COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO. 2007-SC-0922
(CASE NO. 2006-CA-000897 AND 2006-CA-001792)

LARRY THOMAS JONES, ET AL. **APPELLANTS**

v.

Appeal from Hickman Circuit Court
Hon. William L. Shadoan, Judge
Indictment No. 00-CR-00001
And
Appeal from Calloway Circuit Court
Hon. Dennis R. Foust, Judge
Indictment No. 01-CR-00128

COMMONWEALTH OF KENTUCKY **APPELLEE**

BRIEF FOR APPELLANTS, LARRY THOMAS JONES, ET AL.

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Certificate Required by CR 76.12 (b)

The undersigned certifies that this brief was served by U.S. mail, postage prepaid, on the Hon. William L. Shadoan, Judge, Hickman Circuit Court, 132 N. 4th Street, Wickliffe, KY 42087; Hon. Timothy Langford, Commonwealth Attorney, P.O. Box 167, Hickman, KY 42050; Hon. Margot Merrill, Assistant Public Advocate, Suite B, 400 Park Avenue, Paducah, KY 42001; Hon. Dennis R. Foust, Judge, Calloway Circuit Court, Judicial Building, 12 N. 4th Street, Murray, KY 42071; Hon. Cynthia Gale Cook, Commonwealth's Attorney, 304 N. 5th Street, Murray, KY 42071; Hon. Scott West, Assistant Public Advocate, 503 N. 16th Street, Murray, KY 42071 and by messenger mail to: the Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204 on March 16, 2009. The record on appeal has been returned to the Kentucky Supreme Court.

JAMESA J. DRAKE

INTRODUCTION

The provision of the sexual offender conditional discharge statue which authorizes a trial court to adjudicate a claim that a defendant has failed to comply with the conditions of conditional discharge and, if necessary, revoke conditional discharge and imprison the defendant, KRS 532.043(5), unconstitutionally assigns to the judicial branch a power properly belonging to the executive branch in violation of Sections 27 and 28 of the Kentucky Constitution. Defendants respectfully request that this Court reverse the decision of the Court of Appeals to the contrary.

STATEMENT CONCERNING ORAL ARGUMENT

Defendant requests oral argument in this case.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

Defendant Jones pleaded guilty to four counts of first-degree sexual abuse. On April 5, 2001, the trial court entered a judgment sentencing him to six years' prison. On August 3, 2006, the trial court found that Jones violated the terms of his conditional discharge. The court revoked Jones's conditional discharge and ordered him to serve three additional years in prison, minus the time already served on conditional release.

Defendant Henley pleaded guilty to two counts of first-degree sexual abuse. On September 10, 2001, the trial court entered a judgment sentencing him to three years' prison. On March 29, 2006, the trial court found that Henley violated the terms of his conditional discharge. The court revoked Henley's conditional discharge and ordered him to serve three additional years in prison, minus the time already served on conditional release.

ARGUMENT

I.

THE ISSUE PRESENTED HEREIN IS "CAPABLE OF REPETITION, YET EVADING REVIEW."

According to the Department of Corrections, defendant Henley finished serving his conditional discharge revocation sentence on April 23, 2007, and defendant Jones will finish serving his conditional discharge revocation sentence on March 31, 2009. The controversy on appeal is now moot.

However, this Court has recognized that its jurisdiction "is not necessarily defeated simply because the final order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.'" *Lexington Herald-Leader Co., Inc. v. Meigs*, 660 S.W.2d 658, 661 (Ky. 1983) (quoting *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 546, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976)). That exception to the mootness doctrine applies when "(1) the 'challenged action is too short in duration to be fully litigated prior to its cessation or expiration and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again.'" *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992) (quoting *In re Commerce Oil Co.,* 847 F.2d 291, 293 (6th Cir. 1988)).

As these cases demonstrate, persons sentenced to a conditional discharge revocation sentence will likely finish serving that sentence before this Court has an opportunity for review. Given the time it takes for a case to work its way through the direct appeal process, "the events giving rise to this appeal are inherently evasive of review." *See e.g. Commonwealth v. Deweese*, 141 S.W.3d 372, 375 (Ky. 2004)

(discussing the concept). The length of a conditional discharge revocation sentence depends on the amount of time an offender has already successfully served. In no event may a conditional discharge revocation sentence last longer than five years. For many (perhaps most) cases, "the challenged action is too short in duration to be fully litigated prior to its cessation or expiration." *Philpot*, 837 S.W.2d at 493.

