

**IN THE SUPREME COURT OF OHIO  
CASE NO. 2015-0473**

STATE OF OHIO,	}	
	}	
Plaintiff-Appellant,	}	ON APPEAL FROM THE CUYAHOGA
	}	COUNTY COURT OF APPEALS
	}	EIGHTH APPELLATE DISTRICT
v.	}	
	}	
JERMAIN THOMAS,	}	COURT OF APPEALS CASE NO. 101202
	}	
	}	
Defendant-Appellee.	}	

---

**MERIT BRIEF OF APPELLEE  
JERMAIN THOMAS**

---

RUSSELL S. BENSING (0010602)  
600 IMG Building  
1360 East Ninth Street  
Cleveland, OH 44114  
(216) 241-6650

**COUNSEL FOR APPELLEE  
JERMAIN THOMAS**

TIMOTHY J. McGINTY (0024626)  
Cuyahoga County Prosecutor

DANIEL T. VAN (0084614)  
BRETT HAMMOND (0091757)  
Assistant Prosecuting Attorneys  
1200 Ontario Street, 9th Floor  
Cleveland, OH 44113  
(216) 443-7800

**COUNSEL FOR APPELLANT  
STATE OF OHIO**

RON O'BRIEN (0017245)  
Franklin County Prosecutor

STEVEN L. TAYLOR (0043876)  
Chief Counsel, Appellate Division  
373 South High Street, 13th Floor  
Columbus, OH 43215

**COUNSEL FOR AMICUS CURIAE  
FRANKLIN COUNTY PROSECUTOR  
RON O'BRIEN**

JOSEPH T. DETERS (0012084)  
Hamilton County Prosecutor

RACHEL LIPPMAN CURRAN (0078850)  
Assistant Prosecuting Attorney  
230 East Ninth Street, Suite 4000  
Cincinnati, OH 45202

**COUNSEL FOR AMICUS CURIAE  
OHIO PROSECUTING ATTORNEY  
ASSOCIATION**

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE FACTS .....	1
ARGUMENT .....	1
DEFENDANT-APPELLEE’S PROPOSITION OF LAW: A defendant who commits an offense prior to the effective date of the sentencing provisions enacted by H.B. 86, but sentenced after the effective date, must be sentenced pursuant to those provisions. ....	1
CONCLUSION.....	11
SERVICE.....	12

# TABLE OF AUTHORITIES

## Cases

<i>Ankrom v. Hageman</i> , Franklin CP No. 01CVH02-1563, 118 Misc.2d 226, 230, 2001-Ohio-4369, 770 N.E.2d 667 .....	6, 10
<i>Layne v. Ohio Adult Parole Authority</i> , 97 Ohio St.3d 456, 2002-Ohio-6719, 780 N.E.2d 548 .....	5, 6, 10
<i>State v. Foster</i> , 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470 .....	8
<i>State v. Limoli</i> , 140 Ohio St.3d 188, 2014-Ohio-3072, 16 N.E.3d 641 .....	7
<i>State v. Mitchell</i> , 10th Dist. Franklin No. 97APA03-351, 1997 Ohio App. LEXIS 4039.....	4
<i>State v. Rush</i> , 5th Dist. Stark No. 96CA419, 1997 Ohio App. LEXIS 3225 .....	3
<i>State v. Rush</i> , 83 Ohio St.3d 53, 1998 -Ohio-423, 697 N.E.2d 634 .....	4
<i>State v. Smith</i> , 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283 .....	9
<i>State v. Taylor</i> , 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612.....	7

## Statutes

H.B. 86 .....	<i>passim</i>
R.C. §1.58(B).....	2
R.C. §2929.11 .....	3
R.C. §2971.01(H)(1).....	9
R.C. §2971.03(A)(3).....	9

S.B. 2..... *passim*

S.B. 269..... 1

**Other Authorities**

Adult Parole Authority, 2001 Report, <http://www.drc.ohio.gov/web/reports/ParoleBoard/Calendar%20Year%202001%20Report.pdf>, last accessed February 8, 2016 ..... 7

