

State v. Pribble2019-Ohio-4808

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State v. Pribble
2019-Ohio-4808

I. INTRODUCTION

In *State v. Pribble*, the majority resolved a conflict between statutes by using codified rules of statutory construction.¹ The dissent, not satisfied that the conflict had been resolved, instead invoked the rule of lenity, stating “if we are to say with a straight face that ignorance of the law is no excuse, then we must insist that lack of clarity in the law is no excuse either.”² The issue in *Pribble* arose from conflicting language in the third-strike provision of the illegal-assembly statute, and the general and specific provisions of the felony-sentencing statute.³ This case note will discuss the various pressures that influence the judiciary to forgo using the rule of lenity, the practical consequences that has on the landscape of criminal law, and the potential benefits of using a less stringent test to trigger the court’s use of the rule of lenity.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On February 7, 2016, Darian J. Pribble purchased Sudafedrin from a Kroger pharmacy.⁴ Because of his prior drug convictions, the Manchester Village Police Department was informed of the purchase by the DPLeX data system.⁵ Officer Jason Mallott detained Pribble in the vicinity of the

1. 2019-Ohio-4808 at ¶ 17.

2. *Id.* at ¶¶ 34, 71.

3. For violations of the illegal-assembly statute by certain third-strike offenders involving methamphetamine, the third-strike provision provides that “the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than five years.” OHIO REV. CODE ANN. § 2925.041(C)(1) (Lexis 2020). The illegal assembly statute itself defines the degree of felony for the possession of methamphetamine manufacturing paraphernalia, which includes the applicable third-strike provision. OHIO REV. CODE ANN. § 2925.041 (Lexis 2020). Under the general provision of the illegal assembly statute, “[f]or a felony of the third degree that is not an offense for which . . . [the specific provision of the illegal assembly statute] applies, the prison term shall be a definite term of nine, twelve, eighteen, twenty-four, thirty, or thirty-six months.” OHIO REV. CODE ANN. § 2929.14(A)(3)(b) (Lexis 2020). For certain enumerated third-degree felonies, none of which are illegal-assembly or drug related, the specific provision of the felony sentencing statute provides that “the prison term shall be a definite term of twelve, eighteen, twenty-four, thirty, thirty-six, forty-two, forty-eight, fifty-four, or sixty months.” OHIO REV. CODE ANN. § 2929.14(A)(3)(a) (Lexis 2020). The felony sentencing statute itself defines the categories of felonies that fall within the general and specific provisions of the felony sentencing statute. OHIO REV. CODE ANN. § 2929.14 (Lexis 2020).

4. *State v. Pribble*, 2017-Ohio-8499, ¶ 2, 100 N.E.3d 49, 50 (4th Dist.).

5. *Id.*

pharmacy, and searched Pribble and his vehicle.⁶ Officer Mallott found drug paraphernalia, baggies and ties, a baggie containing white residue that was later identified as methamphetamine, the reported Sudafedrin, and a severed lithium battery, which can be used to manufacture methamphetamine.⁷

On February 3, 2017, the Adams County Common Pleas Court found Pribble guilty of a third-degree felony under Ohio's illegal-assembly statute, sentencing him to five years in prison.⁸ Pribble appealed, contending that his sentence of five years under Ohio Revised Code section 2925.041(C)(1) (the third-strike provision), rather than three years under Ohio Revised Code section 2929.14(A)(3) (the felony-sentencing statute), was in error.⁹ The appellate court found that the two statutes conflicted, which the court resolved using the rule of lenity,¹⁰ citing its own precedent in *State v. Clark*.¹¹ The court reversed the judgment of the Adams County Court of Common Pleas, ruling that Pribble could only be sentenced to a maximum of three years under the felony-sentencing statute.¹² The State appealed, alleging that the minimum sentence of five years outlined in the third-strike provision applied.¹³

III. DECISION AND RATIONALE.

A. Majority Opinion by Justice Kennedy

Justice Kennedy opened the opinion by stating that the appellate court correctly identified the conflict between the felony-sentencing and illegal-assembly statutes, but she disagreed with the court's use of the rule of lenity to resolve the conflict, opting instead to use Ohio's statutorily enacted general/specific canon.¹⁴ The Court then analyzed the text and history of the conflicting statutes.¹⁵

6. *Id.* at ¶ 3, 100 N.E.3d 49 at 50-51.

7. *Id.*

8. *Id.* at ¶ 4, 100 N.E.3d 49 at 51; *See* OHIO REV. CODE ANN. § 2925.041(A) (LexisNexis 2020) (the court charged Pribble with illegal assembly of chemicals that can be used to manufacture schedule I or II controlled substances with the intent to manufacture those controlled substances).

9. *State v. Pribble*, 2017-Ohio-8499 at ¶ 5, 100 N.E.3d 49 at 51.

10. *Pribble*, 2019-Ohio-4808 at ¶ 10.

