



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFREY S. CHRISTOPHER

No.: 201, 2013

Plaintiff Below
Appellant,

v.

SUSSEX COUNTY, a political subdivision
of the State of Delaware; MICHAEL H.
VINCENT, Sussex County Council
President; SAMUEL R. WILSON, Sussex
County Council Vice President; JOAN R.
DEAVER, Sussex County Council
Councilwoman; GEORGE R. COLE,
Sussex County Councilman; VANCE C.
PHILLIPS, Sussex County Council
Councilman; TODD F. LAWSON, Sussex
County Administrator; and the STATE OF
DELAWARE

Defendants Below
Appellees

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND FOR SUSSEX COUNTY

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Date: May 30, 2013

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Nature of the Proceedings

This appeal stems from a March 19, 2013, holding of the Superior Court of Delaware in and for Sussex County that the General Assembly may strip the sheriff of arrest powers by statute even though the powers are required to perform his constitutional obligation as a ‘conservator of the peace.’ (Ex. A pg. 9.)

On May 9, 2012, Plaintiff-Below/Appellant Jeffrey Christopher, a duly elected sheriff of Sussex County, Delaware (“Sheriff”) filed a Complaint in the Superior Court of Sussex County against Defendants-Below/Appellees Sussex County, *et al* (“Sussex County”), seeking a declaration that the sheriff has arrest powers in criminal cases as a required tool to perform his constitutional obligation of ‘conservator of the peace.’ (*See* A2, A41-42.) Sheriff subsequently amended the Complaint to include the State of Delaware (“State”) as a defendant. (A4-5.)

At the same time, the Superior Court requested briefing on the constitutionality of the newly-passed House Bill 325 (“HB325”) (A111-117.) and its effect on the sheriff’s arrest powers in criminal cases. (A4.) All the parties cross-moved for Summary Judgment in late 2012. (A6-10.) The Superior Court held oral arguments and issued a Memorandum Opinion on March 19, 2013, granting Summary Judgment to Sussex County and State. (A11.)

This appeal followed.

Statement of the Facts

This appeal is about the General Assembly's power to statutorily preclude the sheriff from faithfully performing his constitutional obligations as a 'conservator of the peace.' Appellant contends that arrest power is constitutionally required as an indispensable tool in the performance of his constitutional obligation as the 'conservator of the peace' under Article XV, Section 1 of the Delaware Constitution. (A131.)

The office of the sheriff existed in Delaware since the earliest of settlements.¹ The sheriff was an officer under every Delaware Constitution and a 'conservator of the peace' under the last three Constitutions. (A15.) The 1792 Constitution required that the "sheriffs . . . shall, by virtue of their offices, be conservators [] within the counties respectively in which they reside." Del. Const. art. VIII, § 1 (1792). The 1897 Constitution mandates that the "sheriffs shall be conservators of the peace within the counties respectively in which they reside." Del. Const. art. XV, §1 (1897).

On June 19, 2012, the Delaware General Assembly enacted HB325 with the purpose of 'clarifying' "that the county sheriffs and their deputies do not have arrest authority." (A111.) The General Assembly further 'explained' in the synopsis portion of HB325 that "[h]istorically the sheriffs and deputies have not

¹ William W. Boyer & Edward C. Ratledge, DELAWARE POLITICS AND GOVERNMENT 123 (University of Nebraska Press 2009).

exercised arrest authority and the Attorney General's office has given an opinion that the sheriff's power to arrest is no greater than that shared by any citizen." (A117.)

In contrast to the baseless conclusions of the General Assembly, the sheriff exercised arrest authority in Delaware and acted as a public peace officer throughout history and at the time of ratification of all the Delaware Constitutions. Public peace officer and 'conservator of the peace' are synonymous. (A110.) The sheriff was an elected public peace officer, accountable to his constituents.

Delaware Code, Title 11, section §1901 (2) defines public peace officers as having arrest powers in criminal cases. HB325 amends Title 11 to exclude sheriffs from having arrest power in criminal cases. (A111.) Therefore, HB325 eliminates sheriffs from acting as public peace officers. Next, HB325 amends Section 1935 of Title 11 to prohibit sheriffs from executing fresh pursuit of any person." (A112.) HB325 also repeals Section 2103 of Title 10, taking away the sheriff's power to assemble *posse comitatus*. (A115.) Finally, Section 2103 of Title 10 explicitly states that "[s]heriffs and deputy sheriffs shall not have any arrest authority." (A115.)

