IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	
Plaintiff-Appellant,	:	Case No. 2017-0483
	:	
vs.	:	On Appeal from the Erie
	:	County Court of Appeals
GERRY L. MOORE, SR.,	:	Sixth Appellate District
AKA GARY L. MOORE, SR.,	:	
	:	C.A. Case No. E-16-030
Defendant-Appellee.	:	

MERIT BRIEF OF APPELLEE GERRY L. MOORE, SR.

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STATEMENT OF THE CASE AND FACTS

Gerry Moore agrees with the statement of the case and relevant facts given in the State's merit brief, except for the State's description of the opinion of the Sixth District Court of Appeals. Moore's disagreement regarding the court of appeals' opinion is addressed in the argument section below.

ARGUMENT

STATE'S PROPOSITION OF LAW I

Revised Code Section 2929.14(B)(1)(b) does not violate the Equal Protection Clause of the United States Constitution or the Ohio Constitution.

A. Introduction.

The State argues that the legislature has enacted a statute which categorically denies confinement credit for certain offenses, and that the statute does not violate the Equal Protection Clauses of the Ohio and United States Constitutions.

The State's argument is without merit for two reasons. First, the plain text of the statute does not preclude a defendant from receiving confinement credit. Revised Code Section 2929.14(B)(1)(b) states that for certain crimes, "the prison term shall not be reduced pursuant to…any [ ] provision of Chapter 2967," which is the chapter that mandates the award of jail-time credit. However, "prison term," as used in R.C. Chapter 2929, is specifically defined to include confinement credit. R.C. 2929.01(BB)-(FF). Therefore, the awarding of confinement credit reflects part of the prison term, rather than a reduction of the prison term.

If this Court finds that R.C. 2929.14(B)(1)(b) does mandate that a defendant not receive confinement credit, then the statute violates the Equal Protection Clauses of the Ohio and United States Constitutions. This Court, the federal courts, and the legislature have all recognized that not granting confinement credit towards a prison term violates equal protection. Accordingly, If

the law prohibits courts from awarding confinement credit for certain offenses, then it violates equal protection.

B. The text of R.C. 2929.14(B)(1)(b) does not prohibit defendants from receiving confinement credit, because confinement credit is part of the prison term.

The statute at issue in this case provides that if a court imposes a sentence for a mandatory gun specification, "the prison term shall not be reduced pursuant to section 2967.19, section 2929.20, section 2967.193, or any other provision of Chapter 2967. or Chapter 5120. of the Revised Code." R.C. 2929.14 (B)(1)(b). Relevant here is the phrase "or any other provision of Chapter 2967." Chapter 2967 includes the statute (R.C. 2967.191) that requires that defendants receive confinement credit. Specifically, Revised Code Section 2967.191 states:

> The department of rehabilitation and correction shall reduce the stated prison term of a prisoner or, if the prisoner is serving a term for which there is parole eligibility, the minimum and maximum term or the parole eligibility date of the prisoner by the total number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced, including confinement in lieu of bail while awaiting trial, confinement for examination to determine the prisoner's competence to stand trial or sanity, confinement while awaiting transportation to the place where the prisoner is to serve the prisoner's prison term, as determined by the sentencing court under division (B)(2)(g)(i) of section 2929.19 of the Revised Code, and confinement in a juvenile facility.

R.C. 2967.191. Confinement credit is also referred to as "jail-time credit," or "credit for dead time."

The State argues that because R.C. 2929.14(B)(1)(b) prohibits "reduction" of the prison term for a mandatory gun specification, a defendant may not receive confinement credit for such a sentence. Merit Brief of Appellant at p. 7-8. However, confinement credit does not reduce the prison term. Rather, *it is part of the prison term*. The Revised Code expressly defines "prison term" as including confinement credit. Revised code section 2929.01 provides, in pertinent part:

> As used in this chapter:
>
> * * *
>
> (BB) "Prison term" includes either of the following sanctions for an offender:
>
> (1) A stated prison term;
>
> (2) A term in a prison shortened by, or with the approval of, the sentencing court pursuant to section 2929.143, 2929.20, 2967.26, 5120.031, 5120.032, or 5120.073 of the Revised Code.
>
> * * *
>
> (FF) "Stated prison term" means the prison term, mandatory prison term, or combination of all prison terms and mandatory prison terms imposed by the sentencing court pursuant to section 2929.14, 2929.142, or 2971.03 of the Revised Code or under section 2919.25 of the Revised Code. *"Stated prison term" includes any credit received by the offender for time spent in jail awaiting trial, sentencing, or transfer to prison for the offense[.]*

(Emphasis added.) R.C. 2929.01.