11. 2015-Ohio-5003 (4th Dist.) (the appellate court found that the general provision prevailed over the third-strike provision).

12. *Pribble*, 2019-Ohio-4808 at ¶ 10.

13. *Id.*

14. *Id.* at ¶ 2. The general/specific canon instructs judges to apply the specific provision over the general provision when two statutes irreconcilably conflict unless it was the legislature's manifest intent to apply the general provision over the specific provision. OHIO REV. CODE ANN. § 1.51 (LexisNexis 2020).

15. *Id.* at ¶¶ 3-7.

Under the third-strike provision of the illegal-assembly statute, the sentencing of a defendant for knowingly possessing substances used in the manufacturing of methamphetamine can be heightened to a “mandatory prison term . . . for a felony of the third degree that is not less than five years” if the defendant was previously convicted, or pleaded guilty, to two or more felony drug-abuse offenses, if at least one of those convictions involved methamphetamine production.¹⁶ The Ohio General Assembly originally enacted the third-strike provision as a stricter second-strike provision in 2006.¹⁷ The second-strike provision directed courts to look to the felony-sentencing statute and prescribe a “mandatory prison term . . . for a felony of the third degree that is not less than five years,” and that language was remained the same with subsequent amendments.¹⁸ At that time, the stricter second-strike provision did not conflict with the felony-sentencing statute, which provided that sentencing “[of] a felony of the third degree . . . shall be one, two, three, four, or five years.”¹⁹

In 2011, H.B. 86²⁰ amended the second-strike provision into the third-strike provision,²¹ and it amended the felony-sentencing statute, bifurcating it into a specific and a general provision.²² Under the general provision of the felony sentencing statute, third-degree felony sentences for felonies not specifically enumerated in the specific provision of the statute could be either nine months, or one to three years in length in six-month increments.²³ Under the specific provision, specific enumerated violent felonies could have a maximum sentence of five years, in six-month increments, with a minimum sentence of 1 year.²⁴ The illegal-assembly statute was not one of the enumerated felonies.²⁵ The third-strike provision now referenced to a mandatory five-year sentence under the felony-sentencing statute that was arguably no longer an available sentence for illegal-assembly convictions.

Justice Kennedy believed that the text of the third-strike provision established the will of the legislature, and she argued that the Ohio General Assembly intended to set the floor for felony sentencing under the third-strike provision to a term not less than five years.²⁶ The question before the Court

16. OHIO REV. CODE ANN. § 2925.041(C)(1) (LexisNexis 2020).

17. *Pribble*, 2019-Ohio-4808 at ¶ 4 (citing Am. Sub. S.B. 53, 126th Gen. Assemb., Reg. Sess. (Ohio 2006); 151 OHIO LAWS, PART I, 806, 835-836).

18. *Id.* (citing 151 OHIO LAWS, PART I at 835).

19. *Id.* at ¶ 5 (citing Am. Sub. H.B. 473, 125th Gen. Assemb., Reg. Sess. (Ohio 2003); 150 OHIO LAWS, PART IV 5707, 5731).

20. Am. Sub. H.B. 86, 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

21. *Pribble*, 2019-Ohio-4808 at ¶ 7.

22. *Id.* at ¶ 6.

23. OHIO REV. CODE ANN. §§ 2929.14(A)(3)(a), (b) (LexisNexis 2020).

24. OHIO REV. CODE ANN. §§ 2929.14(A)(3)(b).

25. OHIO REV. CODE ANN. §§ 2929.14(A)(3)(a).

26. *Pribble*, 2019-Ohio-4808 at ¶ 11.

then became whether the specific provision of the felony-sentencing statute prevented the imposition of a five-year prison sentence when a defendant triggered the third-strike provision, which required statutory interpretation.²⁷ When interpreting a statute, the Revised Code must be read as an interrelated text,²⁸ and the court must attempt to make statutes work together,²⁹ but if that is not possible, the court must construe statutes with the goal of effectuating legislative intent.³⁰

The Court then interpreted the two statutes using the general/specific canon,³¹ which is codified in the Ohio Revised Code.³² Under Ohio's general/specific canon, if a general and a specific provision address the same matter and irreconcilably conflict, the specific provision applies unless the general provision was adopted after the specific provision, and it was the legislature's manifest intent to apply the general provision.³³ Justice Kennedy then determined that under this scheme, the third-strike provision was the more specific provision, and the felony-sentencing statute was the more general provision.³⁴ The scope of the third-strike provision is more specific; it only applies to a narrow subset of repeat offenders involved with the manufacturing of a controlled substance.³⁵ It addresses the methamphetamine crisis, which is a specific problem.³⁶ The felony-sentencing statute is broader; it applies to any third-degree felony.³⁷ The third-strike provision requires a mandatory five-year prison sentence, while the felony-sentencing statute allows a range of prison sentences for third-degree felonies.³⁸

Furthermore, if the Ohio General Assembly intended to set a five-year mandatory sentence in the third-strike provision, it could not have enumerated the statute into the specific provision of the felony-sentencing statute, because the specific provision allows discretionary sentencing from one year to five years and the statutes enumerated in the specific provision simply refer to the felony-sentencing statute to determine sentencing length

27. *Id.*

28. *Id.* at ¶ 12 (citing *State v. Moaning*, 76 Ohio St.3d 126, 666 N.E.2d 1115 (1996)).

