

NO. 2015-

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IN THE SUPREME COURT OF OHIO

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Lower Court Case No. 101633

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STATE OF OHIO

Plaintiff-Appellant

vs.

VICTOR HILL

Defendant-Appellee

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**MEMORANDUM IN SUPPORT OF JURISDICTION**

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**1. WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION OR AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST.**

Senate Bill 2 (“S.B. 2”), the ‘truth in sentencing’ statute, which was made effective July 1, 1996, is only applicable to offenses committed after July 1, 1996. *See generally State v. Rush*, 83 Ohio St.3d 53, 1998-Ohio 423, 697 N.E.2d 634. Specifically, Section 5 of S.B. 2 provides:

Section 5. The provisions of the Revised Code in existence prior to July 1, 1996, shall apply to a person upon whom a court imposed a term of imprisonment prior to that date and to a person upon whom a court, on or after that date in accordance with the law in existence prior to that date, imposed a term of imprisonment for an offense that was committed prior to that date.

The provisions of the Revised Code in existence on and after July 1, 1996, apply to a person who commits an offense on or after that date.

Section 5 of S.B. 2, (146 Laws, part VI, 7810).

Therefore, a defendant who commits an offense prior to July 1, 1996 is subject to the sentencing law in effect at the time of the offense. In turn, a defendant who commits an offense after July 1, 1996, is subject to sentencing under the statutory scheme enacted under S.B. 2 and H.B. 86, which was effective September 30, 2011.

This decision by the Eighth District in *State v. Hill*, 8<sup>th</sup> Dist. Cuyahoga No. 101633, 2015-Ohio 2389 much like many other decisions before is a dramatic change in sentencing law. See also *State v. Bryan*, 8<sup>th</sup> Dist. Cuyahoga No. 101209, 2015-Ohio-1635, *State v. Thomas*, 8<sup>th</sup> Dist. Cuyahoga No. 101202, 2015-Ohio-415, and *State v. Girts*, 8<sup>th</sup> Dist. Cuyahoga No. 101075, 2014-Ohio-5545, *State v. Kent*, 8<sup>th</sup> Dist. Cuyahoga No. 101853, 2015-Ohio-1546 and *State v. Jackson*, 8<sup>th</sup> Dist. Cuyahoga No. 100877, 2014-Ohio-5137. It is far from clear that the General Assembly specifically intended that all defendants, including those who committed their offense prior to July 1, 1996 be sentenced under current law.

The pre- S.B. 2 sentencing law, in which Hill was given an indefinite sentence of 10-25 years, was properly imposed by the trial court in this case. This Court understood and recognized the differences in offenses committed before July 1, 1996 and those committed after July 1, 1996, when this Court held that the amended sentencing provisions of S.B. 2 were applicable only to those crimes committed after July 1, 1996 as manifested through Section 5 of S.B. 2. *State v. Rush*, 83 Ohio St.3d 53 at syllabus ¶ 2, 1998-Ohio-423, 697 N.E.2d 634.

Hill was correctly sentenced under the pre- S.B.2 statutory scheme, as the rape occurred in 1993, before S.B. 2 was enacted in 1996. Under pre-S.B. 2 sentencing laws, rape, a felony of the first degree, is punishable by a prison sentence of 4, 5, 6, 7, or 10 to 25 years in prison. R.C. 2929.11 (1993). Under pre-S.B.2 laws, Hill must serve at least 70% of the amount of years of his sentence, as offenders sentenced for crimes committed before July 1, 1996 may utilize a number of administrative tools that reduce the minimum term imposed. For instance, Hill may be eligible for good time credit, which is typically a reduction of 30% of the minimum imposed sentence. R.C. 2967.19 (1993). According to the precedent established by the Eighth District, since Hill was convicted of rape, in violation of R.C. 2907.02(A)(2), a first-degree felony under H.B. 86, the maximum prison term Hill could receive for his rape conviction is 11 years. *State v. Hill*, 2015-Ohio-2389, at ¶12. Crimes committed after the enactment of S.B.2 are not subject to good time credit, typically a 30% reduction under the law in effect in 1993. R.C. 2967.19. In essence, Hill could actually receive a more lenient sentence under pre-S.B. 2 laws, due to the possibility of good time credit and potentially only serve 70% of his sentence, which could amount to 7 years (30% off the minimum of 10 years) versus the maximum 11 years as determined by current sentencing law.