Sheriff filed this appeal, contending that HB325 is unconstitutional.

Summary of the Argument

I. HB325 violates the Delaware Constitution because it strips the sheriff of arrest power in criminal cases and thus prohibits performance of the constitutional obligation as a conservator of the peace.

A. HB325 impermissibly conflicts with Article XV, Section 1 of the Delaware Constitution

The Delaware Constitution requires sheriffs to act as ‘conservators of the peace.’ Sheriff, as a ‘conservator of the peace,’ was a public peace officer with arrest powers at the time of the ratification of the Delaware Constitution. HB325 prohibits the sheriff to arrest in criminal cases, thus excluding him from acting as a public peace officer. Thus, HB325 prohibits the sheriff from performing his constitutional obligation as a ‘conservator of the peace.’ Therefore, this Court should hold that HB325 is unconstitutional.

B. HB325 impermissibly conflicts with Article XVI of the Delaware Constitution.

HB325 effectively abrogates the office of the sheriff by stripping him of arrest powers. To do so, the General Assembly must amend the constitution.

C. HB325 impermissibly conflicts with Article III of the Delaware Constitution.

The Delaware Constitution, Article III, Sec. 22, provides its citizens with a right to elect a local peacekeeper - the sheriff. HB325 removes the peacekeeping powers from the office of the sheriff, thus violating the right of the voters to elect their peacekeeper.

Argument on the Merits

II. HB325 violates the Delaware Constitution because it strips the sheriff of arrest power in criminal cases and thus prohibits performance of the constitutional obligation as a conservator of the peace.

Question Presented: Whether HB325 violates the Delaware Constitution because it strips the sheriff of arrest powers, thereby prohibiting the sheriff from fulfilling his constitutional obligation as a ‘conservator of the peace? This issue was briefed below at A90 and argued below at A130-132.

Standard of Review. Supreme Court reviews constitutional questions *de novo*. *Flonnory v. State*, 893 A.2d 507, 515 (Del. 2006).

Role of the Court When Interpreting the Constitution

It is the sole province of this Court, not the General Assembly, to define the meaning of the Delaware Constitution as it is this Court’s “province and duty... to say what the law is” in particular cases and controversies. *Evans v. State*, 872 A.2d 539, 549 (Del. 2005).

This Court must interpret the Constitution in such a way as to ensure that, whenever avoidable, not to “nullify, or substantially impair, any other constitutional provision or to produce an irrational result.” *State v. Roberts*, 282 A.2d 603, 606 (Del. 1971) (citing *Opinion of the Justices*, 225 A.2d 481, 484 (Del. 1966)). When construing constitutional provisions, the court’s “ruling must come from the [1] interrelationship of concepts set forth in the Constitution, [2] the

language of the Constitution, and [3] the prior case law that has construed the Constitution.” *State ex rel. Gebelein v. Killen*, 454 A.2d 737, 747 (Del. 1982).

It is also clear that the General Assembly can make law as long as the enactments do not impermissibly conflict with the Delaware Constitution because any “act of the legislature, repugnant to the constitution, is void.” *Evans v. State*, 872 A.2d 539, 553 (Del. 2005) (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). Therefore, the power of the General Assembly “is subject to constitutional restrictions, whether express or necessarily implied. In an appropriate case, it is the duty of the Court to define such restrictions.” *State ex rel. Gebelein* at 745. This is such a case.

A. HB325 impermissibly conflicts with Article XV, Section 1 of the Delaware Constitution because it prohibits the sheriff from acting as a ‘conservator of the peace,’ a public peace officer with arrest powers in criminal cases.

i. Conservator of the peace is a constitutional officer, thus his core obligations are not common law.