29. *Id.* (citing *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St.3d 369, 372, 643 N.E.2d 1129 (1994)).

30. *Id.* (citing *Summerville v. Forest Park*, 128 Ohio St.3d 221, 943 N.E.2d 522 (2010)).

31. *Pribble*, 2019-Ohio-4808 at ¶¶ 13-20.

32. OHIO REV. CODE ANN. § 1.51 (LexisNexis 2020).

33. *Id.*

34. *Pribble*, 2019-Ohio-4808 at ¶ 15.

35. *Id.*

36. *Id.* at ¶ 14.

37. OHIO REV. CODE ANN. § 2929.14(A)(3) (LexisNexis 2019).

38. *Pribble*, 2019-Ohio-4808 at ¶ 16.

(there are no mandatory minimum sentences prescribed in any of the enumerated statutes).³⁹

After identifying the general and specific statute in the analysis, the Court then needed to complete the general/specific canon analysis by determining whether the general statute was enacted after the specific statute, and whether the legislature manifestly intended for the general statute to negate the specific statute.⁴⁰ The Court found that both statutes were changed in H.B. 86, so the general provision was not the later adoption, which bypassed the need to address whether the Ohio General Assembly manifestly intended for the general provision to apply.⁴¹ The Court noted that even if an intent analysis was necessary, “the court will not hold prior legislation to be impliedly repealed . . . unless the subsequent legislation clearly requires that holding.”⁴²

Justice Kennedy then cited another codified rule of statutory interpretation, Ohio Revised Code section 1.47(C), which states that “In enacting a statute, it is presumed that . . . a just and reasonable result is intended.”⁴³ Justice Kennedy claims that if the general provision of the felony-sentencing statute applies to the third-strike provision, then other portions of the illegal-assembly statute would be incongruous.⁴⁴ She claims that a defendant that had two drug related offenses, none of which were related to drug manufacturing, would have a mandatory sentence of two years, while a defendant convicted under the third-strike provision could have a sentence as short as nine months under the general provision of the felony-sentencing statute.⁴⁵

Finally, Justice Kennedy explained why the rule of lenity did not apply to this case.⁴⁶ Ohio’s codified rule of lenity states that “sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.”⁴⁷ The rule of lenity only applies after the court has considered the “text, structure, history, and purpose” of a statute, and is still unable to determine the intent of the legislature without simply guessing.⁴⁸ However, if the conflict is resolved before exhausting information from those sources, there is no need to use the

39. *Id.*

40. *Id.* at ¶ 18.

41. *Id.* at ¶ 19 (citing *State ex rel. Dublin Sec. v. Ohio Div. of Sec.*, 68 Ohio St.3d 426, 431, 627 N.E.2d 993 (1994)).

42. *Id.* (citing *State v. Frost*, 57 Ohio St.2d 121, 124, 387 N.E.2d 235 (1979)).

43. *Pribble*, 2019-Ohio-4808 at ¶ 21.

44. *Id.*

45. *Id.*

46. *Id.* at ¶¶ 22-23.

47. OHIO REV. CODE ANN. § 2901.04(A) (LexisNexis 2020).

48. *Pribble*, 2019-Ohio-4808 at ¶ 23 (citing *Abramski v. United States*, 573 U.S. 169, 188 (2014)).

rule of lenity.⁴⁹ Because the general/specific canon resolves the conflict between the two statutes, the rule of lenity does not apply.⁵⁰

The opinion was then concluded by restating that the third-strike provision conflicted with the general provision of the felony-sentencing statute.⁵¹ Because the third-strike provision is a specific statute, and the general provision of the felony-sentencing statute is a general statute, the general/specific canon resolves the conflict between the two statutes, and the mandatory five-year sentence applied.⁵² The Court reversed the decision of the court of appeals, and reinstated the trial court's sentence.⁵³

B. Dissenting Opinion by Justice DeWine

Justice DeWine found that the general/specific canon analysis performed by the majority did not “provide a satisfactory answer in this case.”⁵⁴ He believed there was a strong argument that the third-strike provision and the illegal-assembly statute were *both* specific statutes.⁵⁵ He reasoned that when examining the illegal-assembly statute as a whole, the statute cites specific third-degree felonies which can heighten prison sentences, which would make the entire statute a specific statute, and the general/specific canon would not apply.⁵⁶

