IN THE SUPREME COURT OF OHIO
CASE NO. 2021-0063

STATE OF OHIO,	)	
	)	
Appellee,	)	
	)	On Appeal from Cuyahoga
vs.	)	County Court of Appeals
	)	Eighth Appellate District
ANTHONY DAMES	)	
	)	C.A. Case No. 109090
Appellant.	)	

MEMORANDUM IN RESPONSE TO JURISDICTION

MICHAEL C. O'MALLEY (#0059592)
Cuyahoga County Prosecutor

DANIEL T. VAN (#0084614)
Assistant Prosecuting Attorneys
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800
dvan@prosecutor.cuyahogacounty.us

COUNSEL FOR APPELLEE, STATE OF OHIO

JOHN MARTIN (#0020606)
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

COUNSEL FOR APPELLANT,
ANTHONY DAMES

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THIS FELONY CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF PUBLIC OR GREAT GENERAL INTEREST

Much of the arguments being made by defendants across the State of Ohio, which have challenge the constitutionality of the Regan Tokes Act is built upon the false premise that the Ohio Department of Rehabilitations and Corrects has been empowered to unlawfully extend prison sentences. The fact of the matter is that the Regan Tokes Act allows the Ohio Department of Rehabilitations and Corrections to maintain custody over an incarcerated defendant under the sentence that has been imposed by the trial court judge.

In this particular case, the Appellant has forfeited his arguments to challenge the constitutionality of the Regan Tokes Act. Courts have also determined that the constitutionality of the Regan Tokes Act, insofar as defendants challenging the mechanism of presumptive release is not ripe for review. Other courts have rejected the merits of Appellant's argument. Here Appellant argues that the Eighth District should have addressed the ripeness issue first but Appellant also argues that the issue should have been decided against him as Appellant's first proposition of law states that the Regan Tokes Act issue is not ripe for review – a point that the State agrees.

The arguments raised by Appellant if adopted by this Court would result in a holding that Appellant's constitutional challenge is not yet ripe for review and the

Eighth District would still be required not to issue an opinion on the merits. For these reasons this Court should not accept review of this case.

STATEMENT OF THE CASE AND FACTS

This appeal arises out of an arrest that was made on April 12, 2019, by the Cleveland Police Department. Anthony Dames, ("Appellant"), was indicted on April 29, 2019, following the commencement of a Cuyahoga County Grand Jury (case no 639052-19-CR). The Grand Jury returned a six-count indictment which includes the following charges:

> Count One: Felonious Assault, a felony of the second degree, in violation of R.C. 2903.11(A)(1); and
>
> Count Two: Felonious Assault, a felony of the second degree, in violation of R.C. 2903.11(A)(2);and;
>
> Count Three: Felonious Assault, a felony of the second degree, in violation of R.C. 2903.11(A)(2); and
>
> Count Four: Domestic Violence, a felony of the third degree, in violation of R.C. 2919.25(A); and
>
> Count Five: Aggravated Menacing, a misdemeanor of the first degree, in violation of R.C. 2903.21(A) and;
>
> Count Six: Disrupting Public Services, a felony of the third degree, in violation of R.C. 2909.04(A)(3).

On July 22, 2019, the Defendant plead to two counts of Felonious Assault, felonies of the second degree; one count of Attempted Felonious Assault, a felony of the third degree; and one count of Domestic Violence, amended to a felony of the fourth degree. The Court proceeded to sentence the Defendant on September 09, 2019. All counts merged into count one for purposes of sentencing.

The Court, on the prosecutor's election, proceeded to sentence on Count One. Pursuant to Senate Bill 201, the Court sentenced the Defendant to a minimum term of seven years with an indefinite term of ten and a half years. In other words, the Appellant's minimum sentence is seven years and the maximum sentence is ten and a half years.

On appeal, Dames challenged his sentence for the first time. The Eighth District found that any challenge to his sentence was forfeited but declined to specifically address whether Dames' sentence was ripe for review. *State v. Dames*, 8th Dist. Cuyahoga No. 109090, 2020-Ohio-4991.

LAW AND ARGUMENT

By way of background, the State begins with a discussion on the Reagan Tokes Act. Effective March 22, 2019, the General Assembly provided in Am.Sub.S.B. 201 ("S.B. 201"), otherwise known as the Reagan Tokes Act, that first-degree and second-degree felonies not already carrying a life sentence will be subject to indefinite sentencing. When imposing prison, the S.B. 201 requires that the sentencing court impose an indefinite sentence with a minimum term selected by the judge and an accompanying maximum term, which is determined by the judge pursuant to a statutory formula under R.C. 2929.144. The laws collectively known as the Reagan Tokes Law is enumerated under R.C. 2901.011. What R.C. 2901.011 indicates is that the Reagan Tokes Law constitutes amendments to 50 sections of the Ohio Revised Code and the enactment of four sections of the Ohio Revised Code.

