Supreme Court of Ohio Clerk of Court - Filed November 30, 2022 - Case No. 2022-0603

IN THE SUPREME COURT OF OHIO

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| STATE OF OHIO, | * | Supreme Court<br>Case No. SC-22-0603 |
| Plaintiff-Appellee, | * | |
| -vs- | * | On Appeal from the Lucas County Court of Appeals, Sixth Appellate District |
| TYREE DANIEL, | * | |
| Defendant-Appellant. | * | Court of Appeals<br>Case No. CL-21-1104 |
| | * | |

# APPELLEE'S BRIEF ON THE MERITS

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## INTRODUCTION

Tyree Daniel claims that Ohio's arson registry is unconstitutional because it allows the executive branch to usurp the judiciary's power to impose and review criminal sentences. He focuses his complaints on a provision which permits trial courts to shorten the lifetime arson registration requirement if the prosecutor and investigating law enforcement agency request the reduction. *See* R.C. 2909.15(D)(2) ("the Registration Reduction Provision").

Daniel's argument assumes that the registration obligation is punitive, and that an exercise of discretion by the executive branch may never be a gateway to the exercise of judicial discretion. Neither assumption is correct. The arson registry is a civil collateral consequence of an arson conviction, not a punishment for that conviction. And even if the registration requirements were considered part of the sentence, separation of powers principles are not offended when a decision by law enforcement triggers a possible reduction in a sentence. Ohio's criminal justice system tolerates many examples of precisely the kind of executive-triggered exercise of judicial discretion in sentencing that Daniel now criticizes.

The Sixth Appellate District rejected Daniel's separation of powers challenge and sua sponte certified that its holding was in direct conflict with the Fourth District on the question "Does R.C. 2909.15(D)(2)(b) unconstitutionally violate the doctrine of separation of powers?" *State v. Daniel*, 6th Dist. Lucas No. L-21-1104, 2022-Ohio-1348, ¶30 (certifying conflict with *State v. Dingus*, 2017-Ohio-2619, 81 N.E.3d 513 (4th Dist.)). Because the Sixth District's holding correctly applied this Court's prior precedents, the certified question should be answered in the negative and the Sixth District's decision should be affirmed.

## STATEMENT OF THE CASE AND RELEVANT FACTS

Appellant Tyree Daniel entered a plea of guilty to the offense of arson in violation of R.C. 2909.03(B)(1) and (D)(1) and (2), a felony of the fourth degree. The plea represented a substantial reduction from the indicted offenses of one count first degree aggravated arson in violation of R.C. 2909.02(A)(1) and one count of second degree arson in violation of R.C. 2909.02(A)(2).

At the plea hearing, the prosecutor stated that Daniel worked with others in the commission of an arson fire for which another person was paid or offered $10,000. Daniel bought a lighter, lighter fluid, and a pack of cigarettes at a gas station. He had to produce identification in order to buy the cigarettes, and his identification was scanned when he made the purchase. Contrary to his assertion that his only involvement in the crime was buying the lighter and lighter fluid, he was actually caught minutes later on film (wearing the same clothing he wore at the gas station) as he sprayed lighter fluid on a commercial building. The building sustained significant damage as a result of the fire. (Brief of Appellant at p. 1; Tr. Jan. 16, 2020 at pp. 3-4.)

Before sentencing, Daniel's counsel argued that R.C. 2909.15(D)(2)(b) violated the doctrine of separation of powers. (Tr. March 31, 2021 at pp. 6-8.) The trial court rejected Daniel's argument and notified him of his arson registration requirements, and the State clarified that it did not seek a reduction of the required registration period. The court sentenced Daniel to 3 years of community control with 60 days of incarceration. (Judgement Entry, April 28, 2021; Tr. April 28, 2021 at pp. 6-7, 11.)

On appeal, Daniel challenged the constitutionality of R.C. 2909.15(D)(2)(b), arguing that the statute permitted relief from lifetime registration obligations only upon request by the prosecutor and law enforcement and that any decision not to request the

relief was insulated from appellate review. The Sixth Appellate District rejected the argument, reasoning that the arson registration statute is not punitive or part of the criminal sentence. *Daniel, supra,* 2022-Ohio-1348, ¶10-11. The Sixth District also held that even if the registry were considered part of a criminal sentence, the provision governing relief from lifetime registration represented "an aspect of judicial discretion that is triggered by, and becomes available as a result of, the executive branch recommendation." *Id.*, ¶22.

