errors do not stop there. The lower court justified applying jail-time credit to Clinkscale’s five-year waiting period on the basis that his “stated prison term” includes “any credit received by the offender for time spent in jail

awaiting trial, sentencing, or transfer to prison for the offense.” App.Op.¶14 (citing R.C. 2929.01(FF)). So, the argument goes that his waiting period to seek judicial release is correspondingly reduced by jail-time credit.

That may be right if Clinkscale’s judicial-release waiting period were tied to his stated prison term. But, because his sentence includes mandatory terms, it is not. Recall that R.C. 2929.20(C)(1)(d) creates two categories of sentences—those with mandatory terms, and those without. *See above* at 12–13. The first clause of that provision governs sentences composed only of nonmandatory terms. *Id.* The waiting period for judicial release for that category connects to the prisoner’s stated prison term and so, as the lower court reasoned, could be shortened by jail-time credit. Not so for the second category of sentences—sentences with one or more mandatory terms—that tie the waiting period to a fixed “five years,” with no other qualification, “after” the end of the last mandatory term. *Id.* at 13. Because Clinkscale’s sentence undisputedly falls into this second category, the court’s reasoning with respect to “stated prison terms” has no place in defining his waiting period to seek judicial release.

## CONCLUSION

For the foregoing reasons, the Court should reverse the Tenth District's decision.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Dave Yost in Support of Appellant State of Ohio was served this 9th day of May, 2024, by e-mail on the following:

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