

**IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
 CRIMINAL DIVISION**

State of Ohio,	:	
	:	
Plaintiff,	:	Case No. 19-CR-04589
	:	
vs.	:	Judge Karen H. Phipps
	:	
Michael G. Davis,	:	
	:	
Defendant.	:	

**STATE'S MEMORANDUM CONTRA DEFENDANT'S MOTION FOR JUDICIAL
 RELEASE**

The Defendant is incarcerated at the Grafton Correctional Institution (GCI). The Grafton Correctional Institution is *one of four prisons* within the Ohio Department of Rehabilitation and Correction (ODRC) that provide the Comprehensive Sex Offender Program (CSOP) to those who qualify. The Grafton Correctional Institution's website provides the following description for the CSOP program.

This program is part of ODRC's mission to reduce recidivism and it focuses on the unique programing needs of this population. The CSOP is twelve to fourteen months long in duration and group sessions are held three days a week, making it one of the most intensive programming efforts of ODRC. GCI's CSOP holds Adult Sex Offender Program Certification by the state advisory board.

(Emphasis added.)

The State contacted the ODRC and was advised that the earliest point that an offender can participate in the programming is *three years from the offender's expected release date*. The Defendant's Case Manager indicates that the Defendant **will be placed** in the program as he does

meet the criteria. However, he only recently entered his three-year timeframe to his out date in 2024. The Defendant has not benefitted from the CSOP at this time.

On May 28, 2020, the Court imposed a prison sentence for two counts of Pandering Sexually-Oriented Matter Involving a Minor, felonies of the second degree; Pandering Sexually-Oriented Matter Involving a Minor or Impaired Person, a felony of the second degree; and Pandering Sexually-Oriented Matter Involving a Minor or Impaired Person, a felony of the fourth degree. The Defendant was sentenced to serve a minimum aggregate prison term of four (4) years and a maximum aggregate prison term of six (6) years. The Defendant was sentenced under SB201 (Reagan Tokes Act) for one of the counts, which allows for an indefinite sentence for all convictions of felony(s) of the 1st or 2nd degree. Although there is a presumption for release at the minimum sentence, SB201 allows for an “Additional Term Hearing (ATH)” to be conducted by the Board or its Designee, if there are violations of identified institutional rules. This ATH hearing allows for the offender to be held in prison up to the maximum sentence.

At his sentencing on May 28, 2020, the Defendant stated that he had not realized that he was victimizing children over the seven years that he duplicated and viewed approximately 16,000 images of child pornography—but he did now. The Defendant’s education and employment with a television *news* channel *laid bare* his claim that he was unaware he was supporting an industry that sexually abused children.

The credibility of the Defendant’s claim was among the “grave” concerns listed by the Court that supported the imposition of a prison sentence for offenses she called “horrendous.” The Court would not specifically comment on the graphic nature of the images in open court that the State described as “extreme fetish” child pornography. In addition to the Defendant not

having engaged in ANY sex offender treatment to control impulse issues associated with pedophilia he also has never acknowledged that he viewed child pornography for sexual gratification. The Court provided the following rationale for the imposition of a prison sentence.

- The Defendant had groomed his family and coworkers over a period of seven (7) years to allow him to view and duplicate child pornography at work and at home without being detected.
- The Defendant's Pre-Sentence Investigation revealed he had Critical Thinking Errors that included Denial, Lack of Victim Empathy, and Minimization of his offenses. (The Defendant objectified the child victims. Prior to sentencing the Defendant voiced only that he had concern for himself—and had never mentioned concern for the victims of child pornography.)
- During the pendency of the case the Defendant claimed that he had engaged in Intensive Behavioral Therapy. However, the therapy he engaged in was to address depression and anxiety and was not sex offender therapy. The Court had been provided no baseline to assess the Defendant's need for therapy to address depression and/or anxiety. In addition the Defendant had likened his offenses to an addiction to sex and the Court stated the Defendant's offenses were more akin to pedophilia.
- The Defendant readily admitted that he had (over) indulged in food and alcohol while awaiting sentencing. The Court found the Defendant's overindulgence denoted his continued lack of impulse control and gave it no reassurance that the Defendant would not resume engagement in duplicating and viewing child pornography.
- The Court outlined that the Defendant had violated the conditions of release on bond by using the internet and failing to provide the Court with an up-to-date address. During the pendency of the case prior to sentencing the Defendant had begun residing in a hotel. The morning of sentencing, a probation officer viewed Defendant's cell phone and located a child erotica image on the phone.

