

**NO. 2022-0969**

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IN THE SUPREME COURT OF OHIO

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APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 110983

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STATE OF OHIO,  
Appellee/Cross-Appellant

-vs-

TERRY K. GIANCATERINO,  
Appellant/Cross-Appellee

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**MEMORANDUM IN SUPPORT OF CROSS-APPEAL/MEMORANDUM IN RESPONSE  
TO JURISDICTION**

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**EXPLANATION OF WHY THIS COURT SHOULD ACCEPT REVIEW OF THE  
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Acceptance of Appellant's propositions of law are unnecessary to determine the constitutionality of the Reagan Tokes Law, as those questions are currently pending before this Court in *State v. Hacker*, Sup. Ct Case No. 2020-1496 and *State v. Simmons*, Sup. Ct Case No. 2021-0532. To the extent that this Court consider those propositions of law, it is first necessary to determine whether a final appealable order existed in this case. The question of whether the sentences in this case were constitutionally valid is not properly before this Court if a final appealable order did not exist below.

Although, not raised below by the parties the dissenting judge identified a potential jurisdictional question in *State v. Giancaterino*, 8th Dist. Cuyahoga No. 110983, 2022-Ohio-2142. Specifically the dissenting judge found a final appealable order did not exist because the trial court imposed what appeared to be a lump sum indefinite prison term as to multiple offenses instead of imposing the same indefinite prison term on each offense. *State v. Giancaterino*, 8th Dist. Cuyahoga No. 110983, 2022-Ohio-2142, ¶7-13 (Gallagher, J. dissenting).

R.C. 2929.14 require a trial court to impose an indefinite prison term for each qualifying felony of the first or second degree with the maximum term determined by a statutory formula under R.C. 2929.144. The plain language of R.C. 2929.14 make clear that a defendant is subject to a maximum prison term on each count, as opposed to a singular maximum prison term on all counts.

Acceptance of the cross-proposition of law would provide guidance to trial courts as to the appropriate mechanism to impose the indefinite sentences required under R.C. 2929.14 and R.C. 2929.144. As such this Court should accept review to provide such guidance.

**STATEMENT OF THE CASE**

On February 23, 2021, Terry Giancaterino (hereinafter “Appellant”) was indicted by the Cuyahoga County Grand Jury of the following counts:

<b>COUNT</b>	<b>OFFENSE</b>	<b>DEGREE</b>
One	Pandering Sexually-Oriented Matter Involving a Minor 2907.322(A)(1)	F2
Two	Pandering Sexually-Oriented Matter Involving a Minor 2907.322(A)(1)	F2
Three	Pandering Sexually-Oriented Matter Involving a Minor 2907.322(A)(1)	F2
Four	Pandering Sexually-Oriented Matter Involving a Minor 2907.322(A)(1)	F2
Five	Pandering Sexually-Oriented Matter Involving a Minor 2907.322(A)(1)	F2
Six	Pandering Sexually-Oriented Matter Involving a Minor 2907.322(A)(1)	F2
Seven	Pandering Sexually-Oriented Matter Involving a Minor 2907.322(A)(1)	F2
Eight	Pandering Sexually-Oriented Matter Involving a Minor 2907.322(A)(1)	F2
Nine	Pandering Sexually-Oriented Matter Involving a Minor 2907.322(A)(1)	F2
Ten	Pandering Sexually-Oriented Matter Involving a Minor 2907.322(A)(1)	F2
Eleven	Pandering Sexually-Oriented Matter Involving a Minor 2907.322(A)(1)	F2
Twelve	Pandering Sexually-Oriented Matter Involving a Minor 2907.322(A)(1)	F2
Thirteen	Pandering Sexually-Oriented Matter Involving a Minor 2907.322(A)(1)	F2
Fourteen	Illegal Use Of Minor In Nudity-Oriented Material Or Performance 2907.323(A)(1)	F2
Fifteen	Illegal Use Of Minor In Nudity-Oriented Material Or Performance 2907.323(A)(1)	F2
Sixteen	Illegal Use Of Minor In Nudity-Oriented Material Or Performance 2907.323(A)(1)	F2
Seventeen	Illegal Use Of Minor In Nudity-Oriented Material Or Performance 2907.323(A)(1)	F2
Eighteen	Illegal Use Of Minor In Nudity-Oriented Material Or Performance 2907.323(A)(1)	F2
Nineteen	Illegal Use Of Minor In Nudity-Oriented Material Or Performance 2907.323(A)(1)	F2

