IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
		Case No. 2022-0603
Plaintiff-Appellee,	:	
		On Appeal from the
v.	:	Lucas County Court of Appeals, Sixth Appellate District
TYREE K. DANIEL,	:	
		COA Case No. L-21-1104
Defendant-Appellant.	:	

MERIT BRIEF OF AMICUS CURIAE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT TYREE K. DANIEL

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STATEMENT OF THE CASE AND FACTS

Amicus curiae adopts and incorporates the statement of the case and facts as set forth by Mr. Daniel in his merit brief.

STATEMENT OF INTEREST OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender ("OPD") is a state agency that represents indigent criminal defendants and coordinates criminal-defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio law and procedural rules. A primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The mission of the OPD is to protect and defend the rights of indigent persons by providing and supporting superior representation in the criminal and juvenile justice systems.

As amicus curiae, the OPD offers this court the perspective of experienced practitioners who routinely handle criminal cases in Ohio courts. This work includes representation at both the trial and appellate levels. The OPD has an interest in the present case because, at its heart, it involves a constitutional issue that is of vital importance to individual liberty: the separation of powers. The power of the courts should not be restrained by preconditioning a judge's consideration to reduce an individual's sentence on a recommendation from the executive branch. That is especially true where, as here, the sentencing of an individual convicted of a crime is solely a judicial power.

INTRODUCTION

Sentencing is an exclusively judicial function. But when another branch of government—in this case, the executive—must first recommend whose sentence can be reduced, the institutional values protected by separation of powers are threatened. Here, the prosecutor has control over who receives a lifetime registration as an arson offender and who can be considered for a reduced registration period. Such control derogates the independence of judicial authority and weakens the fairness and impartiality of how the law is applied. This court should prevent the erosion of such fundamental principles.

ARGUMENT

The Sixth District Appellate Court has certified the following issue for conflict:

"Does R.C. 2909.15(D)(2)(b) unconstitutionally violate the doctrine of separation of powers?"

I. Ohio's Arson Offender Registration Scheme

Effective July 1, 2013, Ohio adopted a statewide arson offender registry. Am.Sub.S.B. No. 70. Under the scheme, a person who meets the definition of an "arson offender" under R.C. 2909.13(B) must register annually for life. R.C. 2909.15(D)(2)(a). There is an exception, however, to this lifetime registration – the judge providing the notice at the time of sentencing is permitted to "limit an arson offender's duty to reregister 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*." (Emphasis added.) R.C. 2909.15(D)(2)(b). This provision violates the separation of powers doctrine.

II. The Separation-of-Powers Doctrine

The first, and defining, principle of a free constitutional government is the separation of powers. *Evans v. State*, 872 A.2d 539, 543 (Del.2005).

> It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers [e]ntrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons [e]ntrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other.

Kilbourn v. Thompson, 103 U.S. 168, 190-191, 26 L.Ed. 377 (1880). Thus, fragmenting government power among the three institutions and guaranteeing that fragmentation is a long-standing principle of constitutional governance to control the actual exercise of that power. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U.Pa.L.Rev. 603 (2001).

And although the Ohio Constitution does not contain explicit language establishing the doctrine of separation of powers, it "is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three [separate] branches of state government. *State ex rel. Bryant v. Akron Metro. Park Dist.*, 120 Ohio St. 464, 166 N.E. 407 (1929); *State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790, 864 N.E.2d 630, ¶ 22; See Articles II, III, IV, Ohio Constitution. These branches have their own unique powers and duties that are separate and apart from the others. *State v. Thompson*, 92 Ohio St.3d 584, 586, 752 N.E.2d 276 (2001); *State ex rel. Finley v. Pfeiffer*, 163 Ohio St. 149, 155, 126 N.E.2d 57 (1955); *I.N.S. v. Chadha*, 462 U.S. 919, 951, 103 S.Ct. 2764, 77 L.Ed.2d 317

(1983). This structure facilitates the separation of powers and effectively means that one branch cannot interfere with, encroach upon, or exercise powers vested in another. *City of S. Euclid v. Jemison*, 28 Ohio St.3d 157, 158-59, 503 N.E.2d 136 (1986); *Finley* at 155.

