IN THE SUPREME COURT OF OHIO
CASE NO. 2022-0495

STATE OF OHIO,	)	
	)	
Appellee,	)	
	)	On Appeal from Cuyahoga
vs.	)	County Court of Appeals
	)	Eighth Appellate District
DAVID WURTZ	)	
	)	C.A. Case No. 110138
Appellant.	)	

MEMORANDUM IN RESPONSE TO JURISDICTION

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THE COURT SHOULD NOT ACCEPT REVIEW OF THIS CASE

David Wurtz ("Appellant") failed to object to the constitutionality of the Reagan Tokes Law at the trial court. Despite this, the Eighth District Court of Appeals disposed of this case based on the en banc decision in *State v. Delvallie*, 8th Dist. Cuyahoga No. 109315, 2022-Ohio-470. However, Appellant's claims are forfeited and he cannot demonstrate plain error. These facts are not apparent from the opinion below; however, the fact that the State argued below that Appellant forfeited his arguments can be found on page four of the State's brief in the Eighth District, as well as on page six of Appellant's brief to the Eighth District (available at https://cpdocket.cp.cuyahogacounty.us/ under case number "110138"). This Court's dismissal of cases such as *State v. Dames*, Sup. Ct. Case No. 2021-0063 and *State v. Stone*, Sup. Ct. Case No. 2021-00863 signals that forfeiture is an appropriate basis for declining jurisdiction; therefore, this case should not be held for *State v. Simmons*, Sup. Ct. Case No. 2021-0532 and *State v. Hacker*, Sup. Ct. Case No. 2020-1496.

STATEMENT OF THE CASE AND FACTS

The State agrees with the statement of the case and facts set forth by Appellant, except that the State would again add that Appellant did not object to the constitutionality of the Reagan Tokes Law at plea or sentencing.

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 terms, 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 law, 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.

It is also important to know that even after the enactment of S.B. 201, judicial release and 80% judicial release are still release options to the sentencing court. See R.C. 2929.20 and R.C. 2967.19. Important to the analysis is the statute that provides for a presumption of release under R.C. 2967.271(B).

The indefinite sentencing scheme under S.B. 201 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, 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).

As a preliminary matter, this Court should decline to address the constitutional challenges to S.B. 201 on the merits because Appellant has forfeited his arguments. (See Tr. 31-32). As the Ohio Supreme 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 the Ohio Supreme Court held that Quarterman forfeited his constitutional challenge to Ohio's mandatory bindover procedure. The Ohio Supreme Court also found that Quarterman failed to address the application of the plain-error rule to the case and did not provided any basis for the court to decide there was plain error under the circumstances. *Id*. at ¶ 2. This Court followed *Quarterman* in *State v. Ponyard*, 8th Dist. Cuyahoga No. 101266, 2015-Ohio-311.

Here, Appellant failed to preserve his argument in the trial court that the S.B. 201 is unconstitutional. This Court should find that Appellant has forfeited his argument or otherwise decline to accept review of this case.

PROPOSITION OF LAW I: THE S.B. 201 INDETERMINATE SENTENCING SCHEME VIOLATES THE SIXTH AMENDMENT AND ARTICLE I, SECTION 5 OF THE OHIO CONSTITUTION BECAUSE A DEFENDANT'S IMPRISONMENT IS DEPENDENT UPON A FACTUAL FINDING NOT MADE BY THE JURY BEYOND A REASONABLE DOUBT.

Appellant first claims that R.C. 2967.271(B) violates his right to trial by jury. To accept Appellant's position would require jury trials in order to determine whether a defendant should be released from prison. This is not what is contemplated by *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and its progeny because the indeterminate sentence is imposed consistent with a statutory formula without fact-finding. To accept Appellant's proposition of law is to accept a position that a jury must be involved in aspects of Appellant's sentence after he has been incarcerated. This position is untenable and ultimately must be rejected by this Court.

That being said, these arguments will be discussed in detailed in the State's merit brief in *State v. Simmons,* Sup. Ct. Case No. 2021-0532; however, the State notes that the arguments that stem from *Apprendi* was not raised in *Simmons* nor in this case. The proposition of law in this case is forfeited.

PROPOSITION OF LAW II: THE S.B. 201 INDETERMINATE SENTENCING SCHEME VIOLATES THE SEPARATION OF POWERS DOCTRINE BY DELEGATING TO THE EXECUTIVE BRANCH DISCRETION TO KEEP THE DEFENDANT IN PRISON BEYOND THE JUDICIALLY-IMPOSED PRESUMPTIVE MINIMUM SENTENCE.