There exists no other impediment to this Court reaching a decision on the merits; the issue is preserved and presently squarely in this Brief.[1] Waiting for another case to decide the issue needlessly wastes time, prolongs the uncertainty over the constitutionality of subsection (5) of the sexual offender conditional discharge statute, and threatens the finality of *every* sexual offender conditional discharge revocation order. The "capable of repetition, yet evading review" exception applies here.

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[1] Below, the Commonwealth argued that Defendant Jones failed to provide notice of his constitutional challenge to the Attorney General's Office pursuant to KRS 418.075, which "provides this court with sufficient basis to reject the challenge in this case." Resp. Br. at 2. Below, the Commonwealth argued that because Defendant Jones failed to challenge the constitutionality of the sexual offender conditional discharge at his initial sentencing hearing (years before he was revoked on conditional discharge), "he is precluded from raising the issue now." The Commonwealth further argued that Defendant Jones's "Motion to Declare KRS 532.043(5) Unconstitutional," failed to provide the statutory or procedural basis for the motion. Resp. Br. at 2-3. The Court of Appeals implicitly rejected those arguments when it decided the cases on the merits, and the Commonwealth has forfeited any opportunity to raise those arguments in this Court by failing to file its own Motion for Discretionary Review.

II.

THE SEXUAL OFFENDER CONDITIONAL DISCHARGE STATUTE ASSIGNS SENTENCING POWERS TO THE JUDICIAL BRANCH THAT PROPERLY BELONG TO THE EXECUTIVE BRANCH IN VIOLATION OF SECTIONS 27 AND 28 OF THE KENTUKY CONSTITUTION.

On the merits, this is not a close case. The Commonwealth would have this Court hold that judicial sentencing powers extend years after a criminal defendant has been released from prison or completed a term of parole. The notion is repugnant; the sentencing powers of the judicial branch do not extend that far.

The sexual offender conditional discharge statute, KRS 532.043, provides:

> (1) In addition to the penalties authorized by law, any person convicted of, pleading guilty to, or entering an Alford plea to a felony offense under KRS Chapter 510, 529.100 involving commercial sexual activity, 530.020, 530.064(1)(a), 531.310, or 531.020 shall be subjected to a period of conditional discharge following release from:
>
> (a) Incarceration upon expiration of sentence; or
>
> (b) Completion of parole.
>
> (2) The period of conditional discharge shall be five (5) years.
>
> (3) During the period of conditional discharge, the defendant shall:
>
> (a) Be subject to all orders specified by the Department of Corrections; and
>
> (b) Comply with all education, treatment, testing, or combination thereof required by the Department of Corrections.
>
> (4) Persons under conditional discharge shall be subject to the supervision of Probation and Parole.

(5) If a person violates a provision specified in subsection (3) of this section, the violation shall be reported in writing to the Commonwealth's attorney in the county of conviction. The Commonwealth's attorney may petition the court to revoke the defendant's conditional discharge and reincarcerate the defendant as set forth in KRS 531.060.

(6) The provisions of this section shall apply only to persons convicted, pleading guilty, or entering an Alford plea after July 16, 1998.

In 2006, the legislature increased the mandatory period of conditional discharge from three to five years. *See* 2006 Ky. Acts. ch. 182, § 42. Throughout, defendants refer to the conditional discharge period as lasting five years. The defendants in this case, however, were sentenced before the 2006 amendment and required to serve three years of conditional discharge.

The sexual offender conditional discharge statute has three main components. First, it automatically lengthens the sentence for sexual offenders by imposing a period of "conditional discharge," which lasts five years after "incarceration upon expiration of sentence" or the "completion of parole," *see* KRS 532.043(1) and (2). Second, it requires the Department of Corrections to develop a set of personalized "orders" that a defendant must comply with while on conditional discharge, and it requires the Division of Probation and Parole to oversee a defendant's compliance with those "orders," *see* KRS 532.043(3) and (4). Third, it requires the judicial branch to adjudicate a claim that a defendant has failed to comply with the "orders" of conditional discharge and, it authorizes courts to "revoke the defendant's conditional discharge and reincarcerate the defendant," *see* KRS 532.043(5).