The Sixth District sua sponte certified that its decision was in conflict with *Dingus, supra*, 2017-Ohio-2619, with respect to the question, "Does R.C. 2909.15(D)(2)(b) unconstitutionally violate the doctrine of separation of powers?" Because the Sixth District correctly rejected the constitutional challenge to the Registration Reduction Provision, the certified question should be answered in the negative.

## ARGUMENT

**Proposition of Law: The General Assembly does not invade the judiciary's sentencing authority when it allows courts to reduce the term of arson offenders' registration obligations if the prosecutor and investigating law enforcement agency recommend the reduction.**

### I. Ohio legislation enjoys a strong presumption of constitutionality and should not be declared unconstitutional unless Appellant demonstrates beyond a reasonable doubt that the statute clearly conflicts with the doctrine of separation of powers.

The constitutionality of Ohio's legislation is presumed, so that "the party challenging the validity of the statute bears the burden of establishing beyond a reasonable doubt that the statute is unconstitutional." *City of Dayton v. State*, 151 Ohio St.3d 168, 2017-0hio-6909, 87 N.E.3d 176, ¶12. Rebutting the presumption of constitutionality imposes a "heavy burden" on the challenger, because statutes enacted by the General Assembly are entitled to a "strong presumption of constitutionality." *Id.*;

*State v. Romage*, 138 Ohio St.3d 390, 2014-0hio-783, 7 N.E.3d 1156, ¶7. The presumption of validity "cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution." *State v. Cook*, 83 Ohio St.3d 404, 409, 1998-Ohio-291, 700 N.E.2d 570, quoting *Xenia v. Schmidt*, 101 Ohio St. 437, 130 N.E. 24 (1920), paragraph two of the syllabus.

A statute may be found unconstitutional based on facial invalidity or as applied to a particular set of facts. Where, as here, the challenge is to the facial validity of the facts, the challenger faces a "higher hurdle" than when waging as-applied challenges. A challenge to a statute's facial validity must demonstrate that it is unconstitutional in all applications, and that there is "no set of circumstances in which the statute would be valid." *Romage, supra,* 2014-Ohio-783, ¶7; and *Groch v. General Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶26.

## II. The Registration Reduction Provision does not permit the executive branch to "directly and completely" administer a power properly assigned to the judiciary.

Ohio's arson registry statutes, R.C. 2909.14 and R.C. 2909.15, require convicted arsonists to register annually with the sheriff's office where they reside. Registrants must provide basic identifying information, fingerprints, and palm prints, and they are photographed. R.C. 2909.15(C)(2). Information about offenders is compiled in a database maintained by the Ohio Attorney General's Office. R.C. 2909.15(E). The database is not made available online to the general public or by way of a public record request under R.C. 149.43. To the contrary, the information may be accessed only by the state fire marshal, law enforcement officers, and certain authorized firefighters. R.C. 2909.15(E)(2). The duty to register continues for life, although a court may consider

reducing that obligation upon request by the prosecutor and law enforcement agency. *See* R.C. 2909.15(D)(2).

Neither the annual registration requirement nor the Registration Reduction Provision can be said to invade the province of the judiciary to impose or review sentences in criminal cases.

### A. The Separation of Powers Doctrine precludes one branch of government from "directly and completely" administering a power entrusted to another branch.

The Ohio Constitution does not contain a specific separation of powers provision but instead vests the executive, legislative, and judicial powers in three separate branches of government. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶42-44, citing Section 1, Articles II and IV and Section 5, Article III; and Section I, Article II of the Ohio Constitution. The allocation of authority means "that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others." *Bodyke, supra,* ¶44, quoting *State ex rel. Bryant v. Akron Metro. Park Dist.*, 120 Ohio St. 464, 473, 166 N.E. 407 (1929).

The separation of powers doctrine involves both "autonomy and comity" as well as "interdependence and independence[] among the three branches." *Bodyke,* ¶42, quoting *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶114. The branches "must work collectively toward a common cause," and "the Constitution permits each branch to have some influence over the other branches in the development of the law." *Bodyke,* ¶48. As a result, "the separate powers of the

government are not required to be kept entirely separate and distinct, in the sense that there must be no common link of connection or dependence, but rather that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments." *Stanton v. State Tax Com.*, 114 Ohio St. 658, 664, 151 N.E. 760 (1926).