The Delaware Constitution states that “[s]heriffs shall be conservators of the peace within the counties respectively in which they reside.” Del. Const. art. XV, §1. (1897). Once used in the Constitution, the obligation of the sheriff to act as a ‘conservator of the peace’ became a constitutional obligation and the powers necessary to carry out that obligation became constitutional powers – not common law powers. *See* Del. Const. art. XXV (1776). Constitutional powers, such as

those of the sheriff as 'conservator of the peace' may only be taken away by amending the Constitution.

The Court below erred in holding that all the powers of the sheriff are common law powers subject to full control of the General Assembly. It is a constitutional *obligation* of the sheriff, to act as a 'conservator of the peace.' *See* Del. Const. art. XV, §1 (1897). Therefore, not all the powers of the sheriff are common law powers because the Constitution reserves some of sheriff's powers to faithfully execute his obligation as 'conservator of the peace.'

Article XXV of the Delaware Constitution of 1776, provides that the "common law of England . . . shall remain in force, unless . . . altered by a future law of the Legislature; [except] such parts . . . as are repugnant to the rights and privileges contained in this Constitution and the Declaration of Rights, etc. agreed to by this convention." Del. Const. art XXV (1776); *See also Dorsey v. State*, 761 A.2d 807 (Del. 2000) (emphasis added). Taking away the arrest power of the sheriff is repugnant to the rights and privileges as 'conservator of the peace' in the Constitution.

Once enshrined in the Constitution, the key features that make up that constitutional term cease to be common law, and become constitutional law. *See State v. Cohen*, 604 A.2d 846, 852 (Del. 1992) (discussing a constitutional right to a trial by jury granted by Article I, Section 4 of the Delaware Constitution) *State v.*

Cohen states that the scope of the right to a jury trial is as it existed at the time of ratification and requires analysis of common law, but the right itself is constitutional law. *Id.* See Also Randy J. Holland, *State Jury Trials and Federalism: Constitutionalizing Common Law Concepts*, 38 VAL. U. L. REV. 373 (2004). This Court should hold that the essence of the term ‘conservator of the peace’ is not common law, but rather constitutional law, and that essence includes the power to arrest in criminal cases.

Additionally, the Court below erroneously held that the legislature, as opposed to the courts, could define the key features of the office of the sheriff by statute because at the time of the ratification of the Delaware Constitution, the office of the sheriff in England was a creature of the statute and thus subject to full legislative control. (Ex. A, 5-7.) While it is true that the sheriff was a statutory officer in England at the time of ratification of the Delaware Constitution, see Stewart Rapalje and Lawrence, A DICTIONARY OF AMERICAN AND ENGLISH LAW 1187 (Frederick D. Lynn Publishers 1888), it is also true, that the British never had a written constitution that required a special process to amend like the Delaware Constitution, or the Constitution of the United States. See Andy Williams, UK GOVERNMENT & POLITICS 11 (Heinemann Educ. Publishers, 1998) (stating that “[t]he British Constitution is one of the last remaining unwritten constitutions in the world” with legislative enactments declared constitutional and scattered

throughout the code.) Therefore, any legislative act in England could become part of the constitution and any legislative act could strike out a term from the constitution. *Id.* In contrast, once a term is used in the Delaware Constitution, it can only be amended by the General Assembly under the provisions of Article XVI. Moreover, and in sharp contrast to the British system of government, *supra*, once a term is used in the Delaware Constitution, it becomes the province of this Court, not the Legislature, to define the scope and meaning of that constitutional term. *Evans v. State*, 872 A.2d 539 (Del. 2005).

The Court below accepted an incorrect argument of the Appellees that if the office is defined in the Constitution by its name only, all of its powers exist in common law and are at the mercy of the General Assembly. *See Darling Apartment Co. v. Springer*, 22 A.2d 397 (Del. 1941). *Darling Apartment* is distinguishable for two reasons. First, sheriff is not a name-only constitutional office because the role of the sheriff is defined as a conservator of the peace. Second, *Darling Apartment* dealt with a peripheral feature of the office of the Attorney General, prosecutorial discretion in a narrow area of the Delaware Code. Without it, the Attorney General retained its core power: the power to investigate and prosecute criminal offenders. In contrast, this case deals with the arrest power of the sheriff as a core of his constitutional role as a ‘conservator of the peace.’ Without arrest power, a sheriff ceases being a ‘conservator of the peace.’

