

STATE OF MARYLAND

v.

ADRIAN PHILLIPS

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IN THE
CIRCUIT COURT

FOR
BALTIMORE CITY

CASE NO.: 811024036

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MEMORANDUM OPINION

NANCE, J.

Defendant, Adrian Phillips, has been charged with Failure to Register as a Gun Offender (Count 1) under case number 811024036. On February 16, 2011, Defendant filed a motion to dismiss the said charge, asserting that State law has preempted the local law for which the Defendant was charged. The State has opposed the Motion and, on March 4, 2011, filed a memorandum in response to Defendant’s Motion to Dismiss. Defendant filed an answer to the State’s response and made additional arguments.

BACKGROUND

Phillips, a convicted gun offender, is charged under the Gun Offender Registration Act, Baltimore City Code, Art. 19 § 60 (2011) (“GORA”), which creates a new substantive crime. The city ordinance requires Baltimore City residents convicted of certain enumerated gun offenses in a Baltimore City court to register with the Baltimore City Police Commissioner every six months for a period of three years. §§ 60-3 *et seq.* Within 48 hours of a conviction or release from incarceration, the gun offender is required to register his/her name, address and physical description, description and date of the underlying gun offense, list of all aliases, and any other information demanded by the Police Commissioner. §§ 60-4(a), 5(b). Failure to

comply with GORA may result in a criminal conviction and a fine up to \$1000 or imprisonment up to twelve (12) months or both. Each day of failure to register is a separate offense. § 60-11(b)

The Police Commissioner, who is delegated regulatory authority under § 60-2(a), requires gun offenders to personally appear at the Police Department's Monitoring Unit, 2100 Guilford Avenue, Room # 111, Baltimore, MD 21218. See GORA Acknowledge Form. Since its enactment in 2008, the Police Department has registered over 1,000 gun offenders with more than 463 gun offenders living in the City.¹

At the time of his sentencing for the underlying gun conviction,² Phillips signed an acknowledgement form obliging his appearance before a monitoring unit to register as a gun offender. Upon his alleged failure to re-register every six months thereafter, the multi-jurisdictional Gun Trace Task Force led by the Baltimore City Police Department apprehended Phillips, and the instant case, soon thereafter, was commenced.

ISSUES PRESENTED

Phillips raises the following issues:

1. Whether provisions of the State code pertaining to firearms preempt GORA.
2. Whether the Police Commissioner's failure to comply with the filing provision of GORA renders GORA ineffectual.
3. Whether GORA is so vague that it violates the Fourteenth Amendment of the United States Constitution and Article 24 of the Maryland Declaration of Rights.
4. Whether the inquiries asserted in the GORA registration form violate the privilege against self-incrimination.

¹ Press Release, Mayor Stephanie Rawlings-Blake (Oct. 13, 2010).

² On December 1, 2008, Defendant was found guilty in the Circuit Court for Baltimore City of armed robbery and carrying a handgun on his person. Case No. 108206050. Defendant received a sentence of nine years incarceration, with all but two years suspended and three years supervised probation.

5. Whether GORA violates the principles of separation of powers enumerated in Article 17 of the Maryland Declaration of Rights.
6. Whether the penalty imposed by GORA for failure to register constitutes cruel and unusual punishment within the meaning of the Eighth Amendment of the United States Constitution.³
7. Whether GORA violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article 24 of the Maryland Declaration of Rights.

ANALYSIS

I. PREEMPTION

Defendant, Adrian Phillips, first alleges that the State, by enacting comprehensive legislation and regulations concerning firearms and ammunition, has preempted local action relating to this area. This contention is without merit.

