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Taking the Gavel Away From the Executive Branch: The Indeterminate Sentencing Scheme Under S.B. 201 is Ripe for Review and Unconstitutional

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TAKING THE GAVEL AWAY FROM THE EXECUTIVE BRANCH: THE INDETERMINATE SENTENCING SCHEME UNDER S.B. 201 IS RIPE FOR REVIEW AND UNCONSTITUTIONAL

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ABSTRACT

In 2019, Senate Bill 201, also known as the Reagan Tokes Act, reintroduced an indeterminate sentencing scheme in Ohio whereby sentences are assigned in the form of a range. Under this sentencing scheme, the Ohio Department of Rehabilitation and Correction, through the parole board, has discretion to retain an inmate past the presumptive release date. This fails to afford the accused their guaranteed right to a jury trial, improperly places judiciary power in the hands of the executive branch, and scrutinizes the violation of due process such that the defendant is being denied a fair hearing and notice. Not only is the Bill unconstitutional on these three bases, but it is also promulgated in racially motivated origins and serves as a mechanism for racially biased outcomes. The Bill is ripe for review by the Ohio Supreme Court, and expeditious action is pertinent to prevent further harm to offenders who have been inappropriately sentenced under the Bill and are consequently at risk of over-serving time in prison—a injury to liberty that can never be fully remedied. This Note proposes a replacement system to be implemented upon striking down S.B. 201 as unconstitutional.

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I. INTRODUCTION

In 1989, Ronnie Shelton received a prison sentence of 1,554 to 3,195 years in Ohio.[1] Common Pleas Court Judge Richard McMonagle assigned this extreme sentence based on Shelton's conviction on two hundred thirty counts of various violations, including the rape of thirty individual victims.[2] This is the longest sentence ever assigned in Ohio's history.[3] It is not only significant in duration but also in format. This sentence is listed in the form of a vast range with an immense difference of 1,641 years.[4] How could someone receive a sentence that is so cryptic, and who determines when the sentence has been served? The answer lies within Ohio's method of sentencing.

This ambiguous interval was assigned in accordance with the indeterminate[5] sentencing scheme as implemented in Ohio at the time of Shelton's sentencing. Under this scheme, the judge assigns a range of years as calculated by a predetermined formula, and the parole board has full discretion to determine the point at which the defendant's sentence has been served—within the confines of the calculated range.[6] While Shelton will assuredly serve a life sentence regardless of the parole board's decision, and this excessive sentence may not necessarily be reflective of the duration of other indeterminate sentences, it serves as a useful illustration of the ambiguity and relatively unfettered discretion within indeterminate sentencing.

The counterpart of indeterminate sentencing is determinate[7] sentencing. Unlike an indeterminate sentence, a determinate one is assigned by the judge as a precise number

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1 *See* State v. Shelton, No. 58737, 1991 WL 127154, at *1 (Ohio Ct. App. June 27, 1991).

2 *See id.*; *see also* Cory Shaffer, *'West Park Rapist' Prison Death Being Investigated as Suspected Suicide*, CLEVELAND.COM (Sept. 27, 2018), https://www.cleveland.com/court-justice/2018/09/west_park_rapist_prison_death_1.html; Danielle Serino, *Convicted Cleveland Rapist Ronnie Shelton Dies in Prison*, WKYC STUDIOS (Sept. 27, 2018), https://www.wkyc.com/article/news/local/cleveland/convicted-cleveland-rapist-ronnie-shelton-dies-in-prison/95-598721625.

3 *See* Michael K. McIntyre, *Judicial Cannon*, THE PLAIN DEALER SUNDAY MAG., June 20, 2004, at 11.

4 *See generally Shelton*, 1991 WL 127154.

5 Indeterminate sentencing is also referred to as indefinite sentencing. The terms are interchangeable, but this Note will refer to indeterminate sentencing only for the purpose of consistency. OHIO CRIM. SENT'G COMM'N, CRIM. JUST. REFORM IN OHIO 1 (2019).

6 *See* OHIO REV. CODE ANN. § 2967.271(D) (West 2021).

7 Determinate sentencing is also referred to as definite sentencing. The terms are interchangeable, but this Note will refer to determinate sentencing only for the purpose of consistency. OHIO CRIM. SENT'G COMM'N, *supra* note 5, at 6.

of years, and it is not subject to review by the parole board.[8] Ohio implemented a brief interlude of determinate sentencing within its history, but that is no longer in effect.[9]

Ohio presently utilizes indeterminate sentencing under Senate Bill 201 (hereinafter "S.B. 201"),[10] whereby a judge is given limited control over the sentencing of high-degree felons.[11] There is a presumption that every offender will be released at the expiration of the minimum prison term;[12] however, the Ohio Department of Rehabilitation and Corrections (hereinafter "ODRC") is authorized to hold an administrative hearing to determine whether the offender should be held beyond the presumptive release date.[13] This hearing is conducted in the same manner as parole hearings.[14] Accordingly, the judge's control is limited by that of the parole board, which has been improperly granted the sole power to extend sentences within a predetermined range according to their determination of a "reasonable period."[15] There is no check on this broad discretion,[16] and those convicted have no recourse in their sentence extension.[17] But what about the right to due process and the separation of branches through the separation of powers doctrine? Theoretically, the citizens should have recourse through their rights. They should not be imprisoned beyond the length of a judge's sentence without a judge's approval. However, the reinstatement of indeterminate sentencing in 2019 under S.B. 201 strips its citizens of their constitutional rights by enforcing these problematic sentences.

The sentencing scheme set forth under S.B. 201 is both ripe for review and unconstitutional. The law infringes upon the right to a jury trial under the Sixth Amendment, the separation of powers doctrine, and the right of due process under the Fourteenth Amendment. The commission of a crime does not revoke a citizen's inherent right to due process; due process is specifically in place to prevent those accused of a crime from being exploited and manipulated. It is a principle that lies at the very core of our justice system, and it must be protected. S.B. 201 further perpetuates racial discrimination in sentencing by imposing an indeterminate

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8 *See Determinate Sentence*, LEGAL INFORMATION INSTITUTE (2021), https://www.law.cornell.edu/wex/determinate_sentence#:~:text=A%20determinate%20sentence%20is%20a,guidelines%20determined%20by%20the%20law.

9 *See infra* text accompanying note 47. OHIO CRIM. SENT'G COMM'N, *supra* note 5, at 2–3.

10 S.B. 201 is also known as the Reagan Tokes Act. *See* S.B. 201, 132nd Gen. Assemb., Reg. Sess. (Ohio 2019). *See also* OHIO REV. CODE ANN. § 2929.14(A)(1)(a), (2)(a) (West 2023).

11 *See* LEWIS R. KATZ ET AL., BALDWIN'S OH. PRAC. CRIM. L. § 118:4 (3d ed. 2022).

12 *See* OHIO REV. CODE ANN. § 2967.271(B) (West 2023).

13 *See id.* § 2967.271(C).

14 *See id.* § 2967.271(E).

15 *See id.* § 2967.271(D).

16 *See* State v. Oneal, No. B 1903562, 2019 WL 7670061, at *7 (C.P. 2020).

17 *See Indeterminate Sentencing Laws*, LEGALMATCH, https://www.legalmatch.com/law-library/article/indeterminate-sentencing-laws.html (last visited Dec. 5, 2021).

sentencing scheme, which enables unchecked judicial discretion. A determinate sentencing scheme may correct some of the injustices conducted under the indeterminate sentencing scheme, but that method is not without flaws. In order to properly grant its people their designated rights and comply with its constitution, the state of Ohio must modify the existing indeterminate sentencing system by incorporating some components of the determinate system, thereby creating a constitutional and effective hybrid system. This process of reforming the sentencing scheme hinges on the Ohio Supreme Court's pending decisions in *State v. Simmons* and *State v. Hacker*. By striking down S.B. 201 as unconstitutional in these cases, the Court can prevent future violations of the peoples' constitutional rights and begin the process of implementing the new system which explicitly seeks to protect those rights.

This Note proceeds in seven parts. Part II reviews the fundamental framework of sentencing schemes especially with respect to S.B. 201. This Part also presents Ohio's history of sentencing schemes through the present-day S.B. 201 model. Part III analyzes the application of the ripeness doctrine to S.B. 201. The issue must be ripe for review in order for the Court to address the issue of constitutionality. Part IV examines how S.B. 201 violates three main constitutional provisions. It first analyzes how S.B. 201 fails to afford the accused their guaranteed right to a jury trial. Moreover, it examines how S.B. 201 violates the separation of powers doctrine because it transfers judicial power from the judge to the executive power of the parole board. Then, it scrutinizes the violation of due process such that the defendant is being denied a fair hearing and notice. Part V identifies the disparate racial impact of indeterminate sentencing schemes, which contributes to the mass carceral state.

Part VI reiterates the gravity of the harms that the people of Ohio will suffer if the Supreme Court upholds the law as constitutional. Part VII outlines a proposal for a hybrid sentencing scheme which integrates the effective contributions of both determinate and indeterminate sentencing. This hybrid sentencing scheme will be based on the successful implementation within other states—which would seek to not only fulfill the right of due process and to comply with the separation of powers doctrine, but also to amend it in a way that adequately addresses the concerns which were inadequately addressed by S.B. 201. The Note concludes in Part VIII by encouraging the Ohio Supreme Court to rectify the wrongs it has committed in S.B. 201 by striking down the law as unconstitutional and reinstating a hybrid system that overcomes the prior flaws of the individual systems.

II. DETERMINATE AND INDETERMINATE SENTENCING IN OHIO, INCLUDING S.B. 201

A. Determinate and Indeterminate Sentencing Schemes

A determinate sentence is one that "has a definite length and can't be reviewed or changed by a parole board or any other agency."[18] In this sentencing scheme, the judge's discretion is significantly limited by legal guidelines.[19] Proponents advocate for this determinate sentencing method for three main reasons: First, determinate sentences employ fairness by creating a predetermined standard that evades judicial

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[18] *Determinate Sentence*, *supra* note 8.

[19] *See id.*

implementation of biases and discrimination.[20] Second, it limits influence upon sentencing guidelines such that the defendant will be aware of the precise consequences they will face, thereby saving the court time.[21] Finally, it provides for a reduction in crimes such that a criminal will have knowledge of the exact severity of the consequences prior to committing a crime, and the harsh penalties may be influential in reconsidering illegal action before it is conducted.[22]

Conversely, critics of this sentencing method have several reasons to oppose determinate sentencing. Its lack of flexibility prevents the judge from considering the unique circumstances of each case, which can result in someone who was unaware they committed a crime being held to the same degree of retribution as someone who purposely committed that same crime.[23] Additionally, this sentencing method contributes to the issue of mass incarceration by increasing the likelihood of being imprisoned coupled with the stricter duration impositions on parole eligibility.[24] Lastly, "because minimum mandatory sentences can be unfair towards the accused, the judge or jury can get tempted to circumvent their duties to help the convict from getting an excessive punishment."[25]

An indeterminate sentencing scheme, on the other hand, is calculated in terms of a range of years.[26] Under this sentencing scheme, the "parole board has discretion in deciding whether the defendant has served their time."[27] Proponents of this sentencing method feel that it allows for the rehabilitation of offenders in an individualized way.[28] Additionally, indeterminate sentencing allows the potential for early release. Using early release as incentive for self-improvement "shows the offenders that their good behavior is going to be acknowledged and rewarded, while their bad behavior is going to be punished."[29] Lastly, this method of sentencing allows the judge to look beyond merely the crime itself and consider factors which are unique to each individual case, including "criminal history and conduct while in prison."[30]

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[20] *See Pros and Cons of Determinate Sentencing*, OP. FRONT, https://opinionfront.com/pros-cons-of-determinate-sentencing (last visited Oct. 28, 2021). *See also "Indeterminate Sentencing" – What Exactly Is It?*, SHOUSE CAL. L. GRP. (Jan. 10, 2023), https://www.shouselaw.com/ca/blog/indeterminate-sentencing/.