There are additional significant differences between pre-S.B. 2 sentencing laws and post-S.B.2 sentencing laws. Pre S.B.2 sentences are subject to parole whereas current law subjects individuals to post-release control. Pre S.B. 2 has shock probation provisions whereas current law has judicial release provisions. Given the significant differences, the significance of the body of case law developed by the Eighth District goes beyond indefinite versus definite sentencing.

The State of Ohio respectfully requests that this Court accept this case for review and to ultimately reverse the decision of the Eighth District, which fails to account for this Court's precedent and the intent of the General Assembly in reforming the structure of Ohio's sentencing law.

#### **I. STATEMENT OF THE CASE AND FACTS**

In *Hill*, the victim was raped on September 24, 1993 on the campus of John Adams High School as she was walking home from a bus stop on East 116th Street. *State v. Hill*, 2015-Ohio 2389 at ¶3. The victim, C.G., went to a hospital where a rape kit was collected, but to no avail for several years. *Id.* The victim's rape kit was sent to the Ohio Attorney General's Bureau of Criminal Investigation ("BCI") for DNA testing. *Id.* at ¶4. On April 8, 2013, a BCI detective, Robert Surgeonor, received a "CODIS letter" from the BCI lab unit informing him that they had identified a suspect in C.G.'s case. *Id.* In the interim, on September 20, 2013, before the expiration of the statute of limitations, the grand jury returned a true bill indictment charging Hill with two counts of rape, in violation of R.C.2907.02, and one count of kidnaping, in violation of R.C. 2905.01. *Id.* at ¶¶ 3-4. Ten days later, on September 30, 2013, the results of the DNA test confirmed that Hill's DNA matched the DNA previously collected in C.G.'s rape kit. *Id.* at ¶4. Hill's case proceeded to trial and the jury found him guilty of one count of rape, in violation of R.C. 2907.02 and one count of kidnaping, in violation of R.C. 2905.01. *Id.* at ¶6. Hill was correctly sentenced to an indefinite prison term of 10-25 years for rape, pursuant to the sentencing provisions in effect at the time the

offense was committed in 1993. *Id.* The court also classified Hill as a sexual predator pursuant to Megan’s Law. *Id.* Hill appealed his sentence, among an additional assignment of error pertaining to the trial court’s error in not granting his motion to dismiss the indictment. *Id.* at ¶¶ 1, 6. The Eighth District affirmed Hill’s first assignment of error and determined *contrary* to the Ohio General Assembly’s intent in that all persons, including those who committed their offense prior to July 1, 1996, be sentenced under S.B. 2 and H.B. 86. *Id.* at ¶¶ 7-15.

## II. LAW AND ARGUMENT

### **PROPOSITION OF LAW: A DEFENDANT WHO COMMITS AN OFFENSE PRIOR TO JULY 1, 1996 IS SUBJECT TO LAW IN EFFECT AT THE TIME OF THE OFFENSE AND NOT SUBJECT TO SENTENCING PROVISIONS OF H.B. 86 EFFECTIVE SEPTEMBER 30, 2011.**

A defendant who commits an offense prior to July 1, 1996 is subject to the law in effect at the time of the offense. This rule is contained in Section 5 of S.B. 2, which is uncodified law. Statements included in legislation but not placed in the code are “uncodified law,” and are part of the law in Ohio. See *Maynard v. Eaton Corporation*, 119 Ohio St.3d 443, 2008-Ohio-4542, 895 N.E.2d 145, ¶7. The original, unamended form of Section 5 of S.B. 2 reads as follows:

Section 5. The provisions of the Revised Code in existence prior to July 1, 1996, shall apply to a person upon whom a court imposed a term of imprisonment prior to that date and to a person upon whom a court, on or after that date and in accordance with the law in existence prior to that date, imposed a term of imprisonment for an offense that was committed prior to that date.

The provisions of the Revised Code in existence on and after July 1, 1996, apply to a person who commits an offense on or after that date.

Section 5 of S.B. 2 (146 Ohio Laws, Part VI, 7810)

This was later redundantly amended through Section 3 of S.B. 269 (146 Ohio Laws, Part VI, 11099) to emphasize that S.B. 2’s provisions apply only to crimes committed on or after July 1, 1996 “notwithstanding division (B) of section 1.58 of the Revised Code.” *State v. Rush*, 83 Ohio

St.3d 53, 57. *Rush* and Section 5 of S.B. 2 make clear that R.C. 1.58(B) do not apply to a person who committed their offense prior to July 1, 1996 and is sentenced after that date.