The third component, KRS 532.043(5), violates the separation of powers between the judicial and the executive branches of government. As a general matter, the separation of powers guarantee in Sections 27 and 28 of the Kentucky Constitution are violated when one branch of government aggrandizes powers that properly belongs to another branch unto itself, or when the Legislative Branch attempts to "reassign powers vested by the Constitution in either the Judicial Branch or the Executive Branch." *Mistretta v. United States*, 488 U.S. 361, 382, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (discussing separation of powers in the context of federal sentencing); *see also Prater v. Commonwealth*, 82 S.W.3d 898, 907 (Ky. 2002) (discussing separation of powers in the context of sentencing in Kentucky).

The process of determining the scope and the extent of an offender's punishment is not exclusive to any single branch of government. Sentencing authority is shared, to varying degrees, by all three branches. The authority to proscribe a range of permissible punishments is vested in the legislative branch, the authority to select a sentence within that range is vested in the judicial branch, and parole and clemency powers are vested in the executive branch. The United States Supreme Court has described the arrangement as a "'three-way sharing' of sentencing responsibility." *Mistretta*, 488 U.S. at 364. Nevertheless, each branch must refrain from interfering with the sentencing authority of the other branches. *See Prater*, 82 S.W.3d at 909 (Although one branch of government may "participate" or "play a role" in another branch's exercise of its constitutional functions, Section 28 prohibits the judiciary from exercising a "purely executive function.")

A.

FOR NEARLY ONE HUNDRED YEARS, KENTUCKY COURTS HAVE IDENTIFIED THE ENTRY OF A FINAL SENTENCING ORDER AS THE FULCUM POINT WHEN THE SENTENCING POWER OF THE JUDICIAL BRANCH GIVES WAY TO THE SENTENCING POWER OF THE EXECUTIVE BRANCH.

The Kentucky Constitution vests the authority to *impose* a sentence in the judicial branch and the authority to *execute* a sentence in the Executive Branch. For nearly one hundred years, Kentucky courts have identified the entry of a final sentencing order as the point when the sentencing power of the judicial branch to gives way to the sentencing power of the executive branch. This Court should reject the Commonwealth's invitation to disrupt that case law.

In *Brabandt v. Commonwealth*, 157 Ky. 130, 162 S.W. 786 (Ky. App. 1914), the Court held that the power to execute a criminal judgment is "not judicial, but wholly executive in its nature." *Id.* at 787. After a prisoner is delivered to the custody of a jailer "under a final order of court," any other "order or direction of said court or any other court" is "void and of no effect." *Id.* at 787.

In *Huggins v. Caldwell*, 223 Ky. 468, 3 S.W.2d 1101 (Ky. App. 1928), the Court held that any attempt by the legislature to "confer upon the court...the right and authority to commute sentences or to pardon prisoners....would violate sections 27 and 28 of our Constitution." *Id.* at 1104. The parole power belongs to the executive branch; it derives from Section 77 of the Kentucky Constitution, which "emphatically vests in the Governor the power and authority to grant reprieves [and] to grant pardons or to commute sentences." *Id.* at 1104.

In *Woodcock v. Richey*, 225 Ky. 318, 8 S.W.2d 389 (Ky. App. 1928), the Court, rejected the notion that courts have "inherent power" to suspend the execution of a criminal judgment when the further confinement of an inmate would "gravely endanger his health and possibly that of the other inmates of the jail." *Id.* at 389. The Court reiterated that when a jailer "receives into his custody a prisoner under a final order of court," the court's power to further effect the sentence is relinquished to the Governor and the executive branch. *Id.* at 390.

In *Darden v. Commonwealth,* 277 Ky. 75, 125 S.W.2d 1031 (Ky. App. 1939), the Court held that the power to suspend the *imposition* of a sentence is vested in the judicial branch; "a wide discretion is given to the court as to when the probative period shall terminate, or the causes for which the probation may be revoked." *Id.* at 1033.