[21] *See Pros and Cons of Determinate Sentencing*, *supra* note 20.

[22] *See id.*

[23] *See id.*

[24] *See id.*

[25] *Id.*

[26] *See Determinate Sentence*, *supra* note 8.

[27] *Id.*

[28] *See Indeterminate Sentencing Pros and Cons*, ASIA-PACIFIC ECON. BLOG (May 6, 2015), https://apecsec.org/indeterminate-sentencing-pros-and-cons/.

[29] *Id.*

[30] *Id.*

Critics of this sentencing method are concerned about its capacity for corruption and manipulation. They argue that indeterminate sentencing gives the parole board excessive unchecked discretionary authority which leads to arbitrary and discriminatory decisions.[31] As a result of these decisions, "too often, minorities and prisoners without connections receive overly harsh decisions from parole boards, while less deserving offenders are released early."[32] Additionally, critics are concerned about the propensity for criminals to behave properly in prison for the purpose of an early release without intention to continue that behavior once released.[33] As a result, this criminal who poses a danger will be released back into society.[34]

B. Ohio's History of Sentencing Schemes – From Indeterminate to Determinate

The fundamental concept of the indeterminate sentencing scheme—a reduction in sentence duration in exchange for "good behavior"—has been prevalent in criminal sentencing for centuries, well before the concept was assigned the modern-day term "indeterminate" in the sentencing context.[35] The first application of this concept was implemented in New York in 1817, when the legislature statutorily assigned "prison inspectors" the authority to release prisoners who provided verification of demonstrating good behavior.[36] The essence of indeterminate sentencing is embedded within this statute through the concept of potential for early release contingent upon "good behavior" as evaluated by the "prison inspectors,"[37] who parallel the parole board in modern-day applications.[38]

This sort of reward system was first introduced in Ohio's sentencing structure in 1856 in a statute which permitted "a deduction of five days in each month during which any prisoner 'shall not be guilty of a violation of any of the rules of the prison and shall labor with diligence and fidelity.'"[39] Ohio continued to implement this ideology as exemplified in an 1869 report by the directors of the penitentiary which

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31 *See Indeterminate Sentencing Pros and Cons*, *supra note* 28. *See also* Janet Portman, *Indeterminate vs Determinate Prison Sentences Explained*, NOLO CRIM. DEF. LAW., https://www.criminaldefenselawyer.com/determinate-sentences.cfm (last visited Oct. 28, 2021).

32 Portman, *supra* note 31.

33 *See Indeterminate Sentencing Pros and Cons*, *supra* note 28.

34 *See id.*

35 Edward Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. CRIM. L. & CRIMINOLOGY 9, 9–10 (1925).

36 *Id.*

37 *Id.*

38 This parallel between the "prison inspectors" of the 1817 New York statute and the modern-day parole board stems from the idea that the discretion is taken out of the hands of the judges and given to a body that functions out of the prison. *See id.*

39 *Id.*

said that "sentences for crime, instead of being for a definite[40] period, especially in case of repeated convictions, will under proper restrictions be made to depend upon the reformation and established good character of the convict."[41] Essentially, evidence of "good behavior" may permit adjusted sentences on an individualized basis as opposed to a ubiquitous approach.

This "good behavior" incentive continued to pervade Ohio's sentencing laws throughout recent history. In 1974 around the "tough on crime" era, Ohio restructured its criminal code to reflect the foundations of the Model Penal Code, and "it retained indeterminate sentencing with the judge selecting the minimum term from a range set by statute for each of four felony levels."[42] In the 1980s, the state sweepingly expanded its mandatory terms on both the felony and misdemeanor levels, which resulted in "eight new sentencing ranges added to the original four ranges from the 1974 criminal code."[43] Throughout the remainder of the decade and into the next one, the prison population proliferated as the bill intended.[44] As the issue of prison crowding expanded, the Ohio Criminal Sentencing Commission ("the Commission") was created to address "prison population and cost, overly complicated sentencing laws, racial disparity in sentencing, and lack of judicial discretion."[45] In response to these issues, the Commission guided the state toward "a determinate system based on judicial discretion and the concept of 'truth in sentencing.'"[46]

In 1996, Ohio engaged in sentencing reform which shifted the system from indeterminate sentencing to determinate sentencing in order to "emphasize that the authority and responsibility for determining how long a defendant will serve in prison belongs to the judge."[47] The state enacted the "truth in sentencing scheme," which "established a type of determinate sentencing structure called a presumptive system that required minimum sentences with judicial discretion from a range of possible punishments."[48] The Commission's reasoning for this transition from indeterminate sentencing to determinate sentencing were as follows:

- A sense that the public found indeterminate sentencing confusing. In practice pre-SB2, "[six] to [twenty-five]" never meant [twenty-five] and

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[40] In 1869, Ohio used the term "definite," which is directly consistent with the language used today for [in]determinate sentencing, also referred to as [in]definite sentencing. OHIO CRIM. SENT'G COMM'N, *supra* note 5, at 6; Lindsey, *supra* note 35, at 17.

[41] Lindsey, *supra* note 35, at 17.

[42] OHIO CRIM. SENT'G COMM'N, *supra* note 5, at 1.

[43] *Id.*

[44] *See id.*

[45] *Id.* at 2.

[46] *Id.*

[47] *See* KATZ ET AL., *supra* note 11.

[48] *See* OHIO CRIM. SENT'G COMM'N, *supra* note 5, at 2.

often didn't mean [six], since parole eligibility came after about [four] years;

- The knowledge that the inmate's actual time served was not determined by the elected judge in a public forum, but by the Parole Board—an unelected body meeting in private;
- A sense that the Parole Board sometimes acted arbitrarily, as Board decisions varied widely;
- A desire to give greater control over sentences to judges, so that all concerned—court, defendant, victims, and public—know that stated sentences equate more closely to time actually served;
- A desire to foster a broader range of correctional alternatives; and
- A desire to make prison populations more predictable for fairness and budgetary purposes.[49]

In accordance with the truth in sentencing scheme, the Ohio legislature enacted Revised Code Section 2967.11,[50] hereinafter the "Bad Time" Statute, which added jail time to a prisoner's sentence for violations committed during incarceration.[51] In *State ex rel. Bray v. Russell*,[52] the Ohio Supreme Court struck down the "Bad Time" Statute as unconstitutional on the grounds that it violated the separation of powers doctrine.[53]

Shortly after the implementation of determinate sentencing, several issues became apparent. Prisons were inundated well beyond their capacities, the system was becoming increasingly costly, and the public became confused by the complexity of the determinate sentencing guidelines and skeptical of their sufficiency, particularly for sex crimes.[54]

C. Passage of S.B. 201 – Return to Indeterminate Sentencing

As determinate sentencing proved increasingly problematic, Ohio reverted back to an indeterminate sentencing scheme in 2019.[55] This transition was fueled by the

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[49] *Id.*

[50] *2006 Ohio Revised Code – 2967.11. Bad Time Added to Prison Term for Violation; Rules Infraction Board at Each Institution*, JUSTIA, https://law.justia.com/codes/ohio/2006/orc/jd_296711-9d5f.html#:~:text=%C2%A7%202967.11.,the%20commission%20of%20the%20offense (last visited Feb. 22, 2023). *See generally* State ex rel. Bray v. Russell, 729 N.E.2d 359 (Ohio 2000).

[51] Stephanie D. Weaver, *Will Bad Times Get Worse? The Problems with Ohio's Bad Time Statute*, 17 N.Y. L. SCH. J. OF HUM. RTS. 341, 341 (2000).

[52] *See generally State ex rel. Bray*, 729 N.E.2d. 359.

[53] *Id.* at 362.

[54] *See id.*

[55] *See* Sean C. Gallagher, *Back to the Future: The Reagan Tokes Act (SB 201) and Ohio's Return to Indefinite Sentencing*, OHIO JUD. CONF. (Apr. 4, 2019),

increasingly problematic tendencies of the determinate system in place since 1996, but it culminated over an incident that outraged communities statewide. In February 2017, twenty-one-year-old Ohio State University student, Reagan Tokes, was abducted, raped, and murdered by Brian Golsby.[56] At the time of the incident, Golsby was on post-release control from serving six years on a prior rape conviction.[57] Over the course of his incarceration, Golsby had accumulated fifty institutional violations across five different prisons.[58] In the week prior to committing murder, he had committed a series of aggravated robberies.[59] Despite the evident danger this man posed to the community, he was released at the end of his term because he served a determinate sentence,[60] meaning that "he could not be detained for longer than his sentence prescribed, regardless of any extenuating circumstances."[61]

The community's outrage over his release sparked a call for change in policy in Reagan's memory—hence, the Reagan Tokes Act.[62] This Act—as codified in Senate Bill 201[63]—is extremely complex, "cover[ing] [four-hundred thirty-five] pages, amend[ing] [seventy-five] existing O.R.C. sections, and enact[ing] [five] new O.R.C sections."[64] Under this Act, "qualifying [felonies are] subject to a minimum term of up to [eleven] years for a first-degree felony and up to eight years for a second-degree felony and a maximum term of one-and-a-half years of the minimum term imposed."[65]

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http://www.ohiojudges.org/Document.ashx?DocGuid=2e1ef4da-605f-41e9-b36c-796973721929.

56 *See* Steve Kilburn, *Ohio's Shift Back to Indefinite Sentencing: Reagan Tokes Act and Current Local Controversy*, RITTGERS & RITTGERS ATT'YS AT L. (Dec. 20, 2019), https://www.rittgers.com/blog/2019/12/ohios-shift-back-to-indefinite-sentencing-reagan-tokes-law-and-current-local-controversy/; Bennett Haeberle, *Reagan Tokes' Mother Still Holds Hope for Legislative Change 4 Years After Daughter's Murder*, 10 WBNS (Aug. 4, 2021), https://www.10tv.com/article/news/investigations/10-investigates/reagan-tokes-mother-still-holds-hope-for-legislative-change-4-years-after-daughters-murder/530-cd14d3f6-f460-4f3c-9608-2d663cbeef8f.

57 *See* Gallagher, *supra* note 55.

58 *See id.*

59 *See* Kilburn, *supra* note 56.

60 *See* Gallagher, *supra* note 55.

