The Supreme Court of Ohio

State of Ohio,	)	
	)	
plaintiff/appellee,	)	**Certified-conflict appeal**
	)	
v.	)	
	)	On Appeal from the Sixth District
Edward Maddox,	)	Court of Appeals, Case No. L-19-1253
	)	
defendant/appellant	)	

APPELLANT'S MERIT BRIEF

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OVERVIEW

The ripeness doctrine started in federal courts as a judge-made practice of restraint meant to bar review of theoretical disputes lacking developed records. One aim is to preserve judicial economy while ensuring that parties are concretely adverse so they are driven to argue in a way that helps courts make good rulings on the merits. Here, the state indicted Maddox and then got a conviction triggering sentencing under the Reagan Tokes Law. When Maddox attacked the constitutionality of that new law, the appeals court held that his challenge isn't ripe except on *habeas corpus* even though:

- The trial court has already sentenced Maddox under the Tokes law;
- Several other courts have already found the validity of that law ripe for review by opining—with mixed results—upon its constitutionality; and
- Waiting until *habeas* review would (a) needlessly consume judicial resources when all defendants, including Maddox, are already entitled to direct appeals in felony cases and (b) have the effect of denying indigent defendants their constitutional right to counsel in Tokes challenges because *habeas* is a civil remedy where no right to appointed counsel exists. This absence of learned counsel will *not* assist a court in determining the ultimate merits, which frustrates the ripeness doctrine.

Because the errors raised below aren't academic or conjectural—indeed, the parties' conflicting interests motivates them to make their best legal arguments on a purely legal issue needing no developed record—this court should reverse and remand for a merits decision. But if this court affirms, then it should also vacate every case upholding the Tokes law as improvidently issued in violation of the ripeness doctrine.

STATEMENT OF THE FACTS

Maddox tendered an *Alford* plea to burglary in violation of R.C. 2911.12(A)(2), a second-degree felony. The trial court gave a four-year minimum prison term and then imposed a maximum term of six years under the formula specified by the Tokes law, Am. Sub.S.B. 201, 2018 Ohio Law 157, eff. March 22, 2019.

Maddox appealed and urged that (1) the trial court plainly erred in sentencing under the Tokes law because it is unconstitutional and (2) his appointed trial counsel was ineffective in not raising the invalidity. The appeals court dismissed his appeal as unripe, held that his redress lies later in the extraordinary writ of *habeas corpus*, and then certified a conflict on the ripeness issue to this court, which accepted this question:

> "Is the constitutionality of the provisions of the Reagan Tokes Act, which allow the Department of Rehabilitation and Corrections to administratively extend a criminal defendant's prison term beyond the presumptive minimum term, ripe for review on direct appeal from sentencing, or only after the defendant has served the minimum term and been subject to extension by application of the Act?"

ARGUMENT

Missing from the certified question and rationale below is an appreciation that the Tokes law doesn't just affect the "tail" of a sentence. Every rational defendant is chiefly concerned with their *maximum* exposure—the "dog." The Tokes law's outsized influence isn't abstract: its real effects sway everything from plea-negotiations to the decision to go to trial. A challenge to its constitutionality is therefore ripe for review upfront—at the trial court level. Thus, its validity is also necessarily ripe in the first

appeal of right. Because the assignments of error raised below are plainly ripe for review, this court should reverse and remand this matter for a merits determination.

The ripeness doctrine is only triggered when a case is abstract or theoretical. But when qualifying first and second-degree felonies are indicted, then exposure to the Tokes law is tangible—especially upon a conviction. Yet the panel below held that any challenge to the Tokes law is neither ripe in common pleas court nor on direct appeal—it said that a challenge is only justiciable on *habeas corpus*—even though the Revised Code says the trial judge shall impose sentence under the Tokes law and allows for a direct appeal. The net effect of affirming would be to deny indigent persons the assistance of trial and appellate counsel *vis-à-vis* any challenge to the Tokes law, a major part of the penal sentence, despite a constitutional promise of counsel. This will be manifested later when no right to counsel exists because *habeas* is a civil remedy.

* * *

This appeal intersects the judge-made ripeness doctrine with the Tokes law, which purports to enable prison officials to keep inmates behind bars without judicial review beyond their presumptive release dates for up to many years. This has generated frequent and substantial constitutional challenges in cases summarized at https://www.sconet.state.oh.us/Boards/Sentencing/resources/SB201/appealTracking.pdf.

Here, the appeals court held that no challenge to the Tokes law is ripe until long *after* sentencing—when a defendant is held over by prison officials. Universalizing this

approach would upend a key aim of the ripeness doctrine: the conservation of judicial resources. Because direct appeals in felony cases already cover the bulk of appellate dockets, a ruling from this court that a challenge to the Tokes law isn't directly reviewable is guaranteed to generate future piecemeal litigation; thusly burdening already-crowded dockets.