This is a change in Ohio law but not anything new. Before Senate Bill 2 in 1996, Ohio law provided for indefinite sentencing for many felonies so that the offender would receive an indefinite sentence of, say, 10 years to 25 years, but, with "good time", he would be eligible for parole after just 7 years, and the parole board would have broad discretion to deny parole, or to grant it, during that 18-year range. Potentially, for prisoners who were obvious dangers, the parole board could continue to deny parole and keep the defendant in prison up to the expiration of the 25-year maximum "tail".

The sentencing scheme under Senate Bill 2 lacked this public-protection feature because, once the defendant was done serving his definite Senate Bill 2 sentence, he walked out the door of the prison, whether or not he was a danger.

Senate Bill 2 did provide for post-release control after such release, but the offender walking the streets under PRC supervision still posed greater dangers to the public than keeping the defendant in prison, as the notorious facts of the aggravated murder of Reagan Tokes showed. Senate Bill 201 restored indefinite sentencing for non-life F-1 and F-2 offenses, giving room to the ODRC to delay the release of the offender for those offenders posing the greatest danger.

An indefinite sentence is a sentence having a minimum and a maximum. In the earlier example of the 10-25 sentence, the minimum was the "10" and the maximum was "25". Under the pre-SB2 sentencing scheme, the "25" maximum was set by law, and the sentencing court picked the bottom "minimum" number from an available range of 5, 6, 7, 8, 9, or 10 years when it would impose the 10-25 sentence.

The court would often pick the longest possible minimum term of 10 years, knowing that the defendant would become parole eligible in about 7 years with good-time credits.

Relevant definitions: Senate Bill 201 contains relevant statutory definitions in calculating the prison term:

- R.C. 2929.01 (EE) “Sentence” means the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense.
- R.C. 2929.01(FFF) "Non-life felony indefinite prison term" means a prison term imposed under division (A)(1)(a) or (2)(a) of section 2929.14 and section 2929.144 of the Revised Code for a felony of the first or second degree committed on or after [March 22, 2019].
- R.C. 2929.144(A) “Qualifying felony of the first or second degree” means a felony of the first or second degree committed on or after [March 22, 2019].

Single felony conviction: Under R.C. 2929.144(B)(1), the maximum is then determined by a formula that is 50% of the minimum term selected by the court. R.C. 2929.14(A)(1)(a) specifies the minimum term available for felonies for the first degree and R.C. 2929.14(A)(2)(a) specifies the minimum term available for felonies of the second degree. For instance for a felony of the first degree, the court having picked an 11-year minimum term, the maximum would add on an additional 50% -- 5.5. years -- to arrive at a maximum of 16.5 years. Based on the court’s setting of an 11-year minimum term, the indefinite sentence would be 11 years to 16.5 years. R.C.

2929.144(B)(1). At the other end of the spectrum, if the court chose a 3-year sentence as the minimum term, then adding 50% would result in a maximum of 4.5 years, for an indefinite sentence of 3 years to 4.5 years.

Simply the available indefinite prison terms available for a single felony conviction are as follows:

If the minimum prison term is:	The maximum prison term is:
2 years	3 years
3 years	4.5 years
4 years	6 years
5 years	7.5 years
6 years	9 years
7 years	10.5 years
8 years	12 years
9 years	13.5 years
10 years	15 years
11 years	16.5 years

When the court is sentencing concurrently. R.C. 2929.144(B)(3) provides for the following formula to calculate the maximum term where multiple sentences are imposed and all sentences are run concurrently:

> If the offender is **being sentenced for more than one felony**, if one or more of the felonies is a qualifying felony of the first or second degree, and if the court orders that **all of the prison terms** imposed are to **run concurrently**, the **maximum term shall be equal to the longest of the minimum terms** imposed on the offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree for which the sentence is being imposed **plus fifty per cent of the longest minimum term for the most serious qualifying felony being sentenced.**

If one of the offenses is a qualifying non-life F-1 or F-2 offense, and if the court is imposing all of the sentences concurrently, then the maximum term will be determined by adding 50% to the longest of the minimum terms imposed for a

qualifying offense, with the 50% amount being determined in relation to the minimum that was imposed for the most-serious qualifying felony being sentenced. R.C. 2929.144(B)(3). "Most serious" would be determined by level of felony degree, not by the length of the sentence being imposed.