61 Brianna Bennett, *The Cruel and Vindictive Murder of Reagan Tokes*, MEDIUM (Dec. 9, 2020), https://medium.com/crimebeat/the-cruel-and-vindictive-murder-of-reagan-tokes-63340a6b83f8.

62 "Tokes's family [fought] for state/federal legislation in her memory, and the only way to ensure that change occur[red] [was] to remember Reagan. It is our moral responsibility to share her story and pressure those in positions of power to take action." *See id.*

63 *See generally* S.B. 201, 132nd Gen. Assemb., Reg. Sess. (Ohio 2019).

64 State v. Oneal, No. B 1903562, 2019 WL 7670061, at *1 (C.P. Nov. 20, 2019).

65 KATZ ET AL., *supra* note 11, § 115:1; *see also* OHIO REV. CODE ANN. § 2929.14(A), (B)(1) (West 2023).

Accordingly, only felonies of the first and second degrees are governed by indeterminate sentencing under S.B. 201; felonies of the third, fourth, and fifth degrees retain the determinate sentencing applications.[66]

D. Prior Conflict Among Ohio's Districts: Ripeness and Constitutionality

S.B. 201 was first deemed unconstitutional by Judge Tom Heekin in the Hamilton County Court of Common Pleas primarily on the basis that it violates the principle of separation of powers.[67] Ohio's twelve districts then began to address the issue and were in stark disagreement[68] over S.B. 201 in two ways: whether the law is ripe for review and whether the law is constitutional.

The ripeness doctrine dictates that "the judicial process should be reserved for problems that are real or present and imminent, not squandered on problems that are abstract, hypothetical, or remote."[69] An issue is ripe for appellate review if it has a "direct and immediate impact on the parties;" otherwise, any adjudication by the court would be premature, and thus not ripe for review.[70] Because the potential extension on the sentence has not yet been served by the defendant and may never be applied, the Fourth, Fifth, Sixth, and Eleventh District Appellate Courts declined to review sentencing disputes under S.B. 201, citing that the issue was not yet ripe for review.[71] The Sixth District Appellate Court was the first to take this stance against ripeness in *State v. Velliquette* and *State v. Maddox*.[72]

When a district deems that the issue is not yet ripe for review, then their adjudication process concludes because they are not authorized to decide an issue which is not yet ripe.[73] However, when a district decides that the issue is ripe for review, then the court will continue its analysis onto the next issue: constitutionality. The Second, Third, and Twelfth District Appellate Courts implicitly found the issue

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66 *See* KATZ ET AL., *supra* note 11.

67 *See generally Oneal*, 2019 WL 7670061.

68 *See* Memorandum from Scott Shumaker, Crim. J. Couns., to Ohio Crim. Sent'g Comm'n (Jan. 13, 2021), https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/SB201/appealTracking.pdf.

69 TRACY BATEMAN FARREL & LONNIE E. GRIFFITH, JR., OH. JUR. ACTIONS § 27 (3d ed. 2023); *accord* State v. Maddox, 2020-Ohio-4702, 2020 WL 5834857, at ¶ 8.

70 MARK P. PAINTER & ANDREW S. POLLIS, BALDWIN'S OH. APP. PRAC. § 7:2 (2022).

71 *See generally* State v. Lavean, No. 2020-L-045, 2021 WL 1611662, at *2 (Ohio Ct. App. Apr. 26, 2021); State v. Cochran, No. 2019 CA 00122, 2020 WL 6779731, at *4 (Ohio Ct. App. Nov. 18, 2020); State v. Ramey, Nos. 20CA1, 20CA2, 2020 WL 7395499, at *1 (Ohio Ct. App. Dec. 15, 2020).

72 *See generally* State v. Velliquette, 2020-Ohio-4855, 160 N.E.3d 414, at ¶ 1; State v. Maddox, No. CL-19-1253, 2020 WL 5834857, at *3 (Ohio Ct. App. Sep. 30, 2020).

73 *See* PAINTER & POLLIS, *supra* note 70, § 7:2.

to be ripe for review by ruling on the constitutional merits without addressing the issue of ripeness.[74]

In *State v. Wilburn*, the Eighth District Appellate Court directly confronted this issue of ripeness. The Court argued that the issue was ripe for review on the grounds that the "operation of the law is inevitable at the end of his minimum term of imprisonment."[75] In *State v. Delvallie*, the Eighth District Appellate Court not only found the issue to be ripe for review but also unconstitutional on the grounds that it violates the separation of powers doctrine.[76] However, within the same district, on the same day as the *Delvallie* ruling, the court held in *State v. Gamble* that the issue was ripe for review and constitutional, creating a serious conflict.[77]

In *State v. Maddox*,[78] the Ohio Supreme Court addressed the issue of ripeness, thereby settling that scope of disagreement among the districts.[79] The Court held that the issue was ripe for review. Because the issue is ripe for review, the Ohio Supreme Court is in the process of settling the issue of constitutionality in *State v. Simmons*[80] and *State v. Hacker*.[81] The premise for the disagreement over constitutionality is rooted in three segments of law. Declarations of unconstitutionality stem from the assertion that S.B. 201—whether in whole or in part—violates the Sixth Amendment right to a jury trial, the separation of powers doctrine, and the Fourteenth Amendment right of due process.

E. The Future of S.B. 201

The Ohio State Legislature recently attempted to reinforce S.B. 201 by addressing "reforms to the GPS monitoring portion of the bill."[82] These reforms had been endorsed during the initial passage of the Bill but were reserved to be implemented at

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74 *See generally* State v. Wilburn, 2021-Ohio-578, 168 N.E.3d 873, at ¶¶ 10–18; State v. Leet, No. 28670, 2020 WL 5743293, at *1–5 (Ohio Ct. App. Sep. 25, 2020); State v. Hacker, 2020-Ohio-5048, 161 N.E.3d 112, at ¶ 18; State v. Guyton, No. CA2019-12-203, 2020 WL 4279793, at *1–4 (Ohio Ct. App. July 27, 2020).

75 *Wilburn*, 168 N.E.3d 873, at ¶ 18.

76 *Compare* State v. Delvallie, 2021-Ohio-1809, 173 N.E.3d 544, at ¶¶ 15, 55 (overruling *State v. Simmons*), *with* State v. Simmons, 2021-Ohio-939, 169 N.E.3d 728, at ¶ 52 (finding the issue to be ripe for review but upheld S.B. 201 as constitutional).

77 *See* State v. Gamble, 2021-Ohio-1810, 173 N.E.3d 132, ¶ 52.

78 *See generally* State v. Maddox, 168 Ohio St. 3d 292, 2022-Ohio-764, 198 N.E.3d 797.

79 *Id.*

80 *See generally* State v. Simmons, 2021-Ohio-3563, 2021 WL 4516879.

81 *See generally* State v. Hacker, 2020-Ohio-5048, 161 N.E.3d 112.

82 Tom Bosco, *House Moves to Shore Up GPS Tracking of Parolees, Five Years After Tokes' Murder*, ABC 6 (Feb. 9, 2022), https://abc6onyourside.com/news/local/house-moves-to-shore-up-gps-tracking-of-parolees-five-years-after-tokes-murder.

a later date.[83] Under H.B. 166,[84] the State has taken the initiative to officialize these remaining portions of the original bill.[85] The purpose of H.B. 166 is to refine the process of monitoring criminal offenders in many respects. First, it would "reduce parole officer caseloads, giving them the time to monitor with a laser focus."[86] Second, it would "require the establishment of post-release, re-entry programs for violent felons," in an effort to rectify the gap in the law which enabled Golsby to murder Tokes.[87] Lastly, it would enhance the boundaries of GPS monitors and give "law [enforcement] access to the GPS supervision data."[88] In February 2022—the five-year anniversary of Tokes' death[89]—the "Ohio House Criminal Justice Committee unanimously pass[ed] H.B. 166"[90] with a vote of 89-0,[91] thereby advancing the bill to the State Senate.[92] However, the Senate failed to address the bill by the end of the legislative term,[93] thereby resulting in its death.[94] Accordingly, a

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83 *See id.*

84 H.B. 166, 134th Gen. Assemb., Reg. Sess. (Ohio 2022).

85 *See* Bosco, *supra* note 82.

86 Jeff Smith, *Legislation Strengthens Reagan Tokes Act*, WTOL11 (Feb. 8, 2022), https://www.wtol.com/article/news/politics/state-politics/legislation-strengthens-reagan-tokes-act/512-e9ffbce5-63ac-4ee7-8524-1d50ca97a55a.

87 *See id.*

88 Bennett Haeberle, *Remaining Portions of Reagan Tokes Act Passes Ohio House*, 10 WBNS (Feb. 9, 2022), https://www.10tv.com/article/news/investigations/10-investigates/remaining-portions-reagan-tokes-act-passes-ohio-house/530-341e4788-7db9-473f-a67f-2a9b2bf0c2ff.

89 *See* Smith, *supra* note 86.

90 *Id.*

91 *Fowler Arthur Supports Passing of House Bill 166*, THE OHIO HOUSE OF REPRESENTATIVES (Feb. 14, 2022), https://ohiohouse.gov/members/sarah-fowler-arthur/news/fowler-arthur-supports-passing-of-house-bill-166-108661.

92 *See* Bennett Haeberle, *Reagan Tokes' Mother Calls Lawmakers Vote to Advance Bill "Long Overdue"*, 10 WBNS (Feb. 10, 2022), https://www.10tv.com/article/news/investigations/10-investigates/reagan-tokes-mother-calls-lawmakers-vote-advance-bill-long-overdue/530-016561d0-dcee-46ef-9381-628ce40676f5#:~:text=House%20Bill%20166%20now%20advances,to%20reduce%20parole%20officers'%20caseloads.

93 Jordan Laird, *Ohio Supreme Court to Consider Whether Reagan Tokes Act Sentences Are Constitutional*, THE COLUMBUS DISPATCH (Dec. 13, 2022), https://www.dispatch.com/story/news/politics/courts/2022/12/13/ohio-supreme-court-to-consider-prisons-authority-over-sentences/69626093007/ (explaining that as of December 13, 2022, the Bill had been sitting in the Ohio Senate judiciary committee since February); *OH HB166*, BILL TRACK 50, https://www.billtrack50.com/BillDetail/1335990 (showing no further action on the Bill since it arrived in the Ohio Senate judiciary committee).

94 Jade Martinez, *What is Lame Duck and How Might It Affect Ohioans?*, ACLU OHIO (Nov. 16, 2022), https://www.acluohio.org/en/news/what-lame-duck-and-how-might-it-affect-

new Bill will need to be reintroduced in the current term to be passed into law.[95] Given that S.B. 201 intended that the reforms set forth by H.B. 166 be implemented at a later date,[96] it is possible that the House will reintroduce this type of expansion bill in the current legislative term, thereby reinforcing S.B. 201.

While the legislative branch grapples with the expansion of S.B. 201, the Ohio Supreme Court is in the process of deciding on the key issue of the Bill's constitutionality in *State v. Simmons*[97] and *State v. Hacker*,[98] both of which challenge the constitutionality of the existing Bill. As Ohio's twelve districts began reaching contradictory rulings,[99] it was inevitable that the Supreme Court would have to address the issue for the purpose of creating statewide unity on the law.