In light of this doctrine, "[t]he administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." *State ex rel. Johnston v. Taulbee*, 66 Ohio St.2d 417, 423 N.E.2d 80 (1981), paragraph one of the syllabus. Courts of general jurisdiction possess "all powers necessary to secure and safeguard the free and untrammeled exercise of their judicial functions and cannot be directed, controlled or impeded therein by other branches of the government." (Citation omitted.) *Id.* at paragraph two of the syllabus.

The certified conflict question is an opportunity for this court to establish whether the clause in R.C. 2909.15(D)(2)(b) violates the separation of powers doctrine and is therefore, unconstitutional. To do so, this court must resolve two essential questions:

(1) Does R.C. 2909.15(D)(2)(b) involve a judicial power, and

(2) By conditioning the reduction of the arson offender's registration period on a request by the executive, does that clause encroach on or limit the judicial power to sentence an arson offender?

Because the answer to both of these questions is yes, the clause in R.C. 2909.15(D)(2)(b) violates the separation of powers doctrine.

a. R.C. 2909.15(D)(2)(b) involves the judicial power of sentencing.

In Ohio's constitutional scheme, the judicial power resides in the judicial branch. Section 1, Article IV of the Ohio Constitution. Although the General Assembly has the plenary power to define, classify, and prescribe punishment, it is the judiciary that has been tasked with deciding cases, rendering judgments, and impose statutorily required punishment through its sentencing

authority. *State v. Bates*, 118 Ohio St.3d 174, 2008-Ohio-1983, 887 N.E.2d 328, ¶ 12-13, citing *State v. O'Mara*, 105 Ohio St. 94, 139 N.E. 885 (1922), paragraph one of the syllabus. Thus, "[t]he determination of guilt in a criminal matter and the sentencing of the defendant convicted of a crime are solely the province of the judiciary." *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 136, 729 N.E.2d 259 (2000). Under the basic concept of separation of powers, this judicial province "can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power * * *." *Stern v. Marshall*, 564 U.S. 462, 483, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011).

"Sentence" is defined as "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) And a "sanction" is "any penalty imposed upon an offender who is convicted of or pleads guilty to an offense, as punishment for the offense." R.C. 2929.01(DD). Simply put, 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-Ohio-1908, 972 N.E.2d 509, ¶ 28. Therefore, because here, the registration requirements for arson offenders are penalties imposed as a result of the offender's punishment, the arson registry implicates the judiciary's power of sentencing.

Under R.C. 2909.15(D)(2)(b), the judge may limit the arson offender's duty to register at the arson offender's sentencing hearing to not less than ten years if the prosecutor and the investigating law enforcement agency make a request to the judge. In other words, the sentencing court may impose a reduced registration period at the sentencing hearing on a person who has been convicted of or pleads guilty to an arson-related offense. Because the sentencing court imposes this registration requirement at the sentencing hearing, it is problematic to conclude that

it is not part of the sentence. Ultimately, since the provision in question authorizes the sentencing court to impose a reduced registration period at the sentencing hearing, it involves the judicial power of sentencing. *State v. Carlisle*, 2019-Ohio-4651, 136 N.E.3d 570, ¶ 61-64 (11th Dist.) (Trapp, J, dissenting); *See also State v. Lawson*, 1st Dist. Hamilton Nos. C-120077 and C-120067, 2012-Ohio-5281, ¶ 18 ("S.B. 10's sex-offender registration requirements are part of a sex offender's sentence"); *State v. Martinez*, 8th Dist. Cuyahoga Nos. 103572, 103573, 2016-Ohio-5515 (sex offender registration requirements imposed as part of a defendant's sentence); *State v. Thompson*, 11th Dist. Portage No. 2006-P-0112, 2007-Ohio-3196 (public indecency was not an offense to which sexually oriented offender registration was an available sentence).

