SLIP OPINION NO. 2023-OHIO-2535

THE STATE OF OHIO, APPELLEE, *v.* HACKER, APPELLANT.

THE STATE OF OHIO, APPELLEE, *v.* SIMMONS, APPELLANT.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *State v. Hacker*, Slip Opinion No. 2023-Ohio-2535.]

Criminal law—Sentencing—R.C. 2967.271—Due Process Clause of the Fourteenth Amendment—Sixth Amendment right to a jury trial—Separation-of-powers doctrine—The Reagan Tokes Law is not void for vagueness, and it is not facially unconstitutional, because (1) it provides that offenders receive a hearing before the Department of Rehabilitation and Correction ("DRC") may extend their prison sentence beyond the minimum but within the maximum term imposed by the trial court, (2) the right to a jury trial is not implicated since no determination by the DRC at the hearing changes the sentence range prescribed by the legislature and imposed by the trial court, and (3) the authority it gives the DRC to extend an offender's prison sentence beyond the minimum but within the maximum range imposed by the trial court does not exceed the power given to the

executive branch of the government and does not interfere with the trial court's discretion when sentencing the offender.

(Nos. 2020-1496 and 2021-0532—Submitted January 11, 2023—Decided July 26, 2023.)

APPEALS from the Court of Appeals for Logan County, No. 8-20-01, 2020-Ohio-5048, and the Court of Appeals for Cuyahoga County, No. 109476, 2021-Ohio-939.

DETERS, J.

{¶ 1} The "Reagan Tokes Law," which became effective in March 2019, requires that for certain first- and second-degree felony offenses, a sentencing court impose on the offender an indefinite sentence consisting of a minimum and a maximum prison term. There is a presumption that the offender will be released from incarceration after serving the minimum prison term. But if that presumption is rebutted, the Ohio Department of Rehabilitation and Correction ("DRC") may maintain the offender's incarceration up to the maximum prison term set by the trial court. In these appeals, which we have consolidated for decision, appellants, Christopher P. Hacker (case No. 2020-1496) and Danan Simmons Jr. (case No. 2021-0532), maintain that indefinite sentencing under the Reagan Tokes Law is unconstitutional because it violates the separation-of-powers doctrine, the offender's right to a jury trial, and procedural due process. We disagree and therefore affirm the judgments of the Third and Eighth District Courts of Appeals.

I. The Underlying Cases

A. State v. Hacker

{¶ 2} In December 2019, Hacker pled guilty to one count of aggravated robbery with a one-year firearm specification. Because aggravated robbery is a first-degree felony offense, Hacker was subject to sentencing under the Reagan Tokes Law. *See* 2018 Am.Sub.S.B. No. 201, effective Mar. 22, 2019. Prior to

sentencing, Hacker filed an objection to the imposition of an indefinite sentence and attached as support the decision of the Hamilton County Court of Common Pleas in *State v. O'Neal*, Hamilton C.P. No. B-1903562, 2019 WL 7670061 (Nov. 20, 2019). In *O'Neal*, the common pleas court declared the Reagan Tokes Law to be unconstitutional on the grounds that it violated the separation-of-powers doctrine and procedural due process. The First District Court of Appeals subsequently reversed the trial court's judgment. *State v. O'Neal*, 1st Dist. Hamilton No. C-190736, 2022-Ohio-3017.[1]

{¶ 3} The trial court overruled Hacker's objection and sentenced him to prison for a minimum term of six years and a maximum term of nine years for the felony offense. The court also sentenced him to a mandatory one-year prison term for the firearm specification, to be served prior to the indefinite sentence. The court imposed a $10,000 fine and ordered Hacker to pay court costs.

{¶ 4} Hacker appealed to the Third District, which affirmed the trial court's decision on separation-of-powers and due-process grounds. 2020-Ohio-5048, 161 N.E.3d 112, ¶ 18, 23. The court of appeals declined to consider Hacker's contention that the Reagan Tokes Law violated his right to a jury trial, finding that he had waived that argument by not raising it in the trial court. *Id*. at ¶ 17.

B. State v. Simmons

{¶ 5} In December 2019, Simmons pled guilty to one count of having weapons while under a disability, one count of drug trafficking with a one-year firearm specification, and one count of drug possession. Because the drug-trafficking offense to which he pled guilty is a second-degree felony offense, Simmons was subject to sentencing under the Reagan Tokes Law. At the sentencing hearing, however, the trial court noted that it had previously held the Reagan Tokes Law to be unconstitutional on the grounds cited by the Hamilton

1. This court has accepted the defendant's appeal in *O'Neal*, and the case is being held pending this court's decision in these cases. 168 Ohio St.3d 1418, 2022-Ohio-3752, 196 N.E.3d 854.

County Court of Common Pleas in *O'Neal*, Hamilton C.P. No. B-1903562, 2019 WL 7670061. The court therefore imposed a definite sentence of four years for Simmons's drug-trafficking offense.

{¶ 6} The state appealed to the Eighth District. That court concluded that the Reagan Tokes Law is constitutional, reversed the lower court's sentencing judgment, and remanded the case for resentencing. 2021-Ohio-939, 169 N.E.3d 728, ¶ 23.

II. The Reagan Tokes Law

{¶ 7} The Reagan Tokes Law provides for indefinite sentencing for offenders convicted of first- or second-degree felonies for which life imprisonment is not an available sentence ("eligible felonies"). R.C. 2929.14(A)(1)(a) and (2)(a). When sentencing an offender for an eligible felony, the trial court must choose a "minimum term" from a range of possible minimum prison terms. *Id.* For an eligible first-degree felony offense, the range for the minimum prison term is 3 to 11 years; for an eligible second-degree felony offense, the range is 2 to 8 years. *Id.* The minimum prison term chosen by the trial court dictates the maximum prison term, which must be one and a half times the minimum term. *Id.*; R.C. 2929.144(B)(1). For example, if the court imposes a minimum prison term of four years, the maximum prison term will be six years.

{¶ 8} R.C. 2967.271(B) lays out how the minimum and maximum prison terms affect the amount of time an offender sentenced under the Reagan Tokes Law will be incarcerated: "When an offender is sentenced to a non-life felony indefinite prison term, there shall be a presumption that the person shall be released from service of the sentence on the expiration of the offender's minimum prison term or on the offender's presumptive earned early release date, whichever is earlier" (the "presumption of release"). The "presumptive earned early release date" is the date resulting from a reduction, if any, of the offender's minimum prison term, R.C.

2967.271(A)(2), on the recommendation of the director of the DRC for "exceptional conduct" or "adjustment to incarceration," R.C. 2967.271(F)(1).

{¶ 9} The presumption of release may be rebutted by the DRC

> only if the department determines, at a hearing, that one or more of the following applies:
>
> (1) Regardless of the security level in which the offender is classified at the time of the hearing, both of the following apply:
>
> (a) During the offender's incarceration, the offender committed institutional rule infractions that involved compromising the security of a state correctional institution, compromising the safety of the staff of a state correctional institution or its inmates, or physical harm or the threat of physical harm to the staff of a state correctional institution or its inmates, or committed a violation of law that was not prosecuted, and the infractions or violations demonstrate that the offender has not been rehabilitated.
>
> (b) The offender's behavior while incarcerated, including, but not limited to the infractions and violations specified in division (C)(1)(a) of this section, demonstrate that the offender continues to pose a threat to society.
>
> (2) Regardless of the security level in which the offender is classified at the time of the hearing, the offender has been placed by the department in extended restrictive housing at any time within the year preceding the date of the hearing.
>
> (3) At the time of the hearing, the offender is classified by the department as a security level three, four, or five, or at a higher security level.

R.C. 2967.271(C).

{¶ 10} If the presumption of release is rebutted, the DRC may maintain the offender's incarceration beyond the minimum prison term or, if applicable, the presumptive earned-early-release date for a "reasonable period * * * specified by the department" not to exceed the maximum prison term established under R.C. 2929.144. R.C. 2967.271(D).

III. Legal Analysis

{¶ 11} Legislation is entitled to a strong presumption of constitutionality. *Ohio Pub. Interest Action Group, Inc. v. Pub. Util. Comm.*, 43 Ohio St.2d 175, 331 N.E.2d 730 (1975), paragraph four of the syllabus. Because Hacker and Simmons raise facial challenges to the Reagan Tokes Law, the presumption of constitutionality may be overcome only if the law is unconstitutional in *all* instances. *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 37, citing *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). The distinction between a facial challenge and an as-applied challenge is important, because a party bringing the latter need show only that the legislation is unconstitutional as applied to a specific set of facts. *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 55 N.E.2d 629 (1944), paragraph six of the syllabus. Conversely, in a facial challenge, if the law can be applied constitutionally in at least one instance, the challenge fails. *Salerno* at 745.

{¶ 12} Despite seeking to have the entire Reagan Tokes Law declared unconstitutional, Hacker and Simmons do not suggest that R.C. 2929.14 and 2929.144, which establish a trial court's power to impose indefinite sentences on offenders convicted of eligible felonies, violate any constitutional standard. Instead, they argue that R.C. 2967.271, which allows the DRC to maintain an offender's incarceration beyond the minimum prison term imposed by a trial court, violates the separation-of-powers doctrine, procedural due process, and the right to a jury trial. We consider each constitutional challenge in turn.

A. Separation of Powers

{¶ 13} Hacker and Simmons each maintain that the Reagan Tokes Law violates the separation-of-powers doctrine because the DRC—part of the executive branch—has been given the authority to maintain an offender's incarceration beyond the minimum prison term imposed by a trial court. Hacker and Simmons reason that the power given to the DRC infringes on the authority of the judicial branch. We disagree. While the Reagan Tokes Law certainly demonstrates the interplay among the three branches of government, the authority given to the DRC—which is to be exercised within the bounds of the sentence imposed by the trial court—does not infringe on the power of the courts.