The State's preemptive authority over local laws occurs in three ways: (1) preemption by conflict, (2) express preemption, or (3) implied preemption. Worton Creek Marina v. Claggett, 381 Md. 499, 512 (2004). Preemption by implication, in question here, occurs where a local law impacts an area in which the General Assembly has acted with such force that intent by the State to occupy the entire field must be implied. See Holiday Point Marina Partners v. Anne Arundel County, 349 Md. 190, 212 (1998); see also Talbot County v. Skipper, 329 Md. 481 (1993). While there is no "particular formula" for ascertaining the General Assembly's intent to preempt an entire field, and several factors are considered,⁴ courts have stated, "the primary indicia of a legislative purpose to preempt an entire field of law is the comprehensiveness with which the

³ Defendant's Eighth Amendment claim is not ripe for review because no conviction and sentence has yet resulted. This Court will not address the contention any further.

⁴ Some of these secondary factors include whether local laws predated state laws governing the same subject matter, the pervasiveness of state regulations, and whether a state law has recognized a local authority to act in the field. County Comm'rs v. Days Cove Reclamation Co., 122 Md. App. 505, 521-522 (1998).

General Assembly has legislated in the field.” Talbot County, 329 Md. at 488. It follows that the State’s proscription of certain activities in a particular field does not necessarily bar local units from enacting additional laws impacting that area. See Mayor of Baltimore v. Hart, 395 Md. 394, 408 (2006). Unless the entire field has been occupied by the State, local entities may enact supplemental laws pertaining to that area that do not explicitly contradict State mandates. Id.

The State regulates firearms through both the Criminal Law and Public Safety articles. Together, the State laws regulate the purchase, sale, taxation, transfer, manufacture, repair, ownership, possession and transportation of firearms. The Criminal Law article, specifically, promulgates criminal sanctions for the unlawful wearing, carrying, and transporting of handguns. Each article, moreover, contains explicit clauses giving State law preemptive authority over local action on the subject matter covered in the respective sections.⁵

The local law, GORA, legislates a wholly distinct and independent area. This ordinance does not prescribe qualifications for the possession, manufacture, sale, transfer, transportation, repair or use of firearms or in any other manner burden gun ownership. It, instead, regulates a class of persons convicted in Baltimore City of enumerated gun-related offenses and imposes upon them the legal obligation to register. The requirement to register, under GORA, is triggered

⁵ Crim. Law. § 4-209 provides the following:

a) State preemption. -- Except as otherwise provided in this section, the State preempts the right of a county, municipal corporation, or special taxing district to regulate the purchase, sale, taxation, transfer, manufacture, repair, ownership, possession, and transportation of: (1) a handgun, rifle, or shotgun; and (2) ammunition for and components of a handgun, rifle, or shotgun.

...

c) Preexisting local laws. -- To the extent that a local law does not create an inconsistency with this section or expand existing regulatory control, a county, municipal corporation, or special taxing district may exercise its existing authority to amend any local law that existed on or before December 31, 1984.

Pub. Safety § 5-104 additionally provides:

This subtitle supersedes any restriction that a local jurisdiction in the State imposes on a sale of a regulated firearm, and the State preempts the right of any local jurisdiction to regulate the sale of a regulated firearm.

See also MD. CODE ANN., PUB. SAFETY § 5-133 (a) (2011).

only against those individual's convicted of a specified gun-related crime; these individuals are already prohibited from possessing a gun by State law. See MD. CODE ANN., PUB. SAFETY § 5-133 (b) (2011). Court does not find the State has so extensively regulated the field of firearms and ammunition that it preempts all local action in the field. GORA is not preempted by any State law.

II. EQUAL PROTECTION OF LAWS

Phillips additionally contends that the Gun Offender Registry Law denies him equal protection of the laws under the Fourteenth Amendment of the United States Constitution and Article 24 of Maryland Declaration of Rights⁶ because its treats individuals convicted in Baltimore City courts differently than similarly situated individuals convicted in other courts within Maryland. To fall within the purview of GORA, an individual must be convicted either in the Circuit Court for Baltimore City or a Baltimore City District Court. Individuals convicted of an identical gun offense in any other state court, even if they are residents of Baltimore City, have no registration requirement imposed upon them. If the gun offender is convicted in a City court and is also a City resident, § 60-6 imposes additional obligations upon the individual, e.g., re-registering every six months.⁷

⁶ Article 24 states “[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.” Maryland courts have held synonymous the phrase “due process of law” as used in the federal constitution with “Law of the land” as used in the state constitution, and thus Supreme Court decisions on the Fourteenth Amendment are “practically direct authorities.” See Griffin v. Bierman, 403 Md. 186, 209-210 (2008).

