[Cite as *State v. Buckner*, 2020-Ohio-7017.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- CHARLES H. BUCKNER, III Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. W. Scott Gwin, J. Hon. John W. Wise, J. Case Nos. CT2020-0023 & CT2020-0024 O P I N IO N
CHARACTER OF PROCEEDINGS:	Appeal from the Muskingum County Court of Common Pleas, Case Nos. CR2020-0162 & CR2020-0157
JUDGMENT:	Dismissed
DATE OF JUDGMENT ENTRY:	December 30, 2020

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Hoffman, P.J.

{¶1} Defendant-appellant Charles H. Buckner, III ["Buckner"] appeals his sentence after a negotiated guilty plea in the Muskingum County Court of Common Pleas.

STATEMENT OF THE FACTS AND CASE

{¶2} In case number CR2020-157, the Muskingum County Grand Jury indicted Buckner for one count of Robbery, a felony of the second degree. In case number CR2020-162, the Muskingum County Grand Jury indicted Buckner for one count of Attempted Murder, a felony of the first degree; two counts of Felonious Assault, both felonies of the second degree; one count of Possession of a Weapon while under Detention, a felony of the third degree; and one count of Participating in a Criminal Gang, a felony of the second degree. Counts 1, 2 and three contained Criminal Gang Specifications.

{¶3} The assistant prosecutor's recitation of the facts at the Change of Plea hearing revealed that on February 27, 2020, Buckner was attempting to leave a Kroger store in Muskingum County with stolen merchandise. In doing so, he shoved a store employee who was attempting to prevent him from leaving the store. Buckner shoved the employee to the ground, causing cuts and bruises to the employee. Buckner was ultimately arrested for that offense and held in the Muskingum County Jail. While incarcerated, Buckner stabbed another inmate with a pen several times, and struck him with a chair. Those actions caused serious injuries to the other inmate. Buckner also stated to corrections officers it was his intention to kill the other inmate. Buckner had tattoos that indicated his membership in the Real Riders Gang, and claimed membership in that gang.

{¶4} In case CR2020-162, Buckner entered a negotiated guilty plea to attempted murder with a gang specification and one count of participating in a criminal gang. The remaining counts of that case were dismissed in exchange for Buckner's plea. In case Number CR2020-0157, Buckner entered a negotiated guilty plea to one count of robbery, a felony of the second degree.

{¶5} The parties recommended to the trial court Buckner serve a sentence of 25 years. Buckner waived findings as to consecutive sentences and agreed the counts did not merge for sentencing. The trial court accepted Buckner's guilty pleas and sentenced him to the jointly recommended sentence. As part of the sentence, the trial court sentenced Buckner to indefinite prison terms pursuant to Revised Code section 2967.271, the Regan Tokes Law.

{¶6} Buckner raises one Assignment of Error:

> THE TRIAL COURT SENTENCED APPELLANT TO INDEFINITE TERMS OF INCARCERATION PURSUANT TO A STATUTORY SCHEME THAT VIOLATES APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶7} In his sole Assignment of Error, Buckner argues that the Reagan Tokes Law, specifically, R.C. 2967.271, is unconstitutional. The state maintains that the issue of the constitutionality of the Regan Tokes Law is not ripe for review, however, the state, nonetheless, maintains the law is constitutional.

{¶8} This Court has previously addressed whether a challenge to the constitutionality of the Reagan Tokes Law is ripe for appellate review where the defendant has yet to serve the minimum term and yet to be subject to the application of the Reagan Tokes Law. This Court has repeatedly held the issue is not ripe for review. See *State v. Clark*, 5th Dist. Licking No. 2020 CA 00017, 2020-Ohio-5013; *State v. Downard,* 5th Dist. Muskingum No. CT2019-0079, 2020-Ohio-4227; and *State v. Manion,* 5th Dist. Tuscarawas No. 2020 AP 03 0009, 2020-Ohio-4230.

{¶9} The Sixth District has reached the same conclusion in *State v. Maddox*, 6th Dist. Lucas No. CL-19-1253, 2020-Ohio-4702, and *State v. Velliquette,* 6th Dist. Lucas No. L-19-1232, 2020-Ohio-4855. Likewise the Fourth District recently found the issue not ripe for review in State v. Ramey, 4th Dist. Washington Nos. 20 CA 1 and 20 CA 2, 2020-Ohio-6733.