Under Ohio Revised Code section 1.54, a “statute which is reenacted or amended is intended to be a continuation of the prior statute and not a new enactment, so far as it is the same as the prior statute.”⁵⁷ The provision of the illegal-assembly statute mandating a five-year minimum sentence was *not* amended by H.B. 86, but rather other provisions that defined the parameters for a heightened sentence were amended.⁵⁸ So under Ohio Revised Code section 1.54, the heightened sentencing provision of the illegal-assembly statute would date back to 2006, when it was originally enacted.⁵⁹ Under Ohio Revised Code section 1.52(A), if two statutes are irreconcilable, the statute enacted at a later date controls.⁶⁰

In 2011, the felony-sentencing statute was amended and bifurcated in H.B. 86, and the general provision of the statute, which Justice DeWine called

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Pribble*, 2019-Ohio-4808 at ¶ 24.

54. *Id.* at ¶ 25.

55. *Id.* at ¶ 30.

56. *Id.*

57. OHIO REV. CODE ANN. § 1.54 (LexisNexis 2020).

58. *Pribble*, 2019-Ohio-4808 at ¶ 31.

59. *Id.*

60. OHIO REV. CODE ANN. § 1.52(A) (LexisNexis 2020).

the sentence-shortening provision, was an entirely new addition to the statute with a newly defined range of sentencing terms.⁶¹ Because the third-strike provision and the illegal-assembly statute were both specific, the general/specific canon did not apply; and because the heightened sentencing provision of the illegal-assembly statute was a continuation of a statute enacted before the general provision of the felony-sentencing statute, the general provision of the felony-sentencing statute was enacted after the heightened sentencing provision, and thus controlled.⁶²

Justice DeWine considered the general provision of the felony-sentencing statute to be the most recently enacted of the conflicting statutes, which would have required the majority to perform the manifest-intent portion of the general/specific canon analysis.⁶³ The preamble of H.B. 86 stated that its purpose was in part to “revise some of the penalties for trafficking in marihuana or hashish, for possession of marihuana, cocaine, or hashish, and for *all* third degree felony drug offenses that currently have mandatory prison terms.”⁶⁴ Legislative intent in H.B. 86 convincingly indicates that the Ohio General Assembly intended to reduce the five-year mandatory sentencing for a third-degree felony conviction under the third-strike provision. Ultimately, under the majority’s ruling, the third-strike provision—which does not itself assign a prison sentence, but merely mandates that the prison sentence must be selected from the felony-sentencing statute and cannot be less than five-years—prescribes a prison sentence that is specifically forbidden by the amended felony-sentencing statute for this particular offense.⁶⁵

The dissent then concluded that since the general/specific canon did not convincingly settle the conflict between the statutes, the rule of lenity applied, which is codified under Ohio Revised Code section 2901.04(A).⁶⁶ Under the rule of lenity, ambiguous statutes that define offenses or penalties are to be liberally construed in favor of the defendant.⁶⁷ When traditional methods of textual construction fail, the rule of lenity applies.⁶⁸ Under the rule of lenity, Justice DeWine deviated from the ruling of the court of appeals and concluded that the shorter sentencing range prescribed in the general provision of the felony-sentencing statute applied.⁶⁹

61. *Pribble*, 2019-Ohio-4808 at ¶ 31.

62. *Id.*

63. *Id.* at ¶ 32.

64. Am. Sub. H.B. 86, 129th Gen. Assemb., Reg. Sess. (emphasis added).

65. *Pribble*, 2019-Ohio-4808 at ¶ 33.

66. *Id.* at ¶ 34.

67. *Id.*

68. *Id.* at ¶ 35 (citing *United States v. R.L.C.*, 503 U.S. 291 (1992) (Thomas, J. concurring in part and concurring in judgment)).

69. *Id.* at ¶ 36.

C. Dissenting Opinion by Justice Donnelly

Justice Donnelly believed that the court of appeals was correct.⁷⁰ He proposed that the appropriate way to solve the conflict between the statutes was to modify the third-strike provision so the sentence it imposed fit within the general provision of the felony-sentencing statute.⁷¹ Justice Donnelly found that the felony-sentencing statute was not necessarily a general statute, that the third-strike provision was not an independent specific statute, and “the true conflict lies within the third-strike provision itself.”⁷² He then described the amendment history of the felony-sentencing statute, which began as a general statute, but then became bifurcated in 2011 into a general and a specific provision.⁷³ The dissent emphasized that the Ohio General Assembly removed suspicion that the specific provision applied to unenumerated offenses by indicating in the general provision that all felonies not listed in the specific provision were to be sentenced under the general provision.⁷⁴ This indicated that the felony-sentencing statute was no longer a general statute, but rather bifurcated.⁷⁵