{¶ 14} The separation-of-powers doctrine is "implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *S. Euclid v. Jemison*, 28 Ohio St.3d 3d 157, 159, 503 N.E.2d 136 (1986). The doctrine "requires that each branch of a government be permitted to exercise its constitutional duties without interference from the other two branches of government." *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 56; *see also State ex rel. Johnston v. Taulbee*, 66 Ohio St.2d 417, 423 N.E.2d 80 (1981), paragraph one of the syllabus ("The 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").

{¶ 15} "What are legislative powers, or what executive or judicial powers [are], is not defined or expressed in the constitution, except in general terms. The boundary line between them is undefined, and often difficult to determine." *State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 647, 4 N.E. 81 (1885). But the boundaries of each branch's power have been described in cases throughout the years. Relevant here is the principle that the legislative branch "define[s] crimes," "fixes the penalty," and "provide[s] such discipline and regulations for prisoners,

not in conflict with the fundamental law, as the legislature deems best." *Id.* Thus, with the Reagan Tokes Law, the General Assembly established indefinite sentencing for offenders convicted of eligible felonies and a scheme for offender discipline by the DRC. The judicial branch determines whether a person is guilty of an offense and, after a finding of guilt, imposes a prison sentence within the bounds established by the legislature. *Id.* at 647-648; *see also State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 136, 729 N.E.2d 359 (2000). And "[p]rison discipline is an exercise of executive power." *Id.* The question is whether the discipline exercised by the DRC under the Reagan Tokes Law interferes with the judiciary's authority to determine guilt and impose a sentence.

{¶ 16} Once the trial court imposes minimum and maximum prison terms under R.C. 2929.14(A)(1)(a) or (2)(a), the sentence for the offender has been set. "[D]efendants who have been sentenced under the Reagan Tokes Law have received the entirety of their sentences and the sentences have been journalized." *State v. Maddox*, 168 Ohio St.3d 292, 2022-Ohio-764, 198 N.E.3d 797, ¶ 16. If the DRC determines that the presumption of release has been rebutted, it may maintain the offender's incarceration—but only within the bounds set by the trial court. It does not impede the court's exercise of its judicial powers.

{¶ 17} Hacker and Simmons ground their separation-of-powers arguments in this court's decision in *Bray*. In that case, the court considered petitions for writs of habeas corpus filed by three offenders whose stated prison terms had been extended by the addition of "bad time" under former R.C. 2967.11. *Bray* at 133. The statute at issue provided: "As part of a prisoner's sentence, the parole board may punish a violation committed by the prisoner by extending the prisoner's stated prison term for a period of fifteen, thirty, sixty, or ninety days in accordance with this section." Former R.C. 2967.11(B), 146 Ohio Laws, Part VI, 10752, 11007. A "violation" was defined as "an act that is a criminal offense under the law of this state or the United States, whether or not a person is prosecuted for the commission

of the offense." Former R.C. 2967.11(A), 146 Ohio Laws, Part VI, at 11007. The court in *Bray* concluded that the "bad time" provision unconstitutionally allowed the executive branch to "try[], convict[], and sentenc[e] inmates for crimes committed while in prison." *Id.* at 136.

{¶ 18} Hacker and Simmons argue that R.C. 2967.271 suffers from the same problems as the former bad-time law because it allows the DRC to try and convict prisoners for various infractions—including crimes—committed while incarcerated, *see* R.C. 2967.271(C), and to sentence them to a prison term that extends beyond their presumptive release dates.

{¶ 19} But their arguments fail to account for this court's discussion of *Bray*, 89 Ohio St.3d 132, 729 N.E.2d 359, in a case released less than two months after *Bray* was decided. In *Woods v. Telb*, 89 Ohio St.3d 504, 733 N.E.2d 1103 (2000), *superseded by statute on other grounds as stated in State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, the state appealed the Sixth District Court of Appeals' judgment granting a writ of habeas corpus to a prisoner who had been sentenced to 30 days in a county jail for violating the conditions of his postrelease control. The court of appeals had concluded that R.C. 2967.28—the postrelease-control statute—violated the separation-of-powers doctrine and the Due Process Clauses of the state and federal Constitutions. *Woods* at 507.

{¶ 20} Under former R.C. 2967.28(B), 146 Ohio Laws, Part IV, 7136, 7597, in effect in 2000, offenders convicted of first- and second-degree felony offenses, third-degree felony offenses in which physical harm was caused or threatened, or felony sex offenses, were subject to mandatory postrelease control. Offenders convicted of other felony offenses were subject to postrelease control at the Ohio Parole Board's discretion. Former R.C. 2967.28(C), 146 Ohio Laws, Part IV, at 7597-7598. And besides determining whether and how long an offender would be subject to postrelease control, the parole board had the authority to sanction offenders for violating the conditions of their postrelease control. The possible

sanctions included a prison term not to "exceed nine months." Former R.C. 2967.28(F)(3), 146 Ohio Laws, Part IV, at 7601. The statute further provided that "the maximum cumulative prison term for all violations * * * shall not exceed one-half of the stated prison term originally imposed upon the offender as part of this sentence." *Id.*

{¶ 21} The Sixth District concluded that R.C. 2967.28 violated the separation-of-powers doctrine because the powers given to the Adult Parole Authority ("APA")—an executive-branch agency—"usurped judicial authority." *Woods* at 511. This court reversed, reasoning that the conditions of postrelease control—which include the period of control to which an offender would be subjected and the violations of which could lead to "essentially, 'time and a half' "—were part of the sentence imposed by the trial court. *Id.*

{¶ 22} In arriving at this conclusion, this court distinguished *Bray*:

> While we acknowledged [in *Bray*] that prison discipline is a proper exercise of executive power, we concluded that trying, convicting, and sentencing inmates for crimes committed while in prison is *not* an appropriate exercise of executive power. The commission of the 'crime' actually resulted in an additional sentence being imposed by an administrator. If an offense was serious enough to constitute an additional crime, and the prison authorities did not feel that administrative sanctions were sufficient (i.e., isolation, loss of privileges), the prison authorities should bring additional charges in a court of law, as they did before SB 2. Accordingly, we held that R.C. 2967.11 violated the doctrine of separation of powers and is therefore unconstitutional.

(Citation omitted.) *Woods*, 89 Ohio St.3d at 512, 733 N.E.2d 1103. The court further explained that "in contrast to the bad-time statute, post-release control is part of the original judicially imposed sentence" and that the power to determine the duration of postrelease control and the sanctions for an offender's violation of postrelease-control conditions was consistent with the authority that had been delegated to the APA in the past under a prior system of parole. *Id.* Moreover, the court noted that the authority of the judiciary was not impeded by the APA's performance of its disciplinary function. *Id.*

{¶ 23} The statutory scheme established in the Reagan Tokes Law is analogous to that in R.C. 2967.28. Should the DRC determine that the presumption of release is rebutted as the result of an offender's behavior during his incarceration, the additional time that the offender may have to serve is limited by the sentence that has already been imposed by the trial court. R.C. 2967.271(D).

{¶ 24} Hacker's separation-of-powers argument is not limited to his challenge to the DRC's authority to hold an offender beyond his presumptive minimum prison term. He also maintains that the authority granted to the DRC director under R.C. 2967.271(F)(1) to recommend that an offender be released before he completes his minimum prison term constitutes executive-branch interference with the judiciary's power. We address this argument summarily. Hacker has no standing to challenge that provision of the Reagan Tokes Law, because he cannot demonstrate that he is aggrieved by it. *See State v. Grevious*, __ Ohio St.3d __, 2022-Ohio-4361, __ N.E.3d__, ¶ 14 ("To have standing to challenge the constitutionality of a statute, a party must have a direct interest in the statute of such a nature that his or her rights will be adversely affected by its enforcement"). Indeed, Hacker and other offenders can only benefit from the DRC's recommending that they be released before they have served their minimum prison terms.

{¶ 25} We conclude that allowing the DRC to rebut the presumption of release for disciplinary reasons does not exceed the power given to the executive branch and does not interfere with the trial court's discretion when sentencing an offender. Therefore, we hold that the Reagan Tokes Law does not violate the separation-of-powers doctrine.

B. The Right to a Jury Trial

{¶ 26} Simmons protests that R.C. 2967.271 violates his right to a jury trial because the DRC is authorized to maintain his incarceration beyond the minimum prison term set by the trial court without any jury findings to support the extended incarceration.[2]

{¶ 27} In support of his argument, Simmons directs us to a line of cases from the United States Supreme Court, beginning with *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In that case, the Supreme Court held 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. Thus, the Supreme Court determined that a statute that permitted the increase of the maximum term of imprisonment from 10 to 20 years when the trial judge—not a jury—found that the defendant had committed a crime with a racial bias violated the constitutional right to a jury trial. *Id.* at 491-495. " '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.' " (Brackets added in *Apprendi*.) *Id*., quoting *Jones v. United States*, 526 U.S. 227, 252-253, 119 S.Ct. 1215, 143 L.Ed.2d 311 (Stevens, J., concurring).

2. Hacker also raised the right-to-a-jury-trial issue, but because he did not preserve the issue below, he has waived it. *See State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986), fn. 1 ("a criminal defendant may not raise constitutional errors on appeal unless such were specifically found to have been raised below").

{¶ 28} But here, the "prescribed range of penalties" is determined upon the return of a guilty verdict—or, as in the cases before us, when the offender pleads guilty to the charged offenses. Once an offender is found guilty of an eligible offense, the trial court has the discretion to sentence him to any minimum sentence within the appropriate range. R.C. 2929.14(A)(1)(a) and (2)(a). And the maximum sentence is calculated based on that minimum sentence. *Id.*; R.C. 2929.144(B)(1). Because no determination by the DRC regarding Simmons's behavior while in prison will change the range of penalties prescribed by the legislature and imposed by the trial court, the right to a jury trial is not implicated.