In the context of criminal prosecutions, Ohio's tripartite form of government vests the judiciary with the power to determine guilt and impose sentences. *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 136, 2000-Ohio-117, 729 N.E.2d 359 (2000). The judiciary also has inherent powers of judicial review. *Daniel, supra*, 2022-Ohio-1348, ¶12, citing *Derolph v. State*, 78 Ohio St.3d 193, 198, 1997-Ohio-84, 677 N.E.2d 733. The legislature, on the other hand, defines criminal offenses and establishes the potential sentences for particular crimes. *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328, ¶12-13.

Appellant claims that the Registration Reduction Provision usurps the judiciary's power to impose and to review sentences in criminal cases. His complaints are unfounded, because the arson registry is remedial and not part of the sentence made available to the judiciary to impose for arson offenses. And even if registration requirements could properly be regarded as a part of the criminal sentence, conditioning relief from the requirements on a request by the executive branch does not amount to an impermissible restriction on the courts' ability to impose sentences in criminal cases.

### B. The arson registration requirements are not part of a criminal sentence.

The Revised Code defines "sentence" to mean "the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads

guilty to an offense." R.C. 2929.01(EE). "Sanction" is specifically defined to include provisions found in Chapter 2929 of the Revised Code:

> "Sanction" means any penalty imposed upon an offender who is convicted of or pleads guilty to an offense, as punishment for the offense. "Sanction" includes any sanction imposed pursuant to any provision of sections 2929.14 to 2929.18 or 2929.24 to 2929.28 of the Revised Code.

R.C. 2929.01(DD). Similarly, "a sentence is a penalty or combination of penalties imposed on a defendant as punishment for the offense he or she is found guilty of committing." *State v. Harris*, 132 Ohio St.3d 318, 2012-0hio-1908, 972 N.E.2d 509, ¶28 (holding that an order of forfeiture is not a sentence).

This Court has recognized that the "intent-effects test" is used in assessing the punitive or remedial character of a statutory provision. *State v. Cook*, 83 Ohio St.3d 404, 415, 700 N.E.2d 570 (1998). Several factors are relevant, including

> ...whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned * * *.

*Id.* at 418, quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). Placement within the criminal code as well as the potential for criminal prosecutions for failure to comply with registration requirements are also considered. *See State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶11.

The intents-effect test has been used in assessing the punitive and remedial nature of different versions of Ohio's sex offender registry as well as the Violent

Offender Database. Appellant and his amicus urge the Court to apply *Williams* and hold that the arson registry is a punitive measure, but *Williams* involved the Adam Walsh Act's registration requirements. (Brief of Appellant at pp. 8-11; OPD Brief at pp. 6-7.) The Adam Walsh Act imposes greater burdens and restrictions on registrants than the arson registry statutes. The intent and requirements of the arson registry more closely resemble those of the Violent Offender Database created by Sierah's Law, which the Court has found not to be punitive. *See State v. Hubbard*, 167 Ohio St.3d 77, 2021-Ohio-3710, 189 N.E.3d 720. *Hubbard*, not *Williams*, should guide the Court's consideration of the remedial nature of the arson registry.

**1. Intent and Remedial Purpose**

Legislative intent is assessed through "the language and purpose of the statute." *Cook, supra*, 83 Ohio St.3d at 416. Like the Violent Offender Database, the arson registry is "a law enforcement technique designed for the convenience of law enforcement agencies through which a list of the names and addresses of felons then residing in a given community is compiled." *Hubbard, supra*, 2021-Ohio-3710, ¶32, quoting *Lambert v. California*, 355 U.S. 225, 229, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957). And like Sierah's Law, the arson registry requirements do not reflect an intent to inflict punishment. *See Hubbard, supra*, ¶31. The language of the arson registry statutes "reveals the General Assembly's intent was to promote public safety" by assisting "law enforcement officials to remain vigilant about possible recidivism by arson offenders." *State v. Reed*, 2014-Ohio-5463, 25 N.E.3d 480 (11th Dist.), ¶79. Allowing law enforcement officials to initiate any relief from the registration term is sensible, "because law enforcement officials are in the best position to determine how best to exercise their

enforcement powers to protect the public from repeat offenders." *Daniel, supra*, 2022-Ohio-1348, ¶24, citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