The Revised Code defined "prison term" to include confinement credit. Words that have acquired a particular meaning by legislative definition must be construed accordingly. R.C. 1.42. Therefore, confinement credit is part of the prison term, rather than a reduction of the prison term. Accordingly, R.C. 2929.14(B)(1)(b) does not prohibit the award of confinement credit.

Relevant cannons of statutory interpretation support this conclusion. The constitutional avoidance doctrine provides that statutes should be interpreted to avoid constitutional difficulty, unless doing so would be plainly contrary to the intent of the legislature. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988); *see also Mayer v. Bristow*, 91 Ohio St.3d 3, 9, 740 N.E.2d 656 (2000). The State's proposed interpretation of the statute is that courts must never award confinement credit to defendants for time that they were incarcerated in relation to mandatory gun specifications. As explained in greater detail below in Subsection C, this would lead to flagrant

equal protection violations. The legislature has recognized that the Equal Protection Clauses require that indigent defendants receive confinement credit. R.C. 2967.191, 1974 Commt. Comment to H 511. It would not make sense for the legislature to then entirely prohibit the award of confinement credit for particular crimes. This Court should interpret the statute in question to avoid unconstitutional outcomes.

The award of confinement credit is fundamentally different from all of the prohibited sentence reductions under R.C. 2929.14(B)(1)(b) because the other items all actually reduce the prison term. The other enumerated items that the statute prohibits include the reduction of the prison sentence pursuant to R.C. 2967.19 (petition by director of rehabilitation and correction to sentencing court to release offender), R.C. 2929.20 (judicial release), and R.C. 2967.193 (good time credit). Similarly, other sections of Chapter 2967 deal with actual sentence reductions, such as pardons, medical release, or sentence reduction due to overcrowding emergency. R.C. 2967.03; R.C. 2967.05; R.C. 2967.18. These are all of a different character from confinement credit because they actually reduce the prison term. Confinement credit does not reduce the prison term because it is, by statute, part of the prison term. R.C. 2929.01 (FF).

One source of confusion on this issue is that R.C. 2967.191 is captioned "Reduction of prison term for related days of confinement," and the statute says the department of rehabilitation and correction "shall reduce the stated prison term" by the total number of days of confinement credit. However, this simply explains the mechanism to apply confinement credit, which is part of the prison term. Further, the rule of lenity requires that any ambiguity or conflict between R.C. 2967.191 and R.C. R.C. 2929.01 (FF) be resolved against increased punishment. R.C. 2901.04(A); *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶ 38.

Ultimately, R.C. 2929.14(B)(1)(b) does not prohibit a defendant receiving confinement credit, because confinement credit is part of the sentence. This definition is made explicit by R.C. 2929.01(BB)-(FF). This Court should hold that R.C. 2929.14(B)(1)(b), read in pari materia with 2929.01(BB)-(FF), does not prohibit defendants from receiving confinement credit. This is what is required by the plain text of the statute, and it avoids the otherwise inevitable constitutional problem discussed below.

C. If R.C. 2929.14(B)(1)(b) prohibits defendants from receiving confinement credit, then it violates the Equal Protection Clauses of the Ohio and United States Constitutions.

1. Legal Standards and Background: Defendants have a constitutional and statutory right to confinement credit.

It is broadly recognized that the Equal Protection Clauses require indigent defendants to receive confinement credit. (Fourteenth Amendment to the U.S. Constitution, Ohio Constitution, Article I, Section 2.) Up until the early 1970s, the award of confinement credit in Ohio was discretionary, rather than mandatory. *Workman v. Cardwell*, 338 F.Supp. 893, 901 (N.D.Ohio 1972), citing former R.C. 2967.191.[1] Due to equal protection violations, former R.C. 2967.191 was found to be unconstitutional on its face. *Id.* The federal courts in the northern and southern districts in Ohio reasoned that indigent defendants would spend more time incarcerated for no reason except for their inability to be able to afford bail. *Id.*; *White v. Gilligan*, 351 F.Supp. 1012 (S.D.Ohio 1972); *see also Williams v. Illinois*, 399 U.S. 235, 244, 90 S.Ct. 2018, 26 L.Ed.2d 586

[1] Former R.C. 2967.191 provided that "The adult parole authority upon proper certification by the trial judge of time served, in the journal entry of sentence and upon recommendation of the trial judge may reduce the minimum sentence of a prisoner by the number of days the prisoner was confined at the county jail or workhouse or confined at a state facility for a presentence examination as provided in section 2947.25 of the Revised Code after a verdict or plea of guilty and before commitment." *Workman v. Cardwell*, 338 F.Supp. 893, 901 (N.D.Ohio 1972), quoting former R.C. 2967.191.