The Separation of Powers arguments has been rejected by many appellate courts throughout Ohio. See *State v. Barnes,* 2nd Dist. Montgomery No. 28613, 2020-Ohio-4150, ¶36, *State v. Ferguson,* 2nd Dist. Montgomery No. 28644, 2020-Ohio-4153, ¶23, *State v. Leet,* 2nd Dist. Montgomery No. 28670, 2020-Ohio-4592, ¶15, *State v. Wallace*, 2nd Dist. Clark No. 2020-CA-3, 2020-Ohio-5109, ¶13-14, *State v. Sinkhorn*, 2nd Dist. Clark No. 2019, *State v. Baker,* 2nd Dist. Montgomery No. 28782, 2021-Ohio-140, ¶10, *State v. Keith,* 2nd Dist. Montgomery No. 28805, 2021-Ohio-518, ¶12-13, *State v. Ross,* 2nd Dist. Montgomery No. 28875, 2021-Ohio-1337, ¶12-14, *State v. Compton,* 2nd Dist. Montgomery No. 28912, 2021-Ohio-1513, ¶10-12, *State v. Hacker,* 3rd Dist. 8-20-01, 2020-Ohio-5048, ¶18-23, *State v. Hacker,* 3rd Dist. 8-20-01, 2020-Ohio-5048, ¶18-23, *State v. Kepling,* 3rd Dist. Hancock No. 5-20-23, 2020-Ohio-6888, ¶6-7, *State v. Crawford,* 3rd Dist. Henry No. 7-20-05, 2021-Ohio-547, ¶10, *State v. Wilburn,* 8th Dist. Cuyahoga No. 109507, 2021-Ohio-578, ¶19-27, *State v. Simmons,* 8th Dist. Cuyahoga No. 109476, 2021-Ohio-939, ¶10-15, *State v. Guyton*

, 12th Dist. Butler No. CA2019-12-203, ¶7, *State v. Morris,* 12th Dist. Butler No. CA2019-12-205, ¶10, *State v. Suder,* 12th Dist. Clermont Nos. CA2020-06-034 & CA2020-06-035, ¶25.

"Sentencing is an area of shared powers; it is the function of the legislature to

prescribe the penalty and the manner of its enforcement, the function of the courts to impose the penalty, and the function of the executive to implement or administer the sentence, as well as to grant paroles." 16 C.J.S. Constitutional Law § 463 (footnotes omitted). As the United States Supreme Court has recognized, with the advent of parole mechanisms, legislatures adopted a "three-way sharing" of sentencing responsibility, with judges deciding the length of sentences within ranges and allowing executive branch parole officials to eventually determine the actual duration of imprisonment. *Mistretta v. United States*, 488 U.S. 361, 364-65 (1989). As the Ohio Supreme Court recognized in *Peters*, "it is among the admitted legislative powers to define crimes, to prescribe the mode of procedure for their punishment, to fix by law the kind and manner of punishment, and to provide such discipline and regulations for prisoners, not in conflict with the fundamental law, as the legislature deems best." *Peters*, 43 Ohio St. at 647. In regard to parole release, "[i]t cannot seriously be contended that this is an interference with the judicial functions of the court, but is rather the exercise of that guardianship and power of discipline which is vested in the state to be exercised through the legislative department for the safe-keeping, proper punishment, and welfare of the prisoner." *Id*. at 650.

Under S.B. 201, the court is required to impose an indefinite sentence, including the minimum term and maximum term, and it is within the range created by that judicially-imposed sentence that the ODRC will be making its decision whether to rebut

the presumptive minimum-term release date. "[T]his construction avoids any potential separation-of-powers problem." *Hernandez v. Kelly*, 108 Ohio St.3d 395, 2006-Ohio-126, ¶19.

This Court can also view R.C. 2967.271(B) as the executive branch's mechanism to release an inmate upon service of the minimum prison term. This mechanism includes a presumption of release by an executive branch agency. What Appellant ignores is that the trial court has its own independent authority to grant judicial release under R.C. 2929.20, which still applies to a sentence imposed under S.B. 201. On top of that, Appellant can obtain, in some circumstances, 80% judicial release under R.C. 2967.19. To the extent that Appellant challenges R.C. 2967.271(B), the State takes the position that Appellant has failed to show it violates the separation of powers doctrine.

Subsequent to these decisions a majority of the en banc Eighth District rejected the separation of powers argument with the lead opinion offering detailed analysis. *State v. Delvallie*, 8th Dist. Cuyahoga No. 109315, 2022-Ohio-470.

That being said, these arguments will be discussed in detailed in the State's merit brief in *State v. Simmons*, Sup. Ct. Case No. 2021-0532. Undoubtedly, more cases will be accepted and held for *Simmons* on these propositions of law. Suffice it to say, whether a defendant is released upon serving the minimum term is akin to parole. R.C. 2967.271 is a proper exercise of executive authority over a judicially imposed sentence. It cannot be said that the Regan Tokes Law violates the separation of powers doctrine. And although

this argument was raised in the court of appeals, no challenge to the Reagan Tokes Law was made in the trial court.