**2. Restraint or Burdens**

Requiring registration with the sheriff of the county in which the offender resides is not in itself a restraint. *Cook, supra*, 83 Ohio St.3d at 418. Registration with a single sheriff's office may create a personal inconvenience, but is considered at most "a de minimus administrative requirement." *Id.* Arson offenders register annually, the same frequency as required for violent offenders, and both categories of offenders provide the sheriff with the same identifying information. *See* R.C. 2909.15(C)(2) and (D) and R.C. 2903.43(C)(2) and (D). Both arson and violent offenders register in the county where they reside. *See* R.C. 2909.15(C)(1) and 2903.43(C)(1). In contrast, sex offenders face registration in as many as three counties, those where they reside, work, and attend school, and must register as often as every 90 days. *Williams, supra,* 2011-Ohio-3374, ¶14; *State v. Caldwell,* 18 N.E.3d 467, 2014-Ohio-3566, ¶34 (1st Dist.). Finally, the arson registry does not impose residency restrictions, unlike the current iteration of the sex offender registry. *Williams, supra*, 2011-Ohio-3374, ¶14; R.C. 2950.034(A); *Hubbard, supra*, ¶34.

**3. Historical Registration and Notification Requirements**

This Court has previously recognized that registration "has long been a valid regulatory technique with a remedial purpose." *Cook, supra*, 83 Ohio St.3d at 419. Such registrations provide law enforcement officials access to registered information in order to protect the public. *Id.*

Dissemination of information about offenders may also be considered in relation to the historical role of registrations. *Cook, supra*, 83 Ohio St.3d at 419. Similar to the Violent Offender Database, the arson registry is not a public record and is accessible only to law enforcement officers. *See* R.C. 2909.15(E)(2) and R.C. 2903.43(F)(2). The limited dissemination of information stands in sharp contrast to the Adam Walsh Act, which provides substantial information about offenders in the sex-offender database available to the general public through internet access, without the need to make requests pursuant to Ohio's public records law. *See Williams, supra*, 2011-Ohio-3374, ¶14, citing R.C. 2950.081; *Caldwell, supra*, 2014-Ohio-3566, ¶34. Likewise, neither the Violent Offender Database nor the arson registry involve community notification, while the Adam Walsh Act requires community notification of certain offenders residing in the area. *Bodyke, supra*, 2010-Ohio-2424, ¶28, citing R.C. 2950.11(A)(1)(b). The arson registry's limited availability weighs in favor of finding that the arson registry is remedial, rather than imposing a burden on the offender. *See Hubbard, supra*, 2021-Ohio-3710, ¶36. *Compare Williams, supra*, 2011-Ohio-3374, ¶15 (emphasizing the stigma associated with placement on a public sex offender registry).

The arson registry statutes impose no restrictions or conditions on how an offender may live his or her life, do not place the offender "under the control and supervision of [a] probation agency" and do not forbid lawful activities such as consuming alcohol or leaving the state without permission. As this Court observed in the context of the Violent Offender Database, a duty to register "does not resemble traditional forms of punishment." *Hubbard, supra*, 2021-Ohio-3710, ¶36.

**4. Scienter**

R.C. 2909.15(A) provides that arson offenders "shall register" with the sheriff of the county in which they reside. The act of failing to register may result in prosecution for a fifth degree felony without any stated scienter. R.C. 2909.15(H).

The potential for punishment for failure to register does not convert a remedial statute into a punitive measure. *See Cook, supra,* 83 Ohio St.3d at 419-420; and *Hubbard, supra,* 2021-Ohio-3710, ¶35. The punishment for failure to register represents a new violation of law, rather than the original offense for which registration is required. *Caldwell, supra,* 2014-Ohio-3566, ¶31. Laws commonly "impose duties on certain classes of people and enforce those duties through criminal penalties." *Hubbard, supra*, 2021-Ohio-3710, ¶35. Moreover, the penalty for failure to register as an arson offender is a felony of the fifth degree, a "low-level felony that carries a presumption of probation." *Caldwell*, 2014-Ohio-3566, ¶34. In contrast, failure to register as a sex offender generally carries a felony of the same degree as the underlying sexually oriented offense. *See* R.C. 2909.15(H), 2903.43(I)(2) and 2950.99(A)(ii).

**5. Retribution and Deterrence**

Registration requirements "do not seek vengeance for vengeance's sake, nor do they seek retribution. Rather, these provisions have the remedial purpose of collecting and disseminating information to relevant persons to protect the public from registrants who may reoffend." *Cook, supra,* 83 Ohio St.3d at 420. And given the carceral penalties available for felony offenses, an annual registration requirement with a single law enforcement office would appear to have little deterrent effect, particularly when that

requirement is unaccompanied by community notification, public access, or residency restrictions. *Id.*; *see also Hubbard, supra,* 2021-Ohio-3710, ¶39.