Adult Parole Authority, 2011 Report, <http://www.drc.ohio.gov/web/reports/ParoleBoard/Calendar%20Year%202011%20Report.pdf>, last accessed February 8, 2016..... 7

Adult Parole Authority, 2015 Report <http://www.drc.ohio.gov/web/reports/ParoleBoard/Fiscal%20Year%202015%20Report.pdf>, last accessed February 8, 2016..... 7

ODRC Annual Report 2011, at 1. <http://www.drc.ohio.gov/web/Reports/Annual/Annual%20Report%202011.pdf>, last accessed February 8, 2016 ..... 7

Ohio Sentencing Commission “A Decade of Sentencing Reform,” 2007 report, <http://www.supremecourt.ohio.gov/Publications/sentencingReform.pdf>, last accessed February 8, 2016 ..... 5

## STATEMENT OF THE FACTS

The Defendant-Appellee, Jermain Thomas, concurs in the Statement of the Case as set forth in the Brief of Appellant, State of Ohio, with the exception that the sentence imposed upon Mr. Thomas, with the inclusion of the three-year firearm specification, was eleven to twenty-eight years, rather than eleven to twenty-five years. Mr. Thomas concurs in the facts as set forth in the opinion of the Eighth District Court of Appeals in this case.

## ARGUMENT

**DEFENDANT-APPELLEE’S PROPOSITION OF LAW: A defendant who commits an offense prior to the effective date of the sentencing provisions enacted by H.B. 86, but sentenced after the effective date, must be sentenced pursuant to those provisions.**

*Summary of argument.* This case presents an issue of statutory construction. On July 1, 1996, S.B. 2 went into effect, essentially reworking Ohio’s entire scheme of sentencing of criminal defendants. The statute ushered in “truth in sentencing,” abolished parole for all offenses except murder, aggravated murder, and certain sexual offenses, and instead imposed determinate sentences for all other offenses. Post-release control was substituted for parole, judges were provided “guided discretion” in sentencing, and restrictions were placed on judges’ ability to impose consecutive, more-than-minimum, and maximum sentences.

Included in the enabling legislation for S.B. 2 was an uncodified provision, Section 5, which provided that defendants who committed their offenses prior to the effective date of S.B. 2 were to be sentenced under pre-S.B. 2 law. That section was later amended by Section 3 of S.B. 269, which provided that S.B. 2’s provisions applied only to crimes committed after its effective

date, “notwithstanding division (B) of section 1.58 of the Revised Code.”

On September 30, 2011, the provisions of H.B. 86 took effect, again working a substantial impact upon Ohio’s sentencing statutes. H.B. 86 also contained an uncodified provision, Section 4, which provided that the amendments to the statutes “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.*” (Emphasis supplied.)

R.C. §1.58(B), in turn, provides

If the penalty, forfeiture, or punishment for any offense is reduced by a reenactment or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended.

In short, for defendants sentenced after September 30, 2011, regardless of the date the offense was committed, the defendant was entitled to be sentenced under the provisions of H.B. 86 if those provisions reduced the “penalty, forfeiture, or punishment.”

The State and its *amici* contend that Section 5 of S.B. 2 survives Section 4 of H.B. 86, essentially creating three classes of defendants for sentencing purposes: (1) those who committed crimes before July 1, 1996; (2) those who committed crimes on or after September 30, 2011, and (3) those who committed crimes after July 1, 1996, but before September 30, 2011, and whose penalties were reduced by H.B. 86.

That argument is wrong. It ignores the great difference in purpose between S.B. 2 and H.B. 86, and the great difference in the practices of the parole board after the enactment of S.B. 2. After taking those differences into account, the legislature’s intent in enacting Section 4 of H.B. 86 – to apply the more lenient sentencing provisions of that bill to *all* defendants, regardless

of when they committed their offense – is manifest.