C. Due Process

{¶ 29} Both Hacker and Simmons contend that the Reagan Tokes Law violates offenders' due-process rights.[3] Their due-process challenges have two bases. First, they claim that the law is unconstitutionally vague. Second, they argue that the procedure provided by the law is insufficient to protect their rights. The problem with their arguments, however, is that they each raise a facial challenge. As such, they must show that in *all* circumstances, offenders are denied notice and a hearing. They have not made any such demonstration.

1. Void-for-Vagueness Doctrine

{¶ 30} The vagueness claims challenge the adequacy of the notice given by the Reagan Tokes Law as to what conduct will trigger maintenance of an offender's incarceration. "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Thus, the adequacy of notice is

3. Neither Hacker nor Simmons has mounted a separate challenge under Ohio's Due Course of Law Clause, Article I, Section 16 of the Ohio Constitution, so we confine our discussion to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

evaluated from two perspectives: whether a person subject to the law can understand what is prohibited and whether those prohibitions are clear enough to prevent arbitrary enforcement.

{¶ 31} Hacker and Simmons argue that R.C. 2967.271(C)(1)—which provides for a rebuttal of the presumption of release, in part, when the DRC determines that an offender's "infractions or violations demonstrate that the offender has not been rehabilitated," R.C. 2967.271(C)(1)(a), and when "the offender continues to pose a threat to society," R.C. 2967.271(C)(1)(b)—does not give offenders adequate notice of what circumstances may result in the DRC's maintaining their incarceration beyond the minimum prison term. To succeed in challenging the Reagan Tokes Law, Hacker and Simmons must demonstrate "that the statute [is] so unclear that [they] could not reasonably understand that it prohibited the acts in which [they] engaged," *State v. Anderson*, 57 Ohio St.3d 168, 171, 566 N.E.2d 1224 (1991).

{¶ 32} The phrases in the law highlighted by Hacker and Simmons must not be read in isolation. The infractions or violations that may "demonstrate that the offender has not been rehabilitated" are those "that involved compromising the security of a state correctional institution, compromising the safety of the staff of a state correctional institution or its inmates, or physical harm or the threat of physical harm to the staff of a state correctional institution or its inmates, or * * * a violation of law that was not prosecuted." R.C. 2967.271(C)(1)(a). This statutory provision puts offenders on notice about which acts are prohibited and may result in the rebuttal of the presumption of their release.

{¶ 33} Simmons further protests that the DRC is given "unfettered discretion" to determine whether certain infractions warrant maintaining an offender's incarceration. Similarly, Hacker quotes the Hamilton County Common Pleas Court's decision in *O'Neal* in support of his argument that the law " 'fails to provide a guideline as to how each consideration shall be weighed,' " *id.*, Hamilton

C.P. No. B-1903562, 2019 WL 7670061, at *7. But the DRC is authorized to make similar determinations in other contexts. *See, e.g.*, Ohio Adm.Code 5120-9-50(B) (giving a warden discretion to determine whether to allow an escorted visit to a dying relative or a private viewing to an offender "who [is] not likely to pose a threat to public safety"); Ohio Adm.Code 5120-9-15(C)(1) (allowing a correctional institution to deny an application for visitation by a member of an inmate's immediate family if "[t]he applicant's presence in the institution could reasonably pose a threat to the institution's security"). Allowing the DRC some discretion does not, on its own, make the Reagan Tokes Law unconstitutionally vague.

{¶ 34} Both Hacker and Simmons provide hypothetical situations in which an offender's incarceration may be maintained beyond the minimum prison term for committing a minor infraction. But while such situations—if they do occur—may show that the Reagan Tokes Law is vague as applied, they do not satisfy the requirement in a facial challenge that the law be unconstitutional in all circumstances.

2. Procedural Due Process

{¶ 35} In their procedural-due-process claims, Hacker and Simmons protest that the Reagan Tokes Law provides insufficient procedure to protect offenders' rights. "Due process under the Ohio and United States Constitutions demands that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner where the state seeks to infringe a protected liberty or property interest." *State v. Hochhausler*, 76 Ohio St.3d 455, 459, 668 N.E.2d 457 (1996).

{¶ 36} As an initial matter, the state argues that offenders do not have a liberty interest in not being held beyond the minimum prison term imposed by a trial court. To be sure, this court has held that when the APA is vested with discretion whether to grant parole to an offender, the offender has "no expectancy of parole or a constitutional liberty interest sufficient to establish a right of

procedural due process." *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128 (1994). But here, the DRC's discretion to maintain an offender's incarceration beyond the minimum prison term imposed by the trial court is curtailed by R.C. 2967.271(B), which creates a presumption that an offender will be released at the completion of his minimum sentence. The presumption can be rebutted based on the offender's behavior while incarcerated. R.C. 2967.271(C). The presumption of release creates an interest that entitles offenders to due-process protection. *See Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) ("the State having created the [statutory] right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause").

{¶ 37} Because a liberty interest is at stake in these cases, due process requires a hearing before offenders are deprived of that interest. R.C. 2967.271(C) provides for a hearing: "The [DRC] may rebut the presumption [of release] only if the department determines, *at a hearing*, that one or more [statutorily identified circumstances] applies * * *." (Emphasis added.) Nevertheless, Hacker and Simmons maintain that the hearing provided for in R.C. 2967.271(C) is inadequate. They point to what they claim are shortcomings in the DRC's Policy No. 105-PBD-15, which sets forth the DRC's standard procedure for conducting hearings as required by the statute. *See Additional Term Hearing 105-PBD-15* (Mar. 1, 2023) available at https://drc.ohio.gov/about/resource/policies-and-procedures/105-pbd-parole-board/additional-term-hiring (accessed July 19, 2023) [https://perma.cc/SF9T-4GWJ], *superseding Additional Term Hearing 105-PBD-15* (Mar. 15, 2021), available at https://drc.ohio.gov/about/resource/policies-and-

procedures/parole-board/additional-term-hiring (accessed Mar. 30, 2023) [https://perma.cc/QA6B-DGNU].

{¶ 38} But recall that Hacker and Simmons each present a facial challenge to the Reagan Tokes Law. Their challenges are to the law itself, not to the policies used by the DRC in furtherance of the law. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Salerno*, 481 U.S. at 745, 107 S.Ct. 2095, 95 L.Ed.2d 697. The fact that the law "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Id*.

{¶ 39} For that reason, "[w]hen 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, 970 N.E.2d 898, ¶ 21, citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). It bears repeating that the Reagan Tokes Law provides the offender with a hearing before his incarceration is maintained. So, it does not, by its terms, deprive an offender of "notice and an opportunity to be heard * * * at a meaningful time and in a meaningful manner," *Hochhausler*, 76 Ohio St.3d 455 at 459, 668 N.E.2d 457. Considering the DRC's nonstatutorily mandated practices for conducting hearings would require this court to "exceed the statute's actual language" and engage in "speculat[ion] about hypothetical or imaginary cases," *Wymsylo* at ¶ 21. And that is beyond the scope of a facial challenge. *See id.* Constitutional challenges to the application of the DRC's policies made under R.C. 2967.271(C) would be subject to review as as-applied challenges, should the facts of a specific case so warrant.

{¶ 40} The Reagan Tokes Law is not void for vagueness. And we also hold that it is not facially unconstitutional, because it provides that offenders receive a hearing before they may be deprived of their liberty interest.

IV. Conclusion

{¶ 41} The Reagan Tokes Law carries a presumption of constitutionality, and to rebut that presumption in a facial challenge, Hacker and Simmons were required to demonstrate that "no set of circumstances exists under which the [law] would be valid," *Salerno*, 481 U.S. at 745, 107 S.Ct. 2095, 95 L.Ed.2d 697. They have not done so. We therefore affirm the judgments of the Third and Eighth District Courts of Appeals that the Reagan Tokes Law is constitutional.

Judgments affirmed.

KENNEDY, C.J., and FISCHER, DEWINE, and STEWART, JJ., concur.

BRUNNER, J., dissents, with an opinion joined by DONNELLY, J.

BRUNNER, J., dissenting.

I. INTRODUCTION

{¶ 42} In both of these cases, we were asked to consider the facial constitutionality of the Reagan Tokes Law ("RTL"). I agree with several of the majority's determinations in its analysis. Because the RTL is, in my view, akin to Ohio's former indefinite-sentencing scheme, I agree that the law does not violate the separation-of-powers doctrine. I also agree that appellants, Christopher P. Hacker and Danan Simmons Jr., lack standing to challenge the Adult Parole Authority's ("APA") exercise of its discretion to recommend a person's release from prison before the presumptive minimum sentence has been served, because they are not aggrieved by that provision of the RTL. I share the majority's view that the RTL does not violate the right to a jury trial, because nothing about the law permits a fact-finder other than a jury to find facts that increase the range of sentencing exposure of the defendant. With respect to the majority's overall due-

process analysis, I agree that appellants do have a protectable interest in their freedom after their presumptive minimum sentence has expired, and thus, I disagree with the contrary argument of appellee, the state of Ohio. Similarly, I agree with the majority that a facial constitutional analysis involves a review of the law that is challenged, not the policies that may be adopted to enforce the law.

{¶ 43} But I part ways with the majority in that I do not agree with its conclusions about procedural due process. The procedures created by the RTL are insufficient in light of the gravity of the decision being made—whether to release a person from prison on his or her presumptive release date. This imbalance facially violates offenders' right to due process and is unconstitutional. And because the unconstitutional portions of the RTL cannot be severed from the law without thwarting the intent of the legislature, I would invalidate as unconstitutional the entire RTL.