**6. Placement within the Revised Code.**

The arson registry is located within the criminal code. *See* R.C. 2909.13, et seq. Such placement is insufficient to necessitate a finding that the statutory scheme was punitive. Like Sierah's Law, the arson registry statutes are not codified "in Chapter 2929, where penalties and sentences for violent offenses are contained." *Hubbard, supra*, 2021-Ohio-3374, ¶31; *see also* R.C. 2929.01(EE). Moreover, the trial court's notification of registration obligations does not transform a notice into a criminal sentence. "Invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive." *Hubbard, supra*, 2021-Ohio-3374, ¶31.

**7. Excessiveness in Relation to Alternative Purpose**

The burden of registration requires the offender to provide basic identifying information on an annual basis with a single law enforcement office. The burden is not unduly onerous in relation to the intent of providing an arson investigation tool or preventing risk to public safety by recidivist arson offenders. *See Hubbard, supra,* 2021-Ohio-3710, ¶40; *Reed, supra*, 2014-Ohio-5463, ¶83; *State v. Galloway*, 50 N.E.3d 1001, 2015-Ohio-4949 (5th Dist. Delaware).

The State recognizes that Sierah's Law creates a presumptive 10-year period of registration for violent offenders, as compared to the lifetime registration period for the arson registry. Of course, under Sierah's Law, a court may extend the 10-year enrollment period indefinitely. *See* R.C. 2903.43(D)(2). But even assuming that the registration periods could not be extended under Sierah's Law, the minimal burden of

an annual registration in the arson registry maintained solely for use by law enforcement, without residency restrictions and without community notification, is nevertheless more comparable to the requirements of Sierah's Law than to those imposed by the Adam Walsh Act.

*Hubbard*'s analysis as applied to the arson registry compels the conclusion that its provision are civil and remedial, not punitive. But when analyzed as a sentence, the registry requirements also fail to reveal any unconstitutional usurpation of judicial authority.

### C. The Registration Reduction Provision merely establishes a mechanism by which trial courts may provide relief from sentencing requirements adopted by the legislature.

The judiciary's essential function "involves fact finding, and application of statutory principles and policies to the facts found." *State ex rel. Bryant v. Akron Metro. Park Dist.,* 120 Ohio St. 464, 476, 166 N.E. 407 (1929). Judicial power extends to the court's ability to "determine guilt in a criminal matter," a power which the legislature may not infringe upon. *State v. Sterling*, 113 Ohio St.3d 255, 2007-0hio-1790, 864 N.E.2d 630, ¶34-35. Similarly, the legislature may not vest the executive branch with authority to set aside a previous judicial order, including a previous sex offender classification. *Bodyke, supra*, 2010-Ohio-2424, ¶55.

The judiciary possesses the inherent power "to maintain order, to secure the attendance of witnesses to the end that the rights of parties may be ascertained, and to enforce process to the end that effect may be given to judgments" because in the absence of those powers, "no other could be exercised." *Hale v. State*, 55 Ohio St. 210, 213, 45 N.E. 199 (1896). Those inherent powers do not extend to the imposition of sentences. "A court has no power to substitute a different sentence for that provided for

by statute or one that is either greater or lesser than that provided for by law." *State v. Taylor*, 138 Ohio St.3d 194, 2014-0hio-460, 5 N.E.3d 612, ¶18, quoting *Colegrove v. Burns*, 175 Ohio St.437, 438, 195 N.E.2d 811 (1964). *See also State v. Anderson*, 143 Ohio St.3d 173, 2015-0hio-2089, 35 N.E.3d 512, ¶12 and *State v. Beasley*, 14 Ohio St.3d 74, 75, 471 N.E.2d 774 (1984). The trial court's discretion in sentencing "exists only to the extent that it has been provided by the legislature." *State v. Hitchcock*, 157 Ohio St.3d 215, 2019-0hio-3246, 134 N.E.3d 164, ¶35.