We will begin with a discussion of the history of S.B. 2 and H.B. 86, as well as the significant court decisions pertaining to the former statute. We will then address the arguments presented by the State and its *amici*, and demonstrate that Mr. Thomas was correctly sentenced under the provisions of the latter statute.

**1. *The purpose of S.B. 2.*** The ostensible purpose of S.B. 2 was two-fold: to introduce “truth in sentencing” to Ohio law, and to reduce inconsistency in sentencing.

The abolition of parole for the vast majority of sentences and substitution of determinate sentences achieved the first objective: henceforth, if a defendant was sentenced to serve four years in prison, he served four years in prison, instead of being sentenced to five to twenty-five years in prison for a first degree felony, and then being paroled after three or five or ten years.

The latter goal was accomplished by a number of statutes intended to guide a judge’s discretion in imposing a sentence. R.C. §2929.11 set forth the principles and purposes of sentencing, and R.C. §2929.12 provided a non-exhaustive list of factors judges were to consider in determining whether an offense was more or less serious, and whether the defendant was more or less likely to recidivate. As noted, limitations were also imposed upon the imposition of maximum, more-than-minimum, and consecutive sentences,

**2. *State v. Rush and the applicability of SB 2 sentences to pre-SB 2 crimes.*** In the wake of the passage of S.B. 2, Ohio district courts came to differing interpretations on whether persons who committed crimes prior to the act’s effective date were to be sentenced under the new law or the prior law. *Cf. State v. Rush*, 5th Dist. Stark No. 96CA419, 1997 Ohio App. LEXIS 3225 (new law applies to pre-SB 2 offenders) with *State v. Mitchell*, 10th Dist. Franklin

No. 97APA03-351, 1997 Ohio App. LEXIS 4039 (old law applies).

This Court resolved that conflict in *State v. Rush*, 83 Ohio St.3d 53, 1998 -Ohio-423, 697 N.E.2d 634. The defendants in that consolidated case made two arguments. First, notwithstanding the language of the uncodified provision, R.C. §1.58(B) made the new sentencing scheme applicable to pre-S.B. 2 offenders, and that the uncodified provision was an unconstitutional attempt to amend Section 1.58. Second, the attempt to limit §1.58(B) violated the proscription against *ex post facto* and retroactive legislation.

The Court rejected both arguments. It found that the uncodified provision was not an attempt to amend §1.58, but merely an expression of the legislature's intent to make S.B. 2 applicable only prospectively. In that light, under other rules of statutory construction, the specific provision of the uncodified section prevailed over the general provision of §1.58. The Court also concluded that there was no *ex post facto* problem, since S.B. 2 did not affect the punishment of those who committed a crime before it went into effect. The same fate befell the argument about the general rule against retroactive legislation: that prohibition applies only if the legislation is indeed applied retroactively, and S.B. 2 was purely prospective in operation.

The opinion raised one other issue in a footnote, which is relied upon by the State and its amici here: whether the sentencing provisions of S.B. 2 actually reduced sentences. Obviously, if they did not, then §1.58(B) wouldn't even come into play. The footnote explained that “[w]hile under the old sentencing scheme, a defendant might receive a longer term of incarceration, that longer term was often *indefinite* and could be reduced by good-time credit.” *Rush*, 83 Ohio St.3d at 56, fn. 2. In other words, a sentence of 8 to 25 years under the old law might actually be less than a sentence 8 years under the new law, because of parole board

practices. Those practices were accurately described in the Sentencing Commission's 2007 report, "A Decade of Sentencing Reform," <http://www.supremecourt.ohio.gov/Publications/sentencingReform.pdf>, last accessed February 8, 2016:

Before S.B. 2, if a court wanted to assure that a rapist served, say, four years in prison, the judge would have sentenced the offender to "6 to 25" years. The 25 was hyperbole, given parole release practices at the time. Even the "minimum" of six years wasn't always served. Each inmate was eligible for a decrease for good behavior. This "good time" reduction was supposed to be earned, but it was given so liberally that it appeared to be earned by breathing. These credits lopped about a third off the minimum term.