Therefore, *Darling Apartment* is not applicable to this case because it does not address the General Assembly's ability to legislate away the core powers that make up the constitutional office.

The General Assembly may not abrogate a constitutional office, or take away the core duties of constitutional officers without enacting an Amendment pursuant to the requirements of Article XVI of the Delaware Constitution. *See Collison v. State*, 2 A.2d 97 (Del. 1938).

This Court should hold that the term "sheriff shall be the conservator of the peace" is a constitutional right under the Delaware Constitution and arrest power is a core tool of the 'conservator of the peace as it applies to the sheriff because a peace officer cannot keep the peace without the ability to arrest. Arrest is a key feature of the term and if it is the wish of the General Assembly to change the powers of a constitutional office, they should amend the Constitution pursuant to Article XVI.

- ii. **Sheriff, as a 'conservator of the peace,' was a public peace officer with power to arrest for criminal violations at the time of ratification of the Delaware Constitution.**

When deciding on the meaning of a constitutional term, this Court looks to the time of ratification and gleans the term's meaning from then-available sources: dictionary definitions, common and literary usage, prior case law. Additionally, the Court looks at the subsequent use of the same term. It will be shown below that all

the sources contemporaneous to ratification, including dictionaries, case law and literature, dictate that the framers of the Delaware Constitution meant for the sheriff, as a ‘conservator of the peace,’ to be a public peace officer with power to arrest in criminal cases.

a. Dictionary definitions contemporaneous to ratification.

Black’s Law Dictionary defines the sheriff as

[t]he chief executive and administrative officer of a county, being chosen by popular election. [] He is also the chief conservator of the peace within his territorial jurisdiction.

BLACK’S LAW DICTIONARY 1543 (4th ed. 1968) (emphasis added). The use of the term ‘also’ implies that the sheriff’s role as a ‘conservator of the peace’ was separate from and additional to the sheriff’s role as a court administrator.

Sheriff is an “officer elected by the people [] to preserve the public peace in his county, arrest malefactors.” Stewart Rapalje and Robert Linn Lawrence, A DICTIONARY OF AMERICAN AND ENGLISH LAW 1187 (Frederick D. Lynn Publishers 1888).

At the time of ratification of 1897 Constitution, the term ‘conservator’ meant “preserver – one whose business is to attend to the enforcement of certain statutes.” John Bouvier and Francis Rawle, THE LAW DICTIONARY ADAPTED TO THE CONSTITUTION AND THE LAWS OF THE UNITED STATES OF AMERICA 375 (15th Ed 1892) (“Bouvier’s Law Dictionary”). Black’s Law Dictionary defines the

conservator as “[o]ne whose business it is to attend to the enforcement of certain statutes. One whose duty requires him to prevent and arrest for breaches of the peace in his presence.” BLACK’S LAW DICTIONARY 378 (4th ed. 1968).

The term ‘conservator of the peace’ built upon the term ‘conservator’ to mean “he who hath a special charge by the virtue of his office to see that the King’s Peace be kept.” See Bouvier’s Law Dictionary at 375. Black’s Law Dictionary further defines ‘conservators of the peace’ as:

Officers authorized to preserve and maintain the public peace. In England, these officers were locally elected by the people []. Their duties were to prevent and arrest for breaches of the peace [and] the term may include the king himself, the lord chancellor, justices of the king’s bench, master of the rolls, coroners, sheriffs, constables.

BLACK’S LAW DICTIONARY 378 (4th ed. 1968) (emphasis added).

It was clear at the time that “conservators of the peace may apprehend law breakers within their own jurisdictions.” Giles Jacob and Sir Thomas Edlyne Tomlins, THE LAW DICTIONARY, Vol. II, 26 (I. Riley, 1811).

The dictionaries printed before and after ratification of Delaware Constitution uniformly define ‘conservator of the peace’ as an officer with inherent—*ex officio*—powers of arrest in criminal cases. The framers could not have embedded a different meaning into the term ‘conservator of the peace’ because the above meaning was the only one available at that time. Accordingly, HB325 impermissibly conflicts with the Delaware Constitution by redefining the

term 'conservator of the peace.' Without powers of arrest, the sheriff cannot act as a public peace officer, or 'conservator of the peace' as mandated by the Constitution.

b. In Britain, Colonial America, and at the time of ratification, sheriff, as a 'conservator of the peace,' was a public peace officer with arrest powers.

