IN THE SUPREME COURT OF OHIO

STATE OF OHIO, Plaintiff-Appellee, vs. **EDWARD MADDOX**, Defendant-Appellant.	Case No.: 2020 - 1266 Appellate Case No.: L-19-1253

ON CERTIFIED CONFLICT FROM THE SIXTH DISTRICT COURT OF APPEALS
LUCAS COUNTY, OHIO

MERIT BRIEF OF AMICI CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER, THE LAW OFFICE OF THE HAMILTON COUNTY PUBLIC DEFENDER, AND ANZELMO LAW IN SUPPORT OF APPELLANT EDWARD MADDOX

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STATEMENT OF THE CASE AND FACTS

Amici Curiae adopt the statement of the case and facts set forth in Appellant Edward Maddox's merit brief.

STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender (OPD) was created to represent indigent criminal defendants, coordinate criminal defense efforts throughout Ohio, promote the proper administration of criminal justice, ensure equal treatment under the law, and protect the individual rights guaranteed by the state and federal constitutions.

The Reagan Tokes Law represents a fundamental shift in Ohio's sentencing laws, creating a release-date decision-making power for an executive agency at the end of certain felony sentences. Because the constitutionality of this new process has not been established, it is the position of the OPD that individuals must be allowed to raise challenges to the process now, rather than once a presumptive release date is reached, in order to prevent the possibility of individuals being wrongfully detained under an unconstitutional sentencing scheme or having their challenges barred by application of the doctrine of res judicata.

STATEMENT OF INTEREST OF AMICUS CURIAE THE LAW OFFICE OF THE HAMILTON COUNTY PUBLIC DEFENDER

The Law Office of the Hamilton County Public Defender (HCPD) represents indigent adult and juvenile criminal defendants in felony and misdemeanor cases in Hamilton County, Ohio, both at the trial level and on appeal. The mission of the HCPD is to defend the life and liberty of our clients and protect their statutory and constitutional rights by providing zealous, effective, and ethical representation. The HCPD seeks to preserve our clients' dignity and afford them hope, while ensuring justice is done.

The attorneys of the HCPD recognize the injustice occasioned by the General Assembly's enactment of the Reagan Tokes Law, legislation which disrupts the checks and balances upon which the integrity of Ohio's criminal justice system rests.

STATEMENT OF INTEREST OF AMICUS CURIAE ANZELMO LAW

Anzelmo Law represents clients in appeals and post-conviction relief. Anzelmo Law is owned and operated by James A. Anzelmo, Esq., who is licensed to practice law in Ohio. Anzelmo Law has a mission to defend the rights, secured by law, of persons accused of the commission of a criminal offense; to foster, maintain, and encourage the integrity, independence, and expertise of criminal defense lawyers through participation in the presentation of accredited Continuing Legal Education programs; and to educate the public as to the role of the criminal defense lawyer in the justice system, as it relates to the protection of the Bill of Rights and individual liberties.

As a firm grounded in defending the rights of individuals accused of the commission of a criminal offense, Anzelmo Law advocates for the recognition that the Reagan Tokes Law is ripe for review, on a direct appeal as of right.

INTRODUCTION

Honesty is the Best Policy: How the Reagan Tokes Law Undermines Ohio's Truth in Sentencing Statutory Scheme.

Ohio departed from an indefinite sentencing scheme in 1996 to allow for truth in sentencing so that the victim, the public, and the defendant were on notice of the precise sentence the defendant would receive. Addressing this change in the law, former Executive Director of the Ohio Criminal Sentencing Commission, David Diroll, boasted:

> S.B. 2 likely is the nation's most honest truth-in-sentencing law. Most persons sent to prison serve the exact sentence imposed in open court. Ohio judges have greater control over the time actually served by the offenders they sentence than they did under prior law. With S.B. 2, the Ohio General Assembly found that honesty is the best policy.

David Diroll, *Thoughts on Applying S.B. 2 to "Old Law" Inmates*, OHIO CRIMINAL SENTENCING COMMISSION, https://www.sconet.state.oh.us/Boards/Sentencing/resources/general/SB2.pdf (accessed March 3, 2021), discussing Senate Bill 2 (effective July 1, 1996).

The Reagan Tokes Law retreats from this lauded goal of truth in sentencing. In its wake, the specter of lengthened incarceration looms over qualifying inmates for the entirety of their "presumptive minimum" terms. This threat of prolonged incarceration is contingent upon the manner in which inmates conduct themselves for the duration of their minimum terms of imprisonment. Said fact establishes a direct nexus between the minimum and maximum terms, rendering a challenge thereto proper immediately upon the imposition of sentence.

The constitutional harms occasioned by the enactment of the Reagan Tokes Law cannot be rectified unless and until this Court finds them to be ripe for review. Amici Curiae respectfully urge this Court to rule as such so that this resurrection of Ohio's unconstitutional "bad time" law can be put to rest and its unlawful ramifications swiftly allayed.