III. Application of the Ripeness Doctrine – Ripe for Appellate Review

The question whether S.B. 201 is constitutional may be addressed only if the issue is first determined to be ripe for review.[100] This process involves the application of the ripeness doctrine. The Fourth, Fifth, Sixth, and Eleventh District Appellate Courts expressly determined that the question of constitutionality of S.B. 201 was not ripe for review[101] on the grounds that "the appellants ha[ve] not served their minimum term of imprisonment and thus ha[ve] not yet been subject to the application of the law."[102] These courts invoke that the Bill contains a "rebuttable presumption" that the offenders will be released upon serving the minimum sentence.[103] The ODRC has the discretion under certain circumstances to keep the offenders detained past this minimum period but within the duration confines as set by the judge, so the courts reason that those offenders have not yet served their minimum sentences and thus have not yet been subject to the ODRC's sentencing authority.[104] Accordingly, they claim that the constitutionality issue of S.B. 201 was not ripe for review.

Despite the erroneous rationale of the aforementioned courts, the issue of constitutionality of S.B. 201 is ripe for review. The Second, Third, and Twelfth District Appellate Courts implied ripeness by making a determination on the issue of constitutionality, regardless of the absence of language pertaining to the ripeness

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ohioans (explaining that a bill dies upon the expiration of a legislative term, which falls on even years, which encompasses 2022, the year this Bill expired); *OH HB166*, *supra* note 93.

95 Martinez, *supra* note 94.

96 *See* Bosco, *supra* note 82.

97 Baldwin's Oh. App. Prac. § 7:2 (West 2021).

98 *Determinate Sentence*, *supra* note 8.

99 State v. Delvallie, 2021-Ohio-1809, 173 N.E.3d 544, ¶ 15.

100 State v. Wilburn, 2021-Ohio-5048, 168 N.E.3d 873, at ¶ 15.

101 *Id.* at ¶ 18.; *Delvallie* at ¶ 13.

102 *Delvallie* at ¶ 13.

103 *Id.* at ¶ 82.

104 *See id.*

doctrine.[105] The Eighth District Appellate Court addressed the issue of ripeness directly.[106] In *State v. Wilburn*[107] and *State v. Delvallie*,[108] the Court explicitly declared that the issue is ripe for review given that the application of S.B. 201 will necessarily be imposed upon all qualifying offenders the point at which the minimum sentence has been served.[109]

According to precedent, the ripeness decision is guided both by "the likelihood that the harm alleged by the plaintiffs will ever come to pass" and "the hardship to the parties if judicial relief is denied at this stage in the proceedings."[110] In *State v. Maddox*,[111] the Court determined that the issue of constitutionality regarding S.B. 201 meets these elements of ripeness, and thus, the issue is ripe for appellate review.[112]

A. Ohio Supreme Court Finds Issue Ripe for Review in State v. Maddox

At the appellate level in *State v. Maddox*, the Sixth District Court of Appeals determined that the issue of constitutionality was not ripe for review on the grounds that the "[a]ppellant has not yet been subject to the application of these provisions, as he has not yet served his minimum term, and therefore has not been denied release at the expiration of his minimum term of incarceration."[113] According to that court, ripeness is a "question of timing,"[114] and because the appellant had not yet been subject to an extension past the presumptive minimum four-year sentence, the timing was not appropriate for them to make any decisions on the constitutionality of the provision.[115] The court ultimately suggested that the appropriate method for bringing this challenge is to "fil[e] a writ of habeas corpus if he is not released at the conclusion of his four-year minimum term of incarceration."[116]

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105 BALDWIN'S OH. APP. PRAC. § 7:2 (West 2021).

106 *Id.*

107 *Delvallie* at ¶ 18.

108 *Wilburn*, 2021-Ohio-5048, 168 N.E.3d 873, at ¶ 15 (Gwin, J., dissenting).

109 *Delvallie* at ¶ 18.

110 *See Wilburn* at ¶ 16.

111 *See generally* State v. Maddox, 168 Ohio St. 3d 292, 2022-Ohio-764, 198 N.E.3d 797.

112 *Id.*

113 State v. Maddox, 2020-Ohio-4702, No. CL-19-1253, 2020 WL 5834857, at ¶ 7 (Sep. 30, 2020).

114 *Maddox* at ¶ 8 (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102 (1974)).

115 *Id.* at ¶ 11.

116 *Id.* at ¶ 12–16 (relying on the holding of State ex rel. Bray v. Russell, 89 Ohio St.3d 132 (2000)). However, the decision in Bray was applied to the "Bad Time" Statute, under which the ODRC "unilaterally extend[ed] an inmate's sentence beyond the sentence imposed by the trial court," making habeas corpus the only viable method for challenging the additional prison time. The Supreme Court distinguished this case from that of Bray on the basis that "Maddox and other defendants who have been sentenced under the Reagan Tokes Law have received the

The Ohio Supreme Court granted *certiorari* in *State v. Maddox*[117] and, in March 2022, reversed the decision, holding that the constitutional challenge to S.B. 201 was ripe for review, and thereby remanding it for the appellate court to address the issue of constitutionality.[118] The Supreme Court held that the issue is ripe for review because "(1) he has been sentenced under the statute, (2) no further factual development is necessary for a court to analyze the challenge, and (3) delaying review would result in duplicative litigation, forcing Maddox and similarly situated people to endure potential violations of their constitutional rights in order to challenge the law."[119] The Ohio Supreme Court also cites to federal precedent in *Steffel v. Thompson*,[120] whereby the United States Supreme Court held that "a constitutional challenge to a statute is ripe for review when the claimant is merely threatened with prosecution under the statute and the statute arguably curtails his or her constitutional rights."[121] Further, "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."[122]

While the Ohio Supreme Court was correct in their holding that the issue of constitutionality is ripe for review, it is crucial to further expound upon the imminence requirement being met as well as the irreversible, inexorable impact on the defendant in the absence of a finding for ripeness.

B. Imminent and Inevitable Harm to Offenders

S.B. 201 inflicts imminent harm upon the offender at the time of trial. An issue is ripe for appellate review if it has a "direct and immediate impact on the parties."[123] Under S.B. 201, the imprecise nature of imposing a sentence in the form of a range[124] prohibits the offender from fully understanding the consequences at stake. This obscured information severely inhibits the legal process because the "maximum potential punishment influences pretrial practice, plea-bargaining, and the decision to

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entirety of their sentences and the sentences have been journalized," and thus, a direct appeal is appropriate.

117 *See generally* State v. Maddox, 168 Ohio St. 3d 292, 2022-Ohio-764, 198 N.E.3d 797.

118 *Id.* at ¶ 22.

119 *Id.* at ¶ 8.

120 *See generally* Steffel v. Thompson, 415 U.S. 452 (1974) (highlighting that the petitioner was threatened with arrest under a state law for distributing handbills opposing U.S. involvement in Vietnam, and he asserted that the state law violated his First and Fourteenth Amendment rights).

121 State v. Maddox, 168 Ohio St. 3d 292, at ¶ 12 (2022); *accord Steffel*, 415 U.S. at 475.

122 *Maddox* at ¶ 13 (quoting *Steffel*, 415 U.S. at 459).

123 BALDWIN'S OH. APP. PRAC. § 7:2 (West 2021).

124 *See Determinate Sentence*, *supra* note 8.

go to trial."[125] By mandating the administration of a vague and ambiguous sentence, the Bill directly and imminently harms the offender by severely disadvantaging them in the legal process through an imbalance of fairness.

The harm is not only imminent in its impact on the legal proceedings in the court, but it is also imminent in the sense that the ODRC's determination of extending a sentence is made on the basis of the corresponding offender's actions and behavior while incarcerated. At the time of the hearing at the Ohio Supreme Court, Maddox had already been incarcerated for over half of his presumed minimum sentence. Accordingly, the ODRC has been collecting data on Maddox for two years, which will be used to make the determination of whether to extend his sentence come the four-year presumed minimum. The ODRC's decision-making process with respect to extending Maddox's sentence had already begun, thus triggering the imminence required for a finding of ripeness.

Not only is the alleged harm imminent, but it is also certain to materialize. According to precedent set by *Riva v. Commonwealth of Massachusetts* in 1995, the ripeness doctrine permits a delay in the onset of a statute so long as the statute's "operation is inevitable (or nearly so)."[126] Offenders sentenced under S.B. 201 will "inevitabl[y]" be subjected to the "operation of the law . . . at the end of [their] minimum term of imprisonment"[127] and corresponding presumptive release.[128] When an offender has served the minimum sentence, they will either be released per the statutory presumption or subject to the ODRC's discretion by a decision it is not entitled to make.[129] In the latter case, the ODRC will assume the authority to either extend the sentence thereby keeping them past the minimum sentence or determine that the sentence has been served, thereby allowing the sentence to conclude at the minimum duration.[130] These decision routes implicate the application of provisions within S.B. 201. Accordingly, the Bill will assuredly be injurious to offenders at the consummation of their sentences. The presence of both immediate and impending harms to the offender fulfills the first element of the ripeness doctrine.[131]

These explanations of imminency and certainty of materialization would have strengthened the Court's finding for ripeness. In Justice Patrick DeWine's dissenting opinion, he asserts that "[t]he majority misapplies federal precedent" set forth in

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125 State v. Delvallie, 2021-Ohio-1809, 173 N.E.3d 544, at ¶ 15 (quoting Appellant's Merit Brief at ¶ 7, State v. Maddox, 268 Ohio St. 3d 292, 2022-Ohio-764, 198 N.E.3d 797 (No. L-19-1253).

126 State v. Wilburn, 2021-Ohio-578, 168 N.E.3d 873, at ¶ 14 (Ohio 2021) (citing *State v. Cochran*, No. 2019 CA 00122, 2020 WL 6779731, at ¶ 28 (Ohio App. Nov. 18, 2020) (Gwin, J., dissenting) (quoting Riva v. Commw. of Mass., 61 F.3d 1003, 1010 (1st Cir. 1995)).

127 *Wilburn* at ¶ 18; *accord Delvallie*, at ¶ 13.

128 *See Delvallie* at ¶ 13.

129 *See id.*

130 *See id.*

131 *See* BALDWIN'S OH. APP. PRAC. § 7:2 (West 2021).