In the decision below, the Sixth District Court of Appeals disposed of this question by concluding that the arson registration statute is not punitive because the registration requirements are not part of any sentence imposed on the arson offender and thus, do not constitute a criminal sentence. *State v. Daniel*, 6th Dist. Lucas No. L-21-1104, 2022-Ohio-1348, ¶ 19. The court reasoned that the statutory obligation to register as an arson offender was not actually part of the sentence imposed on the arson offender but a collateral consequence of the individual's criminal acts. *Id*. Other Ohio courts have also found the arson registration statute remedial and not punitive *See e.g., State v. Reed*, 2014-Ohio-5463, 25 N.E.3d 480, ¶ 80 (11th Dist.). Accord *State v. Galloway*, 5th Dist. Delaware No. 15CAA040029, 2015-Ohio-4949, ¶ 35 ("We are persuaded that the arson offender registration requirements are remedial and not punitive"); *State v. Caldwell*, 2014-Ohio-3566, 18 N.E.3d 467, ¶ 35 (1st Dist.) ("[T]he statutory scheme is remedial in nature * * * ").

However, prior to this court's decision in *Williams* establishing that the sex offender registration scheme is punitive, lower courts had held that it was not punishment or part of any

sentence imposed on the sex offender, and therefore remedial and not punitive. *See e.g.*, *Burbrink v. State*, 185 Ohio App.3d 130, 2009-Ohio-5346, 923 N.E.2d 626 (1st Dist.). ¶ 10. This court reversed course by holding that the sex offender registration and notification requirements of S.B. 10 were indeed punitive. *See State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶ 16 ("Following the enactment of S.B. 10, all doubt has been removed: R.C. Chapter 2950 is punitive"); *State v. Blankenship*, 145 Ohio St. 3d 221, 2015-Ohio-4624, ¶ 9, 48 N.E.3d 516 ("We * * * have held that the enhanced sex-offender reporting and notification requirements contained in R.C. Chapter 2950 enacted by Am.Sub.S.B. No. 10 * * * are punitive in nature").

To arrive at that point, this court, in *Williams*, discussed factors that supported a finding that the sex offender registry is punitive. *Williams* at ¶ 11-15. And because the arson-offender registration statutes bear similarities to the sex-offender registration statutes, the same factors demonstrate that the arson offender registry is punitive. Both the sex-offender and arson offender registration schemes have been placed within R.C. Title 29 – Ohio's criminal code. *See Williams* at ¶11. The failure to register under either scheme subjects offenders to criminal prosecution. *See id*. Arson offenders are automatically subject to registration requirements upon conviction for any arson-related offense, "without regard to the circumstances of the crime or [their] likelihood to reoffend." *See id*. at ¶ 16. The initial registration requires payment of a fee of fifty dollars, and annual re-registration thereafter requires payment of a fee of twenty-five dollars. R.C. 2909.15(F). Failure to register or to re-register as required is a felony of the fifth degree. R.C. 2909.15(H). Arson offenders are not entitled to a hearing prior to classification, nor is there any opportunity for the court to review the appropriateness of the classification. *See id*. at ¶ 19. Further, arson offenders are automatically subject to a lifetime reporting requirement – with a

limited exception that permits the sentencing court to reduce their reporting requirement to no less than ten years, upon the request of the prosecutor and investigating officer. R.C. 2909.15(D)(2)(b).

