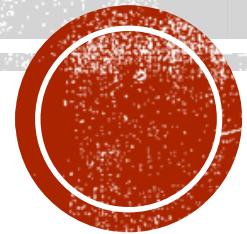


REAGAN TOKES LAW

Challenges and Opportunities
(27 months into the law)



IT'S UNCONSTITUTIONAL!

- Hamilton County Common Pleas Court Judge Thomas Heekin finds the entire Reagan Tokes Law unconstitutional on November 20, 2019 in the case of *State of Ohio v. William O'Neal*, No. B 1903562, Hamilton County Court of Common Pleas.
- SB201 was 435 pages long.
- It enacted 5 new revised code sections.
- It amended another 57 sections.
- Became effective on March 22, 2019.
- Returned indefinite sentencing to F-1 and F-2 offenses in Ohio.

THE CHALLENGES

- Is it even ripe for review?
- Does it violate the 6th Amendment - right to a trial by jury?
- Does it violate the 5th Amendment - Due Process Clause?
- Does it violate the Separation of Powers Doctrine in the US Constitution?

RIPENESS

- ***Because it is uncertain whether the indefinite portion (maximum term) of the sentence will have to be served at the time the sentence is imposed it is not ripe for review on appeal.***
- ***State v. Maddox 2020-1266 (6th District case) finds the Reagan Tokes Law not ripe for review and certifies a conflict between its finding and those of the 2nd and 12th districts that found the law ripe for review.***
- **Hearing set solely on the ripeness issue for Tuesday, June 29, 2021.**
- ***State v. Henderson, 2020-Ohio-4784, October 7, 2020. Modified the longstanding void/voidable doctrine. Now requires issues to be timely appealed by both sides or the claims will be barred by jurisdictional impediments or res judicata.***

SIXTH AMENDMENT RIGHT TO TRIAL BY JURY

- ***The factors to be considered for denying the presumption of release and maintaining the incarceration of the inmate beyond the expiration of the minimum term are factors that are not determined by a jury. (See Blakely, Apprendi, Alleyne and our own State v. Foster)***
- This argument encompasses the claim that this process of maintaining incarceration under the Reagan Tokes Law is similar to the old “bad time” statute from SB2 that was previously found to be unconstitutional. *Bray v. Russell*, 89 Ohio St.3d 132, 729 N.E.2d 359 (2000).
- The problem with this argument is it reinforces the misconception that the ODRC is “extending” the prison sentence when, in fact, the final sentence already imposed by the trial court includes both the minimum/maximum term R.C. 2929.144(C).
- Thus, ODRC really isn’t extending anything, or imposing a term beyond what a jury could find, but rather is making what is similar to a parole determination.

FIFTH AMENDMENT — DUE PROCESS CLAUSE

- ***R.C. 2967.271, which provides offenders with the right to a hearing before imposition of the maximum term imposed under R.C. 2929.144, has no statutorily imposed structure or enumerated rights and therefore violates an inmate's due process rights.***
- The problem with this reasoning is the legislature delegated the authority establishing those constitutional safeguards to the ODRC through R.C. 5120.01.
- Further, the ODRC has established the procedural safeguards through its executive authority under R.C. 5120.01 in compliance with the constitutional requirements. See ODRC Policy 105-PBD-15, Section F, adopted on March 15, 2021 and available at <https://drc.ohio.gov/policies/parole-board>.

SEPARATION OF POWERS DOCTRINE – THE US CONSTITUTION

- ***ODRC “extends” an inmate’s prison term under R.C. 2967.271 by imposing an additional term of imprisonment beyond that which was imposed by the sentencing court and this represents a usurping of judicial power by the executive branch of government.***
- The argument against this view is that it is the trial court (not the ODRC) that imposes the minimum and maximum terms under the language of R.C. 2929.144 and 2929.14(A)(1)(a) and (A)(2)(a).
- The ODRC simply enforces the sentence imposed and has been delegated the responsibility over the release determinations under R.C. 2967.271 similar to the executive branch’s authority to release offenders from sentences under Ohio’s parole system.
- Likewise, this process is similar to ODRC being delegated the authority to impose PRC. See *Woods v. Telb*, 89 Ohio St. 3d 504 (2000).

PEOPLE'S REPUBLIC OF THE 8TH DISTRICT



38TH PARALLEL AKA DIVIDED COURT

- *State v. Delvallie*, 2021-Ohio-1809, Decided May 27, 2021. (Unconstitutional)
- *State v. Sealy*, 2021-Ohio-1949, Decided June 10, 2021. (Unconstitutional)
- *State v. Daniel*, 2021-Ohio-1963, Decided June 10, 2021. (Unconstitutional)
- *State v. Wilburn*, 2021-Ohio-578, Decided March 4, 2021. (Constitutional)
- *State v. Simmons*, 2021-Ohio-939, Decided March 25, 2021. (Constitutional)
- *State v. Gamble*, 2021-Ohio-1810, Decided May 27, 2021. (Constitutional)
- The 8th district has voted (effective June 15, 2021) to en banc the *Delvallie* and *Gamble* decisions to resolve the conflict in the district pursuant to App.R. 26.
- **Note: The 2nd, 3rd (in part) and 12th Districts have found the law to be constitutional. No other districts to date (besides the 8th) have found it unconstitutional.**

OPPORTUNITIES AND OBSERVATIONS

- Challenges (to date) have largely ignored the errors in sentencing computation on determining the maximum term or even applying the indefinite terms.
- Proposed HB 166 has some clean up language that would make the computations easier.
- The challenges have created an “all or nothing” finale. There’s been no effort to “sever” any claimed unconstitutional subsections.
- An unconstitutional outcome could threaten Ohio’s traditional indefinite sentencing model as well as Ohio’s existing parole system.
- The presumption that a legislative enactment is constitutional has taken a beating.
- SB 201 could provide a way forward to move to an incentive-based correction system reinstating good time reductions for defined behavior or rehabilitative efforts.