Steffel.[132] He claims that the imminence requirement in *Steffel* was met because an "imminent threat of enforcement of the statute deterred the petitioner from exercising his constitutional rights."[133] For this reason, he incorrectly concludes that Maddox has "merely pointed to the possibility of injury in the future should certain speculative events come to pass."[134]

Justice DeWine conveniently failed to mention the language in *Steffel* which dictates that an issue is ripe when it "demonstrates a genuine threat of enforcement of a disputed state criminal statute."[135] Had the majority in *Maddox* conducted the analysis which expounds upon the imminency and demonstrates the certain materialization of the S.B. 201 provisions, it would have been clearer that this injury is not merely a possibility, but rather "a genuine threat of enforcement."[136]

C. Necessity of Judicial Relief in Preventing Hardship to Parties

The Ohio Supreme Court's determination that the issue is ripe for review is the first step in minimizing the damages caused by S.B. 201. If the Court had denied judicial relief to the offender "at this stage in the proceedings,"[137] both the offender and the Court would have suffered undue hardships. The Court's promptness is key to reaching a determination on the issue of constitutionality. The longer it takes for the Court to strike down the statute as unconstitutional, the higher the likelihood that Maddox and other similarly situated offenders will be inappropriately and irreversibly deprived of liberty for a considerable period. The Court made the right decision in finding for ripeness as opposed to deflecting an immediate decision to a later point in time to "wait-and-see" if S.B. 201 is unconstitutional at the expense of potentially detaining offenders beyond the requisite duration.[138] In determining the constitutionality of the Bill, time is of the essence, so waiting until the minimum sentence has been served to achieve ripeness could have resulted in years of overserved time should the Bill be found unconstitutional.[139] For the Court to "[postpone] adjudication until after someone is physically restrained under an

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[132] State v. Maddox, 168 Ohio St. 3d 292, 2022-Ohio-764, 198 N.E.3d 797, at ¶ 49–58 (Dewine, J., dissenting).

[133] *Id.* at ¶58 (Dewine,J., dissenting).

[134] *Id.*

[135] Steffel v. Thompson, 415 U.S. 452, 475 (1974).

[136] *Id.*

[137] *Id.*

[138] State v. Maddox, 168 Ohio St. 3d 292, at ¶ 17, 2022-Ohio-764, 198 N.E.3d 797; State v. Delvallie, 2021-Ohio-1809, 173 N.E.3d 544 at ¶ 18 (quoting Appellant's Merit Brief at ¶ 4, State v. Maddox, 268 Ohio St. 3d 292, 2022-Ohio-764, 198 N.E.3d 797 (No. L-19-1253)).

[139] *See State v. Wilburn*, 2021-Ohio-578, 168 N.E.3d 873, at ¶ 16 (citing State v. Cochran, No. 2019 CA 00122, 2020 WL 6779731, at ¶ 33 (Ohio App. Nov. 18, 2020) (Gwin, J., dissenting).

extended sentence results in the worst legal harm—loss of liberty that cannot be retroactively remedied."[140]

Just as the offender will be harmed by any period of over-detention, the court system will suffer as well. Should the Bill be held unconstitutional, the court will have to accommodate for the sentencing discrepancies not only for the offender in that case but all of the other offenders who were improperly sentenced under the Bill as well.[141] For this reason, the longer it takes to come to that decision, the more the "courts will be inundated with writs of habeas corpus, motions and other requests 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 in the inmate's direct appeal."[142]

By the time all of these erroneous sentences are corrected, many offenders likely will have served more than the appropriate amount of time for their offenses for which a retroactive remedy does not exist.[143] The Court must immediately address the harms to all of the offenders across Ohio who were sentenced under S.B. 201 in order to limit the extent of the harm they will endure by providing judicial relief. Prompt action will also help to limit the continued infliction of harm on future offenders whose impending sentences will be assigned pursuant to the Bill. The grave harms that will be inflicted upon offenders statewide as well as the court system invoke the need for urgent judicial relief, thereby fulfilling the second element of the ripeness doctrine.

IV. CONSTITUTIONAL VIOLATIONS OF S.B. 201

Because the Court in *State v. Maddox* determined that the issue is ripe for appellate review, the case was remanded for a decision on the issue of constitutionality.[144] The Court's decision in *State v. Maddox* also remanded an additional twenty-one appellate decisions for further proceedings.[145] This decision "permit[s] offenders to appeal sentences imposed under the [Bill] before the [O]DRC requests an extension of the minimum sentence."[146]

As a result, the Ohio Supreme Court is in the process of determining the constitutionality of S.B. 201.[147] In January 2023, the Supreme Court heard the oral

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[140] *Delvallie*, 2021-Ohio-1809, at ¶ 18 (quoting Appellant's Merit Brief, at ¶ 4, State v. Maddox, 268 Ohio St. 3d 292, 2022-Ohio-764, 198 N.E.3d 797 (No. L-19-1253)).

[141] *See Wilburn* at ¶ 16 (citing *Cochran*, 2020 WL 6779731 at ¶ 33) (Gwin, J., dissenting)

[142] *Id.*

[143] *See supra* text accompanying note 140.

[144] *See infra* text accompanying note 169.

[145] State v. Maddox, 168 Ohio St. 3d 292, 2022-Ohio-764, 198 N.E.3d 797 (remanding twenty-one additional cases).

[146] Kathleen Maloney, *Disputes Over Tokes Act Reach Supreme Court*, CNO (Jan. 4, 2023), https://www.courtnewsohio.gov/cases/2023/SCO/previews/0110-11/0110-11.asp#.Y-6ISXbMKUk.

[147] *See generally* State v. Simmons, 2021-Ohio-939, 169 N.E.3d 728; State v. Hacker, 2020-Ohio-5048, 161 N.E.3d 112.

arguments in *State v. Simmons* and *State v. Hacker*.[148] Similar to the arguments made by opponents of S.B. 201 in the appellate-level cases,[149] the appellants in both cases before the Supreme Court assert that S.B. 201 violates the Constitution in three main ways. First, it violates the Sixth Amendment right to a trial by jury by assigning the role of jury to the ODRC in making sentence-extension determinations.[150] Second, the Bill also defies the separation of powers doctrine by improperly transferring judicial duties to the authority of the ODRC, which is an agency under the executive branch of government.[151] Third, the Bill further infringes upon the right to due process through unconstitutionally vague language.[152] For these reasons, S.B. 201 is unconstitutional and must be reversed.

A. S.B. 201 in Violation of Sixth Amendment Right to a Jury Trial

The Sixth Amendment of the United States Constitution[153] as well as Article I Section 5 of the Ohio Constitution[154] grant the right of the accused to a trial by an impartial jury[155] as opposed to permitting judicial fact-finding.[156] In analyzing this right to a trial by jury, the United States Supreme Court in *Apprendi v. New Jersey*[157]

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148 Video: Supreme Court of Ohio – Case No. 2021-0532 State v. Simmons (on file with Supreme Court of Ohio), https://ohiochannel.org/video/supreme-court-of-ohio-case-no-2021-0532-state-v-simmons; Video: Supreme Court of Ohio – Case No. 2020-1496 State v. Hacker (on file with Supreme Court of Ohio), https://www.ohiochannel.org/video/supreme-court-of-ohio-case-no-2020-1496-state-v-hacker.

149 *See infra* Sections A–C.

150 Merit Brief of Appellant at 4, State v. Simmons, 2021-Ohio-939, 169 N.E.3d 728 (No. 109476).; Merit Brief of Appellant at 14, State v. Hacker, 2020-Ohio-5048, 161 N.E.3d 112 (No. 2020-1496); *see also supra* text accompanying notes 11–17.

151 Merit Brief of Appellant at 6, State v. Hacker, 2020-Ohio-5048, 161 N.E.3d 112 (No. 2020-1496); Merit Brief of Appellant at 6, State v. Hacker, 2020-Ohio-5048, 161 N.E.3d 112 (No. 2020-1496); *see also supra* text accompanying notes 11–17.

152 Merit Brief of Appellant at 9, State v. Simmons, 2021-Ohio-939, 169 N.E.3d 728 (No. 109476).; Merit Brief of Appellant at 19, State v. Hacker, 2020-Ohio-5048, 161 N.E.3d 112 (No. 2020-1496); *see also supra* text accompanying notes 11–17.

153 *See generally* U.S. CONST. amend. VI.

154 *See generally* OHIO CONST. art. I, § 5.

155 Merit Brief of Appellant at ¶ 14, State v. Hacker, 2020-Ohio-5048, 161 N.E.3d 112 (No. 2020-1496) (citing Duncan v. Louisiana, 391 U.S. 145, 161–62 (1968)); In re Winship, 397 U.S. 358, 364 (1970)); *see also* Merit Brief of Appellant at ¶ 4, State v. Simmons, 2021-Ohio-939, 169 N.E.3d 728 (No. 109476).

156 Merit Brief of Appellant at 1, State v. Woods, 2022-Ohio-3970 (No. 2021-L-044), 2022 WL 16735746.

157 Apprendi v. New Jersey, 530 U.S. 466 (2000) (determining that the trial court judge violated Apprendi's constitutional rights when the judge imposed a sentence enhancement which exceeded the statutory maximum without the challenged factual finding); *see* Merit Brief

dictates that a defendant may only be sentenced to a term which exceeds the statutory maximum if "the factual circumstances justifying the enhanced sentence either be admitted via a guilty plea or found by the jury to exist beyond a reasonable doubt."[158] In *Blakely v. Washington*, however, the Court made two distinct clarifications of *Apprendi*. First, the Court held that the statutory maximum sentence "is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[159] The Court in *Blakely* further clarifies that the Sixth Amendment applies more broadly than punishments which exceed the statutory maximum; the protections afforded by the Sixth Amendment "prohibit[] a judge from making any finding necessary for the imposition of a particular sentence, unless that finding was reflected in the jury's verdict."[160]

While both *Apprendi* and *Blakely* address the extension of a sentence beyond the statutory maximum, the Ohio Supreme Court applied these principles in *State v. Foster*,[161] holding that it is unconstitutional for a judge to engage in fact-finding in place of a jury to overcome a minimum sentence.[162] This application of the requirement to keep fact-finding in the hands of the jury for extensions beyond the minimum sentence invokes the same issue with S.B. 201. The facts which support the ODRC's findings are "neither admitted by petitioner nor found by a jury."[163] Rather, the ODRC, acting as a judicial figure, engages in this fact-finding process itself and then proves the factors at a hearing conducted by itself to extend the sentence beyond the presumptive minimum.[164] For this violation alone, S.B. 201 is unconstitutional.

B. S.B. 201 in Violation of the Separation of Powers Doctrine

The principle of separation of powers is implicitly embedded within the foundation of the state constitution through the direct distinction made between the judicial,

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of Appellant at 19, State v. Woods, 2022-Ohio-3970 (No. 2021-L-044), 2022 WL 16735746 (referencing *Apprendi*, 530 U.S. at 471, 490).

158 Merit Brief of Appellant at 4, State v. Simmons, 2021-Ohio-939, 169 N.E.3d 728 (No. 109476) (citing *Apprendi*, 530 U.S. 466).

159 Merit Brief of Appellant at 20, State v. Woods, 2022-Ohio-3970 (No. 2021-L-044), 2022 WL 16735746 (quoting Blakely v. Washington, 542 U.S. 296, 303–04 (2004)).

160 Merit Brief of Appellant at 4–5, State v. Simmons, 2021-Ohio-939, 169 N.E.3d 728 (No. 109476) (referencing *Blakely*, 542 U.S. 296).

161 *See generally* State v. Foster, 109 Ohio St.3d 1 (2006).

162 *Id.* at 61; *see also* Merit Brief of Appellant at 5, State v. Simmons, 2021-Ohio-939, 169 N.E.3d 728 (No. 109476); Merit Brief of Appellant at 20–21; State v. Woods, 2022-Ohio-3970 (No. 2021-L-044), 2022 WL 16735746; Merit Brief of Appellant at 16, State v. Hacker, 2020-Ohio-5048, 161 N.E.3d 112 (No. 2020-1496).