The General Assembly acts within its sphere of authority when it adopts sentencing ranges and procedures, because the "people of Ohio conferred the authority to legislate solely on the General Assembly," including "the important and meaningful role of defining criminal offenses and assigning punishment for those offenses." *State v. South*, 144 Ohio St.3d 295, 2015-Ohio-3930, 42 N.E.3d 734, ¶28 (O'Connor, C.J., concurring). *See also State v. Morris*, 55 Ohio St.2d 101, 112, 378 N.E.2d 708 (1978) and *State v. Thompkins*, 75 Ohio St.3d 558, 560, 1996-0hio-264, 664 N.E.2d 926 (1996).

The legislature's plenary power permits it to completely strip the judicial branch of all discretion to reduce the arson registration period. "The discretionary power of judges to sentence is granted by the legislature and can be circumscribed by the legislature." *State v. Dopart*, 9th Dist. Lorain No. 13CA010486, 2014-0hio-2901, ¶7. As this Court observed, "If the legislature had the power to create, it had the power to destroy, and the power to destroy includes the power . . . to impose conditions or restrictions as its judgment shall dictate." *Euclid v. Camp Wise Ass'n*, 102 Ohio St. 207, 210, 131 N.E. 349 (1921).

By conditioning judicial discretion to reduce the registration period upon a request from the executive branch, the General Assembly did not encroach on a "power properly belonging to" the judicial branch nor did it exert an "overruling influence" over the judicial branch in violation of the doctrine of separation of powers. *Bodyke, supra*, at ¶44. The judicial branch has no inherent power to reduce the arson registration period, but the General Assembly has plenary power to create the arson registration statute however its judgment shall dictate. The legislature's "creation of R.C.2909.15(D)(2)(b), *establishes* an aspect of judicial discretion that is triggered by, and becomes available as a result of, the executive branch recommendation. Thus, the statute puts into place, rather than infringes upon, the judiciary's authority to sentence a defendant to a reduced arson registration period." *Daniel*, supra, 2022-Ohio-1348, at ¶22 (emphasis in original).

### D. Prosecutorial discretion as a catalyst to the exercise of judicial discretion does not offend separation of powers principles.

Ohio law permits the exercise of discretion by the executive in numerous ways that trigger (or limit) the trial court's discretion at sentencing. A prosecutor has the authority to decide whether to prosecute a case and what charges to present to the grand jury. *See, e.g., State ex rel. Nagle v. Olin*, 64 Ohio St.2d 341, 347, 415 N.E.2d 279 (1980). Although that exercise of authority dictates the range of any sentence ultimately imposed by the court, such authority is not an unconstitutional encroachment on the judiciary's sentencing authority. *See State ex rel. Tipton v. Schisler*, 4th Dist. Scioto Case No. 90CA1926, 1991 Ohio App. LEXIS 4510, at *7 (Sep. 25, 1991) ("It is a rule of almost universal application in both federal and state courts that...prosecuting attorneys have discretion as to what cases they will prosecute and such discretion will

not be controlled by the judicial branch")." *See also United States v. Batchelder*, 442 U.S. 114, 123-125, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979) (when an act violates more than one criminal statute, the Government may prosecute under either even though doing do "enables the sentencing judge to impose" certain penalties and precludes the imposition of others).

As the criminal case proceeds, the prosecutor may drop or amend charges in exchange for a plea, an exercise of prosecutorial discretion which may also limit or preclude the imposition of certain sentences. The exercise of such prosecutorial discretion does not encroach upon the judiciary's inherent powers to impose an appropriate sentence for the offense in question.

The prosecutor-as-catalyst role does not end with the selection of charges but directly affects the sentencing process. If two convictions merge, the prosecutor may elect to pursue the higher degree of the two offenses, and the court must accept that selection and sentence accordingly. The court has no discretion to sentence on the lesser offense even though it would result in a shorter sentence. *See State v. Whitfield*, 124 Ohio St.3d 319, 2010-0hio-2, 922 N.E.2d 182, ¶20 ("The General Assembly has made clear that it is the state that chooses which of the allied offenses to pursue at sentencing, and it may choose any of the allied offenses."); and *State v. Wilson*, 129 Ohio St.3d 214, 2011-0hio-2669, 951 N.E.2d 381, ¶11 ("the trial court's authority is limited to accepting the state's merger selection").

By conditioning judicial discretion to consider a reduction in the registration period, the General Assembly did not endow the executive branch with power to impose a sentence. Rather, the recommendation of the executive branch triggers the exercise

of judicial discretion, a sensible arrangement considering that the arson registry exists for the remedial purpose of allowing law enforcement officials to remain vigilant about possible recidivism by arson. Law enforcement officials are in the best position to determine how to best exercise their enforcement powers to protect the public from repeat arson offenders, not the court.