⁷ The three sub-groups, created by GORA, can be further described as the following:

1. A gun offender convicted neither in the Circuit Court for Baltimore City nor a Baltimore City District Court = no requirement to register.
2. A gun offender who is convicted in a Baltimore City court but resides outside of Baltimore City = must register once.
3. A gun offender who is both convicted in a Baltimore City court and resides in Baltimore City = continual six month obligation to register and update information for a period of three years.

Phillips argues that GORA is under-inclusive, i.e., that it includes gun offenders charged in City courts but excludes defendants charged elsewhere. However, the mere fact that a statute is under-inclusive or over-inclusive is not, without more, enough to invalidate it under rational basis.⁸ Here, no suspect class or fundamental right is affected by the law. Gun offenders, unlike most suspect classes, have voluntarily assumed the conduct that placed them within the class group. See Doe v. Dept. of Pub. Safety and Correctional Services, 185 Md. App. 625, 638 (2009) (citing Kahn v. Shevin, 416 U.S. 351 (1974) (Brennan J. dissenting)) see also Hilliard v. Ferguson, 30 F.3d 649, 652 (5th Cir. 1994) (“Convicted felons are not a constitutionally protected suspect class”).⁹

The burden is placed upon the Defendant to show that GORA is not rationally related to a legitimate state interest. The City of Baltimore has a legitimate interest in protecting its citizens from violent gun crimes, and studies demonstrate that individuals with existing gun-related convictions pose a greater risk of recidivism, than the general public.¹⁰ GORA passes constitutional muster under the rational basis test.

⁸ In Doe v. Dept. of Pub. Safety and Correctional Services, 185 Md. App. 625 (2009), the Court of Special Appeals upheld the state sex offender registration statute from a constitutional attack based partly on equal protection grounds. The statute required all “sexual violent offenders” to personally appear and register before a local law enforcement agency every six months. Id. at 631. Doe, previously convicted of rape, argued that the statute was over-inclusive, i.e., that it arbitrarily grouped all sex-offenders together regardless of their actual dangerousness. Id. at 640. The Court found, that despite the alleged over-inclusiveness of the law, sex offenders did not possess any immutable characteristics that would entitle them to suspect class protection. Id. Accordingly, the Court proceeded under the rational basis test and found that the statute’s discriminatory treatment of sex offenders was justified because sex offenders were more likely than either the general public or their fellow releasees to be convicted of a new sex crime. Id.

⁹ Defendant identifies additional constitutional rights, which he believes are compromised by GORA, i.e., privilege against self-incrimination, notice component of due process and the right of checks and balances in government. Courts have never used these rights as a basis to constitutionally probe a statute or ordinance on equal protection grounds. This Court finds no basis to proceed any further in regards to this contention. However, it is troubling to this Court that two Baltimore City residents, living side by side, can violate the same State law and be punished differently by this local law.

¹⁰ For example, Baltimore City statistics show that 42% of defendants charged with felony gun crimes have prior gun arrests. See Mayors Against Illegal Guns, “Gun Offender Registration,” (2008) at <http://www.mayorsagainstillegalguns.org/html/local/gun-offender.shtml>.

III. PRIVILEGE AGAINST SELF INCRIMINATION

Statutes that impose a self-reporting requirement present a difficult task for the judiciary. Tensions between the State's demand for disclosures and the offender's privilege against self incrimination inevitably must be resolved through the balancing of the public need with the fundamental rights afforded to each individual. California v. Byers, 402 U.S. 424, 427 (1971). In explaining the public need for reporting, the Supreme Court explained:

An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours, and working conditions of employees. ... Comparable examples are legion. In each of these situations there is some possibility of prosecution -- often a very real one -- for criminal offenses disclosed by or deriving from the information that the law compels a person to supply. Information revealed by these reports could well be "a link in the chain" of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes[.]