163 Merit Brief of Appellant at 20, State v. Woods, 2022-Ohio-3970 (No. 2021-L-044), 2022 WL 1673574620 (referencing *Blakely*, 542 U.S. at 303).

164 Merit Brief of Appellant at 21, State v. Woods, 2022-Ohio-3970 (No. 2021-L-044), 2022 WL 16735746; *see also* Merit Brief of Appellant at 17–18, State v. Hacker, 2020-Ohio-5048, 161 N.E.3d 112 (No. 2020-1496).

executive, and legislative branches of government.[165] Each branch in this tripartite structure has been assigned its "own unique powers and duties that are separate and apart from the others."[166] This clear-cut division of power among the three branches creates a system of checks and balances, thereby allowing each branch to check the others.[167] The purpose of allocating power is that "the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments."[168] Accordingly, any one branch encroaching upon the authority vested in another branch constitutes a violation of the separation of powers doctrine which is correspondingly unconstitutional.

S.B. 201 blatantly disregards the separation of powers by authorizing one branch to conduct duties which were vested within a different branch. The state constitution vests judicial power within the courts,[169] yet the Bill contains several provisions which inappropriately transfer judicial power from the judge to the executive power of the ORDC.[170] Under the Bill, the ORDC is granted the discretion to rebut the presumption of release upon the completion of the minimum prison term if it decides that the offender committed some infraction, such as violating the law.[171] If the ORDC rebuts that presumption, then it is assigned the broad discretion to determine the length of sentence extension within the maximum sentence range in the complete absence of judicial oversight.[172] Both of these provisions improperly confer judicial sentencing power on an executive body to "try[], convict[], and sentenc[e] inmates for crimes committed while in prison."[173]

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165 Merit Brief of Appellant at 6, State v. Hacker, 2020-Ohio-5048, 161 N.E.3d 112 (No. 2020-1496); *See* State v. Hochhausler, 76 Ohio St. 3d 455, 456–66 (1996); *see also* State v. Thompson, 92 Ohio St. 3d 584, 586, 2001-Ohio-1288, 752 N.E.2d 276; *see generally* OHIO CONST. art. III–IV (West 2021–22).

166 *Thompson* at 586.

167 *See id.* (citing *Hochhausler*, 76 Ohio St. 3d at 466).

168 State *ex rel.* Bryant v. Akron Metro Park Dist., 120 Ohio St. 464, 474 (1929).

169 *See* OHIO CONST. art. IV, § 1 (West 2021–22).

170 Merit Brief of Appellant at 6, State v. Simmons, 2021-Ohio-939, 169 N.E.3d 728 (No. 109476) ("S.B. 201 removes the sentencing enhancement from the prerogative of the judicial branch and transfers it to the executive branch.").

171 Merit Brief of Appellant at 14–15, State v. Woods, 2022-Ohio-3970 (No. 2021-L-044), 2022 WL 16735746 (Jun. 8, 2021); OHIO REV. CODE ANN. § 2967.271(C) (West 2021).

172 *See* OHIO REV. CODE ANN. § 2967.271(C), (D)(1) (West 2021); *see also* Merit Brief of Appellant at 6, State v. Simmons, 2021-Ohio-939, 169 N.E.3d 728 (No. 109476); State v. Wilburn, 2021-Ohio-578, 168 N.E.3d 873, ¶ 20.

173 State v. Delvallie, 2021-Ohio-1809, 173 N.E.3d 544, at ¶ 55 (quoting State *ex rel.* Bray v. Russell, 89 Ohio St. 3d 132, 136 (2000)).

S.B. 201 is similar to the former "Bad Time" Statute under O.R.C. § 2967.11, which was stricken down in *State ex rel. Bray v. Russell*.[174] The "Bad Time" Statute allowed the parole board to "try, convict, and add 'bad time' to offenders' sentences."[175] Under this statute, "an offender could be punished with additional prison time for any 'violation,' or crime, whether or not the offender was prosecuted for that violation."[176] The Court found this statute to be a violation of the separation of powers doctrine because the parole board, as an executive agency, "generally has no power to change sentences, or to add or remove sentencing conditions . . .; [rather,] these powers are vested with the sentencing court."[177] It assessed that the ORDC's ability "to prosecute an inmate for a crime, to determine whether a crime has been committed, and to impose a sentence for that crime" under the "Bad Time" Statute is analogous to "the executive branch's acting as judge, prosecutor, and jury."[178]

S.B. 201 similarly grants judicial powers to the ORDC. The Bill dictates that the ODRC has full discretion to assess whether an offender committed any crimes during incarceration and to arbitrarily extend the sentence past the presumptive release date however it sees fit.[179] Accordingly, the ORDC wields unfettered discretion, precluding the ability of the judicial branch to intervene in any capacity of checks or balances.[180] The ORDC's sole power to make determinations regarding the commission of crimes and corresponding consequences equates to "acting as judge, prosecutor, and jury."[181]

Some courts have differentiated S.B. 201 from the "Bad Time" Statute. They assert that the former "Bad Time" Statute permitted the ODRC to extend the sentence beyond the maximum imposed by the judge, whereas S.B. 201 does not allow the ODRC to adjust the sentence outside of the range as determined by the judge.[182] In *State v. Hacker*, the Court argues that because the Bill "does *not* permit ODRC (the executive branch) to maintain [an offender] beyond the maximum prison term imposed by the trial court," it is not the same as the "Bad Time" Statute.[183]

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[174] *Delvallie* at ¶ 39 (referencing *Bray*, 89 Ohio St. 3d at 132); *see generally* OHIO REV. CODE ANN. § 2967.11 (West 2021).

[175] *Delvallie* at ¶ 38 (quoting *Bray*, 89 Ohio St. 3d at 132, 136).

[176] Merit Brief of Appellant at ¶ 7, State v. Simmons, 2021-Ohio-939, 169 N.E.3d 728 (No. 109476).

[177] State v. Oneal, No. B 1903562, 2019 WL 7670061, at *1 (Nov. 20, 2019).

[178] *Bray* at 135.

[179] *See Oneal*, 2019 WL 7670061, at *5; *see generally* OHIO REV. CODE ANN. § 2967.271(C) (West 2021).

[180] *See* Merit Brief of Appellant at 17, State v. Woods, 2022-Ohio-3970 (No. 2021-L-044), 2022 WL 16735746.

[181] *Bray* at 135; *see supra* text accompanying note 178.

[182] *See* State v. Barnes, No. 28613, 2020 WL 4919780, at ¶ 36 (Aug. 21, 2020).

[183] State v. Hacker, 2020-Ohio-5048, 161 N.E.3d 112, at ¶ 22.

Consequently, the Court argues that the unconstitutionality of the "Bad Time" Statute is not a valid basis for finding the Bill to be unconstitutional.[184]

The Court's differentiation between the two laws is not without merit; however, this differentiation does not preclude the application of *Russell* to S.B. 201. The Court in *Russell* recognized that "[p]rison discipline is an exercise of executive power" but explicitly states that "trying, convicting, and sentencing inmates for crimes committed while in prison is not an exercise of executive power."[185] Regardless of whether the sentence extension is within or exceeds the maximum judicial assignment, the ODRC is still conducting judicial tasks as an executive body. Although the ODRC's authority over sentence extension is limited by the maximum imposed by the judge, the ability to extend is problematic because it is "specifically conditioned on the offender's acts committed during the incarceration and is at the full discretion of the ODRC."[186] Essentially, both the "Bad Time" Statute as well as S.B. 201 "provide for the executive branch prison system to tell an inmate that the inmate will be serving a longer sentence as a result of an executive agency's determination."[187] Thus, the ODRC's convicting and sentencing control over acts which the offender commits subsequent to the original conviction equate to implementing judicial power. Accordingly, S.B. 201 is unconstitutional on the grounds that it violates the separation of powers doctrine.

C. S.B. 201 in Violation of Due Process and Equal Protection

In addition to violating the separation of powers doctrine, S.B. 201 violates the right to due process and equal protection. The Fourteenth Amendment to the United States Constitution as well as Article 1, Section 10 of the Ohio Constitution both guarantee the right of due process to any person who is deprived of "life, liberty or property."[188] In criminal law applications, the right of due process ensures "fundamental fairness" primarily by "requir[ing] notice and the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[189]

In order for the right of due process to apply, there must be a "protected liberty interest," which constitutes "a liberty . . . of which a person has been deprived."[190] Under S.B. 201, there is an "expectation of release" which stems from the presumption of release.[191] The statutory language provides that "there shall be a presumption that

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184 *See id.*

185 State v. Delvallie, 2021-Ohio-1809, 173 N.E.3d 544, at ¶ 55 (quoting State ex rel. Bray v. Russell, 89 Ohio St. 3d 132, 136 (2000)); Merit Brief of Appellant at 7, State v. Hacker, 2020-Ohio-5048, 161 N.E.3d 112 (No. 2020-1496) (quoting State ex rel. Bray v. Russell, 89 Ohio St. 3d 132, 136 (2000)).

186 *Delvallie*, at ¶ 46.

187 Merit Brief of Appellant at 8, State v. Simmons, 2021-Ohio-939, 169 N.E.3d 728 (No. 109476).

188 U.S. CONST. amend. XIV, § 1; *accord* OHIO CONST. art. I, § 10 (West 2021–22).

189 State v. Oneal, No. B 1903562, 2019 WL 7670061, at *5 (Nov. 20, 2019).

190 *Id.* at *6.

191 *Id.*; *see also* OHIO REV. CODE ANN. § 2967.271(B) (West 2021).

the person shall be released from service of the sentence on the expiration of the offender's minimum prison term."[192] The ODRC's statutory authority to rebut that presumption is a threat to the offender's liberty interest in parole revocation, "which entails taking someone's freedom away."[193] The right of due process is thus necessary to protect the liberty interest at stake.

S.B. 201 violates that right to due process and equal protection through the denial of a fair trial and absence of requisite notice. Procedural due process guarantees the right to a fair trial. While the Bill authorizes the ODRC to conduct a hearing to determine whether an offender's conduct meets the qualifying criteria for sentence extension,[194] this hearing is inadequate. The statute's lack of "due process safeguards"[195] constitutes a failure to provide "certain procedural protections . . . which cannot be denied" when the liberty interest of parole revocation is at stake.[196] Such "safeguards" include, but are not limited to, "the presumption of innocence[,][197] . . . the right to counsel and to the appointment of counsel if indigent[,][198] . . . the right to confront witnesses[,][199]. . . and the right to offer testimony."[200] The Bill not only fails to account for those rights but also explicitly requires the hearing to be conducted like a parole hearing, at which "many of these rights do not apply."[201] Thus, the Bill fails to provide for a "meaningful hearing" as required under the due process clause.[202]

Just as the Bill denies the offender a fair trial, it also fails to provide sufficient notice as required by procedural due process. Individuals have the right to know what conduct on their part will provoke legal penalties.[203] The law must be "sufficiently clear in defining the activity proscribed"[204] in order to provide "fair notice of what

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192 OHIO REV. CODE ANN. § 2967.271(B) (West 2021).