In *Lovelace v. Commonwealth*, 285 Ky. 326, 147 S.W.2d 1029 (Ky. App. 1941), the Court noted a "material difference in the status of a defendant following the verdict of guilt and his status after a final judgment has been entered and sentence pronounced." *Id.* at 1033-34. Recognizing that the power to suspend the *execution* of sentence belongs to the executive branch, the Court perceived of no constitutional problem with a statute that permitted a trial court to suspend the *imposition* of a defendant's sentence and place him on probation. *Id.* at 1033-34.

In *Morris v. Commonwealth*, 268 S.W.2d 427 (Ky. 1954), this Court reiterated that the "sentencing of prisoners convicted of [a] crime and the parole of prisoners

from confinement are separate and distinct. The first is a judicial function; the latter is a prerogative of the executive department." *Id.* at 428.

Even the 1974 Commentary to the felony sentencing statute recognized that once "a convicted offender was turned over to the department of corrections... [t]he power to determine the period of incarceration passed at this point to the parole board." KRS 532.060, Official Commentary (Banks/Baldwin 1974).

The allocation of sentencing powers between the judicial and the executive branches, with the entry of a final sentencing order as the line of demarcation between the powers of each branch, survives today. In *Prater v. Commonwealth*, 82 S.W.3d 898 (Ky. 2002), this Court held that "the pre-judgment and post-judgment distinction remains." *Id.* at 905.

The United States Supreme Court has also held that judicial sentencing power ends when a final sentencing order is entered or when the defendant begins serving his sentence.[2] *See United States v. Murray,* 275 U.S. 347, 356-57, 48 S.Ct. 146, 72 L.Ed. 309 (1928) ("The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it."); *Affronti v. United States*, 350 U.S. 79, 83, 76 S.Ct. 171, 100 L.Ed. 62 (1955) (the sentencing power of the judicial branch "ceases...immediately upon imprisonment for any part of

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[2] The federal separation of powers doctrine has not been extended to the states; each state is free to determine its own allocation of governmental power. *See Hughes v. Superior Court*, 339 U.S. 460, 467, 70 S.Ct. 718, 94 L.Ed. 985(1950) ("the Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches.") References to federal law and the decisions of other state courts are simply illustrative. The outcome of this case rests entirely on state constitutional grounds.

the...sentence."); *United States v. Addonizio*, 442 U.S. 178, 189, 99 S.Ct. 223, 60 L.Ed.2d 805 (1979) ("[O]nce a sentence has been imposed, the trial judge's authority to modify it is...circumscribed."); *see also United States v. Taylor*, 931 F.2d 842, 844 (11th Cir. 1991) ("The authority to modify a prisoner's sentence after he has begun serving the sentence is reserved to the executive branch, as well as the right to grant parole and pardons.").

The Supreme Courts of other states have reached the same conclusion. *See e.g. Commonwealth v. Donohue*, 892 N.E.2d 718, 725 (Mass. 2008) ("[O]nce a judge has sentenced a defendant, authority over the defendant passes from the judicial branch to the executive branch of government"); *State ex rel. Nevada Dept. of Prisons v. Kimsey*, 853 P.2d 109, 112 (Nev. 1998) ("Once [defendant] began serving his sentence, the district court lacked jurisdiction to control [defendant's] sentence or to direct the Department of Prisons regarding [defendant's] sentence."); *State v. Wagstaff*, 794 P.2d 118, 121 (Ariz. 1990) ("This Court, along with the courts of our sister states, has long recognized the division of power and the transfer of jurisdiction over a felon from the judicial to the executive branch of government upon conviction."); *Rivera v. Eschler*, 767 P.2d 336, 352 (Mont. 1989) ("This Court has consistently held that once a valid sentence has been pronounced, the court imposing the same is lacking in jurisdiction to vacate or modify the sentence"); *January v. Porter*, 453 P.2d 876, 879 (Wash. 1969) ("Upon the entry of a final judgment and sentence of imprisonment, legal authority over the accused passes to...those agencies of the executive branch [that] bear full responsibility for executing the judgment and

sentence.... The courts have long recognized this division of power and the transfer of jurisdiction over a finally convicted felon from the judicial to the executive branch of government."); *State v. Lewis*, 37 S.E.2d 691, 693 (N.C. 1946) ("After a defendant has begun the service of his term...it is beyond the jurisdiction of the Judge to alter it or interfere with it in any way.")