To be more concise, if there are multiple felonies and at least one is a qualifying F-1 or F-2 and all counts are run concurrently then maximum term is equal to: (1) Longest minimum term imposed for a F-1 or F-2 plus (2) 50% of the longest minimum term for the most serious qualifying felony being sentenced.

When the court is sentencing consecutively. R.C. 2929.144(B)(2) provides for the following formula to calculate the maximum term where multiple sentences are imposed and some or all counts are run consecutively:

> **If the offender is being sentenced for more than one felony**, if one or more of the felonies is a **qualifying felony of the first or second degree**, and if the court orders that **some or all of the prison terms imposed are to be served consecutively**, the court shall **add all of the minimum terms imposed** on the offender under division (A)(1)(a) or (2)(a) of section 2929.14 of the Revised Code for a qualifying felony of the first or second degree that are to be served consecutively **and all of the definite terms of the felonies that are not qualifying felonies of the first or second degree** that are to be served consecutively, and the **maximum term shall be equal to the total of those terms so added by the court plus fifty per cent of the longest minimum term or definite term for the most serious felony being sentenced**.

If one or more of the offenses is a qualifying F-1 or F-2 offense, and if the court is imposing some or all of the sentences consecutively then the maximum term will be determined by adding the consecutive sentences together and by then adding an amount equal to 50% of the longest minimum term *or* longest definite term for the

most serious felony being sentenced.

More concisely, if there are multiple felonies and at least one is a qualifying F-1 or F-2 and at least one count is run consecutively then: (1) Add all the minimum terms (F-1 and F-2) and all definite terms (all other F-3, F-4 and F-5 offenses) that are run consecutively (Aggregate Minimum Term) (2) Maximum term is equal to the Aggregate Minimum Term plus 50% of the longest minimum or definite term for the most serious felony being sentenced. (Note: this provision uses the *most serious felony* being sentenced (i.e. pre S.B. 201 crime) as opposed to the *most serious qualifying felony* being sentenced).

When There Is A Mandatory Sentence: R.C. 2929.144(B)(4) describes how a trial court handles a sentence when a portion of it is mandatory. The statutory provision states:

> **Any mandatory prison term**, or portion of a mandatory prison term, that is imposed or to be imposed on the offender under division (B), (G), or (H) of section 2929.14 of the Revised Code or under any other provision of the Revised Code, with respect to a conviction of or plea of guilty to a specification, and **that is in addition to the sentence imposed for the underlying offense** is separate from the sentence being imposed for the qualifying first or second degree felony committed on or after the effective date of this section and **shall not be considered or included in determining a maximum prison term** for the offender under divisions (B)(1) to (3) of this section

In other words the following types of mandatory sentences are excluded from calculation of the maximum indefinite term under R.C. 2929.144: (1) R.C. 2929.14(B) – One year firearm specification, Automatic firearm/muffler/suppressor specification, Three year firearm specification; (2) R.C. 2929.14(G) – Criminal gang specification; (3) R.C. 2929.14(H) – Offense in school safety zone; (4) Or any other mandatory sentence that is imposed in addition to the underlying felony. However, where the

underlying felony carries a mandatory prison term, then that mandatory prison term is included in the calculation of the maximum term (i.e. mandatory prison term for human trafficking under R.C. 2505.32).

Post Release Control: Post-release control still applies to qualifying felonies of the first and second degree imposed under S.B. 201, with the Parole board able to impose for a violation of post release control a prison term that is equal to one-half of the minimum prison term imposed by the offender. See R.C. 2919.19(B)(2)(d),(e). Notably, in the State's view, the amendment to S.B. 201 eliminates the post-release control requirement for classified felonies carrying a life tail, effectively overruling *State ex rel. Carnail v. McCormick*, 126 Ohio St.3d 124, 2010-Ohio-2671. See R.C. 2967.28(B) (applying to a prison term other than a term of life imprisonment).

Judicial Release and 80% Judicial Release: Under S.B. 201, judicial release and 80% judicial release also still apply to defendants sentenced under the new law. Eligibility for judicial release is determined by the "aggregated nonmandatory prison term" which includes "all nonmandatory minimum prison terms imposed as part of the non-life indefinite prison term or terms." See R.C. 2929.20(C) and R.C. 2929.20(A)(6). Under R.C. 2967.19 or the 80% judicial release statute, the definition of "stated prison term…" now includes "non-life felony indefinite prison term." See R.C. 2967.19(A)(6).