(1970) ("The Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status."). The legislature recognized this equal protection violation, and amended R.C. 2967.191 to grant confinement credit for all time that defendants were held on the relevant charges. When enacting the statutory change, the legislature explained:

> Under the former statute, an offender was not entitled to a "dead time" credit unless the sentencing court recommended that he be given such credit and the Parole Board chose to follow the court's recommendation. The credit was made mandatory under decisions of the U.S. District Courts for both the Northern and Southern Districts of Ohio, on the theory that the law would otherwise unconstitutionally discriminate against poor offenders who languish in jail awaiting trial because they are unable to make bail. Since the mandatory credit for dead time was included in H.B. 511 as introduced in March, 1971, the bill anticipated these decisions.

(Citations omitted.) R.C. 2967.191, 1974 Commt. Comment to H 511.

This Court again reiterated how the award of confinement credit is fundamental to equal protection in *State v. Fugate,* 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440. In *Fugate,* this Court held that when a defendant is sentenced to concurrent prison terms for multiple charges, jail-time credit must be applied toward each concurrent prison term. *State v. Fugate*, at syllabus. This Court noted that not applying credit to all concurrent sentences would, in effect, negate the credit for the time that the offender has been held, which would constitute a violation of equal protection. *Id.* at ¶ 22.

2. Refusing to recognize confinement credit towards mandatory gun specifications violates equal protection, just as it would for any other offense.

As established above, defendants have a constitutional right to confinement credit. This has been recognized by this Court, the federal courts, and the legislature. It would violate the Equal Protection Clauses if the legislature were to begin selecting offenses for which defendants

could not receive confinement credit. Defendants would lose weeks, months, or years of their lives in jail because they could not make bail. Given the legislature's recognition of the right to confinement credit, the interpretation that denies all confinement credit should be rejected, as argued above in subsection B. However, assuming arguendo that the statute denies confinement credit for certain crimes, it violates equal protection.

A statute that precludes defendants from receiving any confinement credit for certain crimes inevitably violates equal protection. In this case, the prejudice to Moore is that the 283 days he spent in jail will not be counted towards his judicial release eligibility. The State argues that there is no equal protection right to judicial release, so there is no constitutional violation in this case. This is incorrect, as explained below in subsection 3, *infra*. However, even the State acknowledges that "The Equal Protection Clause * * * guarantees that all time spent under confinement prior to trial and commitment by a prisoner that is unable to make bail must be credited to his sentence." Merit Brief of Appellant at p. 14. But the inevitable result of a statute that disallows confinement credit is that poor defendants will be incarcerated for longer than their wealthy counterparts. For example, if the amount of time in jail is longer than the sentence for the gun specification, then a poor defendant would inevitably spend more time incarcerated than a wealthy one. This outcome violates equal protection even by the State's reasoning.

The Sixth District Court of Appeals performed the equal protection analysis correctly in this case. Citing to *Fugate*, the Sixth District explained:

> In this determination, we also rely on the rational of *Fugate* 117 Ohio St. 3d 261, 2008-Ohio-586, 883 N.E. 2d 440. The *Fugate* court reversed and applied dead time credit to all of an offender's concurrent terms because, the court declared, otherwise there would be denial of due credit in violation of equal protection. *Id.* at ¶ 12.

> [T]he overall objective of the directives for which dead time is to be calculated is "to comply with the requirements of equal protection by reducing the total time that offenders spend in prison after sentencing by an amount equal to the time that they were previously held." *Id.* at ¶ 11.
>
> Based on our view, *Fugate* supports the proposition that giving full credit to an offender may require applying dead time to a mandatory term when otherwise the potential length of the stated prison sentence is not accurately reflective of the time the offender's liberty was restrained. *See id.* at ¶ 22. ("To deny such credit would constitute a violation of the Equal Protection Clause.")
>
> Here, the record supports that if appellant is successful in seeking judicial release, there is a risk the application of R.C. 2929.14(B)(1)(b) will improperly deny him credit for his dead time. Imposing such a sentence would be contrary to law in light of equal protection and *Fugate*.

