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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JUAN LAMBERTY, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	)))))))))))	No. 232, 2014

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPELLANT'S REPLY BRIEF

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I. REVERSAL IS REQUIRED BECAUSE 11 *DEL C.* § 4120 *ET SEQ.* VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY PLACING AN ONEROUS REGISTRATION PROCESS ON HOMELESS, INDIGENT OFFENDERS.

In its Answering brief, the State suggests that an "offender who seeks to avoid monitoring has an incentive to report himself as homeless." Ans. Br. at 14-15. To support this claim, the State misdirects the Court's attention to *People v. Dowdy,* 802 N.W.2d 239, 250 (Mich. 2011). In *Dowdy*, the Michigan Supreme Court cited an increase in sex offenders claiming homelessness after an appellate court decision removed homeless persons from the reporting requirements. *Id*. at 250 n. 54. However, the State fails to recognize that Mr. Lamberty, both here and in the court below, has never claimed that his homelessness excuses him from reporting. It's simply not at issue here. Nor does Mr. Lamberty dispute the "many other governmental purposes furthered by accurate, up-to-date sex offender registration information." Ans. Br. at 10-11. Rather, Mr. Lamberty argues that the current statutory registration scheme makes indigency a crime and unduly burdens homeless offenders, thus forcing noncompliance. But the State dismisses this argument by suggesting that the additional burden "merely places on more transient sex offenders—the people most able to

verify their own whereabouts—the responsibility to do so." Ans. Br. at 16. Not so.

Contrary to the State's contention, the registration statute does more than simply transfer responsibility. It subjects those who have no resources to frequent, in-person registration[1] at an unreasonably distant reporting location. This, in turn, deters homeless offenders from reporting, resulting in an inaccurate and ineffective registry. The recent surge in homeless offenders arrested for failing to report suggests that the additional burdens are not only irrational, but also counterproductive to legislative intent.[2] The State has chosen not to respond to this argument in its Answering Brief.

Although the State concedes that the efficacy of the registration statute "depends upon the freshness and accuracy of the underlying registration information," it fails to provide any evidence that these rigid reporting requirements achieve the statute's stated goals. Ans. Br. at 14. Instead, the State attempts to further distract this Court by mischaracterizing Mr. Lamberty's equal protection claim as a "policy argument" that should be

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1 Registration "forces an action on the person required to register. It is a continuing, intrusive, and humiliating regulation of the person himself." *Doe v. Dist. Att'y*, 686 N.E.2d 1007, 1016 (Mass. 1997) (Fried, J., concurring).

2 "Why would a sex offender *not* violate supervision and disappear? After all, considering all of the restrictions and collateral consequences already experienced, what do they have to lose?" *See*, Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 Harv. C.R.-C.L. L. Rev. 531 (2007)

made to the legislature. Ans. Br. at 16. The State should certainly get points for creativity. However, by framing the issue as one of policy, the State downplays the political risk-aversion that has driven these laws to the outer boundaries of constitutionality.[3] And while the democratic process can adequately safeguards those bounds, public outrage against sex offenders threatens to chill the usual political protections and justifies careful judicial oversight in this instance. Only by engaging with the practical implications of the registration statute can the Court ensure that the Constitution protects even the nation's most reviled citizens. Contrary to the State's contention, this is not an argument for circumventing the democratic process. Instead, it is an argument for requiring the State to adhere to the Constitution despite motivations to do otherwise.

The concept of stranger danger has been at the core of America's collective panic about sex offenders. Corey Yung, R., *The Ticking Sex-Offender Bomb*, 15 J. Gender Race & Just. 81, 88 (2012). In fact, state legislatures design sex offender policy based on the belief that parental awareness of past offenders in their area will prevent future crimes against children. *Id*. at 90. This myth, however, has been contradicted by clear and

3 *Human Rights Watch, No Easy Answers*: Sex Offender Laws in the U.S. 12 (2007), available at http://hrw.org/reports/2007/us0907/us0907web.pdf. ("Politicians didn't do their homework before enacting these sex offender laws. Instead they have perpetuated myths about sex offenders and failed to deal with the complex realities of sexual violence against children.").

convincing evidence that most victims of rape and child molestation knew their perpetrator.[4] Indeed, statistics make abundantly clear that the real threat is from family and friends of the victim's family—not strangers on the registry. *Id.* As a result, registration requirements have the potential to prevent only a very small fraction of future sex crimes.