Twenty	Pandering Sexually-Oriented Matter Involving a Minor 2907.322(A)(2)	F2
Twenty-One	Illegal Use Of Minor In Nudity-Oriented Material Or Performance 2907.323(A)(1)	F2
Twenty-Two	Illegal Use Of Minor In Nudity-Oriented Material Or Performance 2907.323(A)(1)	F2
Twenty-Three	Possessing Criminal Tools 2923.24(A)	F5

On August 19, 2021 Appellant plead guilty to thirteen counts (Counts 1-13) of Pandering Sexually-Oriented Matter Involving a Minor (F2) and three counts (Counts 14-16) of Illegal Use Of Minor In Nudity-Oriented Material Or Performance (F2). (Tr. 14-17). The remaining counts (Counts 17-23) were nollied. (Tr. 16-17). As part of the plea agreement, the items listed in Count Twenty-Three (23) were forfeited to the state. (Tr. 5-6).

Appellant was sentenced on October 7, 2021 to a lump sum minimum prison term of three (3) years and a maximum prison term of four (4) years and six (6) months on all counts, each to run concurrent to each other. (Tr. 40-44). Appellant was determined to be a Tier II Sex Offender. (Tr. 12).

On appeal, the Eighth District rejected Appellant’s arguments that the Reagan Tokes Law was unconstitutional but the dissent aptly noted that a final appealable order is lacking. *State v. Giancaterino*, 8th Dist. Cuyahoga No. 110983, 2022-Ohio-2142

The State now appeals the question of whether the Eighth District had jurisdiction to decide the appeal.

## LAW AND ARGUMENT

### **CROSS-APPELLANT'S PROPOSITION OF LAW: WHEN SENTENCING A DEFENDANT TO MULTIPLE OFFENSES UNDER R.C. 2929.14 and R.C. 2929.144, A COURT MUST IMPOSE AN INDEFINITE SENTENCE ON EACH COUNT FOR THE SENTENCE TO BE FINAL.**

The State of Ohio appeals and asks this Court to address the jurisdictional question that the dissent implicates – whether a final appealable order existed in this case. Although, the State did not raise the question below – jurisdiction can be raised at any time. The dissent in this case would have dismissed the case for lack of a final appealable order. As the dissent explained:

In this case, Giancaterino pleaded guilty to 16 counts, all offenses were second-degree felonies, and the offenses occurred from June 15, 2020, through August 15, 2020. The trial court was required to impose a separate sentence on each count to which the defendant pleaded or was found guilty. However, the transcript reflects that did not occur. Rather, the trial court sentenced Giancaterino to a blanket sentence on all counts, stating, "the sentence is going to be three years on all of these counts concurrent. That's the sentence." The trial court further stated, "He is receiving a three-year sentence on 1 through 16." The trial court also stated, "Under this bill called Reagan Tokes, that could be increased by 50 percent" and the assistant prosecutor clarified that "his maximum under Reagan Tokes would be 4.5 years. A range of 3 to 4.5 years." The trial court then informed Giancaterino that "your 3 years under Reagan Tokes can be 4.5 years and you will be sentenced that way \* \* \*."

Although the trial court may have intended to impose the same prison term on each count and order the sentences to run concurrently, the transcript reflects that the trial court imposed only one term of incarceration as to "all" the offenses and did not separately sentence Giancaterino on each count individually. To avoid such an error, the better practice would be to specify that the same prison term is being imposed on "each count" or to separately identify each count and the sentence imposed on the individual count.

The sentencing entry also reflects the trial court's failure to sentence Giancaterino on the individual counts. In the sentencing entry, the trial court imposed "a minimum prison term of 3 year(s) and a maximum prison term of 4 year(s), 6 month(s) on the underlying offense(s). The total stated prison term is 3 years to 4+1/2 years \* \* \*." The trial court ordered "all counts to run concurrent to each other, for a total of 3 years." Although the sentencing entry complies with R.C. 2929.144(C) by stating the minimum term the court imposed under R.C. 2929.14(A)(2)(a) and the maximum term determined under R.C. 2929.144(B)(3),

the trial court failed to individually sentence Giancaterino on each count and include the individual sentences imposed in the sentencing entry.