{¶10} For the reasons set forth in our opinion in *Clark, Downard, and Manion,* supra, we find Buckner's assigned error not ripe for review.

{¶11} While doing so, we recognize Judge Gwin's thorough and persuasive analysis of the constitutional challenge in his dissent. While not offered as an alternative to a direct appeal of the original sentence in our previous decisions, we suggest Judge Gwin's concern about the potential hardship a defendant might suffer as a result of delay in deciding the issue now could be remedied by the filing of a declaratory judgment action. Such action would necessitate joining the Ohio Attorney General to defend the constitutionality of the legislation.

{¶12} This appeal is dismissed.

By: Hoffman, P.J.
Wise, John, J. concurs and
Gwin, J., dissents

Gwin, J., dissents

{¶13} I respectfully dissent from the majority's opinion.

Ripeness.

{¶14} Ripeness reflects constitutional considerations that implicate "Article III limitations on judicial power," as well as "prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Social Services, Inc*., 509 U.S. 43, 57, n. 18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993). In evaluating a claim to determine whether it is ripe for judicial review, courts should consider both "the fitness of the issues for judicial decision" and "the hardship of withholding court consideration." *National Park Hospitality Assn. v. Department of Interior*, 538 U.S. 803, 808, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003). The Supreme Court has stated that the "basic rationale" of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

{¶15} In determining the "likelihood" that an injury will come to pass, the Supreme Court has made clear that "[o]ne does not have to await consummation of threatened injury to obtain preventive relief." *Blum v. Yaretsky*, 457 U.S. 991, 1000, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). For example, in the Regional Rail Reorganization Act Cases, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), the Court deemed ripe an action brought by eight major railroads challenging the conveyance of their property to Conrail. Although a reorganization plan had not yet been formulated and a special court had not yet ordered the conveyances, the Court reasoned that "where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable

controversy that there will be a time delay before the disputed provisions will come into effect." Id. at 143, 95 S.Ct. 335. Although not requiring "inevitability," the Court has held that a claim is ripe when it is "highly probable" that the alleged harm or injury will occur.

{¶16} "Three factors guide the ripeness inquiry: '(1) the likelihood that the harm alleged by the plaintiffs will ever come to pass; (2) whether the factual record is sufficiently developed to produce a fair adjudication of the merits of the parties' respective claims; and (3) the hardship to the parties if judicial relief is denied at this stage in the proceedings.'" *Berry v. Schmitt*, 688 F.3d 290, 298 (6th Cir. 2012) (quoting *Grace Cmty. Church v. Lenox Twp.*, 544 F.3d 609, 615 (6th Cir. 2008)). See also, *Reno v. Catholic Social Services, Inc.*, 509 U.S.43, 71, 113 S.Ct. 2485, 125 L.Ed.2d 38(1993) (O'Conner, J. concurring) ("These are just the kinds of factors identified in the two-part, prudential test for ripeness that *Abbott Laboratories [v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681(1967)] articulated. "The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149, 87 S.Ct. at 1515. See *Thomas v. Union Carbide Agricultural Products Co*., 473 U.S. 568, 581–582, 105 S.Ct. 3325, 3333, 87 L.Ed.2d 409 (1985) (relying upon *Abbott Laboratories* test); *Pacific Gas*, supra, 461 U.S. at 200–203, 103 S.Ct., at 1720–1721 (same); *National Crushed Stone*, supra, 449 U.S. at 72–73, n. 12, 101 S.Ct., at 301–302, n. 12 (same)."). As the court in *Riva v. Commonwealth of Massachusetts* noted,

> Although it is a familiar bromide that courts should not labor to protect a party against harm that is merely remote or contingent, *see, e.g., Ernst & Young*, 45 F.3d at 536*; Massachusetts Ass'n of Afro–Am. Police*, 973 F.2d

