NEW YORK STATE COURT OF APPEALS

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

MICHAEL DIACK

Appellant,

APL-2014-00041

APPELLANT'S REPLY BRIEF

July 7, 2014

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REPLY TO RESPONDENT'S PRELIMINARY STATEMENT: STATISTICS SHOW LOW RECIDIVISM RATES FOR SEX OFFENDERS, AND THAT RESIDENCE RESTRICTIONS ARE INEFFECTIVE OR COUNTER-PRODUCTIVE

Recidivism

Respondent quotes the 1997 case of *Doe v. Pataki*, 120 F.3d 1263 (2nd Cir. 1997) (as well as a 2002 Supreme Court case) which stated, *without citing any sources*, "some studies have demonstrated that, as a group, convicted sex offenders are much more likely than other offenders to commit additional crimes." *Doe v. Pataki*, at 1266.

When one looks at *actual studies*, including several recent ones, the truth is very different. Convicted sex offenders have, as a group, among the lowest recidivism rates of all offenders. See University of Nebraska and the Consortium for Crime and Justice Research, "*Nebraska Sex Offender Registry Study: Final Report*" (July 31, 2013)[1]; Zgoba, Kristen M., Michael Milner, Raymond Knight, Elizabeth Letourneau, Jill Levenson, and David

[1] The Nebraska Report is available at http://sentencing.typepad.com/sentencing_law_and_policy/2013/08/new-nebraska-study-suggests-sex-offender-registry-charges-pushed-by-feds-may-do-more-harm-than-good.html

Thornton, "*A Multi-State Recidivism Study Using Static-99R and Static 2002 Risk Scores and Tier Guidelines from the Adam Walsh Act.*" Research Report Submitted to the National Institute of Justice, 2012; Hanson, R. Karl and Monique T. Bussière, "*Predicting Relapse: A meta-Analysis of Sexual Offender Recidivism Studies*." Journal of Consulting and Clinical Psychology, 66 (2):348-362 (1998); Human Rights Watch, "*Raised on the Registry*[2]*,*" 2013.

The Nebraska Report, which cited numerous studies, compared Nebraska sex offender recidivism rates to those in four other states, and found the five year sexual reoffending rates to be less than 5.7%[3] in Nebraska; 5.2% in Florida; 7.0% in Minnesota; 3.5% in New Jersey, and 4.1% in South Carolina. (Nebraska Report, at 20, 22) This is clearly *much lower* than recidivism rates for all offenses.[4]

Similarly, the Human Rights Watch Report stated, at 4, "In 2011, the national recidivism rate for all offenses... was 40 percent, whereas the rate was 13% [which would include not just sexual re-offense, but re-offense for

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[2] The Human Rights Watch Report is available at http://www.hrw.org/reports/2013/05/01/raised-registry

[3] The 5.7% was based on recidivism at any time, just not within five years.

any crime] for adult sex offenders [and even lower for youth sex offenders]." Thus it is submitted that the claim of high recidivism rates for sex offenders is simply wrong, no matter how many times it is repeated. It is a virulent myth used to justify all sorts of harsh measures aimed at this population.

Studies Regarding Residence Restrictions

In addition, as to the efficacy of residence restrictions, while there have been *no studies* showing they are effective at protecting children, there are several studies showing they have no effect or are counterproductive. See Douglas Berman, *"Sex offender housing restrictions do more harm than good*[5]*,"* 2014; Human Rights Watch Report, at 47-47, citing Paul A. Zandbergen, Jill S. Levenson, and Timothy C. Hart, "*Residential proximity to schools and daycares: An empirical analysis of sex offense recidivism*," Criminal Justice & Behavior, vol. 37, no. 5 (May 2010); Paul A. Zandbergen and Timothy C. Hart, "*Geocoding accuracy considerations in determining residency restrictions for sex offenders*," Criminal Justice Policy Review,

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[4] See, i.e. http://www.bjs.gov/content/pub/press/rprts05p0510pr.cfm

[5] Available at http://sentencing.typepad.com/sentencing_law_and_policy/2014/04/sex-offender-housing-restrictions-do-more-harm-than-good.html

vol. 20, no. 1 (March 2009), pp. 62-90 (concluding that individuals in Florida on the sex offender registry who lived closer to schools and daycares were not more likely to reoffend, and living father from schools and daycares did not diminish the probability of sexual reoffending).

It is also noted that, like many of the "21 counties, 16 cities, 48 towns and 32 villages in New York[6]" which adopted sex offender residence restrictions, Nassau County Local Law 4-2006 prohibits all registered sex offenders from going within 500 feet of a "park." The New York Times had an article last year describing the construction of tiny "parks" purely to keep registered sex offenders out of particular neighborhoods[7]. This is but one example of the unintended consequences of these laws.