*State v. Giancaterino*, 8th Dist. Cuyahoga No. 110983, 2022-Ohio-2142, ¶ 10-13 (Gallagher, J., dissenting).

The dissent's reasoning is apt. Both R.C. 2929.14(A)(1)(a) and R.C. 2929.14(A)(2)(a) require the trial court to impose an indefinite prison term with a stated "minimum term" selected by the court and a maximum term determined by R.C. 2929.144. R.C. 2929.144 explains a statutory formula to calculate the maximum term and the calculation varies depending on whether a single count is involved or whether concurrent or consecutive sentences are involved for multiple offenses. The State would argue that the plain language of R.C. 2929.14(A)(a) and R.C. 2929.14(A)(2)(a) requires the imposition of an indefinite prison term on each count

**APPELLANT'S PROPOSITION OF LAW I: THE S.B. 201 INDETERMINATE SENTENCING SCHEME VIOLATES THE SIXTH AMENDMENT AND ARTICLE I, SECTION 5 OF THE OHIO CONSTITUTION BECAUSE A DEFENDANT'S IMPRISONMENT IS DEPENDENT UPON A FACTUAL FINDING NOT MADE BY THE JURY BEYOND A REASONABLE DOUBT.**

Appellant first claims that R.C. 2967.271(B) violates his right to trial by jury. To accept Appellant's position would require jury trials in order to determine whether a defendant should be released from prison. This is not what is contemplated by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and its progeny because the indeterminate sentence is imposed consistent with a statutory formula without fact-finding. To accept Appellant's proposition of law is to accept a position that a jury must be involved in aspects of Appellant's sentence after he has been incarcerated. This position is untenable and ultimately must be rejected by this Court.

That being said, these arguments will be discussed in detailed in the State's merit brief in *State v. Simmons*, Sup. Ct. Case No. 2021-0532; however, the State notes that the arguments that stem from *Apprendi* was not raised in *Simmons* nor in this case. The proposition of law in this case is forfeited.

**APPELLANT'S PROPOSITION OF LAW II: THE S.B. 201 INDETERMINATE SENTENCING SCHEME VIOLATES THE SEPARATION OF POWERS DOCTRINE BY DELEGATING TO THE EXECUTIVE BRANCH DISCRETION TO KEEP THE DEFENDANT IN PRISON BEYOND THE JUDICIALLY-IMPOSED PRESUMPTIVE MINIMUM SENTENCE.**

The Separation of Powers arguments has been rejected by many appellate courts throughout Ohio. See *State v. Barnes*, 2<sup>nd</sup> Dist. Montgomery No. 28613, 2020-Ohio-4150, ¶36, *State v. Ferguson*, 2<sup>nd</sup> Dist. Montgomery No. 28644, 2020-Ohio-4153, ¶23, *State v. Leet*, 2<sup>nd</sup> Dist. Montgomery No. 28670, 2020-Ohio-4592, ¶15, *State v. Wallace*, 2<sup>nd</sup> Dist. Clark No. 2020-CA-3, 2020-Ohio-5109, ¶13-14, *State v. Sinkhorn*, 2<sup>nd</sup> Dist. Clark No. 2019, *State v. Baker*, 2<sup>nd</sup> Dist. Montgomery No. 28782, 2021-Ohio-140, ¶10, *State v. Keith*, 2<sup>nd</sup> Dist. Montgomery No. 28805, 2021-Ohio-518, ¶12-13, *State v. Ross*, 2<sup>nd</sup> Dist. Montgomery No. 28875, 2021-Ohio-1337, ¶12-14, *State v. Compton*, 2<sup>nd</sup> Dist. Montgomery No. 28912, 2021-Ohio-1513, ¶10-12, *State v. Hacker*, 3<sup>rd</sup> Dist. 8-20-01, 2020-Ohio-5048, ¶18-23, *State v. Hacker*, 3<sup>rd</sup> Dist. 8-20-01, 2020-Ohio-5048, ¶18-23, *State v. Kepling*, 3<sup>rd</sup> Dist. Hancock No. 5-20-23, 2020-Ohio-6888, ¶6-7, *State v. Crawford*, 3<sup>rd</sup> Dist. Henry No. 7-20-05, 2021-Ohio-547, ¶10, *State v. Wilburn*, 8<sup>th</sup> Dist. Cuyahoga No. 109507, 2021-Ohio-578, ¶19-27, *State v. Simmons*, 8<sup>th</sup> Dist. Cuyahoga No. 109476, 2021-Ohio-939, ¶10-15, *State v. Guyton*, 12<sup>th</sup> Dist. Butler No. CA2019-12-203, ¶7, *State v. Morris*, 12<sup>th</sup> Dist. Butler No. CA2019-12-205, ¶10, *State v. Suder*, 12<sup>th</sup> Dist. Clermont Nos. CA2020-06-034 & CA2020-06-035, ¶25.