193 State v. Sealey, 2021-Ohio-1949, 173 N.E.3d 894, at ¶ 16; State v. Delvallie, 2021-Ohio-1809, 173 N.E.3d 544, at ¶ 70.

194 *See* OHIO REV. CODE ANN. § 2967.271(C) (West 2021).

195 *Sealey* at ¶ 38.

196 *Sealey* at ¶ 17 (quoting State *ex rel*. Jackson v. McFaul*,* 73 Ohio St.3d 185, 186, 1995-Ohio-228, 652 N.E.2d 746). *See generally* OHIO REV. CODE ANN. § 2967.15(B) (West 2021).

197 *Delvallie* at ¶ 77 (citing *In re Winship*, 397 U.S. 358 (1970)).

198 *Id.* at ¶ 77 (citing *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)).

199 *Id.* at ¶ 77 (citing *Crawford v. Washington*, 541 U.S. 36, 52, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).

200 *Id.* at ¶ 77 (citing *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948)).

201 *Woods* brief, pp. 23–24; *see also* OHIO REV. CODE ANN. § 2967.271(E) (West 2021).

202 State v. Sealey, 2021-Ohio-1949, 173 N.E.3d 894, at ¶ 39.

203 *Delvallie* at ¶ 61 (citing *Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1926)).

204 *Id*.

conduct is 'punishable.'"[205] The Bill, however, is too vague to properly put the offenders "on notice of what conduct could justify the extension of [their] sentence."[206]

The guiding provisions on sentence extension under Ohio Revised Code § 2967.271(C) instruct the ODRC to demonstrate that "the offender has not been rehabilitated" and that the offender "continues to a pose a threat to society."[207] The ODRC is further assigned discretion to determine the length of the sentence extension so long as it constitutes a "reasonable period" and does "not exceed the offender's maximum prison term."[208] This language imposes weak limitations on the ODRC's sentencing power which allows for overly broad discretion. The arbitrary parameters of what the ODRC would classify as a violation inhibits fair notice to offenders, thereby causing a conflict between the Bill and the right to due process.

The opposition provides a skeletal argument regarding due process. Some of the cases briefly touch on the issue; they acknowledge the argument in *State v. Oneal* regarding the violation of due process, but they fail to formulate an analysis why they overruled that assignment of error.[209] In *State v. Simmons*, the Eighth District Court of Appeals addressed the procedural issue of due process in a manner which begs the question; it asserts that the language under Ohio Revised Code § 2967.271(C) contains "factors for the [O]DRC to consider in determining whether an inmate may be imprisoned beyond his minimum release date, thereby limiting its discretion."[210]

However, the Court fails to address the opposing argument that the language contained within those provisions is vague.[211] Furthermore, the Court claims that

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[205] *Sealey* at ¶ 21; *see also* State v. Daniel, 2021-Ohio-1963, 173 N.E.3d 184, at ¶ 21.

[206] Brief of Defendant-Appellant, Woods, 2021 WL 4192175 (No. 2020-L-044), at 25.

[207] *Id.* (quoting OHIO REV. CODE ANN. § 2967.271(c)(1)(a) (West 2021)); *see also* Brief of Defendant-Appellant at 9, State v. Simmons, 163 Ohio St.3d 1492 (2021) (No. 2021-0532) (which describes these standards as "amorphous at best"). Consider the hypothetical conduct that demonstrates this amorphousness with respect to the insufficient rehabilitation standard:

> If, for example, a prisoner argues verbally with a guard (a rule infraction) and thus slows the guard's progress in making a mid-day inmate count, has the prisoner compromised the safety of the institution? If the prisoner fails to clean up a spilled cup of coffee in the mess hall (another rule infraction), has the prisoner compromised the security of prison personnel and inmates? If, in response to a written questionnaire during a therapy session, the prisoner writes that the prisoner is innocent of the crime and disagrees with the jury's verdict, has the prisoner falsified a government writing under R.C. 2913.42(A)(1), (B)(4)? And how does the prisoner know that what was done indicates a lack of rehabilitation . . . and a 'threat to society . . . .'

Id. at 10.

[208] OHIO REV. CODE ANN. § 2967.271(C), (D)(1) (West 2021).

[209] *See* State v. Barnes, No. 28613, 2020 WL 4919780, at *6 (Ohio Ct. App. Aug. 21, 2020).

[210] State v. Simmons, 2021-Ohio-939, 169 N.E.3d 728, at ¶ 21 (Ohio App. 2021).

[211] *See Barnes*, at ¶ 35.

adequate notice of conduct and punishment exists by virtue of the inmate rules of conduct and corresponding disciplinary procedures.[212] While these rules account for the "institutional rule infractions" under the statute,[213] they do not account for other provisions, such as demonstration that "the offender has not been rehabilitated."[214] Such language is too vague to clearly put offenders on notice. Therefore, S.B. 201 violates the right of due process by failing to provide a fair trial or sufficient notice. Because it violates the right to a jury trial, the separation of powers doctrine, and the right of due process, the Bill is unconstitutional.

V. DISPARATE IMPACT AND THE CARCERAL STATE: RACIAL ORIGINS AND OUTCOMES

A. Racially Motivated Origins of S.B. 201

Not only is S.B. 201 unconstitutional on the basis of the right to a jury trial, the separation of powers doctrine and the right of due process, but it was also promulgated in racially motivated origins and serves as a mechanism for racially biased outcomes. S.B. 201 originated in part as a racially biased response which specifically sought to address the white victim—Reagan Tokes—of an African American defendant—Brian Golsby.[215] The Bill was initiated only upon the experience of a white victim, thereby seeming to disregard the similar experiences of preceding African American victims.[216]

There is a longstanding "racial bias against defendants of color and in favor of white victims."[217] Circumstances whereby African American men assault white women constitute "23 percent of all rapes, but 45 percent of all those sent to the penitentiary and for 50 percent of all who received sentences of 6 or more years."[218] This bias against African American defendants and in favor of white victims seemingly plays a role in the origination of the Reagan Tokes Act as well.[219]

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[212] *See Simmons* at ¶ 21; *see also* State v. Wilburn, 2021-Ohio-578, 168 N.E.3d 873, at ¶ 36.

[213] OHIO REV. CODE ANN. § 2967.271(F)(4)(a) (West 2021).

[214] *Barnes* at ¶ 35.

[215] *See* Julie Carr Smyth, *Black Victims Underrepresented in Named Violent Crime Laws*, AP NEWS (Dec. 3, 2019), https://apnews.com/article/us-news-ap-top-news-laws-cleveland-crime-30d5a2a0b8464aec9593f4918cfa51d4; *see also* Bennett Haeberle, *Golsby's Attorneys Want Death Penalty Dropped, GPS Evidence Suppressed*, 10 WBNS, https://www.10tv.com/article/news/investigations/10-investigates/golsbys-attorneys-want-death-penalty-dropped-gps-evidence-suppressed/530-0465ca6e-6def-4e20-91ff-603b14c2e059 (Nov. 27, 2017).

[216] *Infra* text accompanying note 219.

[217] *Policy Issues: Race*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/race (last visited Feb. 18, 2022).

[218] G.D. LaFree, *Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOCIO. REV., 842, 842 (1980).

[219] It is important to note that racial bias is not the sole factor responsible for the creation of the Reagan Tokes Act. The crimes which Golsby committed against Reagan Tokes are egregious in nature, and the gravity of such crimes have understandably led to outrage within

The Reagan Tokes Act is considered a "namesake law" because it was named after the victim, Reagan Tokes.[220] Such laws are "a popular way for lawmakers to recognize victims of horrific crimes and enact tough-on-crime laws."[221] The state legislature, however, did not make such a law for Alianna DeFreeze, whose case was very similar to that of Tokes, with one exception: Tokes is white and DeFreeze is African American.[222] "Both were abducted, raped and murdered in Ohio in 2017. Tokes was a twenty-one-year-old college student, DeFreeze a fourteen-year-old seventh grader. Both their killers, previously convicted sex offenders, were subsequently found guilty."[223]

The murder of Alianna DeFreeze was particularly egregious for several reasons. DeFreeze had a developmental disability.[224] Tools containing DeFreeze's DNA—including a power drill, screwdriver, nut driver, and box cutter—are believed to have caused the puncture wounds to the child's face and head.[225] According to the medical examiner who performed an autopsy on DeFreeze, "her injuries were so numerous and severe that he could not identify which specifically caused her death."[226]

Like the murder of Reagan Tokes, the murder of Alianna DeFreeze also resulted in a namesake law, but the premise of that law was drastically different. This namesake law, known as the Alianna Alert Law, "mandates all school districts to notify a child's parents or guardians within two hours, or 120 minutes after the start of the school day, if the child is absent from school."[227] The Alianna Alert Law, unlike the Reagan Tokes Act, does not seek to target the defendant in addressing the gap in the law that allowed these tragedies to occur. The murder of Tokes is an undoubtedly horrific act, but how is it that the egregious acts committed against DeFreeze did not ignite the same level of retaliation against the defendant? The community's lack of retaliation against the

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the community. The issue lies in the fact that the community failed to take similar initiative in the preceding situations affecting black victims.

220 Smyth, *supra* note 215.

221 *Id.*

222 *Id.*

223 *Id.*

224 Charlie O'Brien, *The Tragic Murder of Alianna DeFreeze*, MEDIUM (July 23, 2022), https://medium.com/@Charlie_OBrien/the-tragic-murder-of-alianna-defreeze-9edd9dbb6a97#:~:text=Alianna%20had%20a%20developmental%20disability,taking%20public%20transit%20to%20school.

225 *See id*.; Cory Shaffer, *Jurors see tools used in slaying of Alianna DeFreeze*, CLEVELAND.COM (Feb. 05, 2018, 9:18 PM), https://www.cleveland.com/metro/2018/02/jurors_see_tools_used_in_slayi_1.html.

226 *Disturbing details revealed during Alianna DeFreeze trial*, FOX8 (Feb. 7, 2018, 1:17 PM), https://fox8.com/news/disturbing-details-revealed-during-alianna-defreeze-trial/.

227 Roetzel & Andress, *"Alianna's Alert": A Reminder To School Districts About Parent Notification*, JDSUPRA (Aug. 28, 2019), https://www.jdsupra.com/legalnews/alianna-s-alert-a-reminder-to-school-45093/.

defendant in DeFreeze's case suggests that the law was more concerned for a white victim than an African American victim.