II. ANALYSIS

A. Standard of Review on Facial Challenges

{¶ 44} We have previously stated that "a facial constitutional challenge requires proof beyond a reasonable doubt." *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶ 20, citing *State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, ¶ 21. But the beyond-a-reasonable-doubt standard "is an evidentiary standard that is poorly suited to the legal question whether a legislative enactment comports with the Constitution." *State v. Grevious*, __ Ohio St.3d __, 2022-Ohio-4361, __ N.E.3d __, ¶ 48 (DeWine, J., concurring in judgment only). And "while the beyond-reasonable-doubt standard is something that we have rotely pasted into constitutional opinions, there is no indication that we actually use it." *Id.* at ¶ 63 (DeWine, J., concurring in judgment only). I would steer parties—and courts—away from reciting the inaccurate beyond-a-reasonable-doubt standard

when discussing constitutional challenges such as the RTL challenge and would instead adhere to the standard that reflects the reality of our review:

> The question of the constitutionality of every law being first determined by the General Assembly, every presumption is in favor of its constitutionality, and it must clearly appear that the law is in direct conflict with inhibitions of the Constitution before a court will declare it unconstitutional.

Ohio Pub. Interest Action Group, Inc. v. Pub. Util. Comm., 43 Ohio St.2d 175, 331 N.E.2d 730 (1975), paragraph four of the syllabus.

{¶ 45} Regardless of whether the phrase "beyond a reasonable doubt" is invoked,

> [f]acial challenges to the constitutionality of a statute are the most difficult to mount successfully, since the challenger must establish that no set of circumstances exists under which the act would be valid. *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). If a statute is unconstitutional on its face, the statute may not be enforced under any circumstances. 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. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). Reference to extrinsic facts is not required to resolve a facial challenge. *Reading* [*v. Pub. Util. Comm.*, 109 Ohio St.3d 193, 2006-Ohio-2181, 846 N.E.2d 840,] ¶ 15.

Wymsylo at ¶ 21. As always, " '[i]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.' " *State v. Turner*, 163 Ohio St.3d 421, 2020-Ohio-6773, 170 N.E.3d 842, ¶ 18, quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 100 L.Ed.2d 313 (1988). Questions of statutory interpretation are reviewed de novo. *State v. Pountney*, 152 Ohio St.3d 474, 2018-Ohio-22, 97 N.E.3d 478, ¶ 20.

B. The Reagan Tokes Law

{¶ 46} The General Assembly enacted 2018 Am.Sub.S.B. No. 201 ("S.B. 201") to

> provide for indefinite prison terms for first or second degree felonies, with presumptive release of offenders sentenced to such a term at the end of the minimum term; to generally allow the Department of Rehabilitation and Correction with approval of the sentencing court to reduce the minimum term for exceptional conduct or adjustment to incarceration; to allow the Department to rebut the release presumption and keep the offender in prison up to the maximum term if it makes specified findings; to require the Adult Parole Authority to study the feasibility of certain GPS monitoring functions; to prioritize funding for residential service contracts that reduce homeless offenders; to name those provisions of the act the Reagan Tokes Law; [and other purposes of no consequence to this case].

To support these goals, S.B. 201 amended numerous provisions of the Revised Code in minor ways and made three major changes to the Revised Code that are relevant to the cases before us.

{¶ 47} S.B. 201 inserted language into R.C. 2929.14 requiring courts sentencing offenders convicted of first- or second-degree felonies to impose an indefinite prison sentence consisting of a minimum and a maximum term. R.C. 2929.14(A)(1)(a), (A)(2)(a). Specifically, for first-degree felonies, R.C. 2929.14(A)(1)(a) now provides:

> For a felony of the first degree committed on or after March 22, 2019, the prison term shall be an indefinite prison term with a stated minimum term selected by the court of three, four, five, six, seven, eight, nine, ten, or eleven years and a maximum term that is determined pursuant to section 2929.144 of the Revised Code, except that if the section that criminalizes the conduct constituting the felony specifies a different minimum term or penalty for the offense, the specific language of that section shall control in determining the minimum term or otherwise sentencing the offender but the minimum term or sentence imposed under that specific language shall be considered for purposes of the Revised Code as if it had been imposed under this division.

As for second-degree felonies, the provision is identical except as to penalties:

> For a felony of the second degree committed on or after March 22, 2019, the prison term shall be an indefinite prison term with a stated minimum term selected by the court of two, three, four, five, six, seven, or eight years and a maximum term that is determined pursuant to section 2929.144 of the Revised Code * * *.

R.C. 2929.14(A)(2)(a).

{¶ 48} The RTL also placed a new section, R.C. 2929.144, into Ohio's criminal-sentencing scheme. Under that section, the maximum sentence would be derived from the sentence for the crime by enhancing it by an additional 50 percent of the longest single sentence for the first- or second-degree felony imposed. R.C. 2929.144 provides:

> (A) As used in this section, "qualifying felony of the first or second degree" means a felony of the first or second degree committed on or after [March 22, 2019].
>
> (B) The court imposing a prison term on an offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree shall determine the maximum prison term that is part of the sentence in accordance with the following:
>
> (1) If the offender is being sentenced for one felony and the felony is a qualifying felony of the first or second degree, the maximum prison term shall be equal to the minimum term imposed on the offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code plus fifty per cent of that term.
>
> (2) If the offender is being sentenced for more than one felony, if one or more of the felonies is a qualifying felony of the first or second degree, and if the court orders that some or all of the prison terms imposed are to be served consecutively, the court shall add all of the minimum terms imposed on the offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree that are to be served consecutively and all of the definite terms of the felonies that are not qualifying felonies of the first or second degree that are to be

served consecutively, and the maximum term shall be equal to the total of those terms so added by the court plus fifty per cent of the longest minimum term or definite term for the most serious felony being sentenced.

(3) If the offender is being sentenced for more than one felony, if one or more of the felonies is a qualifying felony of the first or second degree, and if the court orders that all of the prison terms imposed are to run concurrently, the maximum term shall be equal to the longest of the minimum terms imposed on the offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree for which the sentence is being imposed plus fifty per cent of the longest minimum term for the most serious qualifying felony being sentenced.

(4) Any mandatory prison term, or portion of a mandatory prison term, that is imposed or to be imposed on the offender under division (B), (G), or (H) of section 2929.14 of the Revised Code or under any other provision of the Revised Code, with respect to a conviction of or plea of guilty to a specification, and that is in addition to the sentence imposed for the underlying offense is separate from the sentence being imposed for the qualifying first or second degree felony committed on or after the effective date of this section and shall not be considered or included in determining a maximum prison term for the offender under divisions (B)(1) to (3) of this section.

(C) The court imposing a prison term on an offender pursuant to division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree

> shall sentence the offender, as part of the sentence, to the maximum prison term determined under division (B) of this section. The court shall impose this maximum term at sentencing as part of the sentence it imposes under section 2929.14 of the Revised Code, and shall state the minimum term it imposes under division (A)(1)(a) or (2)(a) of that section, and this maximum term, in the sentencing entry.
>
> (D) If a court imposes a prison term on an offender pursuant to division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree, section 2967.271 of the Revised Code applies with respect to the offender's service of the prison term.

{¶ 49} Finally, the RTL enacted R.C. 2967.271, which explains under what circumstances an offender may be required to serve more than the imposed minimum sentence:

> (A) As used in this section:
>
> (1) "Offender's minimum prison term" means the minimum prison term imposed on an offender under a non-life felony indefinite prison term, diminished as provided in section 2967.191 or 2967.193 of the Revised Code or in any other provision of the Revised Code, other than division (F) of this section, that provides for diminution or reduction of an offender's sentence.
>
> (2) "Offender's presumptive earned early release date" means the date that is determined under the procedures described in division (F) of this section by the reduction, if any, of an offender's

minimum prison term by the sentencing court and the crediting of that reduction toward the satisfaction of the minimum term.

(3) "Rehabilitative programs and activities" means education programs, vocational training, employment in prison industries, treatment for substance abuse, or other constructive programs developed by the department of rehabilitation and correction with specific standards for performance by prisoners.

(4) "Security level" means the security level in which an offender is classified under the inmate classification level system of the department of rehabilitation and correction that then is in effect.

(5) "Sexually oriented offense" has the same meaning as in section 2950.01 of the Revised Code.

(B) When an offender is sentenced to a non-life felony indefinite prison term, there shall be a presumption that the person shall be released from service of the sentence on the expiration of the offender's minimum prison term or on the offender's presumptive earned early release date, whichever is earlier.

(C) The presumption established under division (B) of this section is a rebuttable presumption that the department of rehabilitation and correction may rebut as provided in this division. Unless the department rebuts the presumption, the offender shall be released from service of the sentence on the expiration of the offender's minimum prison term or on the offender's presumptive earned early release date, whichever is earlier. The department may rebut the presumption only if the department determines, at a hearing, that one or more of the following applies:

(1) Regardless of the security level in which the offender is classified at the time of the hearing, both of the following apply:

(a) During the offender's incarceration, the offender committed institutional rule infractions that involved compromising the security of a state correctional institution, compromising the safety of the staff of a state correctional institution or its inmates, or physical harm or the threat of physical harm to the staff of a state correctional institution or its inmates, or committed a violation of law that was not prosecuted, and the infractions or violations demonstrate that the offender has not been rehabilitated.

(b) The offender's behavior while incarcerated, including, but not limited to the infractions and violations specified in division (C)(1)(a) of this section, demonstrate that the offender continues to pose a threat to society.

(2) Regardless of the security level in which the offender is classified at the time of the hearing, the offender has been placed by the department in extended restrictive housing at any time within the year preceding the date of the hearing.

(3) At the time of the hearing, the offender is classified by the department as a security level three, four, or five, or at a higher security level.