### E. Authorities involving the judiciary's factfinding powers have no bearing on the judiciary's duty to sentence in accordance with laws enacted by the legislature.

Appellant relies on *State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790, 864 N.E.2d 630, and *State ex rel. Bray, supra*, 2000-Ohio-117, to support his claim that the arson registry violates the separation of powers. Both *Sterling* and *Bray* are materially distinct from the statute at issue in this case.

*Sterling* held unconstitutional a statute which allowed the prosecutor to disagree with an inmate's request for DNA testing and provided that the decision was not appealable. *Sterling* reasoned that the statute ceded to the prosecutor "the court's function in determining guilt, which is solely the province of the judicial branch of government." *Id.* at ¶35. The Court concluded that "the legislature may not impede the judiciary in its province to determine guilt in a criminal matter--and DNA testing results affect that issue—nor can it delegate to the executive branch of government the power to exercise judicial authority." *Id.* at ¶34. In contrast, the arson registry has no bearing whatsoever on the court's power to determine guilt. As the Sixth District held, "*Sterling* involved a wholly different statute and the implication of a wholly different judicial power than those at issue in the instant case." *Daniel, supra*, 2022-Ohio-1348, ¶18.

Like *Sterling*, *Bray* also involved a different statute and different judicial power. *Bray* considered the constitutionality of former R.C. 2967.11(B), which created "bad

time" provisions allowing the parole board to impose prison terms for violations. The statutory scheme enabled "the executive branch's acting as judge, prosecutor, and jury," an intrusion "well beyond the defined role of the executive branch" established by the Constitution. *Bray, supra*, 89 Ohio St.3d at 135.

In contrast to those broad powers, the Registration Reduction Provision permits the prosecutor and investigating law enforcement agency to request relief from lifetime duty, after the determination of guilt has been made by the court. The structure of the Registration Relief Provision does not vest the executive branch with any factfinding or sentencing authority but merely allows law enforcement to recommend that the Court reduce the registration period in certain cases, after the finding of guilt has occurred.

## III. The Registration Reduction Provision does not encroach on the judiciary's powers of appellate review.

When an executive decision made pursuant to statutory authority does not encroach upon a power of the judicial branch, the fact that such executive discretion is not subject to appellate review does not violate the doctrine of separation of powers. *See Maryland v. United States*, 460 U.S. 1001, 1105, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983) ( "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion."), quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803). *See also McMellon v. United States*, 387 F.3d 329, 342 (4th Cir.2004) ( "Simply stated, principles of separation of powers mandate that the judiciary refrain from deciding questions consigned to the concurrent branches of the government.").

The statutory discretion of the executive branch to request a reduced registration period does not offend the doctrine of separation of powers simply because it is not

subject to appellate review. The doctrine of separation of powers does not require that the three branches of government "be kept entirely separate and distinct," but rather precludes one branch from wholly usurping the power invested in another branch. *Stanton, supra,* 114 Ohio St. at 664.

Ohio's appellate courts have subject matter jurisdiction to review the exercise of judicial discretion to reduce the arson registration period only where such judicial discretion exists, i.e., where the General Assembly has granted the judiciary such discretion. In the absence of a recommendation by the prosecutor and investigating law enforcement agency, "the court must impose a lifetime period of registration and there is no judicial discretion to review on appeal." *Daniel, supra*, 2022-Ohio-1348, ¶25. Until that recommendation is made, "the Arson Offender Registry statute is simply a mandatory [lifetime] registration statute." *State v. Carlisle,* 136 N.E.3d 570, 2019-Ohio-4651, ¶17 (11th Dist.).

When the prosecutor and law enforcement agency make the recommendation, "it does not interfere or remove a court's discretion because the executive branch's request does not bind the court to act in accordance with the recommendation." *Carlisle, supra*, 2019-0hio-4651, ¶16. The court "has full discretion to choose between a lifetime reporting period or a reduced reporting period of not less than ten years, and the appellate court has subject matter jurisdiction to review the exercise of that judicial discretion." *Daniel, supra*, 2022-Ohio-1348, ¶25.

Appellant relies on this Court's decision in *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 159, 503 N.E.2d 136 (1986) in support of his complaint that the arson registry strips the judiciary of its appellate powers. *Jemison* considered the validity of R.C.