> at 20; *Lincoln House v. Dupre*, 903 F.2d 845, 847 (1st Cir. 1990), there is some play in the joints. For example, even when the direct application of a statute is open to a charge of remoteness by reason of a lengthy, built-in time delay before the statute takes effect, ripeness may be found as long as the statute's operation is inevitable (or nearly so). *See, e.g., Regional Rail Reorg. Act Cases*, 419 U.S. 102, 142–43, 95 S.Ct. 335, 357–58, 42 L.Ed.2d 320 (1974). And, even when the direct application of such a statute is subject to some degree of contingency, the statute may impose sufficiently serious collateral injuries that an inquiring court will deem the hardship component satisfied. *See* Erwin Chemerinsky, *Federal Jurisdiction* § 2.4.2, at 121–22 (2d ed. 1994). In general, collateral effects can rise to this level when a statute indirectly permits private action that causes present harm, or when a party must decide currently whether to expend substantial resources that would be largely or entirely wasted if the issue were later resolved in an unfavorable way. *See, e.g*., *Pacific Gas,* 461 U.S. at 201, 103 S.Ct. at 1720–21; *Duke Power Co. v. Carolina Envtl. Study Group, Inc.,* 438 U.S. 59, 81–82, 98 S.Ct. 2620, 2634–35, 57 L.Ed.2d 595 (1978).

61 F.3d 1003, 1010(1st Cir. 1995).

In *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947), the Supreme Court held that review of the Hatch Act, which prohibits federal employees from engaging in certain political activities, was non-justiciable with respect to those plaintiff-employees who had not yet engaged in any of the prohibited activity. Subsequently,

> however, the Court relaxed *Mitchell's* strict approach to justiciability. If the injury is clearly impending, the Court has held that the plaintiffs need not await consummation of the injury to bring their suit. *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 298, 99 S.Ct. 2301, 2308, 60 L.Ed.2d 895 (1979); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143, 95 S.Ct. 335, 358, 42 L.Ed.2d 320 (1974); *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1215, 39 L.Ed.2d 505 (1974); *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 43 S.Ct. 658, 663, 67 L.Ed. 1117 (1923).

Signorelli v. Evans, 637 F.2d 853, 856-857(2nd Cir. 1980).

{¶17} The Ohio Supreme Court has interpreted a "justiciable matter" to mean the existence of an actual controversy, a genuine dispute between adverse parties. *State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas*, 74 Ohio St.3d 535, 542, 660 N.E.2d 458 (1996). In order for a justiciable question to exist, the "threat" to a party's position "must be actual and genuine and not merely possible or remote." *M6 Motors, Inc. v. Nissan of N. Olmsted, L.L.C.,* 2014-Ohio-2537*, 14* N.E.3d 1054, ¶ 17, citing *Mid–Am. Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 9.

{¶18} In the present case, every individual throughout the State of Ohio who is convicted of a first- or second-degree felony must be sentenced under the Reagan Tokes law. It is a virtual certainty that a number of those individuals, perhaps a significantly large number, will have the DRC[1] extend his or her incarceration beyond the presumed release

[1] Ohio Department of Rehabilitation and Corrections.

date. This is not an abstract or hypothetical case; rather, it is a virtual certainty to occur. Under Reagan Tokes, the question is not *if* a defendant will be denied his or her presumptive release date; but rather *when* a defendant's sentence will be extended.

{¶19} The record before this Court is sufficiently developed to allow us to produce a fair adjudication of the merits of the parties' respective claims. It is not unusual for courts to be asked to pass upon the constitutionality of statute. The constitutional arguments are capable of being addressed in the present appeal.

{¶20} I would call attention to the fact that other jurisdictions have implicitly determined the issue to be ripe for review by addressing the constitutional challenge to the Reagan Tokes provisions regarding future, possible extensions of a prison term beyond the presumed minimum term. The Second District Court of Appeals found the law constitutional in *State v. Barnes*, 2nd Dist. Montgomery No. 28613, 2020-Ohio-4150, *State v. Leet,* 2nd Dist. Montgomery No. 28670, 2020-Ohio-4592, and *State v. Ferguson*, 2nd Dist. Montgomery No. 28644, 2020-Ohio-4153. The Third District found the law constitutional in *State v. Hacker*, 3rd Dist. Logan No. 8-20-01, 2020-Ohio-5048. The Twelfth District Court of Appeals also determined the law was constitutional in *State v*. *Guyto*n, 12th Dist. Butler No. CA2019-12-203, 2020-Ohio-3837, *State v. Rodgers*, 12th Dist. Butler No. CA2019-11-194, 2020-Ohio-4102, and *State v. Morris*, 12th Dist. Butler No. CA2019-12-205, 2020-Ohio-4103. I further note that the Sixth District has certified the ripeness issue to the Ohio Supreme Court as being in conflict with the decisions from the Second and Twelfth Districts that have found the law constitutional in two separate