(D)(1) If the department of rehabilitation and correction, pursuant to division (C) of this section, rebuts the presumption established under division (B) of this section, the department may maintain the offender's incarceration in a state correctional institution under the sentence after the expiration of the offender's minimum prison term or, for offenders who have a presumptive earned early release date, after the offender's presumptive earned early release date. The department may maintain the offender's incarceration under this division for an additional period of

incarceration determined by the department. The additional period of incarceration shall be a reasonable period determined by the department, shall be specified by the department, and shall not exceed the offender's maximum prison term.

(2) If the department maintains an offender's incarceration for an additional period under division (D)(1) of this section, there shall be a presumption that the offender shall be released on the expiration of the offender's minimum prison term plus the additional period of incarceration specified by the department as provided under that division or, for offenders who have a presumptive earned early release date, on the expiration of the additional period of incarceration to be served after the offender's presumptive earned early release date that is specified by the department as provided under that division. The presumption is a rebuttable presumption that the department may rebut, but only if it conducts a hearing and makes the determinations specified in division (C) of this section, and if the department rebuts the presumption, it may maintain the offender's incarceration in a state correctional institution for an additional period determined as specified in division (D)(1) of this section. Unless the department rebuts the presumption at the hearing, the offender shall be released from service of the sentence on the expiration of the offender's minimum prison term plus the additional period of incarceration specified by the department or, for offenders who have a presumptive earned early release date, on the expiration of the additional period of incarceration to be served after the offender's presumptive earned early release date as specified by the department.

> The provisions of this division regarding the establishment of a rebuttable presumption, the department's rebuttal of the presumption, and the department's maintenance of an offender's incarceration for an additional period of incarceration apply, and may be utilized more than one time, during the remainder of the offender's incarceration. If the offender has not been released under division (C) of this section or this division prior to the expiration of the offender's maximum prison term imposed as part of the offender's non-life felony indefinite prison term, the offender shall be released upon the expiration of that maximum term.
>
> (E) The department shall provide notices of hearings to be conducted under division (C) or (D) of this section in the same manner, and to the same persons, as specified in section 2967.12 and Chapter 2930. of the Revised Code with respect to hearings to be conducted regarding the possible release on parole of an inmate.

R.C. 2967.271 also includes provisions permitting a trial court to reduce an offender's minimum sentence during the term of his or her imprisonment based on good behavior of the offender but only if a reduction is recommended by the Ohio Department of Rehabilitation and Correction ("ODRC"). R.C. 2967.271(F).[4]

C. The Reagan Tokes Law Does Not Violate an Offender's Right to a Jury Trial

{¶ 50} Both the United States Supreme Court and this court have explained that the historical role of the jury in finding facts necessary to convict or to increase a sentence range is protected by the Sixth Amendment to the United States

4. It is also noteworthy, though not directly relevant to the substantive analysis in this case, that the RTL also requires sentencing courts to notify the offender of the relevant provisions of the RTL. R.C. 2929.19(B)(2)(c).

Constitution. *See Alleyne v. United States*, 570 U.S. 99, 117, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013) (holding that the defendant's Sixth Amendment right to a jury trial was violated when the jury found that the defendant had used or carried a weapon but the sentencing judge found that the defendant had brandished the weapon and the court used its finding to justify increasing the defendant's minimum prison sentence); *Oregon v. Ice*, 555 U.S. 160, 168-172, 129 S.Ct. 711, 172 L.Ed.2d 517 (2009) (holding that the considerations necessary to impose consecutive sentences on a defendant, despite the effect of increasing the total aggregate sentence, are the traditional and proper prerogative of the sentencing judge rather than the jury); *United States v. Booker*, 543 U.S. 220, 232, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005) (holding that the defendant's Sixth Amendment right to a jury trial was violated by a trial judge's finding additional facts by a preponderance of the evidence to justify sentencing the defendant within the statutory maximum but beyond the otherwise-applicable guideline range); *Blakely v. Washington*, 542 U.S. 296, 303-304, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (holding that the defendant's Sixth Amendment right to a jury trial was violated when the trial judge, based on his own fact-finding that the defendant had acted with "deliberate cruelty," sentenced the defendant to more than three years beyond the statutory maximum of the standard sentencing range); *Ring v. Arizona*, 536 U.S. 584, 588, 603-609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (holding that the trial judge's fact-finding that was used to support imposing a sentence of death over the term of imprisonment that would otherwise have been imposed violated the defendant's Sixth Amendment right to a jury trial); *Apprendi v. New Jersey*, 530 U.S. 466, 491-497, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (holding that a trial judge's finding that the crime committed by the defendant was racially motivated, in order to increase the sentence beyond the prescribed statutory maximum term, violated the defendant's Sixth Amendment right to a jury trial); *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147, 915 N.E.2d 292, ¶ 34-39 (discussing *Apprendi* and its

progeny with approval and noting that historically, a sentencing judge's consideration of a defendant's criminal record has not been deemed offensive to the Sixth Amendment's jury-trial guarantee); *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, *abrogated in part by Ice* (holding that a number of Ohio statutes requiring judicial fact-finding violated the defendant's Sixth Amendment right to a jury trial).[5]

{¶ 51} However, the statutory amendments enacted through the RTL do not require a judge or anyone else to make factual findings that alter the minimum or maximum range of sentences to be imposed on the defendant. The RTL does not impact a defendant's right to a jury trial during the guilt and sentencing phases of the trial. If the jury convicts the defendant of a first- or second-degree felony, the trial judge imposes a sentence in the usual manner, selecting a sentence of two to eight years for a second-degree felony, R.C. 2929.14(A)(2)(a), or three to 11 years for a first-degree felony, R.C. 2929.14(A)(1)(a), and the RTL does not require any special fact-finding to support that sentencing choice. The RTL then creates a presumptive minimum sentence, R.C. 2967.271(B), and a maximum sentence at 150 percent of the minimum sentence, R.C. 2929.144(A)(1).[6] That too requires no fact-finding—it is purely a matter of mathematics and statutory application. The only situation in which fact-finding operates within the framework of the RTL is when, based on an offender's behavior or security classification, the ODRC seeks to maintain custody of the offender beyond the expiration of the presumptive

5. Some of the statutes severed or deemed unconstitutional in *Foster* were later reenacted by the General Assembly. *See State v. Hodge*, 128 Ohio St.3d 1, 2010-Ohio-6320, 941 N.E.2d 768, *superseded by statute as stated in State v. Bonnell*, 140 Ohio St.3d 209, 2014-Ohio-3177, 16 N.E.3d 659, ¶ 3-4, 19-23; 2011 Am.Sub.H.B. No. 86.

6. For the sake of simplicity, I speak in terms of sentencing for a single qualifying felony offense. For cases in which multiple qualifying felony offenses are involved, the maximum sentence is calculated under R.C. 2929.144(B)(2) or (3) by adding 50 percent of the longest term for the single "most serious" felony for which the defendant is being sentenced.

minimum prison term. *See* R.C. 2967.271(C). However, that process does not affect the minimum or maximum sentence imposed or the range that could have been imposed; it affects only the amount of time that the offender spends incarcerated within the range of the imposed minimum and maximum sentence. Thus, the RTL does not transgress the *Apprendi* line of cases.

{¶ 52} It could be argued that R.C. 2967.271 encourages fact-finding by the ODRC to, in effect, alter a minimum sentence, because it permits a trial court to reduce an offender's minimum sentence based on good behavior and on the recommendation of the ODRC. *See* R.C. 2967.271(F). However, as the majority determines here, it is not clear that Hacker, Simmons, or any other offender would have standing to challenge this provision, as there appears to be no injury or detriment to offenders because of it. *See State v. Bates*, 167 Ohio St.3d 197, 2022-Ohio-475, 190 N.E.3d 610, ¶ 20-22 ("It is fundamental that appeal lies only on behalf of a party aggrieved," and thus, a "party aggrieved by a court's error * * * must challenge it on direct appeal; otherwise, the sentence will be subject to res judicata"); *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27 (noting that the question of standing depends on whether the party has alleged a personal stake in the outcome of the controversy). Rather, this provision appears to be a benefit to every offender sentenced for a qualifying felony offense since courts do not generally have the authority to reduce sentences (other than through certain statutory mechanisms like judicial release or the granting of some relief undermining the conviction). *See, e.g.*, *State v. Smith*, 42 Ohio St.3d 60, 537 N.E.2d 198 (1989), paragraph one of the syllabus. Thus, any possibility of a sentence reduction (however conditioned) is more beneficial than the status quo and therefore is of benefit to the offender. No right to this benefit is being asserted by either Hacker or Simmons.

D. The Reagan Tokes Law Does Not Violate Separation of Powers

{¶ 53} This court discussed the basis of the separation-of-powers doctrine in a similar case more than 20 years ago:

> This court has repeatedly affirmed that the doctrine of separation of powers is "implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government." *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 158-159, 503 N.E.2d 136, 138 (1986); *State v. Warner*, 55 Ohio St.3d 31, 43-44, 564 N.E.2d 18, 31 (1990). *See State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 475, 715 N.E.2d 1062, 1085 (1999); *State v. Hochhausler*, 76 Ohio St.3d 455, 463, 668 N.E.2d 457, 465-466 (1996).
>
> "The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others." *State ex rel. Bryant v. Akron Metro. Park Dist.*, 120 Ohio St. 464, 473, 166 N.E. 407, 410 (1929). *See also Knapp v. Thomas*, 39 Ohio St. 377, 391-392 (1883); *State ex rel. Finley v. Pfeiffer*, 163 Ohio St. 149, 126 N.E.2d 57, paragraph one of the syllabus.