The dissent then analyzed the third-strike provision, and categorized it as a dependent variable that is merely allegedly specific.⁷⁶ The third-strike provision does not prescribe a definite sentence, it references the felony-sentencing statute and directs the court to choose “one of the prison terms prescribed for a felony of the third degree that is not less than five years.”⁷⁷ The felony sentencing statute prescribes the sentence, not the allegedly specific third-strike provision.⁷⁸ The third strike-provision merely sets the floor for the sentencing range, it does not set the ceiling, and it carries no independent force.⁷⁹ The statute standing alone “[imposes] a five-year minimum on nothing.”⁸⁰

When the third-strike provision was originally enacted in 2006, it made sense because the felony-sentencing statute was a general statute that prescribed one to five year sentences for any third-degree felony.⁸¹ In *State v. South*,⁸² the Court ruled that the sentencing of any third-degree felony

70. *Pribble*, 2019-Ohio-4808 at ¶ 37.

71. *Id.* at ¶ 39.

72. *Id.* at ¶ 43.

73. *Id.* at ¶ 45 (citing Am. Sub. H.B. 86, 129th Gen. Assemb., Reg. Sess.).

74. *Id.* at ¶ 47.

75. *Pribble*, 2019-Ohio-4808 at ¶ 48.

76. *Id.* at ¶¶ 49-51 (citing OHIO REV. CODE ANN. § 2925.041(C)(1)).

77. *Id.* at ¶ 49 (citing OHIO REV. CODE ANN. § 2925.041(C)(1)).

78. *Id.* at ¶ 49.

79. *Id.* at ¶¶ 50-51.

80. *Pribble*, 2019-Ohio-4808 at ¶ 51.

81. *Id.* at ¶ 52.

82. 144 Ohio St.3d 295, 2015-Ohio-3930, 42 N.E.3d 734, ¶ 18

conviction that is not enumerated in the specific provision of the felony-sentencing statute is prescribed by the general provision of the statute.⁸³ There was no conflict in *South* because the language of the OVI statute did not conflict with the language of the general provision of the felony-sentencing statute, so the Court did not have to address the conflict between the third-strike provision and the exclusive nature of the specific provision of the felony-sentencing statute.⁸⁴ The majority did not address that conflict, and merely concluded that the third-strike provision itself was an exception to the felony-sentencing statute's general provision while they ignored the conflict with the specific provision entirely.⁸⁵

Justice Donnelly found that it was not accurate to articulate the third-strike provision as the specific statute in the general/specific canon analysis, because the provision itself could not act independently in lieu of the felony-sentencing statute.⁸⁶ The illegal-assembly statute is more specific than the general provision of the felony-sentencing statute, but the specific provision in the felony sentencing statute contains an exclusive list of offenses with a prescribed range of prison sentences, and is at least as specific as the third-strike provision.⁸⁷ The exclusive list of offenses in which a five-year sentence could be applied leaves no room to assume that the third-strike provision is an exception to the general or specific provisions of the felony-sentencing statute.⁸⁸

Then the dissent raised one of the same issues that Justice DeWine⁸⁹ raised in his dissent—under Ohio Revised Code section 1.54,⁹⁰ the amendment history of the third-strike provision shows that the five-year minimum sentence was enacted before the relevant changes were made in the felony-sentencing statute.⁹¹ Justice Donnelly found that the general/specific canon analysis fails at the first step because the felony-sentencing statute is a specific statute, not a general statute, and it specifically prohibits the

83. *Pribble*, 2019-Ohio-4808 at ¶ 55.

84. *Id.* at ¶ 56.

85. *Id.* at ¶ 57.

86. *Id.* at ¶¶ 60-62.

87. *Id.* at ¶ 62.

88. *Pribble*, 2019-Ohio-4808 at ¶ 62.

89. Justice Donnelly used the same analysis as Justice DeWine. *See supra* Part III.B para. 2 (analysis of the statute under Ohio Revised Code section 1.54).

90. A statute which is reenacted or amended is intended to be a continuation of the prior statute, and not a new enactment, so far as it is the same as the prior statute. OHIO REV. CODE ANN. § 1.54 (LexisNexis 2020).

91. *Pribble*, 2019-Ohio-4808 at ¶¶ 63-67.

inference that the third-strike provision is an exception to the statute.⁹² The conflict was not resolved, so the dissent then used the rule of lenity.⁹³

While the majority characterized the rule of lenity as a tool of last resort, Justice Donnelly believed that some authorities were supportive of using the rule more frequently when interpreting ambiguous criminal statutes.⁹⁴ The dissent went on to write, “I think the rule of lenity ought to apply to the interpretation of criminal statutes far more than it has been applied in recent years.”⁹⁵ The rule of lenity is not to be used to construe statutes so strictly that it subverts legislative intent, but rather it acknowledges that the power to punish lies with the legislature.⁹⁶ Whether the rule should be used as a tool of last resort or not does not matter in Ohio, because the Ohio General Assembly codified the rule in Ohio Revised Code section 2901.04(A) as a rule of construction.⁹⁷ Under the general/specific canon, the rule of lenity is a specific statute and should arguably be used before more general canons of construction.⁹⁸ The dissent criticized the majority for ignoring the codified rule of lenity by “invoking judicially created canons of statutory interpretation,” which are not as authoritative as statutes, “and by citing cases suggesting that the rule of lenity should be applied only as a last resort after considering all other canons of interpretation,” despite the clear legislative intent of the codified rule of lenity.⁹⁹