PROPOSITION OF LAW III: THE S.B. 201 INDETERMINATE SENTENCING SCHEME VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT FAILS TO PROVIDE A DEFENDANT WITH ADEQUATE NOTICE OF WHAT CONDUCT CAN ENABLE THE DEPARTMENT OF REHABILITAITON AND CORRECTION (DRC) TO KEEP THE DEFENDANT IN PRISON BEYOND THE PRESUMPTIVE MINIMUM TERM.

PROPOSITION OF LAW IV: THE S.B. 201 INDETERMINATE SENTENCING SCHEME VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT ALLOWS THE DEPARTMENT OF REHABILITAITONS AND CORRECTIONS TO KEEP A DEFENDANT IN PRISON BEYOND THE PRESUMPTIVE MINIMUM SENTENCE ON THE BASIS OF PRISON HOUSING AND CLASSIFICATION DECISIONS THAT NEED NOT BE THE RESULT OF ANY MISCONDUCT BY THE DEFENDANT WHILE IN PRISON.

PROPOSITION OF LAW V: THE S.B. 201 INDETERMINATE SENTENCING SCHEME VIOLATES PROCEDURAL DUE PROCESS BY ALLOWING FOR THE EXTENSION OF A PRISON SENTENCE BASED ON FINDING MADE AT A HEARING WHERE THERE IS NO STATUTORY GUARANTEE THAT THE PRISONER WILL BE PRESENT, HAVE COUNSEL, CAN CONFRONT, CAN SUBPOENA WITNESSES OR HAVE THE RIGHT TO OFFER TESTIMONY OF THEIR OWN.

The Due Process arguments have also been rejected by appellate courts throughout Ohio. See *State v. Barnes*, 2nd Dist. Montgomery No. 28613, 2020-Ohio-4150, footnote 2, *State v. Ferguson*, 2nd Dist. Montgomery No. 28644, 2020-Ohio-4153, ¶24-27, *State v. Leet*, 2nd Dist. Montgomery No. 28670, 2020-Ohio-4592, ¶19, *State v. Wallace*, 2nd Dist. Clark No. 2020-CA-3, 2020-Ohio-5109, ¶13-14, *State v. Sinkhorn*, 2nd Dist. Clark No.

2019-CA-79,2020-Ohio-5359, ¶32-33, *State v. Baker*, 2nd Dist. Montgomery No. 28782, 2021-Ohio-140, ¶10, *State v. Keith*, 2nd Dist. Montgomery No. 28805, 2021-Ohio-518, ¶12-13, *State v. Ross*, 2nd Dist. Montgomery No. 28875, 2021-Ohio-1337, ¶12-14, *State v. Compton*, 2nd Dist. Montgomery No. 28912, 2021-Ohio-1513, ¶13-19, *State v. Hacker*, 3rd Dist. 8-20-01, 2020-Ohio-5048, ¶18-23, *State v. Kepling*, 3rd Dist. Hancock No. 5-20-23, 2020-Ohio-6888, ¶8-15 (holding the Due Process argument is not ripe for review), *State v. Crawford*, 3rd Dist. Henry No. 7-20-05, 2021-Ohio-547, ¶13, holding the Due Process argument is not ripe for review), *State v. Wilburn*, 8th Dist. Cuyahoga No. 109507, 2021-Ohio-578, ¶28-37, *State v. Simmons*, 8th Dist. Cuyahoga No. 109476, 2021-Ohio-939, ¶16-22, *State v. Guyton*, 12th Dist. Butler No. CA2019-12-203, ¶7, *State v. Morris*, 12th Dist. Butler No. CA2019-12-205, ¶10, *State v. Suder*, 12th Dist. Clermont Nos. CA2020-06-034 & CA2020-06-035, ¶24.

In *Wilburn*, the Eighth District found sufficient due process protections through various statutes and administrative code provisions, including the opportunity for the defendant to be heard at the administrative proceeding. *State v. Wilburn*, 8th Dist. Cuyahoga No. 109507, 2021-Ohio-578, ¶ 34-37. The decision in , *State v. Simmons*, 8th Dist. Cuyahoga No. 109476, 2021-Ohio-939, ¶16-22 was subsequently decided. Subsequent to these decisions a majority of the en banc Eighth District rejected the Due Process arguments with the lead opinion offering detailed analysis. *State v. Delvallie*, 8th Dist. Cuyahoga No. 109315, 2022-Ohio-470.

That being said, these arguments will be discussed in detailed in the State's merit

brief in *State v. Simmons*, Sup. Ct. Case No. 2021-0532. Undoubtedly, more cases will be accepted and held for *Simmons* on these propositions of law. The undersigned waived responses in other cases; however, in this case the issue of forfeiture remains and serves as a basis to deny jurisdiction.

CONCLUSION

Because the constitutional arguments were forfeited, the appeal in this case should not be accepted and held for *State v. Hacker*, Sup. Ct. Case No. 20220-1496 and *State v. Simmons*, Sup. Ct. Case No. 2021-0532.

Respectfully Submitted,

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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 1st day of June 2022 and served upon Robert McCaleb by electronic mail.

/s/ Daniel T. Van