Since the ancient times in England, the sheriff was a law enforcement officer—a public peace officer with powers of arrest.

"The foundation of the whole system of criminal procedure was the prerogative of keeping the peace, which is as old as the [English] monarchy itself, and which was, as it still is, embodied in the expression, 'The King's Peace,' the legal name of the normal state of society. This prerogative was exercised at all times through officers collectively described as the Conservators of the Peace. [] the ordinary conservators of the peace were the sheriff, the coroner, the justices of the peace, [and] the constable, each in his own district."

State v. Mitchell, 212 A. 2d 873, 878 (Del. Super. Ct. 1965) (citing Sir James Stephen, HISTORY OF THE CRIMINAL LAW OF ENGLAND 444 (1883)). Moreover, *Mitchell* recognizes that the sheriff, as a local representative of the Crown, "arrested and imprisoned suspected persons, and, if he thought proper, admitted them to bail." *Id.* Furthermore, it is clear that he could do so without a warrant because "no lord of a franchise [could] interfere to prevent the sheriff from entering his franchise [] to arrest accused persons." *Id.*

Likewise, the sheriff as a 'conservator of the peace' in Delaware at the time of the ratification of the Constitution was obligated to act as a public peace officer with a duty to arrest for suspected breaches of the peace. *See In Re Request of Gov. For Advisory Opinion*, 722 A. 2d 307, 311 (Del. 1998) (stating that "[o]f course, there was no such entity as the State Police before 1897. But there were sheriffs and other conservators of the peace.")

For example, on September 18, 1740, the people of then-Willingtown, now Wilmington, petitioned William Penn for a corporate charter permitting them to choose officers for preserving King's Peace and detecting vice. *See Benjamin Ferris, A HISTORY OF THE ORIGINAL SETTLEMENTS ON THE DELAWARE* 206-208 (Wilson & Herald 1846). It is clear that the conservator of King's peace detected vice, i.e. arrested suspected criminals and brought them to justice.

Another example of the sheriff acting as a public peace officer with power of arrest in criminal cases is Delaware's famous case of Cheney Clow. Delaware Federal Writers Project, *DELAWARE: A GUIDE TO THE FIRST STATE* 490 (North American Book Dist 1976). In 1782, a mere ten years before ratification of Delaware's First Constitution, a British Loyalist named Cheney Clow was charged with treason and John Clayton, Esq., a deputy-sheriff of Kent County proceeded to arrest him. Correctly anticipating armed resistance, the sheriff exercised his power of *posse comitatus*, assembled a large group of armed deputies and proceeded West

of Dover to the “Clow’s Fort.” After a lengthy shootout, Captain Clow and his wife surrendered.

Likewise, multiple sources contemporaneous to the ratification of the Constitution describe the sheriff as the conservator of the peace as a public peace officer with the powers of arrest. In Delaware, sheriff’s policing “of the county is shared with the local constables.” See Chester Collin Maxey, COUNTY ADMINISTRATION IN DELAWARE 25 (Macmillan, 1919). It was also known that

“[e]very sheriff, coroner, constable and marshal of his county is a conservator of the peace within his county and as such is bound to suppress an affray or arrest a breaker of the peace in his view and bring him before a magistrate. Sheriffs are *ex officio* conservators of the peace within their country and it is their duty as well as that of all constables to prevent every breach of the peace and to suppress every unlawful assembly, affray, or riot which may happen in their presence. If there be any affray in a dwelling house the officers may break the door to preserve the peace. And if one engaged in an affray fly into a house and if the officer in fresh pursuit he may break the doors to arrest him.”

J.G. Homsher, THE JUSTICE OF THE PEACE, Vol. I, 8 (1907) (internal citations omitted) (emphasis in the original).