The second myth circulated about sex offenders' concerns post-release recidivism.[5] Like the stranger danger myth, the best available evidence has contradicted the belief that sex offenders have unusually high recidivism rates. In 2003, the United States Department of Justice ("DOJ") issued a comprehensive study of post-release recidivism of the sex offenders typically cited as posing high risks.[6] The DOJ study examined the criminal records of the 9,691 rapists, child molesters, statutory rapists, and those who committed sexual assault that were released from prison after 1994 in fifteen states, one of which was Delaware. *Id*. The key finding of the study was that recidivism rates among those thought to be high-risk sex offenders were far lower than widely believed. *Id*. at 2. The DOJ reported that "[w]ithin the

4 Jill S. Levenson, Ph.D. *Sex Offender Residence Restrictions*: *A Report To The Florida Legislature*, p.4 (2005).

5 The State admits that Delaware's legislature fell victim to this second myth. Ans. Br. at 11 (citing 11 *Del. C.* §4120A(d)(1) which stated that "some offenders are extremely habituated and that there is no known cure for the propensity to commit sexual abuse.")

6 Patrick A. Langan et al., U.S. Dep't of Justice, Recidivism of Sex Offenders Released from Prison in 1994, at 1 (2003), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf.

first 3 years following their release from prison in 1994, only 5.3% of released sex offenders were rearrested for a sex crime." *Id*. In fact, a study conducted in 2001 using data from Delaware produced very similar results.[7] It estimated that released sex offenders had a 3.8% recidivism rate for new sex crimes. *Id*. at 11. This finding buttresses the DOJ's statistical conclusions that sex offenders are very unlikely to recidivate and that sex-offender recidivism is not rising. *Id*.

For these reasons, placing limits on laws that unduly burden homeless offenders without increasing public safety is not rationally related to any legitimate state purpose. Moreover, the nexus between the statutory means and proffered government interest is irrational and the statutory classification of affected individuals is likewise irrational and arbitrary. Thus, the trial court erred in denying Mr. Lamberty's motion to dismiss.

7 Statistical Analysis Ctr., State of Del., Recidivism of Delaware Adult Sex Offenders Released from Prison in 2001, p.2 (2007), available at http://cjc.delaware.gov/pdf/recidivism_adult_2007.pdf.

II. REVERSAL IS REQUIRED BECAUSE 11 *DEL C.* § 4121 *ET SEQ.* IS UNCONSTITUTIONAL AS IT VIOLATES THE DOCTRINES OF SEPARATION OF POWERS AND NON-DELEGATION.

The State claims that by granting the Superintendent authority to designate reporting locations, the legislature "necessarily recognized 'the flexibility necessary to enable the administrative officials to carry out the legislative will.'" Ans. Br. at 23 (quoting *State v. Durham*, 191 A.2d 646 (Del. Super. Ct. 1963)). Although the Superintendent's discretion relates to police regulation for the protection of public safety, the State fails to explain how or why "it is impractical to fix standards" without frustrating the purpose of the statute. *Durham*, 191 A.2d, at 649. Even where it is not feasible for the General Assembly to supply precise statutory standards, the presence of procedural safeguards may compensate substantially for the lack of precise statutory standards.[8] *Atlantis I Condo. Ass'n v. Bryson*, 403 A.2d 711, 713 (Del.1979). However, in the instant case, the statute is devoid of both substantive and procedural safeguards to protect affected parties from arbitrary administrative decisions. The Superintendent has unguided and uncontrolled discretionary power to designate reporting locations as he or

8 The preciseness of the statutory standards will vary with both the complexity of the area at which the legislation is directed and the susceptibility to change of the area in question. *State Conservation Department v. Seaman*, Mich.Supr., 396 Mich. 299, 240 N.W.2d 206, 210 (1976); *United States v. Gordon*, 5 Cir., 580 F.2d 827, 839 (1978); Cf. *Durham*, supra, at 650.

she sees fit and no matter how unreasonable they are.

Nevertheless, the State maintains that "[t]he Superintendent's designation of the official verification locations was manifestly reasonable." Ans. Br. at 23. To make this claim, the State erroneously assumes that both reporting locations "have the facilities necessary to handle the needs of registration and database maintenance required by statute, and are readily accessible by car and public transportation." Ans. Br. at 24. [This language seems to be taken from the Superior Court's Order, at p. 6: "The Superintendent's designation of the official verification locations was reasonable, as both facilities can handle vast administrative processes and are readily accessible to the public].