cases. *State v. Velliquette,* 6th Dist. Logan No. L-19-1232, 2020-Ohio-4855[2]; *State v. Montgomery,* 6th Dist. Logan No. L19-1202, 2020-Ohio-5552(Dec. 4, 2020).

{¶21} The hardship to the parties if judicial relief is denied at this stage in the proceedings is real and immense. Now, the indigent appellant, who wishes to raise a constitutional challenge to the law in his or her direct appeal as of right has the assistance of appointed counsel. If, for example, the appellant must wait for two years for the DRC to extend his sentence, both the inmate and the courts will face a myriad of legal hurdles. First, how will the inmate inform the court of his or her desire to appeal the constitutionally of the law? Next, is the inmate entitled to appointed counsel to pursue such an appeal? If the inmate is not, then an incarcerated inmate with limited legal resources and acumen will have to cobble together a highly involved constitutional argument without the assistance of counsel and with extremely limited access to legal resources.[3] It will also become evident that the DRC decision extending the inmate's sentence is not part of the trial court record. In order to establish that the inmate's sentence was in fact extended, will the trial court be required to order the DRC to file its decision with the clerk of courts for inclusion in the trial and appellate court records? Further, if the law is declared unconstitutional years from now, courts will be inundated with writs of habeas corpus, motions and other request for release or resentencing from the hundreds of inmates who were sentenced under the law and not permitted to appeal the constitutionality of the law

[2] Ohio Supreme Court Case No. 2020-1243.

[3] However, if a Court of Appeals finds the issue in not yet ripe for review, an indigent criminal defendant who had challenged the constitutionality of the Reagan Tokes statute in his or her direct appeal *may* be able to file a motion in that Court of Appeals to re-open his or her direct appeal and request the appointment of counsel at the time the DRC extends his or her sentence.

in the inmate's direct appeal. Finally, the inmate could potentially have been incarcerated perhaps years beyond his release date for the time it takes to decide the issue in the event the law is found to be unconstitutional. "[T]he right to appointed counsel extends to the first appeal as of right, *and no further*." (Emphasis added.) *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 1993, 95 L.Ed.2d 539, 545(1987). *Accord, State v. Buell*, 70 Ohio St.3d 1211, 639 N.E.2d 110, 1994-Ohio-475; *Ross v. Moffitt*, 417 U.S. 600, 610, 94 S.Ct. 2437, 2444(1974); *Wainwright v. Torna,* 455 U.S. 586, 587-88, 102 S.Ct. 1300, 1301(1982); *See also*, SCt. R. III, Sec. 7. Therefore, any suggestion that an indigent criminal defendant can file a declaratory judgment action serving the Ohio Attorney General seeking to have the Reagan Tokes statute declared unconstitutional has limited application. Only criminal defendants affluent enough to pay an attorney will have the ability to redress a violation of their constitutional rights using that approach. Those individuals who cannot afford to pay an attorney to file such an action will have no recourse for any violation of his or her constitutional rights other than to attempt to file a declaratory judgment action without the assistance of an attorney and given only the limited legal resources made available by the prison to an incarcerated inmate.

{¶22} Most importantly, when the law is declared either constitutional or unconstitutional by the Ohio Supreme Court that holding will apply, not just to the single inmate whose appeal was under consideration, *but also to all inmates throughout the State of Ohio that have been sentenced under the new law.* In other words, the issue will be settled and the holding will apply to all defendants even those defendants whose sentences have not yet been subject to review by the DRC. Therefore, it matters not who brings the challenge at this stage of the proceedings because even those individual who

have not yet had their sentences extended by the DRC will be bound by the eventual holding by the Ohio Supreme Court.