State v. Moore, 6th Dist. Erie No. E-16-030, 2017-Ohio-673, ¶ 24-27, citing *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856, 883 N.E.2d 440, ¶ 11-12, 22.

The State argues that the court below misapplied *Fugate* because the cases are factually distinguishable. But the court below acknowledged the factual distinctions, and stated that it was relying on the *rationale* of *Fugate*, as well as other relevant jurisprudence regarding equal protection. *Moore* at ¶ 24-25. The overall objective of equal protection is to reduce the total time that offenders spend in prison by the time that they were previously held. *Fugate* at ¶ 11. Categorically denying confinement credit for certain crimes is incompatible with that objective.

3. Equal protection of the laws applies to judicial release eligibility.

The essence of the State's argument is that there is no equal protection violation because Moore's confinement credit is being applied towards his non-mandatory sentence. The State argues that it is unnecessary for Moore's confinement credit to offset his judicial release eligibility, because equal protection does not apply to judicial release eligibility. State's Merit Brief, p. 12. But this is incorrect. This Court has recognized that defendants are entitled to equal protection under the law with respect to judicial release eligibility. *State v. Peoples*, 102 Ohio

St.3d 460, 2004-Ohio-3923, 812 N.E.2d 963, syllabus (holding that former judicial release eligibility statute violates the Equal Protection Clause of the Ohio Constitution).

Moore's aggregate, mandatory prison term imposed on the firearm specifications attached to Counts 2 and 7 is 4 years; and his aggregate, non-mandatory term, imposed on Counts 2, 7, 8, and 12, is 4 years and 11 months. Because Mr. Moore's non-mandatory sentence is between 2 and 5 years, he is eligible for judicial release 180 days after he has completed his mandatory prison term. R.C. 2929.20(C)(2). As a condition of the plea deal, the State agreed not to oppose Moore's motion for judicial release. April 14, 2016, Guilty Plea Form.

The trial court credited Moore's 283 days of confinement credit towards his non-mandatory time only. April 4, 2016, Tr. 7. He received no credit towards his 4-year mandatory sentence. As a result, the confinement credit offsets Moore's maximum sentence, but it has been effectively negated towards his judicial release eligibility. However, contrary to the State's assertion, confinement credit is generally applicable towards judicial release eligibility. *State v. Weiss*, 180 Ohio App.3d 509, 2009-Ohio-78, 905 N.E.2d 1298, ¶ 12 (3d Dist.).

The State's central objection to the Sixth District's decision is that it is uncertain that Moore will be prejudiced, because it is not certain that he will be granted judicial release. But it is of no consequence that judicial release is not guaranteed. This Court has recognized that defendants must be treated with equal protection under the law with respect to judicial release *eligibility. State v. Peoples*, 102 Ohio St.3d 460, 2004-Ohio-3923, 812 N.E.2d 963, syllabus. And in order to satisfy equal protection, defendants who could not make bail must not be incarcerated longer than their wealthier counterparts before becoming eligible for judicial release.

In this case, the potential prejudice to Moore is that he will receive no credit towards his judicial release eligibility for the time that he spent in jail. In other cases, defendants will see their aggregate prison terms increased for no reason except that they were too poor to afford bail. Both results violate the Equal Protection Clauses of the United States and Ohio Constitutions.

4. Conclusion.

Gerry Moore respectfully requests that this Court hold that R.C. 2929.14(B)(1)(b) does not bar the award of confinement credit. This holding would avert the need to address the constitutional problem. Alternatively, if this Court interprets R.C. 2929.14(B)(1)(b) as prohibiting the award of confinement credit towards certain offenses, then it should hold that the statute violates the Equal Protection Clauses of the Ohio and United States Constitutions.

STATE'S PROPOSITION OF LAW II

An appellate court errs when it sua sponte determines that a statutory scheme violates the equal protection clause when the constitutionality of the statute was never challenged at the trial court level nor was it briefed by either party on appeal.

The State contends that the Sixth District Court of Appeals erred because it ruled that Moore's equal protection rights were violated without having the parties brief that particular argument. The State acknowledges that courts of appeals may raise issues sua sponte, but contends that it may not decide those issues before requesting briefing from the parties. This Court should find this issue moot, because the statute in question should be interpreted so as to avoid the constitutional problem. If this Court reaches the merits of the issue, it should find that the court below did not err by identifying the constitutional error sua sponte. This Court has allowed courts to decide constitutional issues sua sponte before, and has even done so itself, as discussed below.