On September 30, 2021, the Defendant filed a motion for judicial release with placement in CBCF at the **River City Facility** to participate in its intensive sex offender rehabilitation program. The Defendant's request for judicial release includes correspondence from supporters that *predates* the Defendant's sentencing. It is unknown whether the Defendant *still* retains the same familial/friend support he had prior to sentencing. Absent from the Defendant's request for judicial release is any statement *from the Defendant* that *acknowledges* he is a sex offender who

viewed pornography that featured children and that he is remorseful for the offenses. As he did at sentencing the Defendant claims the offenses were committed under circumstances not likely to recur, he has genuine remorse for the offenses, and that *prior to his sentence*, he sought out therapeutic treatments “to address and understand the issues which led to his behavior.” The Defendant indicates that he has participated in an anxiety support group. His Institutional Summary Report (ISR) reflects that he has participated in Pro-Social Activities on September 26, 2021, and May 6, 2021, during the 15-months he has been in prison. The Defendant claims he has completed the following programming: “CageMy (sic) Rage” and “Re-Entry Realities.” The Defendant’s ISR reflects that he has completed NO prison programming while in prison and the Defendant attaches no program certificates to his motion. Most importantly, the Defendant has completed NO prison programming specifically for sex offenders during his incarceration.

Factors that were present at the time of sentencing reflecting the likelihood of recidivism *remaining unchanged*, and the seriousness of the offenses, do not support judicial release. R.C. 2929.20(J)(1)(a) and (b). The State respectfully requests that the motion be denied.

I. General Principles Governing Judicial Release

Judicial release, like the former “shock probation” is a “privilege rather than a right of entitlement.” *State v. Coffman* (2001), 91 Ohio St. 3d 125, 128; *State v. Beasley* (1984), 14 Ohio St. 3d 74, 76. The decision to grant judicial release is an “act of grace” to one convicted of a crime. *Coffman*, 91 Ohio St. 3d, at 128. “There is **no constitutional** or **inherent right** of a convicted person to be conditionally released before the expiration of a valid sentence.” *Comm. Bd. of Pardons v. Dumschat* (1981), 452 U.S. 458, 464.

Courts have no inherent power to suspend execution of sentence. *Municipal Court v. Platter* (1933), 126 Ohio St. 103, paragraph three of the syllabus. Concepts of “equity” do not vest the court with authority to suspend a sentence. A criminal court is a court of *law*, not a court of equity. *State ex rel. Chalfin v. Glick* (1961), 172 Ohio St. 249, 252. “Except where there is express statutory authority therefore, equity has no criminal jurisdiction * * *.” *Id.* As a result, a criminal court’s judgments are not subject to being suspended for mere reasons of equity. The judicial release statute is the exclusive means to suspend a sentence, and that statutory authority must be strictly construed. *State v. Smith* (1989), 42 Ohio St.3d 60, 61.

Only offenders meeting the statutory eligibility criteria may be considered for judicial release. Offenders convicted for engaging in a pattern of corrupt activity under R.C. 2923.32 and specific crimes under R.C. Chapter 2921 cannot apply for judicial release. R.C. 2929.20(A)(1)(b). Other than those statutory exclusions, eligibility for judicial release is determined by the offender’s sentence. An “eligible offender” is a person serving a stated term that includes one or more nonmandatory prison terms. R.C. 2929.20(A). The “stated prison term” is defined as the total aggregate of all prison terms. *State v. Coursey*, 10th Dist. No. 06AP-1295, 2007-Ohio-4412, ¶ 6.

An offender will be automatically ineligible if he and/or the offense of conviction are barred from receiving judicial release under R.C. 2929.13(F). Furthermore, an eligible offender must comply with the applicable statutory waiting period before applying for judicial release. R.C. 2929.20(C). When an offender fails to meet the statutory requirements, the court lacks authority to suspend the offender’s sentence. *Coursey*, *supra* at ¶ 9.

The court may deny a motion for judicial release without a hearing. Such denial is not a final appealable order. *Coffman*, 91 Ohio St.3d at 128. However, a hearing is required before

granting judicial release. R.C. 2929.20(D). At this hearing, the court must consider any statement made by the victim, any victim-impact statement prepared pursuant to R.C. 2947.051, and the offender's institutional report, which must be prepared prior to any hearing on the motion. R.C. 2929.20(G),(I),(L). The court should also review the presentence investigation, or a background investigation report, before imposing the terms and conditions of community control sanctions. "After ruling on the motion, the court must notify the victim of the ruling." R.C. 2929.20(I).

II. Argument

R.C. 2929.20(J) findings are not supported.

The following is a chronology of events pertaining to former WBNS-TV (Channel 10) meteorologist, Mike Davis, pleading guilty and being sentenced to offenses that denote he is a sexual offender.

On August 26, 2019, the Franklin County Sheriff's Office Internet Crimes Against Children Task Force received a cybertip from the National Center for Missing and Exploited Children related to an email address later found to belong to television personality, Mike Davis.