{¶23} It is clear on these facts that Appellant has demonstrated sufficient hardship, and that the question of the constitutionality of the Reagan Tokes Law is fit for our review at this time. I find that nothing is to be gained by postponing for possibly years the unavoidable constitutional challenge to the Reagan Tokes provisions regarding future, possible extensions of a prison term beyond the presumed minimum term.

The Reagan Tokes Law.

{¶24} The Reagan Tokes Law (S.B. 201) was enacted in 2018 and became effective on March 22, 2019. The Reagan Tokes Law, "significantly altered the sentencing structure for many of Ohio's most serious felonies' by implementing an indefinite sentencing system for those non-life felonies of the first and second degree, committed on or after the effective date." *State v. Polley*, 6th Dist. Ottawa No. OT-19-039, 2020-Ohio-3213, ¶ 5, fn. 1.

{¶25} As with any statute enacted by the General Assembly, the Reagan Tokes Law is entitled to a "strong presumption of constitutionality." *State v. Romage*, 138 Ohio St.3d 390, 2014-Ohio-783, 7 N.E.3d 1156, ¶ 7. Thus, "if at all possible, statutes must be construed in conformity with the Ohio and the United States Constitutions." *State v. Collier*, 62 Ohio St.3d 267, 269, 581 N.E.2d 552 (1991). A party challenging the constitutionality of a statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt. *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, 909 N.E.2d 1254, ¶ 41, citing *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, ¶ 12.

{¶26} The power to define criminal offenses and prescribe punishment is vested in the legislative branch of government and courts may only impose sentences as provided by statute. *Whalen v. United States*, 445 U.S. 684, 689, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). In the case at bar, the legislature has authorized as a sentence for a felony of the first degree,

> (1)(a) For a felony of the first degree committed on or after the effective date of this amendment, 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.

R.C. 2929.14(A)(1)(a).

{¶27} The legislature has authorized as a sentence for a felony of the second degree,

> (2)(a) For a felony of the second degree committed on or after the effective date of this amendment, 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, 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. (R.C. 2929.14(A)(2)(a)).

{¶28} Indefinite sentences are not new to Ohio. In fact, the pre-SB2 sentence for a felony of the first degree, the defendant could have received an indeterminate minimum sentence of five, six, seven, eight, nine or ten years up to a maximum of twenty-five years. *See*, *State v. Davis*, 9th Dist. Summit No. 13092, 1987 WL 25743(Nov. 25, 1987), *citing* former R.C. 2929.11. The pre-SB2 sentence for a felony of the second degree was as follows,

> Whoever is convicted of or pleads guilty to a felony other than aggravated murder or murder . . . shall be imprisoned for an indefinite term...
>
> (B)(5) For a felony of the second degree, the minimum term shall be two, three, four or five years, and the maximum shall be fifteen years.

See, *State v. Jenks*, 2nd Dist. Montgomery No. 10264, 1987 WL 20267(Nov. 16, 1987), citing former R.C. 2929.1. What is different from prior law regarding indefinite sentences is that the Reagan Tokes Law has created a presumptive release date.

{¶29} The Reagan Tokes Law requires that a court imposing a prison term under R.C. 2929.14(A)(1)(a) or (2)(a) for a first- or second-degree felony committed on or after

March 22, 2019, impose a minimum prison term under that provision and a maximum prison term determined under R.C. 2929.144(B); R.C. 2929.144(C). Further, under the Reagan Tokes Law, there is a presumption that 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." R.C. 2967.271(B) (emphasis added). A presumptive earned early release date is a date determined under procedures described in R.C. 2967.271(F), which allow the sentencing court to reduce the minimum prison term under certain circumstances. R.C. 2967.271(A)(2). The DRC may rebut the presumption if it determines at a hearing that one or more statutorily numerated factors apply. R.C. 2967.271(C). If DRC rebuts the presumption, it may maintain the offender's incarceration after the expiration of the minimum prison term or presumptive earned early release date for a reasonable period of time, determined and specified by DRC that "shall not exceed the offender's maximum prison term." R.C. 2967.271(D)(1).

An incarcerated individual does not have a constitutional right to parole or release before serving his entire sentence.