Presumption of Release: Appellant makes no claim that the statutory formulas are unconstitutional. What is important in this case is that the statutory framework determines both the minimum term and the maximum term that a

defendant is sentenced to. Fact-finding is not required to determine the maximum term. What is apparent is that the sentencing judge determines the key variables in the sentencing. The *judge* decides whether to impose prison at all. The *judge* decides what the minimum term will be. The *judge* decides whether the sentences will be consecutive or concurrent and therefore what sentencing formula will apply. And then the *judge* pronounces and imposes the indefinite sentence based on the selected minimum term and the resulting maximum term.

Although indefinite sentencing gives ODRC the *ability* to hold the prisoner past the minimum term of the indefinite sentence, the General Assembly has limited that authority by creating a statutory presumption that the prisoner will be released upon serving the minimum term. R.C. 2967.271(B). The ODRC can "rebut" the presumption if it determines at a hearing that, inter alia, the prisoner has violated prison rules or the law, thereby demonstrating that the prisoner has not been rehabilitated and poses a threat to society, or the prisoner has been placed in restrictive housing in the past year, or is classified in security level three, four, or five or higher. R.C. 2967.271(C). If the ODRC finds that the presumption is rebutted, the ODRC can maintain the offender in custody for a reasonable period of time not to exceed the maximum prison term. R.C. 2967.271(D)(1). The presumption of release will apply at the next continued release date, and the presumption can be rebutted at the next date too. R.C. 2967.271(D)(2).

At the time of sentencing, the court is required to advise the defendant of the existence of the presumptive minimum-term release and the possibility of rebuttal among other things. See R.C. 2929.19(B)(2)(c).

PROPOSITION OF LAW III: APP. R. 16 DOES NOT REQUIRE THAT AN APPELLATE BRIEF RECITE THE STANDARD OF REVIEW AND, UNLESS SUH STANDARD IS REQUIRED BY LOCAL RULE, THE FAILURE TO INCLUDE THE STANDARD DOES NOT FORFEIT THE ISSUE ON APPEAL.

As the this Court held in *State v. Quarterman,* 140 Ohio St. 3d 464, 2014-Ohio-4034, 19 N.E.3d 900, the failure to challenge the constitutionality of a statute in the trial court forfeits all but plain error on appeal, and as a consequence this Court held that Quarterman forfeited his constitutional challenge to Ohio's mandatory bindover procedure.

The third proposition of law should not be accepted for review because it misconstrues the basis for forfeiture in this case. It is clear from the opinion that Appellant forfeited his argument to challenge the constitutionality of the Regan Tokes Act because: (1) he did not raise it in the trial court; (2) there is a presumption of constitutionality; and (3) Dames did not raise or show plain error. The issue is not so much what App. R. 16, but how Appellant can overcome his forfeiture of the sentencing challenge. Because Appellant did not overcome this hurdle, the Eighth District found no basis to address the constitutional argument for the first time on direct appeal. *State v. Dames*, 8th Dist. Cuyahoga No. 109090, 2020-Ohio-4991, ¶14-21.

The State presented a separate basis for the Eighth District to decline to address the merits of challenging the constitutionality of the Regan Tokes Act being that the attacks were not ripe for review. The Eighth District did not address whether the claim was ripe for review. Needless to say other courts have agreed on the issue of forfeiture. See *State v. Conant*, 4th Dist. Adams No. 20CA1108, 2020-Ohio-4319, *State v. Barnes*, 2d Dist. Montgomery No. 28613, 2020-Ohio-4150, *State v. Alexander*, 12th Dist. Butler No. CA2019-12-204, 2020-Ohio-3838

Furthermore, two additional panels have held that defendants have forfeited their challenges to the Reagan Tokes Act. See *State v. Hollis,* 8th Dist. Cuyahoga No. 109092, 2020-Ohio-5258 and *State v. Stone,* 8th Dist. Cuyahoga No. 109322, 2020-Ohio-5263.

PROPOSITION OF LAW I: THE CONSTITUTIONALITY OF THE PROVISIONS OF THE REGAN TOKES ACT, WHICH ALLOW THE DEPARTMENT OF REHABILITATIONS ARE NOT RIPE FOR REVIEW ON DIRECT APPEAL FROM SENTENCING, AND ONLY BECOME RIPE AFTER THE DEFENDANT HAS SERVED THE MINIMUM TERM AND BEEN SUBJECT TO EXTENSION BY APPLICATION OF THE ACT.