On September 5, 2019, Detectives seized multiple electronic devices belonging to the Defendant and uncovered various locations/sources used by the Defendant to store and obtain child pornography over a period of approximately seven (7) years.

On October 9, 2019, the Defendant was indicted for two counts of Pandering Sexually-Oriented Matter Involving a Minor, felonies of the second degree; Pandering Sexually-Oriented Matter Involving a Minor or Impaired Person, a felony of the second degree; and Pandering Sexually-Oriented Matter Involving a Minor or Impaired Person, a felony of the fourth degree.

On January 30, 2020, the Defendant pled guilty to all charges. The Defendant was released on bond pending sentencing. A Pre-Sentence Investigation was ordered by the Court.

On March 13, 2020, and May 20, 2020, the Defendant filed a sentencing memorandum, and a sentencing memorandum update. The Defendant requested that the Court sentence him to treatment either in an inpatient treatment program at the CBCF **River City Facility** or a similar intensive therapy term of community control. (The Defendant was accepted into the River City Facility prior to sentencing.)

On March 18, 2021, the State's sentencing memorandum detailed the *breadth* of the Defendant's propensity to view and collect child pornography and arguments supporting the imposition of a prison sentence.

- The Defendant's **HP Laptop** contained ten images of child pornography which had been deleted. (The forensic tool carved the images from the unallocated space on the laptop's hard drive.)
- The Defendant's **iPad** contained over 5,000 images of nude children and child pornography. Detectives also located emails on the iPad that corresponded with emails provided by Yahoo pursuant to the search warrant as well as a search history indicative of child pornography. Detectives subpoenaed the contents of the email address from Yahoo!
- The Defendant's **email address from Yahoo!** revealed that he began emailing himself images of child nudity, child erotica, and child pornography in early 2013. The Yahoo! results showed the Defendant had uploaded approximately 15,912 images of suspected child pornography to his email account. The children depicted in these images ranged from young children (ages 4-6) to young teenagers and some depicted female children engaged in extremely graphic sexual acts.
- **Twenty-two emails found on the Defendant's iPad and results provided by Yahoo!** described in the Pre-sentence Investigation showed a gradual escalation of the imagery sought out by the Defendant. *What began as the Defendant looking at nudist families and nude children and emailing himself a single image at a time over time escalated in frequency and manner of sexual conduct depicted.*
- The Defendant *objectified* children in defense of his

actions when interviewed by a Pre-sentence Investigator. The Defendant referred to abused children groomed to take part in sex acts as “it.” The Defendant describes the children as willing participants in sexual activity, rather than children who were forced or conditioned to engage in sexual conduct.

- The Defendant did not acknowledge that his offenses were sex offenses. He referred to his proclivity to collect child pornography as being indicative of “obsessive compulsive disorder” and a “hoarding disorder.” He referred to his collection of child pornography being similar to someone collecting toys or comic books.
- The Defendant denied being sexually attracted to children. (However, it was apparent from his statements that the Defendant was not merely collecting images of child pornography, and that he was sexually attracted to these children.) His denial directly contradicted some of his other statements to the Pre-sentence investigator. An offender’s denial of sexual attraction to children is consistent with a diagnosis of Pedophilia.
- The court ordered sex offender risk assessment revealed recidivism was more likely. The Defendant scored relatively high on the Internet Sex Screening Test and in the moderate risk interpretive range on the STABLE-2007 assessment.
- The Defendant’s argument that recidivism was unlikely because he has no criminal history was contradicted by the Defendant having lived the last seven years of his life duplicating and viewing child pornography—committing *thousands of felonies* as documented by the sheer number of images.
- On September 30, 2021, the Defendant filed a motion for judicial release. At this time the Defendant has not participated in ANY sex offender programming.

As the Defendant was convicted for the second degree felonies of Pandering Sexually-Oriented Matter Involving a Minor and Pandering Sexually-Oriented Matter Involving a Minor or Impaired Person, this court is required to make detailed findings under R.C.

2929.20(J)(1)(a) *and* (b) before granting judicial release. These findings necessarily incorporate an analysis of the seriousness and recidivism factors under R.C. 2929.12. *State v. Nichter*, 10th Dist. No. 14AP-34, 2014-Ohio-4226, ¶ 20. The State submits the record does not support either finding.

Under R.C. 2929.20(J)(1), this court must find:

(a) That a sanction other than a prison term would adequately punish the offender and protect the public from future criminal violations by the eligible offender because the applicable factors indicating a lesser likelihood of recidivism outweigh the applicable factors indicating a greater likelihood of recidivism;

(b) That a sanction other than a prison term would not demean the seriousness of the offense because factors indicating that the eligible offender's conduct in committing the offense was less serious than conduct normally constituting the offense outweigh factors indicating that the eligible offender's conduct was more serious than conduct normally constituting the offense.