State ex rel. Bray v. Russell, 89 Ohio St.3d 132, 134, 729 N.E.2d 359 (2000). The separation-of-powers doctrine exists not to protect the powers of each branch of the government for the benefit of that branch but for the benefit of the people who rely

on a government of checks and balances as a shield against the arbitrary use of power. *Id.* at 135. In *Bray*, we also discussed the role of the judiciary:

> In our constitutional scheme, the judicial power resides in the judicial branch. Section 1, Article IV of the Ohio Constitution. The determination of guilt in a criminal matter and the sentencing of a defendant convicted of a crime are solely the province of the judiciary. *See State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 648, 4 N.E. 81, 86 (1885). *See also Stanton v. Tax Comm.*, 114 Ohio St. 658, 672, 151 N.E. 760, 764 (1926) ("the primary functions of the judiciary are to declare what the law is and to determine the rights of parties conformably thereto"); *Fairview v. Giffee*, 73 Ohio St. 183, 190, 76 N.E. 865, 867 (1905) ("It is indisputable that it is a judicial function to hear and determine a controversy between adverse parties, to ascertain the facts, and, applying the law to the facts, to render a final judgment").

Bray at 136.

{¶ 54} In *Bray*, we confronted a facial challenge to the following statutory provision:

> "As part of a prisoner's sentence, the parole board may punish a violation committed by the prisoner by extending the prisoner's stated prison term for a period of fifteen, thirty, sixty, or ninety days in accordance with this section. * * * If a prisoner's stated prison term is extended under this section, the time by which it is so extended shall be referred to as 'bad time.' "

Id. at 135, quoting former R.C. 2967.11(B), 146 Ohio Laws, Part VI, 10752, 11007. We concluded that the so-called "bad time" statute was unconstitutional in that it violated the separation-of-powers doctrine because even though the statute provided that "bad time" was "part of a prisoner's sentence," it was actually an addition to the sentence and was therefore "no less than the executive branch's acting as judge, prosecutor, and jury." *Id.* We also distinguished prison discipline from the extension of a prison sentence for "bad time," stating, "Prison discipline is an exercise of executive power and nothing in this opinion should be interpreted to suggest otherwise. However, trying, convicting, and sentencing inmates for crimes committed while in prison is not an exercise of executive power." *Id.* at 136.

{¶ 55} The RTL is like the former "bad time" statute insofar as it permits the executive branch of the government, based on violations or crimes allegedly committed by an offender but never proved in a court of law, to impose a punishment on the offender. *See* R.C. 2967.271(C)(1)(a), (b). But it does differ from the former "bad time" statute in one vital respect: whereas the former "bad time" statute added time to an offender's sentence beyond the sentence imposed by the trial court, the RTL operates within the confined range of the indefinite sentence imposed by the trial court. *See* R.C. 2967.271. In other words, under the RTL, if an offender is sentenced to a prison term of 8 to 12 years, the executive branch of the government may continue to hold the offender after the offender's minimum 8-year sentence based on the offender's having committed certain violations or the offender's security level, but it may not hold the offender past the expiration of the maximum 12-year sentence imposed by the court. *See* R.C. 2967.271(C), (D)(1).

{¶ 56} In this respect, the RTL is more analogous to the indefinite-sentencing scheme that existed in Ohio before Senate Bill 2 ("S.B. 2") took effect on July 1, 1996, and significantly changed Ohio's criminal code. *See* Am.Sub.S.B. No. 2, Sections 1 through 6, 146 Ohio Laws, Part IV, 7136. In the sentencing

scheme that existed before S.B. 2, many sentences were indefinite, composed of a minimum prison term (determined by the trial court based on statutory criteria) and a maximum prison term (set by statute based on the degree of the offense). *See* former R.C. 2929.11(B), Am.Sub.S.B. No. 258, 143 Ohio Laws, Part I, 1308, 1433-1434.[7] Within the minimum and maximum sentence imposed by the trial court, the

7. Former R.C. 2929.11(B), Am.Sub.S.B. No. 258, 143 Ohio Laws, Part I, at 1433-1434, provided:

> (B) Except as provided in division (D) or (H) of this section, sections 2929.71 and 2929.72, and Chapter 2925. of the Revised Code, terms of imprisonment for felony shall be imposed as follows:
>
> (1) For an aggravated felony of the first degree:
>
> (a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be five, six, seven, eight, nine, or ten years, and the maximum term shall be twenty-five years;
>
> (b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of ten, eleven, twelve, thirteen, fourteen, or fifteen years, and the maximum term shall be twenty-five years;
>
> (2) For an aggravated felony of the second degree:
>
> (a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be three, four, five, six, seven, or eight years, and the maximum term shall be fifteen years;
>
> (b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of eight, nine, ten, eleven, or twelve years, and the maximum term shall be fifteen years;
>
> (3) For an aggravated felony of the third degree:

Ohio Parole Board had the authority to continue an offender's term of imprisonment or to release the offender depending on a variety of factors, including the offender's conduct while incarcerated. *See* former R.C. 2967.13(A), Am.Sub.H.B. No. 571, Section 1, 143 Ohio Laws, Part IV, 6342, 6430; *Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶ 34, *abrogated in part by Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517; *see also* Diroll, Ohio Criminal Sentencing Commission, *Thoughts on Applying S.B. 2 to "Old Law" Inmates*, https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/general/SB2.pdf (accessed July 15, 2023). The parole board also had the authority to reduce an offender's minimum sentence for good behavior or earned credit. *See* former R.C. 2967.19, Am.Sub.H.B. No. 571, Section 1, 143 Ohio Laws, Part IV, at 6437; former R.C. 2967.193, Am.Sub.H.B. No. 571, Section 1, 143 Ohio Laws, Part IV, at 6441. At no time during the long history of indefinite sentencing before S.B. 2 became effective did this court find that indefinite sentencing or the parole board's

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(a) If the offender has not previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term, which may be imposed as a term of actual incarceration, shall be two, three, four, or five years, and the maximum term shall be ten years;

(b) If the offender has previously been convicted of or pleaded guilty to any aggravated felony of the first, second, or third degree, aggravated murder or murder, or any offense set forth in any existing or former law of this state, any other state, or the United States that is substantially equivalent to any aggravated felony of the first, second, or third degree or to aggravated murder or murder, the minimum term shall be imposed as a term of actual incarceration of five, six, seven, or eight years, and the maximum term shall be ten years;

(4) For a felony of the first degree, the minimum term shall be four, five, six, or seven years, and the maximum term shall be twenty-five years;

(5) For a felony of the second degree, the minimum term shall be two, three, four, or five years, and the maximum term shall be fifteen years;

(6) For a felony of the third degree, the minimum term shall be two years, thirty months, three years, or four years, and the maximum term shall be ten years;

(7) For a felony of the fourth degree, the minimum term shall be eighteen months, two years, thirty months, or three years, and the maximum term shall be five years.

involvement in indefinite sentencing violated either the state or the federal Constitution. *See, e.g., State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 644-652, 4 N.E. 81 (1885); *see also, e.g., State v. Witwer*, 64 Ohio St.3d 421, 428-429, 596 N.E.2d 451 (1992); *State v. Summers*, 5th Dist. Stark No. 94-CA-0243, 1995 Ohio App. LEXIS 5986, *14 (Oct. 23, 1995); *State v. Perkins*, 93 Ohio App.3d 672, 685-686, 639 N.E.2d 833 (8th Dist.1994).

{¶ 57} Thus, while the RTL shares certain features with the former "bad time" statute that we concluded in *Bray* violated the separation-of-powers doctrine, the RTL lacks the critical feature of delegating the judicial guilt-finding and sentencing functions to the parole board. Unlike the former "bad time" statute, under which time could be added to an offender's sentence, under the RTL, the offender's sentence *is* the sentence. What the RTL allows is for a department of the executive branch of the government to decide when, within the range of the indefinite sentence, an offender has been rehabilitated enough (as reflected by the offender's conduct and security level) to merit release. While it is theoretically questionable whether a parole board should have this power or whether indefinite sentencing is an appropriate division of power between the judicial and the executive branches of the government, indefinite sentencing has a long history in Ohio and the United States, and it has not been invalidated as a violation of the separation-of-powers doctrine. Nothing about the RTL justifies a different result here.

E. The Reagan Tokes Law Violates Procedural Due Process

{¶ 58} Both the Ohio and United States Constitutions guarantee procedural due process. Ohio Constitution, Article I, Section 16; Fourteenth Amendment to the U.S. Constitution, Section 1.

> While the Ohio Constitution is a document of independent force, *Arnold v. Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993),

> paragraph one of the syllabus, the Due Course of Law Clause of Article I, Section 16 of the Ohio Constitution is more often than not considered the functional equivalent of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 15. *But see Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122, ¶ 34 (lead opinion) (noting that this court departed from the general rule in *State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156, ¶ 23-24).

State v. Ireland, 155 Ohio St.3d 287, 2018-Ohio-4494, 121 N.E.3d 285, ¶ 37 (lead opinion). It is therefore reasonable to rely on federal caselaw to establish a floor for what is fair, even while acknowledging that the Ohio Constitution may well require an elevated floor of due-process protection in some cases.

{¶ 59} Due process can seem an imprecise concept at times, but it "requires, at a minimum, an opportunity to be heard when the state seeks to infringe a protected liberty or property right," and that "opportunity to be heard must occur at a meaningful time and in a meaningful manner." *State v. Cowan*, 103 Ohio St.3d 144, 2004-Ohio-4777, 814 N.E.2d 846, ¶ 8, citing *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), and *Hochhausler*, 76 Ohio St.3d at 459, 668 N.E.2d 457. "[F]reedom 'from bodily restraint,' lies 'at the core of the liberty protected by the Due Process Clause.' " *Turner v. Rogers*, 564 U.S. 431, 445, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011), quoting *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). The state has argued that the RTL sentencing scheme is like release on parole under Ohio's former indefinite-sentencing scheme and that no liberty interest is therefore implicated. It is true that

"[t]here is a crucial distinction between being deprived of a liberty one has, as in [revocation of] parole, and being denied a conditional liberty that one desires," as in "discretionary parole release from confinement" or parole eligibility. (Emphasis deleted.) *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 9, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). However, the United States Supreme Court has made clear that drawing that distinction must be done with caution, for freedom from restraint is a protectable interest for prisoners insofar as it may be violated by infringements that impose atypical and significant hardship or that affect the duration of the prisoner's sentence. *See Sandin v. Conner*, 515 U.S. 472, 484, 487, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), fn. 11. Moreover, the RTL provides that "there shall be a presumption that the person shall be released from service of the sentence on the expiration of the offender's minimum prison term or on the offender's presumptive earned early release date, whichever is earlier." R.C. 2967.271(B). Thus, the RTL is different from the former Ohio parole system as the state has prescribed, under which no presumption or expectation of liberty had to be overcome. Here, to the extent that the state would overcome such a presumption and alter the duration of an offender's sentence to deprive the offender of physical freedom, I agree with the majority that due process must be required—and a significant degree of procedural due process at that. *See* majority opinion, ¶ 35-38.