Finally, the dissent used the rule of lenity to resolve the conflict between the statutes.¹⁰⁰ Justice Donnelly wrote that it was obvious that the legislature made a mistake by either not imposing a clear mandatory five-year sentence as the majority decided, or by not posing a clear mandatory three-year sentence, but fixing the mistake was not the Court’s job.¹⁰¹ The Court must strictly construe the statute until it is fixed by the Ohio General Assembly, but the Court need not invalidate the statute entirely.¹⁰² A court “should refrain from invalidating more of the statute than is necessary.”¹⁰³ The mandatory five-year prison term in the third-strike provision is the only

92. *Id.* at ¶ 67.

93. *Id.* (citing SCALIA & GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 190 (2012)).

94. *Id.* at ¶ 70 (quoting SCALIA & GARNER, *READING LAW* at 301).

95. *Id.* at ¶ 71.

96. *Pribble*, 2019-Ohio-4808 at ¶ 71 (quoting *United States v. Wiltberger*, 18 U.S. 76, 77, 95, 5 L.Ed. 37 (1820)).

97. *Id.* at ¶ 72.

98. *Id.*

99. *Id.* at ¶ 73.

100. *Id.* at ¶¶ 75-78.

101. *Pribble*, 2019-Ohio-4808 at ¶ 75 (citing *Bell v. United States*, 349 U.S. 81, 83 (1955)).

102. *Id.* at ¶¶ 75-76.

103. *Id.* at ¶ 75 (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1984)).

portion of the statute that needs to be invalidated to resolve the conflict.¹⁰⁴ The majority warned that if the five-year term was invalidated, absurd results would occur because the general provision of the felony-sentencing statute allows for prison sentences as low as nine months, which would be a lesser punishment than that imposed on offenders who have committed only one drug-related felony offense.¹⁰⁵ The dissent believed that such an absurd result could be avoided by simply “changing the number five to the number three,” which would ignore much less of the language of the statute than the solution proposed by the majority.¹⁰⁶ Justice Donnelly agreed with the decision of the Fourth District Court of Appeals, and he would have imposed a three-year mandatory sentence.¹⁰⁷

IV. ANALYSIS

Justice Kennedy believed that the dissent failed to show that the legislature did not intend for the third-strike provision to mandate a five-year prison sentence.¹⁰⁸ She believed it was the role of the Court to construe the conflicting statutes in a manner that best gave effect to legislative intent.¹⁰⁹ Justice Kennedy then applied the general/specific canon in a unique way to arrive at the result she believed best reflected legislative intent.¹¹⁰ But to reach that result, she had to conclude that both statutes were enacted at the same time.¹¹¹

Justice DeWine showed that under Ohio Revised Code section 1.54, portions of statutes that remain unchanged after an amendment are to be treated as a continuation of that statute, which meant that the actual language prescribing the five-year mandatory sentence was enacted in 2006, while the general provision of the felony-sentencing statute was enacted in 2011.¹¹² Justice Kennedy ignored that part of the dissent’s argument entirely, seemingly to avoid the second portion of the general/specific canon analysis, which would have required the Court to determine if the legislature had intended that the general provision would prevail over the third-strike provision.¹¹³ As Justice DeWine argued, the preamble of H.B. 86¹¹⁴

104. *Id.* at ¶ 76.

105. *See supra* Part III.A para. 8.

106. *Pribble*, 2019-Ohio-4808 at ¶ 76.

107. *Id.* at ¶ 80.

108. *Id.* at ¶ 11.

109. *Id.* at ¶ 12 (quoting *Summerville*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 24).

110. *Id.* at ¶¶ 13-21.

111. *Pribble*, 2019-Ohio-4808 at ¶ 19.

112. *Id.* at ¶ 31.

113. *Id.* at ¶ 19.

114. The pertinent language of the preamble describing legislative intent was “to revise some of the penalties for trafficking in marihuana or hashish, for possession of marihuana, cocaine, or hashish, and for

evidenced the legislature's manifest intent to revise mandatory prison sentences for *all* third-degree felonies.¹¹⁵ This suggests that the legislature intended for the general provision to prevail over the third-strike provision.