R.C. 2929.20(J)(1) provides that the court must make these findings "with reference to factors under section 2929.12". A court granting judicial release "shall specify on the record both findings required in [R.C.2929.20(J)(1)] and also shall list all the factors described in that division that were presented at the hearing." R.C. 2929.20(J)(2).

"[B]efore a trial court may grant judicial release, the court must make the findings contained in R.C. 2929.20(J) with reference to factors in R.C. 2929.12, specify those findings on the record, and list the relevant factors presented at the hearing." *State v. Walker*, 10th Dist. No. 14AP-181, 2014-Ohio-4586, ¶ 10. "This court has previously noted that, in addition to the findings required under R.C. 2929.20(J)(1), the statute obligates the trial court to justify its findings with an analysis of the relevant R.C. 2929.12 factors. Without the R.C. 2929.20(J) findings and the analysis of all the relevant R.C. 2929.12 factors, a trial court cannot grant judicial release." *State v. Nichter*, 10th Dist. No. 15AP-40, 2015-Ohio-3489, ¶ 9 (citations and

quote marks omitted). “R.C. 2929.20(J) requires a trial court to make a *very specific set* of findings before the court can grant judicial release to an individual imprisoned for a first or second degree felony, and those findings *must be made on the record*.” *State v. Nichter*, 10th Dist. No. 14AP-34, 2014-Ohio-4226, ¶ 13 (emphasis added).

The statute also emphasizes the need for the trial court to memorialize the needed findings. “If the court made any findings pursuant to division (J)(1) of this section, the court shall serve a copy of the findings upon counsel for the parties within fifteen days after the date on which the court grants the motion for judicial release.” R.C. 2929.20(K).

These finding requirements continue to apply after *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, syllabus.

As shown by the language and structure of the statute, the General Assembly requires that a first-degree felon satisfy *both* the “seriousness” *and* “recidivism” prongs. No matter how much “remorse” a defendant might have or how “rehabilitated” a defendant is, a defendant’s current-day contrition and “reformed” nature does not change the seriousness of the crimes he committed before. Thus, even when a court has grounds to say “lesser recidivism” outweighs “greater recidivism”, its inability to make the needed finding regarding seriousness is fatal to any effort to grant judicial release.

Judicial release is unwarranted.

The applicable factors indicating a lesser likelihood of recidivism do not outweigh the applicable factors indicating a greater likelihood of recidivism, and factors indicating the Defendant’s conduct in committing the offenses was less serious do not outweigh the applicable factors denoting that the conduct was more serious in the analysis of the recidivism and seriousness factors under R.C. 2929.12(D) and (E) and R.C. 2929.12 (B) and (C).

The following enumerated and relevant factors support the likelihood of recidivism. The Defendant continues to show no genuine remorse for the victims of the offenses. R.C. 2929.12(D)(5). Relevant factors pertaining to the likelihood of recidivism include the following. The Defendant duplicated and viewed child pornography for **seven years**, having groomed his family and co-workers to permit him to do so, undetected. Absent from the Defendant's request for judicial release is any statement from the Defendant that *acknowledges* his crimes.

The following enumerated factors support the seriousness of the offenses. The physical or mental injuries suffered by the victims featured in the pornographic images was exacerbated because of the ages of the victim. R.C. 2929.12(B)(1). The victims featured in the pornographic images suffered physical or psychological harm as a result of the offenses. R.C. 2929.12(B)(2). A relevant factor pertaining to the seriousness of the offense is the Defendant's patronage of an organized criminal activity.

The requirements of the statute are clear. Judicial release is only appropriate when *both* findings under R.C. 2929.20(J)(1) can be made. As there is no support for either finding, defendant's motion should be denied.

COVID-19 has impacted the availability of most prison programming; however, Evidence Based Tool/Interventions still are available to inmates. Evidence Based Tool/Interventions also referred to as "Carey Guides" are self-help tools offering independent study to address "risk factors, triggers, and other conditions" that lead to recidivism.

III. Conclusion

For the foregoing reasons, the State opposes defendant's motion for judicial release and respectfully requests that the motion be denied.

Respectfully submitted,

G. GARY TYACK
Prosecuting Attorney

/s/ Kara Keating
Kara D. Keating 0087252
Assistant Prosecuting Attorney
373 South High Street – 14th Floor
Columbus, OH 43215
(614) 525-3555
Counsel for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that service of a copy of the foregoing has been made to Adam Lee Nemann, 35 East Livingston Avenue, Columbus, Ohio 43215. This document has been filed electronically on the date of the filing with the Clerk of the Court by using the e-filing system which will send a notice of electronic filing.

/s/ Kara Keating
Kara D. Keating 0087252
Assistant Prosecuting Attorney