As explained above in response to Proposition of Law I, applying the plain language of the statute at issue averts the constitutional problem entirely, and renders Proposition of Law II moot. In the Sixth District Court of Appeals, Moore argued that he was not precluded from receiving confinement credit based on the plain text of R.C. 2929.14(B)(1)(b). While the court below did not expressly decide the issue on those grounds, it ruled that there was a risk that the application of R.C. 2929.14(B)(1)(b) would improperly deny Moore credit. *State v. Moore*, 6th Dist. Erie No. E-16-030, 2017-Ohio-673, ¶ 26. Accordingly, the court of appeals sustained Moore's sole assignment of error. *Id.* at ¶ 28.

Revised Code Section 2929.14(B)(1)(b) states that the "prison term" shall not be "reduced" by any section of R.C. 2967, which includes confinement credit. However, "prison term" as used in Revised Code Chapter 2929 is expressly defined as including confinement credit. R.C. 2929.01(BB)-(FF). Accordingly, the plain text of the statute does not prohibit the award of confinement credit. Therefore, the courts need not review whether the statute violates equal protection, and this proposition of law is moot.

If this Court finds that R.C. 2929.14(B)(1)(b) does prohibit the award of confinement credit, then such an application violates equal protection, as explained above in response to Proposition of Law I. In this case there was nothing improper about the court of appeals observing this constitutional violation. Courts of appeals are permitted to sua sponte observe the unconstitutionality of statutes. This Court has previously approved of courts of appeals raising constitutional violations sua sponte when necessary. For example, in *Mayer v. Bristow*, this Court explained:

> Moreover, the issue is raised as to whether the court of appeals should have considered the constitutionality of the statute sua sponte* * * * The court of appeals specifically determined that it was necessary to consider the

> constitutionality of R.C. 2323.52 in rendering its decision, and we find nothing improper in its reasons for doing so.

Mayer v. Bristow, 91 Ohio St.3d 3, 9, 740 N.E.2d 656 (2000). In *Mayer*, as in this case, the court of appeals made the constitutional inquiry without receiving briefing on the issue from the parties. *Id.* at 8. This Court itself has raised reviewed the constitutionality of statutes sua sponte. *State v. Buell*, 22 Ohio St.3d 124, 142, 489 N.E.2d 795 (1986) ("Having addressed those constitutional issues raised by the appellant, *sua sponte* we examine the constitutionality of the imposition of the death penalty in this case in light of the Supreme Court's recent decision in *Caldwell v. Mississippi*."); *but see State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 171, 522 N.E.2d 524 (1988) (court of appeals abused its discretion when it sua sponte decided an unbriefed issue, and then did not address other issues that it found to be moot); *C. Miller Chevrolet, Inc. v. Willoughby Hills*, 38 Ohio St.2d 298, 301, 313 N.E.2d 400 (1974), fn. 3.

In this case, the Sixth District Court of Appeals determined that it did not need briefing on the equal protection issue. If that court had any uncertainty concerning the issue, it presumably would have requested briefing. Further, if the State needed to present an argument that would have changed the outcome, then it could have filed a motion for reconsideration. But no motion for reconsideration was filed. It is not clear what actual remedy would now be available to the State, given that the issue has already been decided by the Sixth District Court of Appeals.

Because R.C. 2929.14(B)(1)(b) should be interpreted to avoid unconstitutionality, Moore respectfully asks that this Court find this proposition of law to be moot. Alternatively, Moore requests that this Court find no reversible error in the Sixth District's recognition of the equal protection violation, and affirm the court below.

CONCLUSION

For the reasons presented above, Moore respectfully requests that this Court affirm the ruling below, or hold that R.C. 2929.14(B)(1)(b) does not bar the recognition of confinement credit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a copy of the foregoing **MERIT BRIEF OF APPELLEE GERRY L. MOORE, SR.** has been sent by regular U.S. mail to Frank Romeo Zeleznikar, Cuyahoga County Assistant Prosecutor, Cuyahoga County Prosecutor's Office, The Justice Center, Courts Tower, 1200 Ontario St. – 9th Fl., Cleveland, Ohio 44113, and Johnathan M. McGookey, Erie County Assistant Prosecutor, Erie County Prosecutor's Office, 247 Columbus Ave. – Ste. 319, Sandusky, Ohio 44870, on this 4th day of October, 2017.

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