In February 2012, during a Delaware Sex Offender Management Board ("SOMB") meeting, concerns were raised "that Troop 2 is not equipped to handle the processing of sex offenders." *See*, SOMB Summary Minutes; (attached hereto as Exhibit A), February 27, 2012 at 2. At the time, a proposal was put forth to have all sex offenders report to register and verify at SBI in Dover "because it is a separate facility equipped to handle the process." *Id*. This proposal, however, raised more concern about a potential increase in failure to verify and prosecution of the offense. *Id*. One Board Member correctly pointed out that "offenders residing in New Castle

and Sussex Counties might have some difficulty in getting to Dover." *Id*. Despite these warnings, the Superintendent now requires every homeless sex offender in the state of Delaware to appear in-person at SBI with Troop 2 not even an option.[9] So for homeless offenders that do not live close to or in Dover, SBI is not readily accessible.

For instance, homeless offenders living in New Castle County must spend about $4 for bus fare to Kent County (SBI), and $4 for bus fare back.[10] Because homeless registrants in Tier III are required report to SBI weekly, these offenders can expect to spend over $400 a year on public transportation. And with lifetime registration requirements, the cost to comply inevitably dwarfs the risk of conviction for failing to report.

Finally, the State alleges that this Court should not consider whether the regulations imposed on homeless offenders are unreasonable because "the cursory mention of the issue . . . is insufficient to merit appellate review." Ans. Br. at 26. The State's reliance on Supreme Court Rule 14 is misplaced for several reasons. First, in denying Mr. Lamberty's motion to dismiss, the Superior Court stated that "[t]he Superintendent's designation of the official

9 Under the FAQ section on Delaware's Sex Offender Central Registry website, it states that "Tier 1 homeless registrants are required to appear *at SBI in-person* every 90 days, tier 2 homeless registrants must appear *in-person at SBI* every 30 days, and tier 3 homeless registrants must appear *in-person at SBI* every seven (7) days." Available at https://sexoffender.dsp.delaware.gov.

10 This estimate is based on the prices listed under DART's InterCounty Fares; available at: http://www.dartfirststate.com/information/getting_there/fares/index.shtml#ncc

verification locations was reasonable, as both facilities can handle vast administrative processes and are readily accessible to the public." This finding inextricably tied the reasonableness of the Superintendent's designation to the issue of nondelegation. Second, Mr. Lamberty properly raised the issue in the body of his opening brief[11], which contained the following position: "The Superintendent expects every sex offender in Delaware to verify their registration at two locations in the entire State. For the myriad of reasons detailed above, this expectation is simply unreasonable." See, Op. Br. at 19. And third, neither case that the State cites supports the conclusion that Mr. Lamberty waived this argument. See, *Ploof v. State*, 75 A.3d 811, 823 (Del. 2013) (barring appellant's attempt to incorporate arguments by referring to the Superior Court briefs in his appendix); *see also*, *Flamer v. State,* 953 A.2d 130, 134 (Del. 2008) *(*failure to cite a single case in the opening brief resulted in waiver of appellant's constitutional claims). Because the relevant facts were clearly introduced and the argument fairly presented, it is properly before this Court.

It is well-established that "[t]his Court will refrain from deciding constitutional questions unless a decision can be reached on no other ground."

11 *Accord, Murphy v. State,* 632 A.2d at 1152 (holding that the failure to present and argue a legal issue in the text of an opening brief constitutes a waiver of that claim on appeal) .

Keeler v. Metal Masters Foodservice Equip. Co., 712 A.2d 1004, 1005 (Del.1998) (per curiam)). In fact, this principle is so firmly rooted that in *Cantor v. Sachs,* the Chancellor declared that:

> While the power of courts is undoubted and their duty imperative in a clear case to declare an act of the Legislature void for its infringement of constitutional provisions, yet the rule is well nigh universal that courts will refuse to exercise the power or even to consider whether the case is one that invokes the performance of the duty, unless a decision can be reached on no other ground than the constitutional one. This proposition is so well settled I deem it unnecessary to cite the authorities establishing it.

162 A. 73, 75 (Del.Ch.1932).

Following this principle, this Court may decline to consider the constitutional question, as it could arise only if the statute is construed as it was in the court below. Cf., *Collison v. State ex rel. Green*, 2 A.2d 97 (Sup.Ct.1938). However, Mr. Lamberty merely posits a reasonably possible construction of the statute which obviates the question of its constitutionality and instead focuses on its reasonableness or lack thereof. Thus, this Court has the power to strike down this statute for being unreasonable on its face.

Conclusion

For the reasons and upon the authority cited herein, the undersigned

respectfully submits that Mr. Lamberty's conviction should be reversed and sentence vacated.

Respectfully submitted,

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