Id.

In striking this balance, the courts have designed an analytical framework where the privilege may not be invoked to avoid compliance with "a regulatory regime that advances public purposes unrelated to the enforcement of criminal laws," In re Ariel G., 153 Md. App. 698 (2003), unless the regulation at issue is directed to a group "inherently suspect of criminal activities" and falls in an "area permeated with criminal statutes." See Unnamed Attorney v. Attorney Grievance Comm'n of Maryland, 349 Md. 391, 401 (1998).

Phillips raises serious and legitimate concerns regarding GORA's potential infringement of the privilege;¹¹ however, Defendant has proffered no evidence on how he personally would be

¹¹ Pursuant to this authority, the Commissioner requires affected gun offenders to provide information regarding "Gang Affiliation/ Source of Information." While gang membership, alone, is not a crime, affiliation with a gang is highly relevant to a prosecution under § 9-802 and 9-804(a)(1) of the Criminal Law article. In both of these substantive offenses, gang affiliation is "a link in the chain of evidence" needed to prosecute the individual. Section 9-804(a)(1) criminalizes the participation of a criminal gang, per se, when the members of the gang engage in a

incriminated by completing the registration requirement and thus does not have a cognizable Fifth Amendment claim. This Court finds no existing merit to this argument and will not speculate.

IV. COMMISSIONER'S FAILURE TO COMPLY WITH GORA

An issue of most significance is Phillips' assertion that the Police Commissioner has failed to comply with GORA § 60-2(c). This section of the ordinance states that “[a] copy of all rules and regulations adopted under this subtitle must be filed with the Department of Legislative Reference before they take effect.” See GORA § 60-2(c) (2011). The State relies on the permissive language of § 60-2(a) and (b), arguing that the forms and additional inquiries and documents sought need not be filed in the Department of Legislative Reference. Defendant, relying on the mandatory language of § 60-2(c), argues that unless and until the materials are filed with the Department of Legislative Reference, the regulation, by the ordinance's own language, takes no legal effect.

An agency is required to implement its statutory powers in a manner that is consistent with the intent of the legislature. The answer to how the legislation is to be implemented is principally found in the language of the statute itself; otherwise, the intent is generally found in the legislative history. “Where the statutory language is plain and free from ambiguity, and expresses a definite and simple meaning, courts normally do not look beyond the words of the statute to determine legislative intent.” Montgomery County v. Jamsa, 153 Md. App. 346 (2003); see also Johnson v. Mayor of Baltimore, 387 Md. 1, 23 (2005) (holding that “the best source of

pattern of criminal gang activity. A person who violates the section is guilty of a felony and subject to imprisonment not exceeding 10 years or a fine not exceeding \$100,000 or both. Potential gun offenders, subject to GORA, will face a real crisis in complying with GORA; a crisis that the Fifth Amendment was designed to protect against.

legislative intent is the statute's plain language and when the language is clear and unambiguous, our inquiry ordinarily ends there”).

This Court, therefore, must begin its review with the language of the ordinance. Section 60-2 is a hodgepodge of permissive and mandatory language. It provides the following:

(a) Commissioner may adopt.

The Police Commissioner *may* adopt rules and regulations to carry out this subtitle.

(b) Scope. These rules and regulations *may* govern:

(1) the form, content, and processing of the acknowledgment required by this subtitle;

(2) the form and content of the registration required under this subtitle;

(3) the documentation required to verify the content of the registration required under this subtitle;

(4) the maintenance, use, and availability of the information that is collected by the Police Commissioner under this subtitle.

(c) Filing.

A copy of all rules and regulations adopted under this subtitle *must* be filed with the Department of Legislative Reference before they take effect

GORA § 60-2 (2011) (emphasis added).