{¶ 60} In evaluating procedural-due-process claims, both this court and the United States Supreme Court have generally applied the *Mathews* balancing test. *See Liming v. Damos*, 133 Ohio St.3d 509, 2012-Ohio-4783, 979 N.E.2d 297, ¶ 28; *Mathews*, 424 U.S. at 335, 96 S.Ct. 893, 47 L.Ed.2d 18. "Under the *Mathews* balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake." *Nelson v. Colorado*, 581 U.S. 128, 135, 137 S.Ct. 1249, 197 L.Ed.2d 611 (2017).

{¶ 61} Freedom from imprisonment is perhaps the most basic and essential private interest and lies at the core of the liberty protected by the Due Process Clause. *Turner* at 445. Counterbalancing that, however, the government's interest in protecting society from the depredations of criminals who are not yet rehabilitated is self-evident and strong. With those considerations arguably balanced, the due-process issue in these cases collapses into a single question: Under the procedures established by the RTL, is there a risk of erroneously overcoming the presumption of release and unjustifiably depriving an offender of his or her liberty beyond the presumptive release date?

{¶ 62} Under the RTL, an offender is presumed to be released upon the expiration of his or her minimum term. R.C. 2967.271(B). Yet the ODRC may rebut that presumption and continue the offender's incarceration for "a reasonable period determined by the department * * * not [to] exceed the offender's maximum prison term" if any of three findings are made. R.C. 2967.271(D)(1). The first possibility is a multipart finding that "the offender committed institutional rule infractions that" compromised the security of the institution, either compromised or threatened the safety of staff or inmates, or "committed a violation of law that was not prosecuted, and the infractions or violations demonstrate that the offender has not been rehabilitated," R.C. 2967.271(C)(1)(a), *and* "[t]he offender's behavior while incarcerated, including, but not limited to the infractions and violations specified [in R.C. 2967.271(C)(1)(a)] demonstrate that the offender continues to pose a threat to society," R.C. 2967.271(C)(1)(b). The second possibility is that "the offender has been placed by the department in extended restrictive housing at any time within the year preceding the date of the hearing." R.C. 2967.271(C)(2). And the third possibility is that "[a]t the time of the hearing, the offender is classified by the department as a security level three, four, or five, or at a higher security level." R.C. 2967.271(C)(3). The ODRC is required to hold a hearing at which it may attempt to rebut the presumption based on such findings, R.C.

2967.271(C), (D), and to give notice of the hearing to victims and certain court personnel (though not to the inmate), R.C. 2967.271(E), 2967.12, and Chapter 2930. The RTL does not specify the contents of (or the standards to be applied at) this hearing.[8]

{¶ 63} Considering for the moment only the hearing at which the ODRC may attempt to rebut the presumption, it is particularly troubling, from the standpoint of avoiding fact-finder bias, that the entity that will seek to rebut the presumption of release is the same entity that will decide whether the presumption has, in fact, been rebutted. *See* R.C. 2967.271(C). Moreover, once the ODRC has judged its own submission and found the presumption to be rebutted, it has the discretion to decide whether it "*may* maintain the offender's incarceration" for "an additional period" that "shall be * * * *reasonable*" but "shall not exceed the offender's maximum prison term." (Emphasis added.) R.C. 2967.271(D)(1). There is no statutory guidance whatsoever about what types of circumstances prompt the exercise of this discretion or what constitutes a "reasonable" "additional period" of incarceration. And while there are provisions requiring notice to offenders regarding administrative procedures for determining classifications and rules infractions, *see* Ohio Adm.Code 5120-9-53(B) and 5120-9-08(C), there is no provision requiring that offenders receive notice of a hearing pursuant to R.C. 2967.271. *See* R.C. 2967.271(E); *see also* R.C. 2967.12 (notice to law enforcement and victims); R.C. 2930.01 et seq. (victims' rights). Finally, while R.C. 2967.271 indisputably requires a hearing, there is no provision requiring (or even permitting) the offender's presence at the hearing. These are obvious and significant defects.

8. The state's briefs include copies of procedures adopted by the ODRC for rules-infraction-board hearings and hearings pursuant to the RTL. However, referring to extrinsic facts and changeable procedures that exceed the statutory language and do not have the force of law is not appropriate in resolving a facial constitutional challenge. *Wymsylo*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, at ¶ 21.

{¶ 64} Moreover, the three possibilities for rebutting an offender's presumptive release date (demonstration of a lack of rehabilitation and continued threat to society, placement in extended restrictive housing, or high security level) are matters determined under other, separate hearing processes. I proceed to determine whether those processes at all compensate for the absence of due-process provisions in R.C. 2967.271.

{¶ 65} First, an inmate's security level is initially determined by reception-center institutions that collect information for the Bureau of Classification. Ohio Adm.Code 5120-9-52. Classification is accomplished by considering the following:

> (1) Nature or seriousness of the offense for which the inmate was committed;
>
> (2) Length of sentence for which the inmate was committed;
>
> (3) Medical and mental health status;
>
> (4) Previous experience while on parole, furlough, probation, post release control, administrative release or while under any other form of correctional supervision[;]
>
> (5) Nature of prior criminal conduct as shown by the official record;
>
> (6) Age of inmate;
>
> (7) Potential for escape;
>
> (8) Potential of danger to the inmate, other inmates, staff, or the community through the inmate's actions or actions of others;
>
> (9) Availability of housing, work, and programming at the various institutions;
>
> (10) The physical facilities of an institution; [and]
>
> (11) Any other relevant information contained in the reports.

Ohio Adm.Code 5120-9-52(C). That classification is thereafter reviewed and revised periodically by a classification committee at the institution. Ohio Adm.Code 5120-9-53. The inmate receives 48 hours' notice of such review, during which he or she may submit a written statement and may meet with at least one member of the committee. Ohio Adm.Code 5120-9-53(B). The inmate may appeal the committee's recommendation to the warden and may appeal the warden's decision to the bureau. Ohio Adm.Code 5120-9-53(D).

{¶ 66} Second, regarding restrictive housing and rule infractions, Ohio Adm.Code 5120-9-06 sets forth some 61 rules of inmate conduct that forbid a range of behavior, from homicide, hostage-taking, escape, assault, etc., to mundane and vaguely defined behavior such as "[b]eing out of place," showing "[d]isrespect to an officer, staff member, visitor[,] or other inmate," or even "[a]ny violation of any published institutional rules, regulations or procedures." Ohio Adm.Code 5120-9-06(C); *see also, e.g.*, Ohio Adm.Code 5120-9-25(F) (requiring inmates' sideburns, beards, and moustaches to be clean and neatly trimmed). An inmate may be "found guilty" of a violation of these rules based on "some evidence of the commission of an act and the intent to commit the act." Ohio Adm.Code 5120-9-06(D).

{¶ 67} Hearings on rule violations are held before the rules-infraction board ("RIB"), which consists of two ODRC staff members who have "completed RIB training" and who did not witness or investigate the alleged violation. Ohio Adm.Code 5120-9-08(B). Hearings are generally required to be held within seven business days of issuance of a conduct report, and an inmate receives 24 hours' notice of the hearing. Ohio Adm.Code 5120-9-08(C). Inmates are allowed to make a statement in their defense and may request witnesses, Ohio Adm.Code 5120-9-08(E)(2)(d), but that request may be denied if the witness-request form has not been completed or for reasons of relevancy, redundancy, unavailability, or security, Ohio Adm.Code 5120-9-08(E)(3). The inmate may require the presence of the charging

official. Ohio Adm.Code 5120-9-08(F)(5). Witnesses are apparently not sworn but may be subject to discipline for presentation of false testimony. *See* Ohio Adm.Code 5120-9-08(F)(1). The inmate may not address or examine witnesses but may ask the chair of the board to do so. Ohio Adm.Code 5120-9-08(F)(2). In the discretion of the board, the inmate charged may be excluded from the hearing during a witness's examination if there is a risk of disturbance or of harm to the witness. Ohio Adm.Code 5120-9-08(F)(4). The board may take testimony or evidence in person, by telephone, or by "any [other] form or manner it deems appropriate." Ohio Adm.Code 5120-9-08(F)(6). In the event that information from a confidential source is used, the inmate is prevented from being present while the board considers and evaluates that information. Ohio Adm.Code 5120-9-08(G). An inmate may be found guilty of a rule violation only if the two staff members who are presiding over the hearing agree; if they do not agree, a tie-breaking vote must be cast by a designee of the managing officer after reviewing the record of the hearing. Ohio Adm.Code 5120-9-08(K).

{¶ 68} Finally, one possible outcome of a rule violation is the inmate's placement in restrictive housing. Ohio Adm.Code 5120-9-08(L)(1). An inmate may also be placed in restrictive housing pending an investigation or a hearing on an incident. Ohio Adm.Code 5120-9-10(B) and 5120-9-11. The inmate may appeal a decision of an RIB panel to the managing officer, Ohio Adm.Code 5120-9-08(O), and may further appeal to the chief legal counsel, Ohio Adm.Code 5120-9-08(P).