It makes no sense to "wait-and-see" if the Tokes law is unconstitutional until after an inmate is held-over because a Byzantine system that postpones adjudication until someone is physically restrained under an extended sentence results in the worst legal harm—loss of liberty that can't be retroactively remedied—if the Tokes law is ultimately held invalid. Trial jurists who impose felony sentences are logically first in line to ensure that their punishments are handed down under valid laws. Thus, the validity of the Tokes law is naturally ripe *before* sentencing. And any constitutional ruling is then directly reviewable under R.C. 2953.08(A)(4) in the normal course.

I. Overview of the Reagan Tokes Law.

Because this appeal presents a question of ripeness, we will only briefly touch upon the Tokes law's substantive particulars.

A. The minimum and maximum terms under R.C. 2929.14 and R.C. 2929.144.

Generally, R.C. 2929.14(A)(2)(a) requires a court imposing a prison term for a second-degree felony to levy an indefinite term composed of a:

- "Minimum" term of two, three, four, five, six, seven, or eight years; and

- "Maximum" term determined under R.C. 2929.144, which in turn requires judges to give a maximum term equal to 150% of the minimum term.

Trial judges have no discretion on the maximum term except that it's formulaically tethered to the minimum term. While the state claims that the trial judge imposes the sentence as part of the "original sentence," the prison department alone adjudicates the most vital aspect: whether it will be served. The fact that the decision below says we must wait to see what the prison department decides just features the constitutional problem. Regardless, the trial judge gave Maddox a minimum sentence of four years with a maximum term of six years. Now, the Tokes law contemplates prison officials to be judicial proxies with the clout to determine—without review—if any of this maximum term is actually served. For many people, this can mean years extra.

B. The Tokes law gives the prison department sole and unchecked power to order an inmate to serve the maximum sentence.

The Tokes law presumes that an offender will be released upon the earlier of either (a) expiration of the minimum term or (b) the offender's presumptively earned early release date. *See* R.C. 2967.271(B). But this presumption is "rebuttable" at a "hearing" within the department of rehabilitation and correction. *See* R.C. 2967.271.

Ultimately, R.C. 2967.271(D)(1) enables the prison department to keep an offender imprisoned beyond the presumptive release date for supposed conduct that the department alone adjudges without any review:

> If the department of rehabilitation and correction, pursuant to division (C) of this section, rebuts the presumption established under division (B) of this section, the department may maintain the offender's incarceration in a state correctional institution under the sentence after the expiration of the offender's minimum prison term or, for offenders who have a presumptive earned early release date, after the offender's presumptive earned early release date. The department may maintain the offender's incarceration under this division for an additional period of incarceration determined by the department. The additional period of incarceration shall be a reasonable period determined by the department, shall be specified by the department, and shall not exceed the offender's maximum prison term.

In contrast, if prison officials recommend release before the minimum term expires, then an inmate is released if the trial court approves. *See* R.C. 2967.21(F). This means that the Tokes law affords judicial review only if the offender might benefit from its provisions, but if, in the words of the certified-conflict question, officials "extend a criminal defendant's prison term beyond the presumptive minimum term" or the offender has "been subject to extension by application of the Act," then no mechanism for review exists. This resembles the old "bad time" statute held unconstitutional in *State ex. rel. Bray v. Russell*, 89 Ohio St.3d 132 (2000). But when is a challenge ripe?

II. A challenge to the Tokes law is ripe before sentencing in the common pleas court. Therefore, the merits are also ripe on review in the first appeal.

This court should reverse by holding that the challenge to the Tokes law is ripe and remand to the appeals court for ruling on the assignments of errors raised there.

A. The rationale for the ripeness doctrine wasn't served below.

The ripeness doctrine began in federal courts as a rule of practice rather than a matter of substantive law, and is aimed at conserving judicial resources by avoiding theoretical questions. The rationale for the rule doesn't fit here because, in criminal law, the maximum potential punishment influences pretrial practice, plea-bargaining, and the decision to go to trial. And as stated, appellate courts already hear numerous direct appeals in felony cases. Thus, an arrangement that (1) freely permits counseled direct appeals but (2) separately puts off any Tokes challenges for *habeas* review will consume the very judicial resources that the ripeness doctrine is intended to conserve.

B. This court should hold that a challenge to the Tokes Law is ripe for review in the sentencing court and on the first appeal.

In practice, the sentencing scheme regularly drives the whole proceedings: rational defendants and effective trial counsel weigh the chances for an acquittal versus the potential legitimate legal exposure. This is incalculable if the Tokes law can't be challenged until after protracted *habeas* review after a conviction. Not knowing a key variable accounting for a large percentage of a potential penalty makes the normal cost-benefit analysis unworkable and negates the chance of truly knowing, voluntary, and intelligent pleas.