4509.101, which involved procedures following trial courts' suspension of licenses for failure to establish financial responsibility at the time of a traffic offense. The statutory scheme required the clerk of courts to notify the Registrar of Motor Vehicles of the suspension. The Registrar then notified the individual of the obligation to present proof of financial responsibility along with a certificate of registration, plates, and license, or to submit a statement that he did not operate or permit the operation of the motor vehicle at the time of the offense and has not failed to appear in court on the charge. The Registrar was required to investigate to determine "whether there is a reasonable basis for believing that the person has operated or permitted the operation of the motor vehicle at the time of the traffic offense without the operation being covered by proof of financial responsibility," followed by an opportunity for a hearing to determine whether the individual violated the statute.

In holding the statute violated the doctrine of separation of powers, *Jemison* reasoned that the Registrar was empowered to accept a statement from the motorist that expressly contradicted the trial court's findings. The registrar could then terminate a court-ordered suspension, which in effect permitted the registrar to review and possibly reverse or vacate a prior court order. *Id.,* 28 Ohio St.3d at 162.

No similar mechanism is at work in the arson registry statutes. The prosecutor and investigating law enforcement agency may recommend relief from the arson offender's lifetime registration requirement, after which the trial court may exercise its discretion and grant or deny the recommended relief. The court—not the prosecutor and law enforcement--determines whether to grant the recommended relief. And once the trial court makes that determination, it is subject only to judicial review. The

prosecutor and law enforcement have no authority to vacate or reverse or override the trial court's determination.

*Jemison* fails to support the notion that the Registration Reduction Provision usurps the appellate function of the judiciary. The Registration Reduction Provision enables the exercise of judicial discretion which is then subject to judicial review, not review by the executive branch.

## IV. If the Court finds that the Registration Reduction Provision violates the separation of powers, the appropriate remedy is not to sever part of the provision, but instead, to sever the relief provision in its entirety.

Appellant asks the Court to declare the Registration Reduction Provision unconstitutional and excise the portion conditioning relief on a request by the prosecutor and the investigating law enforcement agency, so that the statute would read:

> (a) Except as provided in division (D)(2)(b) of this section, the duty of an arson offender or out-of-state arson offender to reregister annually shall continue until the offender's death.
> (b) The judge may limit an arson offender's duty to re-register at an arson offender's sentencing hearing to not less than ten years ~~if the judge receives a request from the prosecutor and the investigating law enforcement agency to consider limiting the arson offender's registration period.~~

R.C. 2909.15(D)(2)(a) and (b).

Before severing language found to be unconstitutional from the remaining portions of a statute, this Court asks

> (1)Are the constitutional and the unconstitutional parts capable of separation so that **each may be read and may stand by itself?** (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?"

*Geiger v. Geiger*, 117 Ohio St. 451, 466, 160 N.E. 28 (1927) (emphasis added), quoting *State v. Bickford,* 28 N.D. 36, 147 N.W. 407 (1913). "Severance is

appropriate only when the answer to the first question is yes and the answers to the second and third questions are no." *Romage, supra*, 2014-Ohio-783, ¶15. *See also* R.C. 1.50 (constitutional invalidity of one provision of a section "does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable").

The first question suggests that the severed portion of the statute should be capable of existing independently, "by itself." But the conditional clause in the Registration Reduction Provision is dependent on the remaining text, so that it is not capable of standing "by itself" after separation from the remaining text.

The legislature's evident intent in creating the registry was to permit the executive branch to assess the need for lifetime registration in order to protect public safety. That intent is frustrated by permitting the trial court to shorten the registration period in the absence of a request by the executive branch. Severance of the conditional clause is a remedy not permitted pursuant to *Geiger, supra*.

## CONCLUSION

The certified question should be answered in the negative, and the Sixth Appellate District's judgment should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent, via e-mail, this 30th of November, 2022 to Edward J. Stechschulte at estechschulte@ioriolegal.com, Attorney for Defendant-Appellant; R. Jessica Manungo at Jessica.manungo@opd.ohio.gov, Counsel for Amicus Curiae, Ohio Public Defender; Benjamin M. Flowers at Benjamin.flowers@ohioago.gov, Counsel for Amicus Curiae, Ohio Attorney General; and Steven L. Taylor at taylor@ohiopa.org, Counsel for Amicus Curiae, Ohio Prosecuting Attorneys Association.

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