{¶30} An inmate has no constitutional right to parole release before the expiration of his sentence. *Greenholtz v. Inmates of the Nebraska Penal & Corr*. Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). The Ohio Adult Parole Authority has "wide-ranging discretion in parole matters." *Layne v. Ohio Adult Parole Auth*., 97 Ohio St.3d 456, 2002-Ohio-6719, 780 N.E.2d 548, ¶ 28. See also, *State ex rel. Bailey v. Ohio Parole Board,* 152 Ohio St.3d 426, 2017-Ohio-9202, 97 N.E.3d 433, ¶9.

{¶31} The Supreme Court has made it clear that a mere unilateral hope or expectation of release on parole is not enough to constitute a protected liberty interest; the prisoner "must, instead, have *a legitimate claim of entitlement to it*." *Greenholtz*, 422 U.S. at 7, 99 S.Ct. at 2104 (*quoting Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972)) (emphasis supplied). Moreover, only state law can create this "legitimate claim of entitlement"; the federal constitution protects such claims, but does not create them. "There is no constitutional or inherent right of a convicted person to be conditionally released [i.e., released on parole] before the expiration of a valid sentence." *Greenholtz*, 442 U.S. at 7, 99 S.Ct. at 2104. *Accord, Inmates of Orient Correctional Institute v. Ohio State Parole Board*, 929 F.2d 233, 235(6th Cir 1991).

{¶32} However, if state law entitles an inmate to release on parole that entitlement is a liberty interest that is not to be taken away without due process. See *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), where the Supreme Court so held in the context of a statute providing that the Nebraska parole board "shall" release parole-eligible inmates unless one of several factors specified in the statute should be found to exist.

{¶33} As relevant here, R.C. 2967.271(B) states:

> (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. (Emphasis added).

{¶34} Also relevant is R.C. 2967.271(C), which states:

(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.

{¶35} The legislature by choosing the language "there *shall be a presumption* that the person *shall be released*" and "Unless the department rebuts the presumption, the offender *shall be released*," within the Reagan Tokes Law has arguably created enforceable liberty interests in parole. *Board of Pardons v. Allen,* 482 U.S. 369, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987). *See, also*, *Inmates of Orient Correctional Institute v. Ohio State Adult Parole Authority,* 929 F.2d 233, 236-237(6th Cir. 1991("Although the power to deny parole is purely discretionary as far as Ohio's statutes are concerned, the state's administrative regulations must also be considered. If Ohio's regulations created an explicit presumption of entitlement to release on parole—as Tennessee's regulations formerly did, see *Mayes v. Trammell*, 751 F.2d 175, 178 (6th Cir. 1984)—or if the Ohio regulations otherwise used "'mandatory language' in connection with 'specific substantive predicates' " for release on parole, see *Beard v. Livesay*, 798 F.2d 874, 877 (6th Cir.1986) (*quoting Hewitt v. Helms*, 459 U.S. 460, 472, 103 S.Ct. 864, 871, 74 L.Ed.2d 675 (1983)), the regulations alone could create a protected liberty interest."). C*f. State, ex rel. Bailey v. Ohio Parole Board,* 152 Ohio St.3d 426, 2017-Ohio-9202, 97 N.E.3d 433, ¶ 10 ("The Revised Code creates an inherent expectation 'that a criminal offender will receive meaningful consideration for parole.'" (Citing *Layne v. Ohio Adult Parole Auth*., 97 Ohio St.3d 456, 2002-Ohio-6719, 780 N.E.2d 548, ¶ 27).

{¶36} "As for the Due Process Clause, standard analysis under that provision proceeds in two steps: We first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989)." *Swarthout v. Cooke*, 562 U.S. 216, 219-220, 131 S.Ct. 859, 178 L.Ed.2d 732(2011). Assuming arguendo that the language chosen by the legislature has created an enforceable liberty interest in parole by the express terms of the Reagan Tokes Act, the question now becomes what process is due in the prison setting.

Due Process in the Prison Setting.

{¶37} When a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication—and courts will review the application of those constitutionally required procedures. *Swarthout v. Cooke*, 562 U.S. 216, 220, 131 S.Ct. 859, 178 L.Ed.2d 732(2011).