The sexual offender conditional discharge statute authorizes a court to decide whether a defendant has violated the terms of his conditional discharge and, if necessary, to order him to serve more time in prison, long after the judgment entry date and long after the date when the defendant first began serving his sentence. At that point, any residual sentencing power properly belongs to the executive branch.

B.

A STATUTE THAT AUTHORIZES A COURT TO MAKE SENTENCE MODIFICATIONS DECADES AFTER THE JUDGMENT ENTRY DATE AND YEARS AFTER THE DEFENDANT'S RELEASE FROM PRISON AND PAROLE VIOLATES THE SEPARATION OF POWERS BETWEEN THE JUDICIAL AND EXEUCTIVE BRANCHES OF GOVERNMENT.

Kentucky courts have previously considered the constitutionality of statutes that purport to extend judicial sentencing powers past the entry date of the criminal conviction. Until the Court of Appeals' decision in this case, the "shock probation" statute marked the outward limit of the judicial branch's sentencing authority after the entry of a final judgment.[3]

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[3] At all times, a trial court retains jurisdiction to make non-substantive changes to the criminal judgment. *See* CR 60.01 ("Clerical mistakes in judgments...and errors therein arising from oversight or omission. . . *cont. on page 12.*

The shock probation statute gives a defendant one hundred fifty (150) days to petition the trial court to reconsider its sentencing decision and order probation, and it gives a trial court seventy (70) days to rule on the motion. *See* KRS 439.265(1), (2). The court's authority to modify the judgment and impose probation ends two hundred fifty (250) days after the judgment entry date, if not sooner.

The shock probation statute does not violate the separation of powers doctrine because it establishes a period, "not unreasonably long," during which the court retains "limited control" over its judgments in criminal cases. *See Commonwealth v. Williamson*, 492 S.W.2d 874, 875 (Ky. 1973) (so stating). Such a statute "does not invade or encroach upon the executive power. *Id.* at 875.

By comparison, in *Prater v. Commonwealth*, 898 S.W.3d 898 (Ky. 2002), this Court considered the constitutionality of a statute "that purported to grant to trial courts the authority to make 'probation' decisions regarding inmates they have

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Cont. from page 11. . .may be corrected by the court at any. time...."); *Cardwell v. Commonwealth*, 12 S.W.3d 672, 674 (Ky. 2002) (CR 60.01 allows the court to correct clerical mistakes, not substantive legal errors).

For all other errors, "a trial court loses jurisdiction to amend a judgment in a criminal case ten days after its entry" pursuant to CR 59.05. *See Commonwealth v. Graddie*, 239 S.W.3d 59, 61-62 (Ky. 2007) (so stating).

A trial court retains authority to vacate the judgment altogether in accordance with CR 60.02. And, a trial court has inherent authority to "grant relief against a judgment" in "extraordinary circumstances where a fraud has been perpetrated upon the court." *See Potter v. Eli Lilly and Co.*, 926 S.W.2d 449, 454 (Ky. 1996); *Commonwealth v. Gross*, 936 S.W.2d 85, 88 (Ky. 1996) (explaining that *Potter* "recognizes a very narrow exception to the rules of finality.") Neither rule violates the separation of powers doctrine, however, because the executive branch's sentencing power is predicated on the entry of a *valid* criminal judgment.

sentenced to prison at any point during their period of incarceration – presumably until their final discharge from custody." *Id.* at 907. This Court held that such a statute violates separation of powers principles because it "grants trial courts interminable, and therefore 'unreasonably long,' authority to suspend the execution of a defendant's sentence – in other words, authority that is entirely in the bailiwick of the executive branch of government." *Id.* at 907 (internal citation omitted).

If a statute that grants a trial court the authority to modify an executed sentence *up to* the point when the defendant is finally discharged from custody is unconstitutional, then the sexual offender conditional discharge statute, which grants a trial court the authority to modify an executed sentence *after* the defendant is finally discharged from custody and off parole is unconstitutional, as well.