Justice Donnelly then succinctly identified the source of the metaconflict at issue, which was that the legislature made a mistake.¹¹⁶ The legislature either meant to reduce the prison term in the third-strike provision to match the new, less severe general provision of the felony-sentencing statute, or the legislature meant to sever the third-strike provision from the felony-sentencing statute and grant the provision independent force to prescribe a mandatory five-year sentence.¹¹⁷ Regardless of legislative intent, the legislature *failed* at either task.¹¹⁸ The metaconflict is not between two statutes, but rather two conflicting philosophies regarding the use of the rule of lenity.

Use of the rule of lenity, as Justice Kennedy explained, is only appropriate when the Court must simply guess what the legislature intended.¹¹⁹ That was the Supreme Court of the United States's characterization of the rule of lenity in *Abramski*, however, the Supreme Court has cited at least nine different tests to determine when a court may validly invoke the rule of lenity.¹²⁰

How much ambiguity constitutes enough ambiguity to trigger lenity? It is impossible to know. But whether the statute is reasonably clear or grievously ambiguous or sufficiently ambiguous, or whether the proffered construction is plausible, or rational, or plain, is in the eye of the beholder. The Supreme Court's various attempts to test for ambiguity is either a makeweight or a symptom of the larger problem—the Court's reluctance to fully embrace the rule of lenity and the vital due process rights it protects.¹²¹

Courts seem reluctant to use the rule of lenity. “On the whole, it might fairly be said that the rule of lenity is underused in modern judicial decision-making—perhaps the consequence of zeal to smite the wicked. The

all third degree felony drug offenses that currently have mandatory prison terms.” Am. Sub. H.B. 86, 129th Gen. Assemb., Reg. Sess. (emphasis added).

115. *Pribble*, 2019-Ohio-4808 at ¶ 32.

116. *Id.* at ¶ 75.

117. *Id.*

118. *Id.*

119. *Id.* at ¶ 23 (quoting *Abramski*, 573 U.S. 169, 188, 134 S.Ct. 2259, 189 L.Ed.2d 262).

120. Davis S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 567 (Dec. 2018).

121. *Id.*

defendant has almost always done a bad thing, and the instinct to punish the wrongdoer is a strong one.”¹²²

In criminal cases, courts tend to broadly interpret statutes in favor of the prosecution.¹²³ Courts rarely find statutes to be void and unenforceable because of vagueness, and instead of invoking the rule of lenity, courts often come up with inventive ways to search for clarity in favor of the government over the defendant.¹²⁴ Judges have wide discretion with many issues in criminal law such as jury instructions, evidentiary rulings, and as this case demonstrates, in sentencing.¹²⁵ Judicial discretion allows judges to wield enormous political power over the way criminal law is carried out in the United States.¹²⁶ Courts frequently approach ambiguous law in a way that ultimately creates new crimes and punishments, and expands on criminal law, but outside the rule of lenity, courts rarely find anything that favors the defendant such as new defenses.¹²⁷ Judicial discretion in this area of the law has helped to construct “an irrational scheme that over-criminalizes and imposes excess punishment,”¹²⁸ a “one-way ratchet[ing]”¹²⁹ of criminal law that reduces the public’s wealth and liberty in exchange for a theoretical and immeasurable benefit to public safety.¹³⁰

The desire to punish criminals is not the only pressure that encourages the court to ignore the rule of lenity. Although the Supreme Court of Ohio does not have to worry about having its decision reversed on appeal, there is a threat that their decisions can be overturned by statute.¹³¹ Out of fear of having their decisions overturned, some courts tend to construe statutes in a way that “internalize[s] legislative preferences.”¹³² Because legislatures tend to prefer broad criminal statutes that more easily can be construed to the defendant’s detriment, courts that fear having their decision overturned—on appeal or by statute—are more likely to construe criminal statutes broadly,

122. *Pribble*, 2019-Ohio-4808 at ¶ 70 (quoting SCALIA & GARNER, *READING LAW* at 301).

123. Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 568 (2012).

124. Rachel E. Barkow, *Criminal Justice Reform and the Courts*, 10/15/2019 U. CHI. L. REV. ONLINE 1, 2 (2019).

125. *Id.*

126. *Id.*

127. Smith, *supra* note 130 at 577.

128. Barkow, *supra* note 131.

129. Smith, *supra* note 130 at 577.

130. Barkow, *supra* note 131.

131. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 562 (2001) (citing Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEXAS L. REV. 1, 77-78).