Assuming *arguendo* that the Tokes law is invalid, but this court mandates delay before determining this issue on the merits, then, in the interim, the state can still

asymmetrically leverage the specter of an invalid law to extract pleas it may not otherwise gain. This shows that the issue is ripe even before any conviction.

At minimum, this court should hold that a challenge is at least ripe after a guilty plea (or verdict) but before sentencing: if the Tokes law is invalid, then no sentence should ever be imposed under it. To avoid imposition of an invalid sentence, a common pleas judge should review the potential invalidity of a sentencing scheme. And if the judge finds the scheme invalid, then the judge shouldn't impose sentence under it. Of course, if the state thinks that a trial judge made a legal error, then it may appeal. This logical sequence would serve the judicial process well, whereas affirming the decision below would force a common pleas judge who would otherwise find the sentencing scheme invalid to impose sentence under it anyway.

This odd result would have practical consequences. For example, a trial judge's knowledge that an inmate could be subject to a 50% "extra" penalty may influence the judge to decrease a sentence that otherwise might be imposed if, for example, the judge thinks an offender justly deserves a six-year term but does *not* deserve the potential for up to a nine-year term (six years plus 50%). Conversely, because the Tokes law has a section enabling potential early release at the recommendation of the prison department, this could drive sentences upward if a judge thinks an offender who might earn early release still should serve at least a certain minimum term no matter what. In sum, judges will inevitably compensate for the Toke's law's contingencies.

Plus, defendants, victims, and society have an interest in not "waiting" to know if a sentence was imposed under invalid legislation. And as mentioned above, not knowing if the maximum exposure is legitimate or not places defendants and their counsel in a bind. In sum, the typical "abstract dispute" concerns behind the ripeness doctrine just aren't present here. This is not an ivory-tower academic discussion or a case of the Tokes law offending someone's political or philosophical bents: nobody has a more concrete, imminent interest or stake in whether a penal law is valid than someone who is indicted and being prosecuted under its provisions.

The validity of the Tokes law is naturally ripe for review *at the trial court level* with either side retaining the right to appeal any merits determination. Delay ensures harm if the law is later invalidated after people are imprisoned under it. This potential hardship—and the fact that the challenge "essentially involves legal questions" where "there is sufficient information in the record upon which this court can base its decision"—satisfies ripeness. *Burger Brewing Co. v. Liquor Control Comm'n*, 34 Ohio St. 2d 93, 98, 296 N.E.2d 261, 265 (1973). Like in *Burger Brewing*, this court is not being asked to rule in a "vacuum." *Id*.

1. Several cases illustrate how a challenge to the Tokes law should work in trial courts and on direct appeal.

At least three separate common pleas judges in two of Ohio's largest counties have held the Tokes law invalid. *State v. Oneal*, Hamilton C.P. No. 1903562, 2019 WL 7670061 (Nov. 20, 2019), (Heekin, J.), (currently pending appeal before the First District

Court of Appeals); *State v. Simmons*, Cuyahoga C.P. No. CR-638591, (Russo, Joseph, J.), (pending appeal in Eighth District case number CA 20 109476); *State v. Tupper*, Cuyahoga C.P. No. CR-19-645523, (Russo, Joseph, J.); *State v. Sealey*, Cuyahoga C.P. No. CR-19-644811, (Fuerst, J.), (pending appeal in Eighth District case number CA-20-109670). These judges impose sentence under the law in effect before Tokes was enacted because when a court strikes a statute as unconstitutional, and the offending measure replaced an existing law that had been repealed in the same bill that enacted the offending statute, the repeal is also generally invalid. *State v. Sullivan*, 2001-Ohio-6, 90 Ohio St. 3d 502, syllabus. This sequence doesn't offend the ripeness doctrine.

Rather, each judge adjudicated what sentencing scheme applied *before* imposing sentence. Their merits decisions aren't material to the wholly distinct issue of ripeness and the disappointed party is free to appeal—as the state has done in the cases listed above—and the constitutional issue then logically works its way up the judicial hierarchy as in any other case.

2. The Ohio Revised Code and this court's precedent contemplate direct appellate review.

A defendant who pleads guilty to a felony may appeal the sentence imposed "as a matter of right" on the grounds that it is "contrary to law." R.C. 2953.08(A)(4). This presupposes that trial courts will normally be first to decide if a sentencing scheme is contrary to law. And because the Tokes law supposedly makes the "maximum" term part of the underlying sentence, Maddox's appeal on the grounds that the law is

unconstitutional is necessarily reviewable under R.C. 2953.08(A)(4) because an invalid sentence is, by definition, contrary to law.