The footnote in *Rush* concluded that "the state persuasively asserts that these variables will in many instances make it difficult, if not impossible, to calculate whether a defendant's sentence would truly be reduced under the terms of S.B. 2."

The footnote didn't even qualify as *dicta*; only three justices concurred in the opinion, with one concurring only in the syllabus and judgment, and the other three concurring only in judgment. And whatever the merits of the observation about the difficulty of gauging whether a defendant's sentence was "truly reduced" by S.B. 2, that difficulty was removed by the subsequent actions of the parole board.

**3. *The Parole Board after S.B. 2.*** While the laxity of the parole board in 1996 was common knowledge among judges, prosecutors, and defense attorneys, as indicated by the Sentencing Commission report, *supra*, that changed dramatically in 1998. Those changes are recounted in *Layne v. Ohio Adult Parole Authority*, 97 Ohio St.3d 456, 2002-Ohio-6719, 780 N.E.2d 548.

The APA had used a scoring system to determine parole dates, but in 1998 adopted new rules which allowed them to assign an inmate a score based not on the crimes he had been

convicted of, but on what the board determined had been the “underlying criminal activity” associated with the conviction, even if the defendant had never been charged with that activity, or had been acquitted of it. Layne, for example, had pled guilty to one count of abduction and two of having weapons under disability. Under the old guidelines chart, he would have been eligible for parole after serving between sixty and eighty-four months of his two-to-ten-year sentence. Instead, the parole board determined that Layne had committed kidnapping, which meant he had to serve between 150 and 210 months, which was beyond his actual maximum sentence. In short, the parole board’s decision made him ineligible to be paroled at all. This practice was widespread; as one court noted, “many defendants sentenced under the old law are currently serving more than twice, [sic] as many years as defendants sentenced under the new law for the same offenses.” *Ankrom v. Hageman*, Franklin CP No. 01CVH02-1563, 118 Misc.2d 226, 230, 2001-Ohio-4369, 770 N.E.2d 667.

The *Layne* court held that this practice deprived the inmate of a “meaningful consideration for parole.”

In our view, meaningful consideration for parole consists of more than a parole hearing in which an inmate’s offense of conviction is disregarded and parole eligibility is judged largely, if not entirely, on an offense category score that does not correspond to the offense or offenses of conviction set forth in the plea agreement. ¶27.

The court’s opinion contained one caveat, though: “[T]he APA, when considering an inmate for parole, still retains its discretion to consider any circumstances relating to the offense or offenses of conviction, including crimes that did not result in conviction, as well as any other factors the APA deems relevant.”

In essence, that meant that the parole board could do in practice what it could not do by

rule. Parole was granted with increasing infrequency. In 2001, the Adult Parole Authority granted release in 39.2% of the cases it considered. <http://www.drc.ohio.gov/web/reports/ParoleBoard/Calendar%20Year%202001%20Report.pdf>, last accessed February 8, 2016. For 2011, the year that saw the passage of H.B. 86, releases were granted in just 6.9% of the cases. <http://www.drc.ohio.gov/web/reports/ParoleBoard/Calendar%20Year%202011%20Report.pdf>, last accessed February 8, 2016. (The figure for Fiscal Year 2015 was 6.81%. <http://www.drc.ohio.gov/web/reports/ParoleBoard/Fiscal%20Year%202015%20Report.pdf>, last accessed February 8, 2016.)

It was in that climate that the legislature passed H.B. 86, and the governor signed it, effective September 30, 2011.