Clearly, the term ‘conservator of the peace,’ as used at the time of ratification of the Constitution, meant an officer with inherent powers of criminal enforcement—the *ex officio* power of arrest in criminal cases. The framers embedded this meaning into the term ‘conservator of the peace’ as used in the

Delaware Constitution because, at the time of ratification, the term ‘conservator of the peace’ did not have another meaning when applied to the sheriff.

Without powers of arrest, the sheriff cannot act as a public peace officer, or ‘conservator of the peace,’ as mandated by the Constitution. Therefore, HB325 impermissibly conflicts with the Delaware Constitution by redefining the term ‘conservator of the peace.’

c. Delaware case law implicitly recognized sheriff’s constitutional right to serve as a public peace officer with a power of arrest.

When construing a constitutional term, this Court should look to prior case law to determine whether the Court’s interpretation of the Constitution is both conceptually and literally consistent with past judicial construction. *State ex rel. Gebelein v. Killen*, 454 A.2d 737, 746 (Del. 1982).

Delaware courts have recognized the fundamental principle before ratification of the 1897 Constitution that any public “peace officer, such as a constable or sheriff, has the right to arrest, even without warrant, a person concerned in a breach of the peace, or other crime; or when he has reasonable ground to suspect the party of such offence.” *State v. Brown*, 5 Del. 505, 507 (Del. 1854); *See Also State v. Wyatt*, 27 Del. 473, 89 A. 217 (Gen. Sess. 1913). Therefore, at the time of ratification of the Delaware Constitution, sheriff was synonymous with ‘public peace officer’ in his role as a ‘conservator of the peace.’

Indicative of the powers of public peace officers in Delaware is the case of *State v. Wyatt*, 27 Del. 473, 89 A. 217 (Woolley J., Conrad J.). Mr. Wolcott, then-Attorney General, stated the cardinal principle that the “public peace officer may arrest anyone engaged in disorderly conduct on a public street” . . . upon reasonable grounds to believe the breach of the peace has occurred. *Id.* Judge Conrad agreed, and charged the jury, as follows:

“The public peace officers are charged not only with the maintenance of the public peace and order but with the preservation of the safety of person and property within their jurisdiction Their duties therefore are very responsible ones and at times very perilous ones and unless they are protected by the law neither the public peace nor the preservation and protection of life person and property can be secured in this community In fact all the power of the state civil and military may be invoked for their protection and support.”

Id.

Clearly, the Delaware Courts recognized the sheriff as a public peace officer with the inherent power to enforce the law and arrest criminal violators. HB325 impermissibly conflicts with the Delaware Constitution by redefining the term ‘conservator of the peace.’ Without powers of arrest, the sheriff cannot act as a public peace officer, or ‘conservator of the peace,’ as mandated by the Constitution.

d. “Conservator of the peace’ was used by the General Assembly in 1925 to create the State Police.

In 1925, The General Assembly created the State Police as having

“police powers similar to those of sheriffs, constables and other police officers, and shall be conservators of the peace throughout the State, and . . . are directed to suppress all acts of violence and to enforce all laws relating to the safety of persons and property.”

34 Del. Laws ch. 84, §4 (1925) (emphasis added).² It is clear that the State Police have arrest powers. The General Assembly’s legislative use of the term ‘conservator of the peace’ to create the State Police with powers and duties similar to those of the sheriff further indicates that the term ‘conservator of the peace’ means a public peace officer with powers of arrest. The General Assembly could not have abrogated the office of the sheriff by statute in 1925 because it established the State Police as a conservator of the peace in the State, and the sheriff was already a conservator of the peace in each county.

By stripping the sheriff of arrest powers, the General Assembly violated the Delaware Constitution because it took away a tool indispensable to the sheriff’s constitutional obligation to act as a ‘conservator of the peace.’ Therefore, HB325 impermissibly conflicts with the Delaware Constitution by redefining the term ‘conservator of the peace.’

iii. HB325 impermissibly bans the sheriff from using tools required to perform the obligation of ‘conservator of the peace.’