Subsection (5) of the sexual offender conditional discharge statute thrusts the judicial branch back into the sentencing process *decades* after the judgment entry date and up to *five years* after the defendant has been released from prison or has completed parole. For example, a sexual offender who stands convicted of a single Class A felony may not begin conditional discharge until fifty (50) years or more after the judgment entry date. *See* KRS 532.060(a) (the authorized maximum term of imprisonment for a Class A felony is not more than fifty years or life in prison); KRS 532.043(1) (the period of conditional discharge follows incarceration upon expiration of sentence or completion of parole). Subsection (5) of the sexual offender conditional discharge statute permits a trial court to revoke a defendant's conditional discharge and send him back to prison fifty-five (55) years or more after the judgment

entry date and after the defendant first began serving his prison sentence. It strains credulity to suggest that the judicial branch's sentencing powers extend that far.

The distinction between the judicial power to impose a sentence and the executive power to administer a sentence makes intuitive sense. As the Supreme Court explained in *Affronti v. United States*, 350 U.S. 79, 76 S.Ct. 171, 100 L.Ed. 62 (1955), "[a]t the time of entering a judgment of conviction, the district court is in the best position to fix the terms of a convict's sentence. Thereafter, however, the judge becomes progressively less familiar with the considerations material to the adjustment of punishment to fit the criminal. At the same time, the officials of the Executive Branch responsible for these matters become progressively better qualified to make the proper adjustments." *Id.* at 84 n. 13.

The Court put it more bluntly in *United States v. Murray,* 275 U.S. 347, 48 S.Ct. 146, 72 L.Ed. 309 (1928). Any enlargement of judicial sentencing power would subject the courts to "the applications of convicts during the entire time until the full ending of the sentences. This would seem unnecessary for the hard-worked District Judges with their crowded dockets. A more reasonable construction is to reconcile the provisions for probation, parole, and executive clemency, making them as little of a repetition as we can." *Id.* at 356-57.

The sexual offender conditional discharge statute interjects the judicial branch back into the sentencing process long past the time when a trial judge is familiar with the full panoply of considerations "material to the adjustment of punishment to fit the criminal." *Affronti*, 350 U.S. at 84 n. 13. Given the significant lapse of time between

the entry of a final judgment and the defendant's release from prison on conditional discharge, the executive branch is far better qualified to evaluate "an array of information about a prisoner and make a predication whether he is ready to reintegrate into society." *Morrissey v. Brewer*, 408 U.S. 471, 477-78, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1974) (discussing the role of the executive branch in parole decisions).

III.

THE COURT OF APPEALS MISCONSTRUED THE SEXUAL OFFENDER CONDITIONAL DISCHARGE STATUTE AND APPLIED AN OUTDATED ANALYSIS.

The phrase "conditional discharge" appears elsewhere in the Penal Code. "Conditional discharge" under KRS 533.020(3) is understood as an alternative to a sentence of imprisonment. *See* KRS 533.020(3) ("When a person who has been convicted of an offense...is not sentenced to imprisonment, the court may sentence him to conditional discharge if it is of the opinion that...probationary supervision is inappropriate."); *United States v. Miller*, 56 F.3d 719 (6th Cir. 1995) ("conditional discharge is the 'functional equivalent' of unsupervised probation").

"Conditional discharge" under KRS 532.043, however, is, by its own terms, not an alternative to a sentence of imprisonment and it is not a form of unsupervised release. Conditional discharge for sexual offenders exists in addition to a sentence of imprisonment, and a sexual offender is on conditional discharge is "subject to the supervision of the Division of Probation and Parole." KRS 532.043(1) and (4).

At any rate, the label given to something by the General Assembly is not dispositive. *See Huggins*, 3 S.W.2d at 1103 ("it is not so much the expressed name

that determines the actual classification, but it is the substance of the thing that points to its true designation."); *Prater*, 82 S.W.3d at 902 (courts will "examine the substance of the power that [the statute] grants").

The Court of Appeals purported to examine the power that the sexual offender conditional discharge statute granted to the courts. Inexplicably, it characterized conditional discharge as a "release" "from a sentence imposed by the court:"

> Conditional discharge...releases a defendant from a sentence imposed by the court prior to his further incarceration with the executive branch. The defendant has not been again placed in the physical custody of the executive branch (although he or she continues under its supervision). The service of the defendant's sentence remains under the control of the judicial branch.