The precatory language “may,” when used in a statute, usually gives discretion to the administering agency. See Gazunis v. Foster, 400 Md. 541, 565 (2007). Section 60-2(a) makes the adoption of rules and regulations permissive. However, § 60-2(c) makes clear that once a rule and regulation is adopted, it is mandatory that the Commissioner file that rule or regulation with the Department of Legislative Reference. See id (stating that “the ordinary definition of the word ‘must’ is ‘to be required or obliged by law, morality, or custom’”). From the direct language of the ordinance, if this filing does not occur, the rules and regulations do not take legal effect.¹²

¹² In support of its contention that City Council did not intend filing to be a prerequisite to enforcement of any regulations, the State cites commentary to a recently proposed City Council bill. The commentary states that “the legal effectiveness of the duly adopted regulation was not intended to be contingent on the filing [with the Department of Legislative Reference].” However, courts may not rely on subsequent statements of legislators in its determination of legislative intent because such statements have “very little, if any,” probative value on the intent of

The Court of Appeals discussed a similar issue in Evans v. State, 396 Md. 256 (2006). In that case, Evans, a death-row inmate, challenged the validity of the Department of Corrections' lethal injection protocol, arguing in part, that the regulations were without effect, because the agency had failed to publish the protocol in the Maryland Register. The Court of Appeals found that § 10-110 and 10-111¹³ of the State Government article required all State agencies seeking to adopt regulations to publish proposed regulations in the Maryland Register and issue a copy to a specified joint legislative committee. Id. at 344-45. The Court of Appeals concluded that "there can be no legitimate doubt" that the Department of Correction's lethal injection protocol are regulations when they "have general application and future effect, were adopted to detail or carry out a law that DOC administers, and govern the procedure of DOC" and that these regulations would have no effect until properly published, pursuant to § 10-110 and 10-111. Id. at 346; see cf., Hotch v. United States, 212 F.2d 280, 283 (9th Cir. 1954) (Failure to publish rule banning fishing in Taku Inlet, pursuant to mandate in APA, causes the rule to have no legal effect.); Morton v. Ruiz, 415 U.S. 199 (1974) (An unpublished Interior Department manual limiting benefits to certain Native Americans was void.); Maryland v. Environmental Protection Agency, 530 F.2d 215 (4th Cir. 1975) (EPA regulation that failed to comply with the APA publication requirement is void.)

In the case, *sub judice*, the Commissioner exercised the discretion given to him. The Police Commissioner created acknowledgment and registration forms and required each offender, affected by the law, to physically appear at a designated area and register accordingly.

the legislative session that passed the law. See United States v. Clark, 445 U.S. 23, 33 n.9 (1980); see also United States v. Markgraf, 736 F.2d 1179, 1184 n.4 (7th cir. 1984). Moreover, the commentary is irrelevant to GORA; it was directed towards an unrelated proposed bill that shares some language with GORA.

¹³ Section 10-111, in relevant part, provides that "a unit may not adopt a proposed regulation until (i) after submission of the proposed regulation to the Committee for preliminary review under § 10-110 of this subtitle; and (ii) at least 45 days after its first publication in the Register."

In addition, within the forms, the Commissioner requires all sorts of additional information from the offender that was not specifically enumerated in the ordinance, e.g., the name, address, and phone number of the nearest relatives and friends, their relationship with the offender, the offender's occupation, vehicle information, and "Gang Affiliation/ Source of Information." All, arguably, pursuant to the regulatory authority given to the Commissioner by GORA. The registration forms are not, as the State suggests, mere "procedural aspects of GORA's operational framework" and "internal office procedures for collecting information", but rather are enforcement devices that affect the substantive penal rights of prescribed gun offenders and possess both a general application and future effect.¹⁴ The purpose and function of the registration forms is to implement GORA and add details to the procedures that the ordinance obviously leaves unaddressed. See Evans, 396 Md. at 346 (2006); see also Massey v. Sec'y, Dep't of Pub. Safety & Corr. Servs., 389 Md. 496 (2005) (Internal management decisions, not subject to the transparency requirements of rules or regulations, are those which are purely the concerns of the agency and its staff and "do not substantially affects rights of the public.") (quoting ARTHUR EARL BONFIELD, STATE ADMINISTRATIVE RULE MAKING, § 6.17.). Therefore, this Court must find that the Commissioner's registration forms are the embodiment of regulations and subject to the filing requirements of § 60-2(c).