“Acts of the General Assembly (and the codified and uncoded statutes they contain) are compiled and published in Ohio’s ‘session laws,’ the *Laws of Ohio*.” A Guidebook for Ohio Legislators, *Appendix C*, pg. 169-170, <http://www.lsc.state.oh.us/guidebook/guidebook13.pdf> (accessed November 24, 2014). 2011 Am. Sub. H.B. 86 was then enacted by the 129<sup>th</sup> General Assembly and is published with the Secretary of State. *Laws of Ohio, 129<sup>th</sup> General Assembly*, <http://www.sos.state.oh.us/SOS/historicaldocuments/LawsOfOhio/historical/129th.aspx> (accessed November 24, 2014). Also published are uncoded laws affected by the acts of the 129<sup>th</sup> General Assembly. This publication does not include Section 5 of S.B. 2 of the 121<sup>st</sup> General Assembly as being affected by any legislative act of the 129<sup>th</sup> General Assembly. <http://www.sos.state.oh.us/sos/upload/laws/129/11-uncoded-affected.pdf> (accessed November 24, 2014). No express language in H.B. 86 repeals Section 5 of 1995 S.B. 2, and as a result that uncoded provision is still the law in Ohio.

In its analysis, the Eighth District interpreted Section 4 of H.B. 86 to make H.B. 86 retroactively applicable to offenses committed prior to July 1, 1996. See *Kent*, 8<sup>th</sup> Dist. Cuyahoga No. 101853, 2015-Ohio-1546, ¶ 3-4.

Section 4 of H.B. 86 provides that the amendments “apply to a person who commits an offense specified or penalized under those sections on or after the effective date of this section and to a person to whom division (B) of section 1.58 of the Revised Code makes the amendments applicable.” Thus, H.B. 86 applies in only two circumstances: (1) where an offense is committed on or after September 30, 2011 or (2) where a person is sentenced after September 30, 2011 **and** R.C. 1.58 applies (emphasis added). Neither condition is met with regard to pre S.B. 2 offenders.

The Eighth District reasoned that the lack of limiting language in Section 4 of H.B. 86, like the limiting in Section 5 of S.B. 2, should be read to mean that H.B. 86 applies retroactively to offenses committed prior to July 1, 1996.

Even though an offender such as Appellee is sentenced after September 30, 2011, R.C. 1.58(B) has not been made applicable to him due to S.B. 2's uncodified provisions, which have not been expressly repealed. *Rush*, 83 Ohio St.3d 53, 57. The absence of limiting language in H.B. 86 does not expressly repeal Section 5 of S.B. 2. Nor should Section 4 of H.B. 86 be interpreted as a repeal by implication. As a general rule “repeals by implication are not favored, and the presumption obtains that the legislature in passing a statute did not intend to interfere with or abrogate any former law relating to the same matter unless the [differences] between the two is irreconcilable.” *State ex rel. Fleisher Engineering & Construction Co. v. State Office Building Commission et al.*, 123 Ohio St. 70, 74 174 N.E. 8. The more recent amendments to H.B. 86 are not irreconcilable with S.B. 2. Therefore, Section 5 of S.B. 2 must be given full effect.

To the extent that the Appellee would rely upon this Court's recent decisions in *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612 and *State v. Limoli*, 140 Ohio St.3d 188, 2014-Ohio-3072, 16 N.E.3d 641, both cases are distinguishable and do not address the question posed here. In *Taylor* and *Limoli*, both defendants committed their offenses well after S.B. 2's effective date of July 1, 1996 (July 23, 2011 and July 16, 2010). *Taylor*, ¶2 and *Limoli*, ¶5. Therefore, this Court in holding that the determining factor “is not the date of the commission of the offense but rather whether sentence has been imposed,” was not faced with the commission of a pre S.B. 2 crime. *Taylor* and *Limoli* should not be read to eviscerate Section 5 of S.B. 2's clear mandate that, provisions of the Revised Code in existence prior to July 1, 1996 applies to an offense committed prior to that date.

### III. CONCLUSION

This case should accept this case to review a decision that dramatically alters sentencing law in Ohio.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

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