Jones Slip op. at 4; Henley Slip op. at 4.

The court's understanding of the conditional discharge statute is wrong. First, a defendant who is "released" from a "sentence imposed by the court" obviously cannot, at the same time, "serve" a "sentence under the control of the judicial branch." The court's reasoning is internally inconsistent.

Second, the Court of Appeals cannot possibly mean what it says. The executive branch cannot supervise, and the judicial branch cannot control, a defendant who has been "released" "from a sentence imposed by the court." No branch of government has power over a person who has been "released" "from a sentence imposed by the court." *See e.g. Hamdi v. Rumsfeld*, 542 U.S. 507, 527, 124 S.Ct. 2633, 15 L.Ed.2d 578 (2004) (freedom from restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action).

More importantly, the Court of Appeals misconstrued the plain language of the sexual offender conditional discharge statute. The use of the word "release" in the statute unambiguously refers to a defendant's physical release from prison or the time when he completes parole. It does not refer to a "release" "from a sentence imposed by the court." KRS 532.043(1) provides:

> (1) In addition to the penalties authorized by law, any person convicted of [a sexual offense] shall be subject to a period of conditional discharge following release from:
>
> (a) Incarceration upon expiration of sentence; or
>
> (b) Completion of parole.

The legislative history resolves any uncertainty. The legislature did not conceive of conditional discharge as "releasing" a sexual offender "from a sentence imposed by the court." The opposite is true (as one might suspect). The legislature intended conditional discharge to *extend* the sentence imposed by the court. The sexual offender conditional discharge statute originated as House Bill 455 and, at the second House Judiciary Committee meeting to discuss the bill, this exchange took place:

> REPRESENTATIVE STINE: "...I guess conditional discharge is on agreement, right? I mean, you could choose to stay and serve your whole sentence because when you go on conditional discharge you may be exposed to a longer sentence than what you were given."
>
> WITNESS ROBERT LUTZ: "No. ... [T]hey're lengthening all sexual offense sentences by three years by making the last three years conditional discharge."
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> REPRESENTATIVE BOWLING: "That's right."

Videotape: House Judiciary Committee (2/11/1998).

The Court of Appeals also ignored the proper legal analysis. The parties and the Court of Appeals framed the issue as whether sexual offender conditional discharge was "akin" to probation or parole. As this Court explained in *Prater*, historically, "Kentucky courts have utilized the pre-judgment character of probation and the post-judgment character of parole to address constitutional issues concerning authority assigned to the executive and judicial branches." *Id.* at 904. Today, however, the distinction between probation as the suspended imposition of a sentence, and probation as the suspended execution of a sentence, is inapt because, "the sentencing provisions of the Kentucky Penal Code now permit trial courts to enter a judgment sentencing a defendant to a *sentence of probation*." *Id.* at 905 (emphasis in the original). As *Prater* instructs, "the pre-judgment and post-judgment distinction" and controls the analysis. *Id.* at 905.

The sexual offender conditional discharge statute authorizes the judicial branch to make sentencing decisions years after the sentence has been executed, years after the defendant has been released from the penitentiary, and years after he has completed parole. For nearly one hundred (100) years, Kentucky Courts have consistently held that judicial sentencing powers do not extend past the entry date of the final judgment. Before the Court of Appeals opinion, the only exception was the shock probation statute, which permits a trial court to exercise "limited control" over the judgment for a maximum of two hundred fifty (250) days. Because courts are in a "unique position as the final unchecked arbiter of constitutional disputes," they "should be particularly vigilant to restrain [their] own exercise of power." *Elk Horn*

Coal Corp. v. Cheyenne Resources, Inc., 163 S.W.3d 408, 422 (Ky. 2005); *Kuprion v. Fitzgerald*, 88 S.W.2d 679, 699 (Ky. 1994). This Court should reject the Commonwealth's invitation to engorge judicial sentencing powers to an unprecedented degree.

CONCLUSION

Defendant respectfully requests that this Court declare the sexual offender conditional discharge statute, KRS 532.043(5) to be unconstitutional, and to vacate the court orders, entered pursuant to KRS 532.043(5), imprisoning defendants.

Respectfully submitted,

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