Maryland courts will give considerable deference to an agency's interpretation of its enabling statute. See e.g., Montgomery County v. Jamsa, 153 Md. App. 346, 352 (2003) (stating that "[d]espite some unfortunate language that has crept into a few of our opinions, a court's task

¹⁴ GORA or any other portion of the City Code fails to provide a definition of "regulation." Section 10-101 (g) of the State Government Article defines "regulation" as "a statement or an amendment or repeal of a statement that (i) has general application; (ii) has future effect; (iii) is adopted by a unit to: detail or carry out a law that the unit administers; govern organization of the unit; govern the procedure of the unit; or govern practice before the unit[.] Regulations, however, do not include " (i) a statement that: concerns only internal management of the unit; and does not affect directly the rights of the public or the procedures available to the public; ..."

on review is not to substitute its judgment for the expertise of those persons who constitute the administrative agency.”). However, the degree of deference afforded to administrative interpretations depends on the consistency, thoroughness, breadth, and validity of the agency's reasoning. See Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981); see also Comptroller of the Treasury v. Mack Truck, 343 Md. 606 (1996). Here, no evidence has been presented that the Commissioner engaged in any thorough interpretation of § 60-2 prior to this litigation.

Lastly, the State contends that despite the Police Commissioner's failure to file the “regulations,” the charge should not be dismissed, because the Defendant obtained actual notice of this obligation at the time he was convicted of the underlying gun offense. This contention is misplaced. The Defendant is not making a mistake of law or fact argument. Defendant, instead, protests that he was unable to balance his constitutional rights, e.g., privilege against self-incrimination, without knowing the substance of the regulation beforehand, and Defendant rightfully argues that he does not know or have notice of when, where or how he could inspect the varying inquiries, the registration form, etc., to make an informed decision on how to proceed.¹⁵ The statutory filing requirement in all likelihood was asserted in the bill to avoid the very scenario at hand.

V. VOID FOR VAGUENESS

Phillips argues that the Gun Offender Registry Law runs afoul of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article 24 of the Maryland Declaration of Rights,¹⁶ because it lacks sufficient definiteness or specificity to give notice of

¹⁵ Such actual notice is left to the whims of the individual prosecutor, courts and parties present. Moreover, the State has failed to establish any consistency in the methodology used.

¹⁶ See note 6, *supra*.

what is required to achieve compliance. Phillips' vagueness challenge is directed at both the Police Commissioner's regulations and GORA itself.

In determining whether a statute or regulation fails to meet this constitutional mandate, courts consider two independent rationales.

The first rationale is the fair notice principle that persons of ordinary intelligence and experience be afforded a reasonable opportunity to know what is prohibited, so that they may govern their behavior accordingly. The standard for determining whether a statute provides fair notice is whether persons of common intelligence must necessarily guess at the statute's meaning.

...

The second criterion of the vagueness doctrine regards enforcement of the statute. This rationale exists to ensure that criminal statutes provide legally fixed standards and adequate guidelines for police, judicial officers, triers of fact and others whose obligation it is to enforce, apply and administer the penal laws.

McFarlin v. State, 409 Md. 391, 411 (2009) (quoting Galloway v. State, 365 Md. 599, 615-16, (2001)).