“Sentencing is an area of shared powers; it is the function of the legislature to prescribe the penalty and the manner of its enforcement, the function of the courts to impose the penalty, and the function of the executive to implement or administer the sentence, as well as to grant paroles.” 16 C.J.S. Constitutional Law § 463 (footnotes omitted). As the United States Supreme Court has recognized, with the advent of parole mechanisms, legislatures adopted a “three-way sharing” of sentencing responsibility, with judges deciding the length of sentences within ranges and allowing executive branch parole officials to eventually determine the actual duration of imprisonment. *Mistretta v. United States*, 488 U.S. 361, 364-65 (1989). As the Ohio Supreme Court recognized in *Peters*, “it is among the admitted legislative powers to define crimes, to prescribe the mode of procedure for their punishment, to fix by law the kind and manner of punishment, and to provide such discipline and regulations for prisoners, not in conflict with the fundamental law, as the legislature deems best.” *Peters*, 43 Ohio St. at 647. In regard to parole release, “[i]t cannot seriously be contended that this is an interference with the judicial functions of the court, but is rather the exercise of that guardianship and power of discipline which is vested in the state to be exercised through the legislative department for the safe-keeping, proper punishment, and welfare of the prisoner.” *Id.* at 650.

Under S.B. 201, the court is required to impose an indefinite sentence, including the minimum term and maximum term, and it is within the range created by that judicially-imposed sentence that the ODRC will be making its decision whether to rebut the presumptive minimum-term release date. “[T]his construction avoids any potential separation-of-powers problem.” *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, ¶19.

This Court can also view R.C. 2967.271(B) as the executive branch’s mechanism to release an inmate upon service of the minimum prison term. This mechanism includes a presumption of

release by an executive branch agency. What Appellant ignores is that the trial court has its own independent authority to grant judicial release under R.C. 2929.20, which still applies to a sentence imposed under S.B. 201. On top of that, Appellant can obtain, in some circumstances, 80% judicial release under R.C. 2967.19. To the extent that Appellant challenges R.C. 2967.271(B), the State takes the position that Appellant has failed to show it violates the separation of powers doctrine.

Subsequent to these decisions a majority of the en banc Eighth District rejected the separation of powers argument with the lead opinion offering detailed analysis. *State v. Delvallie*, 8<sup>th</sup> Dist. Cuyahoga No. 109315, 2022-Ohio-470.

That being said, these arguments will be discussed in detailed in the State's merit brief in *State v. Simmons*, Sup. Ct. Case No. 2021-0532. Undoubtedly, more cases will be accepted and held for *Simmons* on these propositions of law. Suffice it to say, whether a defendant is released upon serving the minimum term is akin to parole. R.C. 2967.271 is a proper exercise of executive authority over a judicially imposed sentence. It cannot be said that the Regan Tokes Law violates the separation of powers doctrine.

**APPELLANT’S PROPOSITION OF LAW III: THE S.B. 201 INDETERMINATE SENTENCING SCHEME VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT FAILS TO PROVIDE A DEFENDANT WITH ADEQUATE NOTICE OF WHAT CONDUCT CAN ENABLE THE DEPARTMENT OF REHABILITATION AND CORRECTION (DRC) TO KEEP THE DEFENDANT IN PRISON BEYOND THE PRESUMPTIVE MINIMUM TERM.**

**APPELLANT’S PROPOSITION OF LAW IV: THE S.B. 201 INDETERMINATE SENTENCING SCHEME VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT ALLOWS THE DEPARTMENT OF REHABILITATION AND CORRECTIONS TO KEEP A DEFENDANT IN PRISON BEYOND THE PRESUMPTIVE MINIMUM SENTENCE ON THE BASIS OF PRISON HOUSING AND CLASSIFICATION DECISIONS THAT NEED NOT BE THE RESULT OF ANY MISCONDUCT BY THE DEFENDANT WHILE IN PRISON.**