132. *Id.* (citing N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 390 (1991)).

and this additional pressure on the courts exacerbates the one-way ratcheting scheme of statutory construction that disfavors defendants.¹³³

Prosecutors, sometimes acting out of “zeal to smite the wicked,”¹³⁴ sometimes acting politically because of elections, are another source of pressure on the judiciary to avoid the rule of lenity. Prosecutors have “nearly unlimited authority” to decide who to charge and how to charge them.¹³⁵ Prosecutors decide which crimes to investigate, which to ignore, whether to file charges to begin with, and whether to seek mandatory minimum prison sentences.¹³⁶ With wide prosecutorial discretion, legislators are incentivized to write ambiguous law; it grants legislators the luxury of celebrating legislation that is popular with the public while simultaneously being able to distance themselves from unpopular convictions that they can chalk up to overzealous prosecutors.¹³⁷ This pressure influences lawmakers to be vague with the law, which is harmful to due process. The relationship between prosecutors, legislators, and judges is as follows:

Prosecutors are better off when criminal law is broad than when it is narrow. Legislators are better off when prosecutors are better off. The potential for alliance is strong, and obvious. And given legislative supremacy—meaning legislatures control crime definition—and prosecutorial discretion—meaning prosecutors decide whom to charge, and for what—judges cannot separate these natural allies.¹³⁸

The judiciary has not been pushing back against these pressures and has been actively enforcing vague law in tandem with prosecutors. The rule of lenity can push back against these pressures. The current regime against the rule of lenity skews favorably to the prosecution, and allows prosecutors to punish defendants more severely while evading sentencing limitations enacted by the legislature.¹³⁹ As long as the alleged interpretation is not frivolous,¹⁴⁰ the risk of sanctions is negligible, so there is little risk for prosecutors to experiment with statutory ambiguity when broad and

133. *Id.*

134. *Pribble*, 2019-Ohio-4808 at ¶ 70 (quoting SCALIA & GARNER, *READING LAW* at 301).

135. Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform”*, 128 *Yale L.J. Forum* 848, 873 (2019) (citing *United States v. Batchelder*, 442 U.S. 114, 124-25 (1979)).

136. *Id.* (citing David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 *Yale L.J.F.* 203, 213 (2011)).

137. Stuntz, *supra* note 138 at 528.

138. *Id.* at 510.

139. Smith, *supra* note 130 at 579.

140. *Carbone v. Nueva Constr. Grp., L.L.C.*, 2017-Ohio-382, ¶ 21, 23.

ambiguous laws are the lay of the land. Construction of the law due to these pressures precipitates a dormant “rule of severity”¹⁴¹ in place of the rule of lenity. The practical result of these pressures is a dormant rule which awakens when a defendant is accused of morally blameworthy behavior that creates the presumption that ambiguous criminal statutes should be construed in favor of the government to prevent defendants from evading punishment.¹⁴²

The rule of lenity is a natural solution to push back against some of these pressures. Enforcement of the rule makes broad, vague, or conflicting statutes, an obstacle to enforcement of the law, rather than an opportunity for judicial or prosecutorial creativity.¹⁴³ Use of the rule would encourage legislators to enact unambiguous law. When a court desires to interpret a criminal statute more broadly to avoid the consequences of having their decision overturned by statute, there is little pressure pushing back against that instinct, because legislators and prosecutors benefit from broad statutory interpretation.¹⁴⁴ When a statute criminal statute is interpreted more narrowly, prosecutors and anti-criminal lobbying groups are more likely to pressure legislators to make the law more clear, and it is much more likely that the legislature will respond.¹⁴⁵ Criminal defendants do not have that same lobbying power to pressure legislators into changing broad criminal statutes.

Applying the rule of lenity offers less danger of legislating from the bench compared to interpreting statutes broadly to effectuate perceived legislative intent. One analysis shows that interpretations of criminal statutes are overruled by statute more than any other class of statute.¹⁴⁶ Furthermore, due to pressures from prosecutors and anti-criminal lobbying groups, narrower rulings that are favorable to defendants are more likely to be overruled by statute.¹⁴⁷ A more lenient test for triggering the rule of lenity would encourage the legislature to make clear laws, and it would be self-policing. If the court became aggressive, or if the legislature was displeased with its decisions, the legislature could respond by overruling decisions by statute.¹⁴⁸

141. Smith, *supra* note 130 at 580.

142. *Id.*

143. *Id.* at 567.

144. Stuntz, *supra* note 138 at 564.

145. *Id.* (quoting Elnor Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2194 (2002)).

146. Stuntz, *supra* note 138 at 562 (citing Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions* at 344 tbl.4).

147. *Id.* (citing Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions* at 351 tbl.9).

148. *Id.*

V. CONCLUSION

The rule of lenity is a classic tool of statutory construction that is often underutilized in modern jurisprudence. Because of the various pressures discussed above, courts are reluctant to use the rule of lenity to virtually invalidate criminal sentencing statutes, even when those statutes are ambiguous. Without any outside forces pressuring legislatures to make clearer laws, legislatures are unlikely to address this problem because they benefit politically when statutes are broad and vague. The courts are in the best position to influence the legislature to enact unambiguous criminal sentencing statutes by policing the legislature with the rule of lenity. Unfortunately, as this case demonstrates, when states like Ohio codify the rule of lenity, it remains underutilized by the courts, which risks reducing public freedom and wealth beyond what may have been intended by the legislature.

BEN WALDRON