In the absence of prior guidance from this Court, the General Assembly enacted HB325 to clarify that “the county sheriffs and their deputies do not have

² The powers and duties of the State Police are codified in 11 Del. C. § 8302(a). Interestingly, in 2007, this section was amended to remove the words “sheriffs” from the statute.

arrest authority.”³ The General Assembly further explained in the bill synopsis that “[h]istorically the sheriffs and deputies have not exercised arrest authority and the Attorney General’s office has given an opinion that the sheriff’s power to arrest is no greater than that shared by any citizen.” (A117.) By stripping the sheriff of arrest authority, HB325 effectively excludes the sheriff from acting as a public peace officer because all public peace officers have arrest authority provided by 11 Del. C. §1901(2). It was shown above that ‘conservator of the peace’ and ‘public peace officer’ are synonymous when applied to the sheriff. Therefore, by stripping the sheriff of arrest authority, the General Assembly prevented the sheriff from exercising his constitutional obligation to act as a ‘conservator of the peace.’

iv. The Constitution and each part thereof must be harmonized and construed together.

It is the position of the Attorney General and the General Assembly that the term ‘conservator of the peace’ does not confer constitutional powers when used in the Constitution. *See* HB325.

When determining the meaning of the term ‘conservator of the peace,’ the Court must attempt to derive its meaning from the use of the term in the

³ HB325 amended Title 11, Section 1901(2) to exclude the sheriff from acting as a public peace officer by stripping him of the arrest powers in criminal cases. Moreover, HB325 amended Section 1935 of Title 11 to prohibit the sheriff from executing fresh pursuit of any person on reasonable grounds to suspect a breach of the criminal code. Next, HB325 repealed the old language of Section 2103 of Title 10, taking away the sheriff’s power to form a posse and replaced it with “sheriffs and deputy sheriffs shall not have any arrest authority.”

Constitution itself, specifically as it applies to the sheriff. *State ex rel. Gebelein v. Killen*, 454 A.2d 737, 746 (Del. 1982). Moreover, the Constitution and each part thereof must be harmonized and be construed as a whole. It cannot be presumed that any clause of the Constitution is intended to be without full force and effect.' *State v. Roberts*, 282 A.2d 603, 606 (Del. 1971); *State ex rel. Gebelein v. Killen*, 454 A.2d 737, 746 (Del. 1982).

This Court has previously held that:

If different portions of the Constitution seem to conflict, they must be harmonized if possible. That construction must be favored which will render every word of the instrument operative; and that construction must be avoided which would make any provision idle and nugatory. Every provision of the Constitution must be construed, whenever possible, to give effect to every other provision. Otherwise stated, whenever avoidable, no constitutional provisions should be so construed as to nullify, or substantially impair, any other constitutional provision or to produce an irrational result.

Opinion of the Justices, Del., 225 A.2d 481, 484 (1966). *See Also State ex rel. Gebelein v. Killen*, 454 A.2d 737, 746 (Del. 1982).

The 1897 Constitution requires that the Chancellor, the Attorney General and the Judges act as the conservators of the peace in the State, and the sheriff act as the conservator of the peace in each county. *See* Del. Const. art. XV, Sect 1. It was shown above that "conservator of the peace" means enforcer of the criminal code. *See, e.g. State v. Mitchell*, 212 A. 2d 873, 878 (Del. Super. Ct. 1965) (stating that "foundation of the whole system of criminal procedure was the prerogative of

keeping the peace [by] conservators of the peace"). Therefore, each of the four constitutional conservators of the peace played a part in harmonious enforcement of Delaware's criminal justice system and used tools inherent to his office to achieve the required peace.

It is clear that Judges, as conservators of the peace, presided over criminal trials. The Attorney General, as a conservator of the peace, investigated criminal offenses and prosecuted the breaches thereof. The Chancellor was the Chief Judicial officer of the State and, in addition to presiding over the Court of Chancery, presided over the criminal appeals before 1951, the year the Delaware Supreme Court was created by constitutional amendment. See Henry R. Horsey and William Duffy, *The Supreme Court of Delaware Until 1951, the "Leftover Judge" System*, <http://courts.delaware.gov/supreme/history2.stm>. (Stating that Chancellor Wolcott became the first associate justice of the post-1951 Supreme Court of Delaware. This was a demotion, because before the 1951 amendment Chancellor Wolcott, although a Chancellor, was the head judicial officer of the State.)