ARGUMENT

Certified Question: Is the constitutionality of the provisions of the Reagan Tokes Act, which allow the Department of Rehabilitation and Correctio[n] 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?

I. The constitutionality of the Reagan Tokes Law is ripe for determination now.

It is well settled that courts abhor the prospect of issuing advisory opinions on matters not yet ripe for adjudication. *Dohme v. Eurand Am., Inc.*, 130 Ohio St.3d 168, 2011-Ohio-4609, 956 N.E.2d 825, ¶ 27. "For a cause to be justiciable, there must exist a real controversy presenting issues that are ripe for judicial resolution and that will have a direct and immediate effect on the parties." *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451, 525, 715 N.E.2d 1062 (1999) (Moyer, C.J., dissenting). Put another way, judicial resources are not to be squandered on purely abstract questions of jurisprudential ideology. *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970). But that is not what we have here.

Mr. Maddox and those similarly situated across the State of Ohio have lodged claims against the Reagan Tokes Law that implicate the sentence rendered by the trial court immediately upon their respective convictions. The propriety of the instant sentence imposed upon Mr. Maddox hinges upon the constitutionality of the Reagan Tokes Law. If this Court deems the law constitutional, then qualifying defendants can be sentenced to an indefinite term thereunder. Conversely, if this Court deems the law unconstitutional, sentencing courts cannot impose indefinite terms upon these individuals.

It is instructive to look to the United States Supreme Court and the lower federal courts for guidance regarding ripeness determinations. As recently noted by the Sixth Circuit Court of

Appeals, the Supreme Court has formulated a straightforward two-part test for ripeness: whether a given claim is "fit for judicial decision," and whether "'withholding court consideration' will cause hardship to the parties." *Hill v. Snyder*, 878 F.3d 193, 213 (6th Cir.2017), quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 153, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). As noted in *Hill*, the Sixth Circuit has on several occasions "heeded these instructions and found pre-enforcement facial constitutional challenges ripe for review." *Hill* at 214; *see, e.g., Natl. Rifle Assn. of Am. v. Magaw*, 132 F.3d 272, 290-91 (6th Cir.1997) (facial challenges to a statute on constitutional grounds were ripe because they could be resolved by analyzing the statutory text and constitutional precedent).

When the "issue presented * * * is purely legal, and will not be clarified by further factual development," the first ripeness prong is satisfied. *Thomas v. Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 581, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985). Here, Mr. Maddox seeks to raise several constitutional challenges to the Reagan Tokes Law, none of which require further factual development. Thus, his claims meet the first prong of the *Abbott Labs.* ripeness test.

As for the second prong, the hardship that would befall Mr. Maddox and others similarly situated if barred from pursuing their claims at present, such hardship can be demonstrated by considering the harm suffered by a previous claimant, Gary Bray. Four years after Senate Bill 2 took effect in 1996, Mr. Bray successfully challenged the constitutionality of the then-new "bad time" provisions which allowed DRC to extend sentences for inmates whose disciplinary records were less than exemplary. *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 729 N.E.2d 359 (2000) (striking down former R.C. 2967.11). But he had to do so through a state-court habeas corpus action initiated only *after* his sentence was extended for accumulation of unlawful "bad time."

Mr. Bray filed his habeas complaint in the Twelfth District Court of Appeals on June 12, 1998. It was two full years before his claim was resolved, as *State ex rel. Bray v. Russell* was released on June 14, 2000. There is no valid, let alone compelling, reason to subject defendants sentenced under the Reagan Tokes Law to such a potential injustice here. And that injustice—obtaining a ruling that one's sentence was unconstitutional only *after* one started serving unlawful additional incarceration—surely must be deemed the type of "hardship" that the *Abbott Labs.* Court intended to avoid in fashioning its ripeness test.

Because the fundamental constitutional claim herein is that Mr. Maddox's sentence—as it is stated in his sentencing entry—explicitly and improperly confers powers upon DRC at the end of his presumptive sentence, he is situated to pursue his claims even more firmly than a claimant explicitly found by the United States Supreme Court in 1974 to have presented a ripe constitutional claim. That claimant, Richard Steffel, had been threatened with prosecution if he continued to post certain political handbills. The Court concluded that, under such circumstances, "it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), citing *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968). In other words, even though it was possible that Mr. Steffel could continue to post handbills *without* being prosecuted, the Court still allowed him to challenge the statute under which he conceivably could have been punished.

In arriving at this conclusion, the *Steffel* Court observed that "[t]he prosecution of petitioner's handbilling companion is ample demonstration that petitioner's concern with arrest has not been 'chimerical[.]'" *Steffel* at 459, quoting *Poe v. Ullman*, 367 U.S. 497, 508, 81 S.Ct.