PROPOSITION OF LAW II: THE DETERMINATION THAT AN ISSUE BEFORE A COURT OF APPEALS IS RIPE FOR REVIEW IS A CONDITION PRECEDENT TO DETERMINIG THE ISSUE ON ANY OTHER GROUNDS, INCLUDING WAIVER OR FORFEITURE

The State has taken the position that, even if the argument below was not forfeited it certainly is not ripe for review and this juncture. Another basis exists for declining to address the merits of Appellant's constitutional challenges. The State of Ohio argues that many of Appellant's arguments lack justiciability, in that

those particular arguments challenge provisions that have not yet been applied. For instance, Appellant challenges the process upon which he may or may not be released. But that process involves an executive branch agency and no hearing has been held under the applicable statutory provisions.

This Court has described justiciability as follows: The duty of a reviewing court is to decide actual controversies and render judgments that are capable of enforcement. *Knutty v. Wallace* (1995), 100 Ohio App. 3d 555, 558-559, 654 N.E.2d 420. We are not required to address issues that are not ripe for review or those that would be purely academic in nature. See *Bentleyville v. Pisani* (1995), 100 Ohio App. 3d 515, 518-519; [*4] *James A. Keller, Inc. v. Flaherty* (1991), 74 Ohio App. 3d 788, 791, 600 N.E.2d 736; see, also, *Karches v. Cincinnati* (1988), 38 Ohio St. 3d 12, 14-15, 526 N.E.2d 1350. A claim is not ripe for appellate review unless the trial court has arrived at a definitive position on the issue. *Pisani, supra,* 100 Ohio App. 3d at 518-519. To address an issue prematurely would have the effect of rendering an advisory opinion on ***potential*** issues. See *Andonian v. A.C. & S., Inc.* (1994), 97 Ohio App. 3d 572, 575-576, 647 N.E.2d 174; *State v. Bistricky* (1990), 66 Ohio App. 3d 395, 397, 584 N.E.2d 75. *Brady v. BP Exploration & Oil*, 8th Dist. Cuyahoga No. 70862, 1997 Ohio App. LEXIS 2198, at *3-4 (May 22, 1997)

It is apparent that Appellant takes issue with a process that has not yet occurred, namely the presumptive release process. Appellant has not yet served his minimum prison sentence and the department of corrections has not rebutted any presumption that Appellant's incarceration should be maintained beyond the

minimum term. The Court should not address the constitutionality of a process that has not yet occurred. Several appellate courts have agreed with the State's position that the issue is not ripe for review. *State v. Clark*, 5th Dist. Licking No. 2020 CA 00017, 2020 Ohio App. LEXIS 3852 (Oct. 20, 2020), *State v. Velliquette*, 6th Dist. Lucas No. L-19-1232, 2020-Ohio-4855, *State v. Maddox*, 6th Dist. Lucas No. CL-19-1253, 2020-Ohio-4702, *State v. Kibler*, 5th Dist. Muskingum No. CT2020-0026, 2020-Ohio-4631, *State v. Downard*, 5th Dist. Muskingum No. CT2019-0079, 2020-Ohio-4227, *State v. Manion*, 5th Dist. Tuscarawas No. 2020 AP 03 0009, 2020-Ohio-4230

Appellate courts have also rejected on the merits arguments that the Reagan Tokes law violates the separation of powers doctrine and due process clause. See *State v. Wallace*, 2d Dist. Clark No. 2020-CA-3, 2020-Ohio-5109, *State v. Hacker*, 3d Dist. Logan No. 8-20-01, 2020-Ohio-5048. *State v. Leet*, 2d Dist. Montgomery No. 28670, 2020-Ohio-4592, *State v. Ferguson*, 2d Dist. Montgomery No. 28644, 2020-Ohio-4153, *State v. Guyton*, 12th Dist. Butler No. CA2019-12-203, 2020-Ohio-3837.

CONCLUSION

This Court should not accept jurisdiction in this case. Here the Eighth District held that Dames forfeited his constitutional challenge. Even if Dames raised an objection below it would not be ripe for review.

Respectfully Submitted,

Michael C. O'Malley
Cuyahoga County Prosecutor

By: /s/ Daniel T. Van
Daniel T. Van (#0084614)
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7865
dvan@prosecutor.cuyahogacounty.us

CERTIFICATE OF SERVICE

A copy of this Memorandum in Response to Jurisdiction has been filed through the Court's electronic filing system and sent on this 16th day of February 2021 to John Martin through electronic service.

/s/ Daniel T. Van