The Constitution requires that four officers act as conservators of the peace. The Chancellor presides over the appeal, Judges preside over the trial, the Attorney General brings the charges and prosecutes the offender. They are all acting as conservators of the peace, or enforcers of the criminal code. It follows that the

sheriff, as the fourth conservator of the peace, must act as the first link in criminal enforcement to arrest the suspected criminal offender.

Article XV, Section 1 is effortlessly harmonized as follows: the Chancellor, the Judges, the Attorney General and the Sheriff were all conservators of the peace, the enforcers of the criminal code. Each played its part, and used the tools of his own trade. The Chancellor had the jurisdiction to hear criminal appeals, judges had the jurisdiction to decide criminal matters before them, the Attorney General had the jurisdiction to enforce the criminal code of the state of Delaware by way of charge and prosecution. The sheriff must have had the jurisdiction under Article XV, Section 1, to arrest and detain suspected criminals. *See In Re Request of Gov. For Advisory Opin.*, 722 A. 2d 307 (Del. 1998). (stating that “there was no such entity as the State Police before 1897. But there were sheriffs and other conservators of the peace.”)

Therefore, contrary to the opinion of the Attorney General and the General Assembly, the term ‘conservator of the peace,’ as used Article XV, Section 1, does confer constitutional powers to each enforcer of the criminal code. Accordingly, HB325’s attempt to strip the sheriff of his constitutional power to act as a public peace officer is impermissible as it nullifies the term ‘conservator of the peace’ as used in the Constitution and breaks the harmony of Article XV, Sect. 1.

Throughout Delaware history and certainly at the time of ratification of the Delaware Constitution, the term ‘conservator of the peace’ was synonymous with the term ‘public peace officer.’ All public peace officers had, and still have, powers of arrest in criminal cases. Moreover, throughout Delaware history, and certainly at the time of ratification of Constitution, a sheriff was a public peace officer with arrest powers and that obligation was frozen into Article XV, Section 1, of the Delaware Constitution under the term conservator of the peace.

Without arrest powers, the sheriff cannot act as a conservator of the peace under the Constitution. HB325, however, explicitly excludes the sheriff from acting as a ‘public peace officer’ because it prohibits the sheriff from arresting in criminal cases. HB325 thus prohibits the sheriff from acting as a ‘conservator of the peace’ because it eliminates a core feature of the office of the sheriff and his right to act as such.

Therefore, this Court, as a sole arbiter of the Constitutional terms, should rule that ‘conservator of the peace’ is, and always has been, synonymous with the term ‘public peace officer,’ and a sheriff, as a ‘conservator of the peace,’ has the power of arrest in criminal cases, thus rendering HB325 unconstitutional.

B. HB325 impermissibly conflicts with Article XVI of the Delaware Constitution because it is an unconstitutional attempt to amend the Delaware Constitution.

The General Assembly may amend the Delaware Constitution. *See Del. Const. art XVI.* To do so, Article XVI, Section 1, requires the approval of two-thirds of House members, a publication, an election cycle, and two-thirds of the votes of the General Assembly in favor of the amendment. *See Id.*

It was shown above that HB325 extinguishes the rights of the sheriff to act as a ‘conservator of the peace.’ See Section A, *supra*. Therefore, HB325 violates Article XVI as an impermissible attempt to amend the Constitution because it was not enacted according to the requirements of Article XVI.

In short, the enactment of HB325 is the General Assembly’s attempt to amend the Constitution without facing political consequences and this Court should hold that an amendment is required to change the core features of a constitutional office.

C. HB325 violates the constitutional right of the voters to elect a public peace officer in each county.

The Delaware Constitution, Article III, Sec. 22, in conjunction with Article XV, provide the people with a right to elect their sheriff—a conservator of the peace—a public peace officer with power to arrest the suspected violators of the criminal code. HB325 violates that constitutional right of the people to elect their peacekeeper directly because it redefines the role of the sheriff to exclude the peacekeeping power.

Conclusion

Based on the foregoing, this Court should hold that HB325 is unconstitutional because it impermissibly conflicts with Articles III, XV, and XVI of the Delaware Constitution.