{¶38} In the context of parole, the United States Supreme Court has held that the procedures required are minimal. In *Greenholtz*, the Court found that a prisoner subject to a parole statute received adequate process when he was allowed an opportunity to be heard and was provided a statement of the reasons why parole was denied. Id. at 16, 99 S.Ct. 2100. "The Constitution," we held, "does not require more." *Swarthout v. Cooke,* 562 U.S. 216, 220, 131 S.Ct. 859, 178 L.Ed.2d 732(2011).

{¶39} In *Woods v. Telb*, the Ohio Supreme Court made the following observation concerning Ohio law,

> Under the [pre-SB2] system of parole, a sentencing judge, imposing an indefinite sentence with the possibility of parole, had limited power or authority to control the minimum time to be served before the offender's release on parole; the judge could control the maximum length of the prison sentence, but the judge had no power over when parole might be granted in between those parameters. The judge had no power to control the conditions of parole or the length of the parole supervision.
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> But, we observe that for as long as parole has existed in Ohio, the executive branch (the APA and its predecessors) has had absolute discretion over that portion of an offender's sentence. *See State ex rel. Atty. Gen. v. Peters* (1885), 43 Ohio St. 629, 4 N.E. 81.
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Woods v. Telb, 89 Ohio St.3d at 511-512, 733 N.E.2d 1103.

{¶40} Although entitled to the protection under the Due Process Clause, "prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolfe v. McDonnell*, 416 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed.2d 935(1974) (citations omitted). In *Wolfe,* the United States Supreme Court observed,

> In striking the balance that the Due Process Clause demands, however, we think the major consideration militating against adopting the full range of procedures suggested by *Morrissey [v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484(1972)] for alleged parole violators is the very

> different stake the State has in the structure and content of the prison disciplinary hearing. That the revocation of parole be justified and based on an accurate assessment of the facts is a critical matter to the State as well as the parolee; but the procedures by which it is determined whether the conditions of parole have been breached do not themselves threaten other important state interests, parole officers, the police, or witnesses—at least no more so than in the case of the ordinary criminal trial. Prison disciplinary proceedings, on the other hand, take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. Although there are very many varieties of prisons with different degrees of security, we must realize that in many of them the inmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace. Relationships among the inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner.

416 U.S. 539, 561-562, 94 S.Ct. 2963, 41 L.Ed.2d 935. Indeed, it has been noted,

> "[C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." [*Procunier v. Martinez*, 416 U.S. 396, 405, 94 S.Ct. 1800, 40 L.Ed.2d 224(1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413(1989)]. As the *Martinez* Court acknowledged, "the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree." Id., at 404–405, 94 S.Ct. at 1807. Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have, as we indicated in *Martinez*, additional reason to accord deference to the appropriate prison authorities. See Id., at 405, 94 S.Ct. at 1807.

Turner v. Safley, 482 U.S. 78, 84-85, 107 S.Ct. 2254, 96 L.Ed.2d 64(1987). "Viewed in this light it is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison." *Wolfe v. McDonnell*, 418 U.S. at 560, 94 S.Ct. 2963, 41 L.Ed.2d 935.

{¶41} The Courts have found therefore, that the following procedures should be accorded to prisoners facing prison disciplinary proceedings: 1). a prisoner is entitled to

a review unaffected by "arbitrary" decision-making. *Wolfe*, 418 U.S. at 557-558; (*See*, Ohio Adm. Code 5120-9-08). 2). Advance written notice of the claimed violation. *Wolfe*, 418 U.S. at 563. (*See*, Ohio Adm. Code 5120:1-8-12). 3). A written statement of the fact finders as to the evidence relied upon and the reasons for the disciplinary action taken. Wolfe, 418 U.S. at 563. (*See*, Ohio Adm. Code 5120-9-08(M); Ohio Adm. Code 5120:1-11(G)(1)). 4). Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence. *Wolfe*, 418 U.S. at 566. (*See*, Ohio Adm. Code 5120-9-08(E) (3); Ohio Adm. Code 5120-9-08(F)). 5). Where an illiterate inmate is involved, however, or whether the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff. *Wolfe*, 418 U.S. at 570. (*See*, Ohio Adm. Code 5120-9-07(H)(1)).