B. Racial Disparity in Indeterminate Sentencing Under S.B. 201

In addition to having racially motivated origins, S.B. 201 produces racially prejudiced outcomes. According to a study of Ohio's prison population, "whites are underrepresented in the incarcerated population while [African Americans] . . . are overrepresented."[228] This difference is prominent both in scope and duration. In terms of scope, whites—who constitute eighty-one percent of the population—are incarcerated at a rate of fifty-two percent, and African Americans—who constitute just twelve percent of the population—are incarcerated at a rate of forty-three percent.[229] Within Ohio, African American individuals are "imprisoned at six times the rate of white residents."[230] In terms of duration, "African Americans remain incarcerated for three months longer than [their white counterparts] in discretionary parole systems and seven months longer than [whites] in mandatory state parole systems."[231] On a national scale, "[African American] men receive sentences on average 19% longer than similarly situated white men."[232] In general, the state legislature has attributed these racial disparities in the prison system to a defect in sentencing laws.[233]

Racial disparity is an alarming issue which permeates sentencing in any capacity,[234] but it is especially disconcerting in the application of indeterminate sentencing schemes. The overly broad implementation of parole board discretion as created by S.B. 201 contributes to these effects on disparate incarceration of minorities—especially African American individuals[235]—as well as the existing mass

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228 Peter Wagner & Joshua Aiken, *Racial and Ethnic Disparities in Prisons and Jails in Ohio*, PRISON POL'Y INITIATIVE, (Dec. 2016), https://www.prisonpolicy.org/graphs/disparities2010/OH_racial_disparities_2010.html.

229 *Id.*

230 *Disparate Sentences in Ohio Court Raise Questions of Racial Injustice*, EQUAL JUST. INITIATIVE (Aug. 13, 2021), https://eji.org/news/disparate-sentences-in-ohio-court-raise-questions-of-racial-injustice/.

231 Douglas Smith, *Narrowing Racial Disparities in Sentencing Through a System of Mandatory Downward Departures*, 2 MODERN AMERICAN 2, 33 (2006).

232 *Disparate Sentences in Ohio Court*, *supra* note 230.

233 *See* OHIO CRIM. SENT'G COMM'N, CRIMINAL JUSTICE REFORM IN OHIO 2 (Apr. 12, 2019), https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/general/CJReformOhioCupp2019.pdf.

234 *Shadow Report to the United Nations on Racial Disparities in Sentencing in the United States*, THE SENT'G PROJECT (July 14, 2022), https://www.sentencingproject.org/policy-brief/shadow-report-to-the-united-nations-on-racial-disparities-in-sentencing-in-the-united-states/.

235 *See supra* text accompanying note 230.

carceral state.[236] Research has found that indeterminate sentencing schemes effectuate "striking differences and wide disparity in sentence type and length" to the extent that "racial discrimination [manifested] itself in the form of more severe sentences for minority defendants than for equally situated white offenders."[237] This problem is compounded by the fact that judges are not required to provide any rationale when they assign indeterminate sentences, and the assigned sentences are not reviewable.[238] This broad, unchecked discretion creates "a system of sentencing in which there [is] little understanding or predictability as to who [will] be imprisoned and for how long."[239] By imposing an indeterminate sentencing scheme, S.B. 201 has exacerbated the problem of racial disparity in sentencing which contributes to the escalation of the mass carceral state accordingly.

VI. GRAVE CONSEQUENCES OF UPHOLDING S.B. 201 AS CONSTITUTIONAL

The people of Ohio cannot afford to be subjected to S.B. 201 any longer. If the Supreme Court erroneously upholds S.B. 201 as constitutional, it will not only exacerbate the harm to offenders who have been inappropriately sentenced under the Bill and are consequently at risk of over-serving time in prison, but it will also perpetuate racist outcomes in sentencing which ultimately contribute to the amplification of the mass carceral state. Neither *Simmons* nor *Hacker* have called to the Supreme Court's intention this issue of racially disparate sentencing applications, thereby painting an incomplete picture of the range of harms inflicted by S.B. 201. As if the denial of three major constitutional rights to the people of Ohio is not harmful enough in itself, S.B. 201 acts as a conduit for concealing racially motivated sentencing tactics. Should the Supreme Court of Ohio uphold S.B. 201 as constitutional, the State of Ohio will effectively be condoning the pervasion of racist applications of the law.

VII. NEXT STEPS: A NEW HYBRID SENTENCING SCHEME PROPOSAL FOR OHIO AFTER STRIKING DOWN S.B. 201 AS UNCONSTITUTIONAL

A. A Blend of Indeterminate and Determinate Sentencing Features

The indeterminate sentencing scheme as it exists under S.B. 201 must be abolished. The State cannot idly stand by as fundamental constitutional components are brazenly violated through the implementation of the Bill. Upon striking it down as unconstitutional, the system must be equipped with a superior sentencing scheme which will accommodate for the shortcomings of S.B. 201. The solution, however, is not a purely determinate system; both the indeterminate and determinate sentencing schemes are fatally flawed. Accordingly, the replacement should seek to morph the

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236 *See supra* text accompanying note 24.

237 Smith, *supra* note 231, at 33 (quoting Jane A. Dall, Note, *A Question for Another Day: The Constitutionality of The U.S. Sentencing Guidelines Under Apprendi v. New Jersey*, 78 NOTRE DAME L. REV. 1617, 1620 (2003)).

238 *See id.* at 33.

239 CASSIA C. SPOHN, HOW DO JUDGES DECIDE?: THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT 225 (SAGE Publications, Inc., 2d ed. 2009).

two systems into a hybrid sentencing scheme which allows for the benefits of each system to be achieved simultaneously in a constitutional manner.

This system should retain the judicial flexibility in indeterminate sentencing. By eliminating the judge's ability to consider the individual circumstances, the determinate sentencing scheme overly restricts the role of the judiciary and creates a rigid system. Such a system forgoes the individual circumstances of the offenders, victims, witnesses, and others, which are the components that differentiate one case from another. Though they may be similar, no two cases are exactly the same. Reducing the humanity of the cases to mere numbers invalidates the authority of the judge and diminishes the court's ability to help the people. Alternatively, too much flexibility leads to arbitrary and oftentimes discriminatory sentencing tactics.

The new system should allow the judge to consider individual circumstances within a controlled set of parameters in order to avoid ambiguous and discriminatory practices. To do this, the new system should take advantage of the much-anticipated public statewide sentencing database.[240] The use of this system would disclose any implication of prejudicial decisions, thereby allowing the public to check the court's discretion and encouraging the court to root its determination in the law as opposed to discriminatory reasoning. Furthermore, the judges should be required to explain how they arrived at their decisions with respect to the sentencing database information for the purpose of suppressing the formation of arbitrary decisions.

The judge should retain the ability to issue sentences in the form of a range for the existing qualifying offenses. The presumption of release upon serving the minimum sentence should also be permitted, but the ODRC should be severely restricted to a persuasive role. The agency should collect evidence of offenders' bad behavior during incarceration and present that information to the judge prior to the minimum sentence date. The judge would then have the authority to try the offenders properly within the courtroom, keeping the sentencing power within the judiciary. This would achieve the goal of preventing dangerous offenders, who have not successfully rehabilitated, from re-entering the public while maintaining the separation of powers. It would also achieve due process, as the offender would be afforded all of the requisite procedural protections since the process is conducted within the courtroom.

B. Program for Successful Reintegration into Society

For those offenders who are not deemed dangerous to the extent that requires extended imprisonment, HB 166 sets an effective foundation to monitor them through an enhanced post-release control system.[241] As suggested in the Bill, the need for a re-entry program is critical to ensuring successful reintegration into society.[242] In addition to the enhanced GPS data system as proposed in the Bill,[243] the program should include a mental health initiative, given the strong correlation of mental illness

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240 "[T]he Ohio Sentencing Data Platform . . . is a searchable website of sentencing data to guide judges and court staff on sentencing decisions." Susan Miller, *Ohio Builds Sentencing Database*, GCN (Oct. 6, 2021), https://gcn.com/articles/2021/10/06/ohio-sentencing-data.aspx.

241 *Sees supra* text accompanying note 85.

242 *Sees supra* text accompanying note 87.

243 *Sees supra* text accompanying note 88.

in the criminal realm.[244] Golsby was not an exception to this pattern, given that he was "raised by a mentally unstable, drug-addicted and physically abusive mother . . . [and] was raped at a young age and was in and out of foster care and youth homes for much of his upbringing."[245] These experiences have led Golsby to experience "a history of depression, ADHD and has said . . . that he has heard voices."[246] A psychologist determined that the best course of action for holding Golsby accountable would be to keep him in "jail with structure, proper medication and trauma care."[247] As seen with Golsby, "[w]hen mentally ill inmates are released from prison, their disorders complicate and disrupt their reentry into the community."[248] Because the need for mental health services extends beyond time in prison, a mental health initiative vis-à-vis the post release control program could efficiently provide the requisite structure and care as outlined by the psychologist in a way that minimizes danger and disruption to the surrounding community. In addition to mental health services, the program should incorporate other services such as "life skills training, dental and medical care, needs and risk assessments, treatment and release plans, and job placement," all of which have proven to be successful components of other reentry programs for violent offenders.[249]

VIII. CONCLUSION

This Note implores the Honorable Supreme Court of Ohio to grant *certiorari* to review one of many appealed decisions regarding the constitutionality of S.B. 201.[250] The application of the Bill varies across the state districts as this complex circuit split unfolds. It is imperative that the Supreme Court of Ohio appropriately remedies this contention to ensure a clear and uniform application of the law throughout the state. This Note calls on the Court to rectify the wrongs that the State has committed in S.B.

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244 *Criminalization of Mental Illness*, TREATMENT ADVOC. CTR., https://www.treatmentadvocacycenter.org/key-issues/criminalization-of-mental-illness (last visited Feb. 18, 2022).

245 Owen Daugherty, *Reagan Tokes Trial: Golsby's Defense Attempts to Spare Him Death Penalty*, THE LANTERN (Mar. 16, 2018), https://www.thelantern.com/2018/03/golsbys-defense-attempts-to-spare-him-death-penalty/.

246 Summer Cartwright, *Reagan Tokes Trial: Defense Tries to Victimize Golsby in Final Day of Sentencing*, THE LANTERN (Mar. 19, 2018), https://www.thelantern.com/2018/03/reagan-tokes-trial-defense-tries-to-victimize-golsby-in-final-day-of-sentencing/.

247 *Id.*

248 Arthur J. Lurigio, Angie Rollins, & John Fallon, *The Effects of Serious Mental Illness on Offender Reentry*, 68 FEDERAL PROBATION.

249 Blair Ames, *Funded Research Examines What Works for Successful Reentry*, NAT'L INST. OF JUST. (Oct. 7, 2019), https://nij.ojp.gov/topics/articles/nij-funded-research-examines-what-works-successful-reentry.

250 *State v. Maddox* is one of many "case[s] pending before the Supreme Court of Ohio to determine whether the constitutionality of the Reagan Tokes Law is ripe for review." *See* State v. Wolfe, 2022 WL 214559, 2022-Ohio-96, at fn. 2; *accord* State v. Maddox, 2020-Ohio-6913, 160 Ohio St.3d 1505.

201 by striking it down as unconstitutional on the grounds that it violates the right to a trial by jury, the separation of powers doctrine, and the right to due process and equal protection. Expeditious action is pertinent to prevent further harm to offenders who have been inappropriately sentenced under the Bill and are consequently at risk of over-serving time in prison—a injury to liberty that can never be fully remedied. The Honorable Supreme Court has the ability to mitigate any further wrongs to the people of Ohio by striking down S.B. 201 as unconstitutional in the cases that are currently before it—both *State v. Simmons* and *State v. Hacker*. It's time to confiscate the gavel from the hands of the ODRC and return that power back to the courts where it belongs.