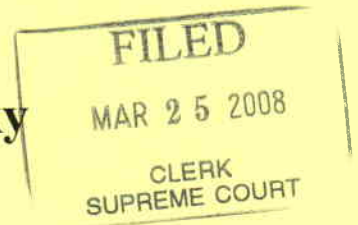


Commonwealth of Kentucky
Supreme Court
No. 2007-SC-000347-CL



COMMONWEALTH OF KENTUCKY

APPELLANT

v.

Appeal from Kenton District Court
Hon. Martin J. Sheehan, Judge
Indictment No. 07-M-604

MICHAEL BAKER

APPELLEE

Reply Brief for Commonwealth

Submitted by,

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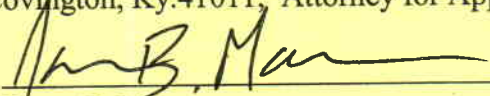
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CERTIFICATE OF SERVICE

I certify that the record on appeal has not been checked out from the Clerk of this Court and that a copy of the Brief for Commonwealth has been this 25th day of March, 2008, mailed via U.S. Mail to Honorable Martin J. Sheehan, Judge, Kenton District Court, 500 Justice Center, 230 Madison Avenue, Covington, Kentucky 41011, sent via electronic mail to Hon. Christopher S. Nordloh, Assistant Kenton County Attorney, 28 West Fifth Street, Covington, Kentucky 41011, by regular mail to Hon. Bradley Fox, Fox & Scott, P. L. L. C., 517 Madison Avenue, Covington, Ky. 41011, Attorney for Appellee.



Jason B. Moore
Assistant Attorney General

PURPOSE OF THIS REPLY BRIEF

This Reply Brief responds to the Appellee's brief. Any failure to respond to any particular argument should not be taken as a waiver of an issue or argument.

I.

APPELLEE'S ARGUMENT RELIES ALMOST EXCLUSIVELY ON AN UNPUBLISHED DECISION OF A SINGLE UNITED STATES DISTRICT COURT.

In his brief, appellee relies heavily on the decision of the United States District Court for the Northern District of Ohio in the case of Mikaloff v. Walsh, 2007 WL 2572268 (N.D. Ohio September 4, 2007). This is an unpublished slip opinion considering whether Ohio's sex offender residency restriction constituted an *ex post facto* law. In his brief, appellee variously cites this case as being from both the United States Sixth Circuit Court of Appeals (See pages iii, 4, 6, 7, 9, 11, 12, 15, 17, 18, and 19) and the Ohio Supreme Court (See page 7 and 11). It is, in fact, merely the opinion of a single United States District Court judge that was not selected for publication in the Federal Supplement. The state of Ohio took an appeal of the decision to the United States Sixth Circuit Court of Appeals, but the appeal was dismissed on March 6, 2008, on the state's motion.

Although not explicitly stated, it is assumed that the appeal of the decision was dismissed because the Ohio Supreme Court issued an opinion on this matter on February 20, 2008, in Hyle v. Porter, — N.E.2d —, 2008 WL 467895 (Ohio 2008)(copy attached). In Hyle, the Ohio Supreme Court relied upon the Ohio Constitution to hold

that the sex offender residency restriction could not be applied retroactively because the Ohio legislature had not expressly made it retroactive. Id. at 6. Obviously, such a question is not presented in the case at bar.

Appellee's reliance upon Mikaloff, *supra*, is understandable as it represents the only decision, published or non-published, which has agreed with his position in this matter, and it relied upon the decision of the Kenton District Court in the case at bar as support for its decision. The Commonwealth, however, asserts that the line of cases cited in its original brief¹, rendered by appellate courts and courts of last resort, should be more persuasive to and provide better guidance to this Court in considering the merits of this case than the opinion of a single United States District Judge. Mikaloff, and the opinion of the Kenton District Court, represent the exception, not the rule.

II.

THE QUESTION IS NOT WHETHER THE GENERAL ASSEMBLY MADE THE BEST DECISION IN ADDRESSING THE ISSUE.

In his brief, appellee cites a Department of Justice study which purports that sex offenders do not have high rates of recidivism despite the United States Supreme Court's statement to the contrary when it affirmed Alaska's sex offender registration system in Smith v. Doe, 538 U.S. 84, 103, 123 S.Ct. 1140 (2003). Be that as it may, the question is not whether the General Assembly made the best, or the wisest, choice in

¹ The Commonwealth would also cite the Court to People v. Morgan, 881 N.E.2d 507 (Ill. App.3 Dist. 2007), which became final since the filing of its original brief herein. This decision followed the prior decision of People v. Leroy, 828 N.E.2d 769 (Ill. App. 5 Dist. 2005) in holding that Illinois's sex offender residency restriction did not constitute an *ex post facto* law.

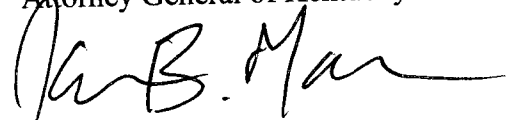
responding to the issue, but rather whether the law is rationally connected to a legitimate non-punitive purpose. Appellee makes no showing that KRS 17. 545 is not so related. Instead, he argues that the statute provides a “false sense of security” and that there are “numerous other ways to address” this issue. App’ee Br. at 17 and 18. Again, that is not the issue presented herein. Rather, the question is whether the statute is rationally connected to a legitimate non-punitive purpose. Clearly, public safety is a legitimate non-punitive purpose, and KRS 17.545 is rationally connected thereto.

Finally, appellee argues that the criminal sanction imposed for the violation of KRS 17.545 makes the statute excessive with respect to its purpose of protecting public safety and argues that “injunctions, evictions and the contempt powers of the courts afford an alternative and less punitive means of effectively promoting public safety and enforcing registration requirements.” App’ee. Br. at 19. Appellee ignores the line of cases cited by the Commonwealth in its original brief, all of which imposed criminal sanctions for the violation of a sex offender residency restriction, and were found not to be excessive with respect to the non-punitive purpose of protecting public safety.

WHEREFORE, the Commonwealth respectfully requests that this Court certify that KRS 17.545 is a civil, non-punitive regulatory statute and is not an *ex post facto* law.

Respectfully submitted,

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