Thus, the holding below that the remedy lies in *habeas* is wrong because *habeas* relief "is not available when there is an adequate remedy in the ordinary course of law," such as direct appeal. *Billiter v. Banks*, 2013-Ohio-1719, 135 Ohio St. 3d 426, 428, ¶8.

Next, this court's precedent is that a sentence is immediately appealable even if the effects may be contingent upon future events. *State v. Smith*, 2012-Ohio-781, 131 Ohio St. 3d 297, 297, 964 N.E.2d 423, 424, syllabus, ("A sentencing court's failure to inform an offender, as required by R.C. 2947.23(A)(1), that community service could be imposed if the offender fails to pay the costs of prosecution or court costs presents an issue ripe for review even though the record does not show that the offender has failed to pay such costs or that the trial court has ordered the offender to perform community service as a result of failure to pay.") Similarly, Criminal Rule 12 permits a defendant to challenge the constitutionality of a criminal statute before trial even if a defendant could be acquitted and therefore never penalized under the statute.

3. The remedy fashioned below frustrates the purpose of the ripeness doctrine while simultaneously violating the constitutional right to appointed trial and appellate counsel because *habeas corpus* is a civil remedy.

The extraordinary writ of *habeas corpus* is civil in nature and thus inmates have no right to appointed counsel. Uncounseled prisoners bringing piecemeal *habeas* claims after their direct appeals on other issues will *not* conserve judicial resources. On this

point, the ripeness doctrine doesn't exist just so courts avoid "abstract" disputes. The point in ensuring that a particular dispute is concrete is to ensure the claimants are incentivized to properly present their cases—with the ultimate aim of helping courts reach the right results on the merits. That is, the ripeness doctrine is rooted in the idea that suitable merits briefing generally results in better judicial decisions in the long run. But because of the absence of the right to counsel on *habeas* review—compared to the existence of that right on direct review—the result below minimizes the odds of good briefing and thus would defeat a core tenet of the ripeness doctrine.

Indeed, this state's prison population unduly consists of a disproportionate percentage of racial minorities and the poor, who are often at a disadvantage from the very start of a criminal case due to a myriad of socio-economic phenomena, such as implicit bias or economic hardship. If the Tokes law is ultimately held unconstitutional, a ruling here from this high court that the Tokes law cannot even be challenged until after the prison system prolongs inmates' sentences will aggravate the social issues already plaguing the criminal-justice system. Because racial minorities and the underprivileged are disproportionately represented in prison populations, they are likelier to be subjected to the after-effects of the Tokes law. Yet, as a class, are less likely to have the means to retain counsel to launch a constitutional attack on *habeas* review and will therefore feel the brunt of this law—especially since it has no judicial review.

Affirming would have the consequence of ensuring that these persons cannot challenge the Tokes law until after being physically restrained under it for supposed conduct *not* adjudicated by a judicial officer and, even then, must do so without the effective assistance of learned appointed counsel trained in the law. This "remedy" is itself unconstitutional. *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963), (right to appointed trial counsel); *Douglas v. California*, 372 U.S. 353, 355 (1963), (right to counsel on direct appeal); *Evitts v. Lucey*, 469 U.S. 387 (1985), (right to appointed counsel includes right to *effective* counsel).

CONCLUSION

If the Tokes law is invalid—a legal issue ripe for review now—then common pleas courts shouldn't be imposing sentences under it in the first place. Yet the decision below would ensure that the Tokes law eventually keeps people imprisoned for extended periods even it is unconstitutional. Federal courts didn't invent the ripeness doctrine to enable such a paradoxical result.

If this high court rules that a legal attack of a tiered sentencing scheme must wait until after someone's sentence is prolonged after the point at which legislature has effectively ceded judicial power to the prison department, then it takes little imagination to grasp that government could someday expand upon the Tokes law and create a different tiered scheme giving prison officials huge discretion while simultaneously denying any potential judicial challenge until after people are placed in

prolonged incarceration system. Because trial-court judges shouldn't be legislatively forced to robotically impose sentences under a potentially invalid scheme, this court should hold that constitutional challenges, even if they may later fail on the merits, to sentencing schemes like this one are (a) necessarily ripe for review *before* prolonged detention and (b) best situated for adjudication when the challenging party has the constitutionally-mandated benefit of the assistance of effective counsel.

Respectfully submitted,

MAYLE LLC

/s/ Andy Mayle

CERTIFICATE OF SERVICE

I emailed a copy of this brief to appellee's counsel at *ABreyman@co.lucas.oh.us* on the date that I electronically filed the brief with this court's clerk.

/s/ Andy Mayle