Finally, Respondent cited the ongoing federal case of *Moore v. Suffolk County,* 2013 WL 4432351 (EDNY 2013), where the court is, not surprisingly, waiting for a decision in the instant case before moving forward in that case. However, tellingly, Respondent did *not* cite or mention the many other cases in other jurisdictions (including the Third Circuit Court

[6] These numbers were cited in Respondent's Brief, at 10, and they come from a website (www.theparson.net) developed by a man named David Hess, a level one registered sex offender who was

of Appeals, and the highest courts of New Jersey, Pennsylvania, and California) all of which, as cited in Appellant's Brief, found local residence restrictions to be preempted by state law under a preemption analysis nearly identical to New York's.

ARGUMENT

I. CONFLICT PREEMPTION APPLIES WITH REGARD TO THOSE UNDER SUPERVISION OR IN NEED OF PUBLIC ASSISTANCE – AND LOCAL RESIDENCE RESTRICTIONS RENDER PEOPLE HOMELESS AND THUS CREATE A DIRECT CONFLICT

In discussing conflict preemption, Respondent, at 22, cites *Lansdowne v. NYC Dep't of Consumer Affairs*, 74 NY2d 761 (1989) for the proposition that the question is whether there is a "head-on collision" between a local ordinance and a state statute. In *Lansdowne*, supra, this Court found that a local cabaret law requiring licensed cabarets to close between 4am and 8am was preempted by a state Alcohol and Beverage Control Law allowing patrons to remain at a cabaret until 4:30am.

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also the parson of the West Henrietta Baptist Church. His parishioners knew of his offense and still loved him and wanted him as their pastor. Very sadly, David passed away from lung cancer in March, 2014.

[7] http://www.nytimes.com/2013/03/10/us/building-tiny-parks-to-drive-sex-offenders-away.html?hp&_r=0)

Likewise, there is such a "head-on collision" between New York statutes and related regulations which would allow registered sex offenders under parole or probation supervision, and all homeless registered sex offenders, to reside in locations not allowed by local laws.

Respondent appears to concede that conflict preemption applies with regard to those under parole or probation supervision or who are seeking public assistance (given that the Appellate Term Decision appealed from found that preemption applied as to those people, and Respondent is not challenging that finding.)

However, Respondent does not consider that fact that local laws such as Nassau County Local Law 4-2006 often have the effect of *rendering people homeless* - then there is a direct conflict because the person is "seeking public assistance." See, i.e, "*In 2 Trailers, the Neighbors Nobody Wants,*" New York Times, February 5, 2013[8], describing how a Suffolk County local residence restriction (the one challenged in *Moore v. Suffolk Co.,* supra) forced many registered sex offenders into homelessness, and

[8] Available at http://www.nytimes.com/2013/02/05/nyregion/suffolk-county-still-struggling-to-house-sex-offenders.html?_r=0

stating, "The restrictions are so sweeping that it can be difficult for the offenders to find housing, leaving many homeless..."

A. State Recognition of Local Laws is not Approval

Respondent claims, at 23, 28-29, and 39-40, that the fact that state agencies have cited the existence of local residence restrictions somehow means that the agencies are not opposed to said local laws. Clearly, the agencies themselves cannot simply declare these laws invalid; that is up to this Court. Thus they cannot help but recognize their existence.

However, as noted in Appellant's Brief, at 7-8, the agencies (including the Division of Probation and Correctional Alternatives [DPCA], the Division of Parole [DOP] and the Office of Temporary and Disability Assistance [OTDA]) which were directed by the Legislature to implement Chapter 568 by issuing housing regulations for sex offenders under supervision, have noted their opposition to these laws. For example, DPCA's Regulations for Sex Offender Housing, Statement of Purpose, codified at 9 NYCRR 365.3, stated (emphasis supplied):

“““***

(b)...Sex *offender management, and the placement and housing of sex offenders, are areas that have been, and will continue to be, matters addressed by the State. These regulations further the State's coordinated and comprehensive policies in these areas, and are intended to provide further guidance to relevant state and local agencies in applying the State's approach.*

(c) Public safety is a primary concern and these regulations are intended to better protect children, vulnerable populations and the general public from sex offenders. *The State's coordinated and comprehensive approach also recognizes the necessity to provide emergency shelter to individuals in need, including those who are sex offenders, and the importance of stable housing and support in allowing offenders to live in and re-enter the community and become law-abiding and productive citizens. ...*

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(d) In implementing this statute and the State's comprehensive approach, DOP [Division of Parole], DPCA, OTDA (Office of Temporary and Disability Assistance) and the Division of Criminal Justice Services' Office of Sex Offender Management (DCJS/OSOM) recognize that:

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(4) *to reduce recidivism it is important that offenders be able to re-enter society and become productive and law-abiding citizens whenever possible. A stable living situation and access to employment and support services are important factors that can help offenders to successfully re-enter society.*

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(5).... *[I]t is not appropriate for any one community to bear an inappropriate burden in housing sex offenders because another community has attempted to shift responsibility for those offenders onto other areas of the State. The proliferation of local ordinances imposing residency restrictions, while well-intentioned, have made it more challenging for the State and local authorities to address the difficulties in finding secure and appropriate housing for sex offenders.*”

Respondent claims, at 28, that there is no evidence that Local Law 4-2006 would "inhibit the operation" of parole or probation staff. However, it is hard to see how local laws which would prevent said staff from placing people in locations chosen after a careful examination of the relevant factors (see, i.e, 9 NYCRR 365.4) would not be inhibiting their operation

B. The *Nyack* Case is Distinguishable as it Involves Zoning

Finally, at 29-33, Respondent cites *Inc. Vil. of Nyack v. Daytop Vil.*, 78 NY2d 500, 506, where this Court found that state laws regarding substance abuse facilities did not preempt local *zoning* laws. In *Nyack*, this Court stated:

> "Both the State and the Village have important interests at stake in this controversy – the State in promoting its substance abuse policy, the Village in *controlling its present shape and future growth.* ...
>
> ***
>
> ...The Village has a legitimate, legally grounded interest in *regulating development within its borders*..." *Nyack*, supra, at 507-508, emphasis supplied.

The *Nyack* case is distinguishable from the instant situation because, among other reasons, it involved zoning laws, an area particularly suited to home rule for the reasons stated in the above quotation. In contrast, the

Local Law herein does not involve zoning, does not involve any purely local considerations, and is contrary to state policy on sex offender management.

II. FIELD PREEMPTION APPLIES WITH REGARD TO ALL REGISTERED SEX OFFENDERS

A. SARA "School Grounds" Provision Prevents Residence

In discussing the Sexual Assault Reform Act (SARA), Respondent, at 37, appears to claim that SARA's prohibition on offenders under supervision "entering onto" "school grounds" somehow does not affect residency.

However, it is very clear that, as shown in *Williams v. Dep't of Corrections and Corrections and Community Supervision [DOCCS]*, 43 Misc.3d 356 (NY Co. 2014) and elsewhere, DOCCS *is* interpreting SARA (codified in PL 65.10[4-a], Correction Law 272[9] and Executive Law 259-c[14]) to disallow *residence* within one thousand feet of "school grounds." As defined in PL 220.00, "school grounds" means "...(b) any area accessible to the public located within one thousand feet of the real property boundary line comprising any such school..."). The plaintiff in *Williams* as well as the plaintiff in *Devine v. Annuci*, Index No. 5406/14 (Kings Co. filed 4/9/14), and many others have been told by state authorities that they *cannot reside* within one thousand feet of "school grounds" under SARA.

B. SOMTA is Relevant as its Residence Restrictions may Apply After the Supervision Period Ends

At 38, Respondent claims that the Sex Offender Management Treatment Act (SOMTA) is "even less relevant" to residency than SARA. However, it is submitted that SOMTA is quite relevant as it allows for either civil confinement or "strict and intensive supervision and treatment" (SIST) (*including residence restrictions*) for registered sex offenders who are found to have a "mental abnormality." Mental Hygiene Law (MHL) Article 10 provides that the Attorney General may file a petition at any point while a registered sex offender is incarcerated or under supervision, and seek to have the individual civilly confined or intensely supervised. If a court such a "mental abnormality," the person will be civilly confined or subject to SIST even after the period of parole or probation supervision is over.

Pursuant to MHL 10.03(i) "Mental Abnormality" means a condition that "predisposes [the individual] to the commission of conduct constituting a sex offense and that results in the person having serious difficulty in controlling such conduct."

This Court has stated that the "mental abnormality" need not be one identified in the Diagnostic and Statistical Manual of Mental Disorders (DSM). *State v. Shannon S.*, 20 NY3d 99 (2012).

MHL 10.11 deals with SIST and states that in such situations, DOCCS will recommend supervision requirements to the court which "may include ...*specification of residence*... strict and intensive supervision by a parole officer, and any other lawful and necessary conditions that may be imposed by a court." (MHL 10.11[a][1])

People have been placed under SIST (and sometimes had it revoked and civil confinement imposed instead) under various circumstances, and not all of them are recidivist sex offenders. See *Matter of Gierszewski*, 81 AD3d 1473 (4th Dep't 2011) (the respondent was found to be in need of SIST even though his expert witness stated that he posed a low risk of re-offense if he abstained from alcohol); *Matter of Shawn X.*, 69 AD3d 165 (3rd Dep't 2009) (respondent, who had only *one conviction for a sex offense*, did not meet the DSM criteria for pedophilia or any other mental abnormality, and whose highly regarded expert witness found him to pose a low risk of re-offense, was still held to be in need of SIST); *State v. Donald N*, 63 AD3d