**4. *The purpose of H.B. 86.*** While Ohio’s lack of a counterpart to the Congressional Record might ordinarily hamper a determination of legislative intent, no such problem exists with respect to discerning the purpose of H.B. 86: it was intended to save money, by sending fewer people to prison, sending them for shorter periods, and providing an earlier release to those sent there. The Ohio Department of Rehabilitation and Correction noted that the H.B. 86 reforms “will reduce Ohio’s prison population by more than 3,700 inmates by FY 2015, at a projected savings of over \$37 million.” ODRC Annual Report 2011, at 1. <http://www.drc.ohio.gov/web/Reports/Annual/Annual%20Report%202011.pdf>, last accessed February 8, 2016. This Court has acknowledged that purpose. *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612 (goal of H.B. 86 was “to reduce the state's prison population and to save the associated costs of incarceration,” ¶17); *State v. Limoli*, 140 Ohio St.3d 188, 2014-Ohio-3072, 16 N.E.3d 641 (same).

H.B. 86 achieved its first objective, sending fewer people to prison and for shorter periods, in a variety of ways: it doubled the monetary threshold for felony property crimes, it introduced “mandatory probation” for first-time low-level offenders, it substantially increased good-time credits, it reduced the maximum penalty for most third-degree felonies from five years to three years, it expanded eligibility for treatment in lieu of conviction, and it reintroduced the requirement for findings for imposition of consecutive sentences, which had been eliminated by the Supreme Court’s decision in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. The reforms achieved the second objective, earlier release of inmates, by expanding eligibility for judicial release to inmates serving more than ten years of non-mandatory time, by allowing certain inmates to be released after serving 80% of their sentence, and by requiring the parole board to review the cases of all parole-eligible inmates aged 65 or older.

**5. *The State’s arguments.*** The State and its amici present two arguments in support of its contention that the clear wording of Section 4 H.B. 86 should be ignored. The first is that “it remains far from clear that defendants sentenced under SB 2 would face a ‘reduced’ penalty in comparison to pre-SB 2 law.” Brief of Amicus Curiae Franklin County Prosecutor, at 5. This argument relies first on the footnote in *Rush, supra*. As noted earlier, that footnote has no precedential value. Moreover, the footnote’s observation that pre-S.B. 2 law contained various provisions, like good-time credit, that S.B. 2 did not, has been rendered obsolete by the subsequent actions of the parole board. If Mr. Thomas is given an indefinite sentence, it is a certainty that he will serve more than the eleven year-maximum he would receive under S.B. 2 and H.B. 86.<sup>1</sup>

---

<sup>1</sup> In fact, after remand from the 8th District, Mr. Thomas was sentenced to eleven years

The argument that a defendant given the maximum sentence under H.B. 86 would “receiv[e] what amounts to an 11-to-16 year sentence” due to “the additional possibility during his PRC supervision of facing up to 5.5 years of prison time being added for PRC violations,” *id.* at 6, is similarly unavailing. While true, it ignores the fact that even assuming that Mr. Thomas would be paroled, a violation of parole would return him to prison for the remainder of his 25-year prison sentence. In short, even assuming Mr. Thomas violated PRC under H.B. 86, his resulting sentence would be far below what he would receive if he violated parole under pre-S.B. 2 law.

The State and its amici raise one more scenario in an attempt to show that the penalties under H.B. 86 might be more onerous than those under pre-S.B. 2 law. S.B. 2 also introduced the concept of the sexually violent predator, R.C. §2971.03(A)(3); conviction of the specification under that section would result in a prison sentence of ten years to life. Brief of Amicus Curiae Ohio Prosecuting Attorneys Association, at 4. That argument runs into two problems. First, when S.B. 2 was passed, the sexually violent predator statute required that a defendant have been convicted of a prior sexual offense.<sup>2</sup> Mr. Thomas had no such offense; his criminal record at the time of his sentencing in 2014 consisted of two misdemeanor convictions and one for receiving stolen property, a fourth degree felony, the last conviction occurring eighteen years earlier. This leads to the second problem with the State’s argument. The sexually violent predator statute required the State to prove that defendant committed a sexually violent offense “and is likely to

---

imprisonment, consecutive to the three-year firearm specification.