{¶ 69} These procedures, designed to process rules infractions and set security classifications within the ODRC, are likely sufficient for those purposes when the state's interest in institutional security is great and the inmate's interest in institutional privileges is comparatively less. But the RTL uses the outcomes of these procedures for a far more constitutionally significant purpose—whether to release an inmate on his or her presumptive release date. Thus, we must ask: Under

these procedures, is there a risk of using this data to wrongly overcome the presumption of release and deprive an inmate of his or her liberty?

{¶ 70} While any human endeavor is fallible and has *some* risk of error, certain safeguards have been judicially shown to produce reliable results for a fair process before deprivation of certain basic rights—among which is liberty of person, including freedom from unlawful restraint. Important among these constitutional safeguards are notice, a meaningful hearing, the right to counsel, and the opportunity to confront and cross-examine adverse witnesses. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145-46, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); *Crawford v. Washington*, 541 U.S. 36, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 141 Ohio St.3d 113, 2014-Ohio-4364, 22 N.E.3d 1040, ¶ 34 ("the essence of due process is notice and a *meaningful* opportunity to be heard" [emphasis sic]), citing *State v. Mateo*, 57 Ohio St.3d 50, 52, 565 N.E.2d 590 (1991). As the United States Supreme Court has carefully observed:

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. *E.g.*, *ICC v. Louisville & N.R. Co.*, 227 U.S. 88, 93-94, 33 S.Ct. 185, 187-188, 57 L.Ed. 431 (1913); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-104, 83 S.Ct. 1175, 1180-1181, 10 L.Ed.2d 224 (1963). What we said in *Greene v. McElroy*, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959), is particularly pertinent here: "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the

> Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment * * *. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny."

(Ellipses sic.) *Goldberg v. Kelly*, 397 U.S. 254, 269-70, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). In fact, in the somewhat analogous context of a parole revocation, the United States Supreme Court has declared "the minimum requirements of due process" as "includ[ing]":

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

{¶ 71} Yet, in both of the RTL's statutory procedures as well as the other, administrative procedures on which the RTL relies, notice is minimal (measured in hours) or nonexistent, the rights to counsel and to confront witnesses are entirely absent, and the decision-making factfinder and the prosecutor are one and the same (i.e., the ODRC). These shortcomings and shortcuts are perhaps permissible when the controversy at issue is merely the question of security level or restrictive housing—i.e., when the offender's interest is a relatively minor matter of different institutional privileges and the state's countervailing interest in maintaining institutional security is great. But the absence of these procedural safeguards of fairness is far more significant when the interest at issue is the choice between incarceration and freedom. The RTL, as presently constituted, facially violates offenders' rights to procedural due process because it provides insufficient procedural guarantees to reduce the risk of an erroneous result, given the gravity of the interests affected. *Nelson*, 581 U.S. at 135, 137 S.Ct. 1249, 197 L.Ed.2d 611 ("Under the *Mathews* balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake").

F. Severability

{¶ 72} The Revised Code instructs:

> If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.

R.C. 1.50. We have previously explained how we weigh the propriety of severance:

> Three questions are to be answered before severance is appropriate. " '(1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) 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? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?' "

Foster, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶ 95, *abrogated in part by Ice*, 555 U.S. 160, 129 S.Ct. 711, 172 L.Ed.2d 517, quoting *Geiger v. Geiger*, 117 Ohio St. 451, 466, 160 N.E. 28 (1927), quoting *State v. Bickford*, 28 N.D. 36, 147 N.W. 407 (1913), paragraph 19 of the syllabus.

{¶ 73} Simmons takes the position that if any part of the RTL is unconstitutional, there is cause to invalidate the entire act; Hacker does not address this issue. The state argues that if portions of the RTL offend the Constitution, they may be severed.

{¶ 74} Neither Hacker nor Simmons has challenged the constitutionality of the indefinite-sentencing structure set forth in R.C. 2929.14(A)(1) and (2), the method for calculating the maximum sentence set forth in R.C. 2929.144, the notification provisions in R.C. 2929.19(B)(2)(c), the definitions set forth in R.C. 2967.271(A), or the establishment of a presumptive minimum sentence as provided by R.C. 2967.271(B). Hacker does challenge the constitutionality of the provisions in R.C. 2967.271(F) permitting a trial court to make a reduction in the minimum sentence based on an offender's good behavior and the recommendation of the

ODRC. However, as mentioned above and found by the majority, it is not clear that Hacker (or any offender) would have standing to challenge those provisions, as there appears to be no injury or detriment to offenders because of the provisions, and, in fact, they benefit offenders. *See* majority opinion at ¶ 24 *Bates*, 167 Ohio St.3d 197, 2022-Ohio-475, 190 N.E.3d 610, at ¶ 20-22; *Ohio Pyro*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, at ¶ 27; *see also supra* at ¶ 52. In short, all that has been challenged and all that the due-process analysis directly affects is the executive action involved in retaining an offender beyond a presumptive release date. R.C. 2967.271(C) and (D) are therefore the only parts of the RTL that are unconstitutional as a due-process violation. Yet, it is also necessary to invalidate R.C. 2967.271(E) and 2929.19(B)(2)(c)(ii), (iii), and (iv), as those provisions require notice of the substance of R.C. 2967.271(C) and (D) and cannot stand on their own. *See Foster* at ¶ 95.

{¶ 75} Clearly, the indefinite-sentencing provisions and the presumption of release at the expiration of the offender's minimum sentence each " ' "may be read and may stand by" ' " themselves, *id.*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶ 95, quoting *Geiger*, 117 Ohio St. at 466, 160 N.E. 28, quoting *Bickford*, 28 N.D. 36, 147 N.W. 407, at paragraph 19 of the syllabus. It is not necessary to insert words or terms to separate the constitutional part of a statute from the unconstitutional parts and to give effect to the former only. *Id.* Nothing about invalidating the language in R.C. 2967.271(C), (D), and (E) and 2929.19(B)(2)(c)(ii), (iii), and (iv) would prevent a trial court from imposing an indefinite sentence when the minimum sentence is the presumed release date. However, without R.C. 2967.271(C), (D), and (E) and 2929.19(B)(2)(c)(ii), (iii), and (iv), there would be no mechanism for enforcing any sentence beyond the presumptive minimum and the maximum sentence would become merely symbolic. Accordingly, " ' "the unconstitutional part [is] 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." ' " *Foster* at ¶ 95, quoting *Geiger* at 466, quoting *Bickford* at paragraph 19 of the syllabus.

{¶ 76} The state suggests curing this problem by also striking the presumption of a minimum sentence. But neither Hacker nor Simmons has challenged that provision, and more importantly, there is nothing apparently unconstitutional about designating the minimum sentence as the presumptive release date. We may not arbitrarily strike a provision to make a statutory scheme work in the context of other stricken parts that violate offenders' rights to procedural due process. The state alternatively suggests that this problem could be cured by permitting standard parole procedures to operate in the context of indefinite sentencing. However, there is nothing in the RTL that permits this. Creating a requirement such as this just to try to "fix" the now patchwork statutory scheme, even if well intentioned, would be a textbook example of judicial fiat.

{¶ 77} Because of the basic due-process infirmity in the RTL, there remains no mechanism to enforce the maximum sentence and the intention of the legislature is largely thwarted. The balance struck between flexibility on the maximum and flexibility on the minimum—as provided in R.C. 2967.271(F)—is destroyed by the unenforceability of those parts of the RTL that are unconstitutional. Consequently, invalidating the entire RTL structure is the only legally justifiable course.

III. CONCLUSION

{¶ 78} The RTL is akin to Ohio's former indefinite-sentencing scheme and consequently does not violate the separation-of-powers doctrine. Hacker and Simmons lack standing to challenge the discretion granted to the APA to recommend their release before they have served their presumptive minimum sentences because they are not aggrieved by the RTL as to these circumstances. The RTL also does not violate the right to a jury trial, because nothing about the law permits a fact-finder other than a jury to find facts that increase the defendant's sentencing-range exposure.

{¶ 79} However, the RTL does facially violate offenders' rights to procedural due process. The procedures created by the RTL are insufficient in relation to the gravity of the decision being undertaken—determining whether to release an offender on his or her presumptive release date, affecting the offender's personal liberty. For this reason, the RTL facially violates offenders' rights to procedural due process, requiring severance of certain provisions, without which the remaining language collapses in its operation, leaving part of the RTL meaningless and without a mechanism to implement it. Therefore, the RTL is wholly unconstitutional. Accordingly, I respectfully dissent and would reverse the judgments of the Third and Eighth District Courts of Appeals upholding and applying the RTL as currently written.

DONNELLY, J., concurs in the foregoing opinion.

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Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Daniel T. Van, Assistant Prosecuting Attorney, urging affirmance for amicus curiae Cuyahoga County Prosecutor's Office in case No. 2020-1496.

Steven L. Taylor, Legal Research and Staff Counsel, urging affirmance for amicus curiae Ohio Prosecuting Attorneys Association in case Nos. 2020-1496 and 2021-0532.

Timothy Young, Ohio Public Defender, Stephen P. Hardwick, Assistant Public Defender, and Daniel S. Marcus, Supervising Attorney, urging reversal for amicus curiae The Ohio Public Defender in case No. 2020-1496.

Mayle, L.L.C., Andrew R. Mayle, Benjamin G. Padanilam, and Ronald J. Mayle, urging reversal for amicus curiae Edward Maddox in case No. 2020-1496.

Dave Yost, Attorney General, Benjamin M. Flowers, Solicitor General, Michael J. Hendershot, Chief Deputy Solicitor General, and Samuel C. Peterson, Deputy Solicitor General, urging affirmance for amicus curiae Ohio Attorney General Dave Yost in case No. 2021-0532.