While there are some significant differences with the sex offender registry as to the frequency of re-registering, the publicity of the record, and residential restrictions, that does not abrogate the new duties, and obligations placed on the individual as a result of being on the registry. This registry is maintained by the Bureau of Criminal Identification and Investigation. R.C. 2909.15(E)(2). And can be accessed by the fire marshal's office, state and local law enforcement officers, and certain authorized firefighters. *Id*. Still, all arson offenders are expected, for the remainder of their lives, to register, in-person, their residences, employment, school or institution of higher education, vehicles owned or operated, fingerprints, palm prints, and any physically distinguishing marks. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the burden or punishment imposed as a result of the offender's actions. *Id*. at ¶ 15, citing *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, ¶ 47. These duties are demanding and cannot, for example, be compared to the inconvenience of renewing a driver's license. *See e.g.*, *State v. Cook*, 83 Ohio St.3d 404, 418, 1998 Ohio 291, 700 N.E.2d 570 (1998).

But regardless of whether the statute is remedial or punitive, the relevant inquiry here is whether one provision of the arson registry statutory scheme, i.e., R.C. 2909.15(D)(2)(b), not the entire statutory scheme, involves the judicial power of sentencing. Does it encroach on a power properly belonging to the judicial branch that should not be directly or completely administered by either of the other branches? *Carlisle*, 2019-Ohio-4651, 136 N.E.3d 570, ¶ 25-27 (Trapp, J, dissenting).

b. By only allowing a reduction of the lifetime registration after or upon the request from the prosecutor and law enforcement, R.C. 2909.15(D)(2)(b) encroaches upon a judicial power.

Under R.C. 2909.15(D)(2)(b), the sentencing court has the discretion to impose a reduced reporting period of not less than ten years if—and only, if—the prosecutor and the investigating law enforcement agency make a request for that reduction. Without that request, the sentencing court cannot consider imposing a reduced reporting period and the arson offender must register for life. *See State v. Dingus*, 4th Dist. Ross No. 16CA3525, 2017-Ohio-2619. The *Dingus* court concluded that by depriving the sentencing court of the ability to act without the request of the prosecutor and the investigating law enforcement agency, the sentencing court's independence was compromised. *Id*. at ¶ 31. Effectively, it is the prosecutor and the law enforcement agency, i.e., the executive, who decide which registration periods can be reviewed by the court. *Id*. So, the executive, in this case, has a prevailing influence over, and directs the sentencing court toward, the registration periods that it can and should reduce. *Id*. This direction and encroachment is fatal to the separation of powers.

The *Daniel* court, on the other hand, focused on the apparent discretion of the sentencing court. The court concluded that 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, this recommendation was reasonable. *Id*. at ¶ 24. The court added that the prosecutor's request is simply a recommendation that is not binding on the sentencing court to act in accordance with that recommendation. *Id*. at ¶ 22. It also concluded that the recommendation did not encroach on an inherent power of the judicial branch because the sentencing court maintains its full discretion to choose between a lifetime reporting period or a reduced reporting period of not less than ten years. *Id*. And the appellate court has subject matter jurisdiction to review the

exercise of that judicial discretion. *Id*. What the *Daniel* court failed to factor in was that the only way that the sentencing court even considers this reduction in reporting is if the executive actors recommend it. The sentencing court cannot reduce the lifetime registration requirement on its own. In this way, the exercise of judicial authority is restricted to only those instances where the prosecutor agrees with and supports the reduction. *Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790 at ¶ 34. Where the prosecutor does not agree and therefore, does not recommend a reduction, the sentencing court has no authority to exercise its discretion. Because the imposition of a sentence is a power that lies solely within the province of the judicial branch, this encroachment into another branch's role renders R.C. 2909.15(D)(2)(b) unconstitutional. Article IV, Section 1, Ohio Constitution; Article III, Section 2, United States Constitution. *See also Bray* at 136, citing *State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 648, 4 N.E. 81 (1885).

CONCLUSION

For these reasons, this court should find that R.C. 2909.15(D)(2)(b) violates the constitutional guarantee of separation of powers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically delivered to Assistant Lucas County Prosecutor Evy Jarrett, at ejarrett@co.lucas.oh.us; and Edward Stechschulte, Counsel for Tyree Daniel, at estechschulte@ioriolegal.com, on this 11th day of October, 2022.

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