1752, 6 L.Ed.2d 989 (1961). Here, whether it is Mr. Maddox whose imprisonment is later extended by DRC action, or whether it is another individual involved in similar litigation, the prospect of being subject to a process that may ultimately be deemed unconstitutional is similarly not "chimerical." The *Steffel* Court went on to note that "[Mr. Steffel]'s challenge is to those specific provisions of state law which have provided the basis for threats of criminal prosecution against him." *Steffel* at 459, citing *Boyle v. Landry*, 401 U.S. 77, 81, 91 S.Ct. 758, 27 L.Ed.2d 696 (1971); *Watson v. Buck*, 313 U.S. 387, 399-400, 61 S.Ct. 962, 85 L.Ed. 1416 (1941). And just as Mr. Steffel challenged "specific provisions of state law," so, too, do Mr. Maddox and other newly sentenced defendants subject to the Reagan Tokes Law challenge specific statutory provisions on constitutional grounds.

Mr. Maddox does not seek an advisory opinion. If the merits of his claim are reached, the appellate court can establish now whether the new DRC-determined release process is or is not constitutional, and thus establish whether his sentence will remain at the presumptive release date or be subject to extension by a state agency. The constitutional viability of the Reagan Tokes Law is ripe for review, and the time for judicial relief in these cases is now. *See State ex rel. Elyria Foundry Co. v. Indus. Comm.*, 82 Ohio St.3d 88, 89, 694 N.E.2d 459 (1998), quoting Comment, *Mootness and Ripeness: The Postman Always Rings Twice*, 65 Colum.L.Rev. 867, 876 (1965).

II. If not ripe then, ipso facto, not constitutional.

The means by which the State of Ohio purports to differentiate the Reagan Tokes Law from former R.C. 2967.11, Ohio's "bad time" statute, is by insisting that the entirety of the sentence is doled out at the time of sentencing. In other words, the minimum and maximum terms are part and parcel of the holistic sentence imposed by the sentencing court. Indeed, in order for the Reagan Tokes Law to survive a separation of powers challenge, the indefinite

portion of the prison term *must* be part of the sentence. *See Bray*, 89 Ohio St.3d at 135-36. If not, the Reagan Tokes Law falls victim to the very separation of powers malady infecting former R.C. 2967.11. *See id.*

It follows that, if the indefinite term is part of a felony sentence, it is necessarily ripe for review under R.C. 2953.08(A) *at the time sentence is rendered*. That statute provides:

> In addition to any other right to appeal and except as provided in division (D) of this section, a defendant who is convicted of or pleads guilty to a felony may appeal as a matter of right the sentence imposed upon the defendant on one of the following grounds * * *.

The indefinite term appended to qualifying offenses under the Reagan Tokes Law is purported to be part of the sentence upon journalization by the sentencing court. Thus, those sentenced under the Reagan Tokes Law are entitled to an appeal as of right to challenge said sentence under R.C. 2953.08(A). Whether, in practice, this statutory construct survives a separation of powers analysis is a separate inquiry upon which Amici Curiae do not pass here.

III. Denying individuals an appeal as of right to challenge a sentence under the Reagan Tokes Law creates an undue hardship to the individual.

Although individuals have a constitutional right to counsel in an appeal as of right, the individuals do not have a constitutional right to counsel in post-conviction proceedings. *See State v. Crowder*, 60 Ohio St.3d 151, 152, 573 N.E.2d 652 (1991). If individuals are denied an appeal as of right to challenge a sentence under the Reagan Tokes Law, the individuals are left to handle the highly involved constitutional issues themselves at a later time. This is problematic, especially for imprisoned defendants, given that nearly sixty-five percent of those incarcerated in the United States did not receive a high school diploma and seventy percent of prisoners function at the lowest literacy levels. *See* Alicia Bannon, Mitali Nagercha & Rebekah Diller, Brennan Ctr.

For Justice, *Criminal Justice Debt: A Barrier to Reentry* (2010), http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf (accessed March 4, 2021).

Also problematic is that indigent individuals will not be able to afford to hire counsel to assist in a post-appellate challenge to their sentence under the Reagan Tokes Law. Moreover, it will be difficult for indigent individuals to find pro-bono assistance from an attorney. It is well established that legal needs are going unmet for the vast majority of indigent people in the United States. *See* Legal Services Corporation, *Documenting the Justice Gap In America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Sept. 2009), available at https://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf (accessed March 4, 2021).

In view of these considerations, denying individuals an appeal as of right to challenge a sentence under the Reagan Tokes Law creates an undue hardship to the individual. This hardship is exacerbated by the fact that, as denoted above, challenges to the Reagan Tokes Law are ripe for review in an appeal as of right.

CONCLUSION

For the reasons set forth above, this Court should hold that challenges to the Reagan Tokes Law are ripe for review immediately upon the imposition of sentence by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing amicus brief has been served upon Andrew Mayle, counsel for Edward Maddox, via email at amayle@maylelaw.com, and Alyssa Breyman, Assistant Lucas County Prosecutor, via email at abreyman@co.lucas.oh.us, on March 5, 2021.

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