{¶42} In the case at bar, in order to rebut the presumptive release date, the DRC must conduct a hearing and determine whether any of the following factors are applicable:

> 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 [and] [t]he 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.

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.

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)(1), (2) and (3).

{¶43} "Although the power to deny parole is purely discretionary as far as Ohio's statutes are concerned, the state's administrative regulations must also be considered." *Inmates of Orient Correctional Institute v. Ohio State Adult Parole Authority*, 929 F.2d 233, 236-237(6th Cir. 1991). The DRC is required to provide notice of the hearing. R.C. 2967.271(E). Ohio Adm. Code 5120-9-06 sets forth the inmate rules of conduct. Ohio Adm. Code 5120-9-08 sets forth the disciplinary procedures for violations of inmate rules of conduct before the rules infraction board. Ohio Adm. Code 5120-9-10 sets forth the procedures for when and under what circumstances an inmate may be placed in and/or transferred to a restrictive housing assignment. Ohio Adm. Code 5120:1-1-11 sets forth the procedure of release consideration hearings. Thus, an inmate is given notice in advance of the behavior that can contribute or result in an extended sentence and under

what circumstance the inmate can be placed or transferred to a restrictive housing assignment. Each procedure employed provides at the least for notice and the opportunity to be heard.

{¶44} Under the Reagan Tokes Law, an inmate is afforded notice and a hearing by R.C. 2967.271(E), which states:

> [DRC] 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.

{¶45} See, *State v. Guyton*, 12th Dist. Butler No. CA2019-12-203, 2020-Ohio-3837, ¶ 11; *State v. Leet*, 2nd Dist. Montgomery No. 28670, 2020-Ohio-4592, ¶11 ("Reagan Tokes does not facially violate a defendant's right to procedural due process.")

Separation of Powers is not violated.

{¶46} Nor can it be argued that because the DRC can increase a sentence beyond the minimum given by the trial judge, the Reagan Tokes Law usurps judicial authority. As already noted, the DRC may not increase the sentence beyond the maximum sentence imposed by the trial court. The Ohio Supreme Court has made it clear that, when the power to sanction is delegated to the executive branch, a separation-of-powers problem is avoided if the sanction is originally imposed by a court and included in its sentence. See *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, 844 N.E.2d 301, ¶ 18-20, citing *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, 817 N.E.2d 864, ¶ 19. Such is the case under the scheme established by the Reagan Tokes Law. *State v. Ferguson*,

2nd Dist. Montgomery No. 28644, 2020-Ohio-4153, ¶23. The statute does not permit the DRC to act "'as judge, prosecutor and jury,' for an action that could be prosecuted as a felony in a court of law." *Woods v. Telb,* 89 Ohio St.3d at 512, 733 N.E.2d 1103, *quoting State, ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 135, 729 N.E.2d 359(2000). It should be noted that Bray was charged with and convicted of drug possession and sentenced to an eight-month prison term. While in prison, Bray allegedly assaulted a prison guard in violation of R.C. 2903.13. Pursuant to R.C. 2967.11(B), the Ohio Parole Board imposed a ninety-day bad-time penalty to be added to Bray's original term. Bray's original sentence of eight months for drug possession expired on June 5, 1998, at which time his additional ninety-day penalty began. On June 12, 1998, Bray filed a writ of habeas corpus in the Court of Appeals for Warren County, claiming that Warden Harry Russell was unlawfully restraining him. 89 Ohio St.3d 132, 133, 729 N.E.2d 359. Thus, the Parole Board extended Brey's sentence beyond the maximum sentence the trial court had impose.

{¶47} Further, as we have noted, under the Reagan Tokes Law an inmate is afforded the due process rights accorded to one who is incarcerated before any increase can occur. Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. For as long as parole has existed in Ohio, the executive branch (the APA and its predecessors) has had absolute discretion over when parole will be granted. *Woods v. Telb*, 89 Ohio St.3d at 511-512, 733 N.E.2d 1103.

{¶48} Because I find the issue to be ripe for review, and because I find the statute to be constitutional, I would overrule Appellant's sole Assignment of Error.