<sup>2</sup> After this Court held in *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, that the underlying offense couldn’t serve as the predicate for a sexually violent predator specification, the law was amended to allow that.

engage in the future in one or more sexually violent offenses.” R.C. §2971.01(H)(1). How the State would have proved after Mr. Thomas’ conviction in 2014 that he was likely to engage in future sexually violent offenses, when he hadn’t done so in the previous twenty years, is a mystery.

The second argument is a variation of the first: that the task of deciding whether a defendant’s sentence would actually be reduced is too difficult. This argument focuses entirely on the upper range of the sentencing scale, with the State arguing that since H.B. 86 does not set parole-board policy or discretion, a sentencing court could not determine whether a defendant would actually serve more time under H.B. 86 than under S.B. 2 law. This argument might have more force if there were indeed substantial variations in parole-board policies. That has not been the case; save for a spate of releases occasioned by the *Layne* and *Ankrom* decisions, the parole release rate has been at the low teens to single digits for most of the past decade.

The basic fallacy of this argument, though, is its premise that the determination of whether there has been a reduction in penalty has to be done on an individual basis. Nothing compels that conclusion. A court sentencing a defendant for stealing \$600 from Wal-Mart prior to H.B. 86 – which would be a felony – would be extremely unlikely to send the offender to prison. A municipal court judge confronted with the same case post-H.B. 86 – which would be a misdemeanor – might be very likely to give the offender a jail sentence. No one would suggest that that possibility of incarceration meant a defendant’s sentence for theft wasn’t “reduced” by H.B. 86. Regardless of what an *individual* defendant might receive, H.B. 86 reduces the sentence from pre-S.B. 2 law. Even one unversed in higher mathematics can figure out that 3 to 11 years is less than 5 to 25 years.

## CONCLUSION

Again, this is an issue of legislative intent: did the Ohio General Assembly intend to extend the reduction of prison sentences provided by H.B. 86 to defendants who committed their crimes prior to July 1, 1996? The conclusion that it did is compelled by the fact that the primary, if not sole, purpose of H.B. 86 was to reduce the prison population. In this context, it must be remembered that the situation presented by this case would only arise from crimes committed two decades ago, and would apply to defendants already in their forties or older. (Mr. Thomas is 45.)<sup>3</sup> In light of H.B. 86's provision for "geriatric parole," it is highly unlikely that the legislature sought to reduce the prison population of elderly inmates, only to add a new crop of them.<sup>4</sup>

For the foregoing reasons, Appellant respectfully prays the Court to affirm the judgment of the court below.

---

<sup>3</sup> On page 2 of its Brief, the State cites three other cases similar to Mr. Thomas'. One of the defendants in those cases was also 45; the other two were 63.

<sup>4</sup> Mr. Thomas and other similarly situated defendants would not be eligible for special parole consideration after reaching age 65; that provision of H.B. 86 expired ninety days after its effective date.

Respectfully submitted,

/s/Russell S. Bensing  
Russell S. Bensing (0010602)  
600 IMG Building  
1360 East Ninth Street  
Cleveland, OH 44114  
(216) 241-6650  
[rbensing@ameritech.net](mailto:rbensing@ameritech.net)

**ATTORNEY FOR APPELLANT  
JERMAIN THOMAS**

## **SERVICE**

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Appellee Jermain Thomas was sent by ordinary U.S. mail, postage prepaid, to Daniel Van, Attorney for Appellant State of Ohio, 1200 Ontario Street, 9th Floor, Cleveland, OH 44113; Steven L. Taylor, Attorney for *Amicus Curiae* Franklin County Prosecutor, 373 South High Street, 13th Floor, Columbus, OH 43215; and Rachel Lipman Curran, Attorney for *Amicus Curiae* Ohio State Prosecutor's Association, 230 East Ninth Street, Suite 4000, Cincinnati, OH 45202, this 9th day of February, 2016.

/s/Russell S. Bensing  
Russell S. Bensing