1391 (3rd Dep't 2009) (man with two prior sex offenses involving teens had his SIST revoked and was confined after he was arrested for driving under the influence of drugs); *State v. Matter*, 109 AD3d 1181 (4th Dep't 2013) (revocation of SIST and imposition of civil confinement was upheld); *Matter of Nelson D.*, 22 NY3d 233 (2013) (noting the distinction between confinement and SIST); *Matter of Daniel F.*, 19 NY3d 1086 (2012) (upholding a finding of SIST).

Thus it is submitted that in those rare cases where it may appear that an individual poses a very high degree of risk, even after the period of supervision ends (as noted in Appellant's Brief, at 19-20, those periods are generally quite long, and according to the statistics cited herein on Page 1-2, the vast majority of re-offenses occur within the first few years of release) SOMTA is available to either have him or her civilly confined or placed under SIST.

C. New York has a Comprehensive and Detailed Sex Offender Management Scheme and there is a Clear Need for Statewide Uniformity

Respondent, at 42-43, states that the use of the word "comprehensive" in the DPCA regulations on sex offender housing (9 NYCRR 365.3, quoted,

supra) somehow does not evince any intent to preempt the field of sex offender management, and that the policy statement therein "merely serves as an acknowledgement by the DPCA that exercise of its supervisory authority must be within the context of 'local ordinances imposing residency restrictions.'"

While, as noted above, DPCA cannot help but recognize the *existence* of these local laws, the policy statement, far from simply acknowledging them, clearly states that these laws are misguided, stating:

> "...[I]t is not appropriate for any one community to bear an inappropriate burden in housing sex offenders because another community has attempted to shift responsibility for those offenders onto other areas of the State. The proliferation of local ordinances imposing residency restrictions, while well-intentioned, have made it more challenging for the State and local authorities to address the difficulties in finding secure and appropriate housing for sex offenders." (9 NYCRR 365.3[d][5])

The cases cited by Respondent are distinguishable. At 43-48, Respondent cites *Jancyn Manufacturing Corp. v. Suffolk Co.*, 71 NY2d 91 (1987) (where a local law banning a cesspool additive was not held to be preempted by state law) and *Vatore v. Comm. of Consumer Affairs of the City of NY*, 83 NY2d 645 (1994) (where a local law banning tobacco

vending machines anywhere but in taverns was held not to be preempted by state tobacco regulations) for the proposition that the state did not intend to occupy the field of sex offender management, and does not have a comprehensive and detailed statutory scheme in that regard.

However, neither of those cases involved matters where there is a need for statewide uniformity. Nor do they involve situations where the local laws in question are actually contrary to state policy and have been creating serious problems noted by the state.

In *Jancyn*, supra, this Court stated, at 98, "... entirely absent [from the state statutory scheme therein] is any desire for across-the-board uniformity..." In contrast, as stated above, the DPCA regulations herein (as well as similar policy statements cited in Appellant's Brief) *do* recognize a need for statewide uniformity, stating, once again, at 9 NYCRR 365.3:

"(b)...Sex offender management, and the placement and housing of sex offenders, are areas that have been, and will continue to be, matters addressed by the State. These regulations further the State's coordinated and comprehensive policies in these areas...

***

(d)(5)...[I]t is not appropriate for any one community to bear an inappropriate burden in housing sex offenders because another community has attempted to shift responsibility for those offenders onto other areas of the State."

Vatore is likewise distinguishable for the same reason, and also because, in that case, this Court stated that the local law was permissible in that it furthered, rather that acted contrary to, state policy. In this case, while both the State and Nassau County share the policy goals of protecting the public, Local Law 4-2006 runs counter to another part of the state policy - that is, in an attempt to prevent recidivism, it is state policy *to ensure stable housing* for registered sex offenders. (Correction Law 203[1]; Executive Law 243[4]; and Social Services Law 20[8]).

CONCLUSION

As argued in Appellant's Brief, it is submitted that Nassau County Local Law 4-2006 (and similar laws in other localities) is preempted by New York's comprehensive and detailed scheme of sex offender management. Moreover, these laws not only are contrary to state policy, as noted above, but they actually create many problems and do not solve any.

If localities are free to compete with each other to see who can most successfully banish sex offenders from their communities, many more former offenders will become homeless and will be driven underground. No one will be any safer and many who would otherwise be productive, law

abiding citizens will be driven into hiding in the recesses and corners of society, where they will be much more likely to commit new crimes.

Dated: July 7, 2014.

Respectfully submitted,

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