**APPELLANT’S PROPOSITION OF LAW V: THE S.B. 201 INDETERMINATE SENTENCING SCHEME VIOLATES PROCEDURAL DUE PROCESS BY ALLOWING FOR THE EXTENSION OF A PRISON SENTENCE BASED ON FINDING MADE AT A HEARING WHERE THERE IS NO STATUTORY GUARANTEE THAT THE PRISONER WILL BE PRESENT, HAVE COUNSEL, CAN CONFRONT, CAN SUBPOENA WITNESSES OR HAVE THE RIGHT TO OFFER TESTIMONY OF THEIR OWN.**

The Due Process arguments have also been rejected by appellate courts throughout Ohio. See *State v. Barnes*, 2<sup>nd</sup> Dist. Montgomery No. 28613, 2020-Ohio-4150, footnote 2, *State v. Ferguson*, 2<sup>nd</sup> Dist. Montgomery No. 28644, 2020-Ohio-4153, ¶¶24-27, *State v. Leet*, 2<sup>nd</sup> Dist. Montgomery No. 28670, 2020-Ohio-4592, ¶19, *State v. Wallace*, 2<sup>nd</sup> Dist. Clark No. 2020-CA-3, 2020-Ohio-5109, ¶¶13-14, *State v. Sinkhorn*, 2<sup>nd</sup> Dist. Clark No. 2019-CA-79, 2020-Ohio-5359, ¶¶32-33, *State v. Baker*, 2<sup>nd</sup> Dist. Montgomery No. 28782, 2021-Ohio-140, ¶10, *State v. Keith*, 2<sup>nd</sup> Dist. Montgomery No. 28805, 2021-Ohio-518, ¶¶12-13, *State v. Ross*, 2<sup>nd</sup> Dist. Montgomery No. 28875, 2021-Ohio-1337, ¶¶12-14, *State v. Compton*, 2<sup>nd</sup> Dist. Montgomery No. 28912, 2021-Ohio-1513, ¶¶13-19, *State v. Hacker*, 3<sup>rd</sup> Dist. 8-20-01, 2020-Ohio-5048, ¶¶18-23, *State v. Kepling*, 3<sup>rd</sup> Dist. Hancock No. 5-20-23, 2020-Ohio-6888, ¶¶8-15 (holding the Due Process argument is not ripe for review), *State v. Crawford*, 3<sup>rd</sup> Dist. Henry No. 7-20-05, 2021-Ohio-547, ¶13, holding the Due Process argument is not ripe for review), *State v. Wilburn*, 8<sup>th</sup> Dist. Cuyahoga No. 109507, 2021-

Ohio-578, ¶¶28-37, *State v. Simmons*, 8<sup>th</sup> Dist. Cuyahoga No. 109476, 2021-Ohio-939, ¶¶16-22, *State v. Guyton*, 12<sup>th</sup> Dist. Butler No. CA2019-12-203, ¶7, *State v. Morris*, 12<sup>th</sup> Dist. Butler No. CA2019-12-205, ¶10, *State v. Suder*, 12<sup>th</sup> Dist. Clermont Nos. CA2020-06-034 & CA2020-06-035, ¶24.

In *Wilburn*, the Eighth District found sufficient due process protections through various statutes and administrative code provisions, including the opportunity for the defendant to be heard at the administrative proceeding. *State v. Wilburn*, 8<sup>th</sup> Dist. Cuyahoga No. 109507, 2021-Ohio-578, ¶¶ 34-37. The decision in *State v. Simmons*, 8<sup>th</sup> Dist. Cuyahoga No. 109476, 2021-Ohio-939, ¶¶16-22 was subsequently decided. Subsequent to these decisions a majority of the en banc Eighth District rejected the Due Process arguments with the lead opinion offering detailed analysis. *State v. Delvallie*, 8<sup>th</sup> Dist. Cuyahoga No. 109315, 2022-Ohio-470.

### **CONCLUSION**

The State of Ohio asks this Court to accept the cross-appeal. Appellant's appeal would not be properly before the Court if a final appealable order was lacking.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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