It is well established that a statute or regulation is void-for-vagueness when it fails to "sufficiently ... inform those who are subject to it what conduct on their part will render them liable to its penalties[.]" Id. at 410. Defendant presents the rare occurrence where the void for vagueness doctrine is asserted against an unpublished penal regulation or "secret law." Most regulations, at any level, affecting substantive criminal rights, are published for public consumption.¹⁷

¹⁷ Where the questioned law is a mere civil regulatory regime, not generally implicating criminal liability, courts have more often upheld the validity of unpublished regulations. See, e.g., Willis v. Town of Marshall, 426 F.3d 251, 261 f.4 (4th Cir. 2005) (upholding a town's unpublished prohibition on lewd or otherwise inappropriate dancing on ground that the "government as a property owner must have the flexibility to respond to disruptive situations as they arise."); Families Achieving Independence & Respect v. Nebraska Dep't of Soc. Servs., 111 F.3d 1408, 1415 (8th Cir. 1997) (en banc) ("[T]he fact that a policy is not committed to writing does not of itself constitute a First Amendment violation."); Gilmore v. Gonzales, 435 F.3d 1125, 1135-36 (9th Cir. 2006) (publication of airline identification policy not required when airline passengers are told orally by employees and through posted signs that passengers must display identification at check-in or submit to a search). The doctrine of void-for-vagueness is more stringent, however, when a statute or regulation entails criminal prosecution. "[I]t requires that a *penal statute* define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Gilmore, 435 F.3d at 1135 (quoting Kolender v. Lawson, 461 U.S. 352 (1983)).

GORA, § 60-3, plainly requires a gun offender to register with the Police Commissioner. The issue here, however, is the effectiveness of the regulatory regime, administered by the Police Commissioner, to properly affect that registration. An administering agency cannot constitutionally enforce its rules or regulations when it fails to provide reasonable guidance and fair notice to the public. Here, only after the gun offender arrives at the place designated by the Police Commissioner is he/she told the rules and requirements. As discussed, *supra*, the Police Commissioner, who is delegated exclusive regulatory authority under this law, has failed to meet the explicit filing requirement. The rules and regulations are not simply unclear, they are unknown and unreviewable outside of the walls of the Police Department. Gun offenders are left with no fair notice on how to proceed.

The State vigorously counters that gun offenders are provided sufficient notice through their direct contacts with the regulatory organs, i.e., (1) the state's attorney at the sentencing hearing, (2) the printed acknowledge form, and (3) the registration form and inquiries at the time of registration. The Defendant, in other words, is being required to go to the bowels of the Police Department to learn what constitutes the law and then instantly comply with its requirements or be found in violation of the law. This is not the notice envisioned by Due Process. The current design makes it impossible for anyone, including this Court, to determine whether the Police Commissioner, his agents and/or Defendant have acted properly. This practice entrusts the Police Department to create, apply and modify regulations not only in secret but in a wholly arbitrary fashion.

This Court addresses the second "touchstone" of vagueness, i.e., whether the law in question provides "legally fixed standards and adequate guidelines" to the individual charged with enforcing the enactment. See Finucan v. Md. Bd. of Physician Quality Assur., 380 Md. 577,

592 (2004); see also Eanes v. State, 318 Md. 436, 458-9 (1990) (stating that statute is unconstitutionally vague if it “impermissibly delegates basic policy matters to policemen ... for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application[]”). “It is only where a statute is so broad as to be susceptible to irrational and selective patterns of enforcement that it will be held unconstitutional under this second arm of the vagueness principle.” Galloway 365 Md. at 616. Unlike the fair notice component, discussed *supra*, this issue goes to and touches directly the language of GORA, raising questions of the constitutional propriety of the ordinance itself.

Section 60-5 provides an itemized list of information that the Police Commissioner must solicit in the registration, e.g., offender’s name and address, description and date of the underlying gun offense, list of all aliases, and physical description of the gun offender. Phillips, specifically, takes great issue with the final item in the enumerated list, which states that the information requirement of the registration process includes “any other information required by the rules and regulations adopted by the Police Commissioner under this subtitle.” § 60-5(b)(8). This appears on its face to give the Police Commissioner absolute and limitless discretion to seek any and all information from an offender,¹⁸ and, succinctly stated, gives the police the discretion to transform the registration process from an information-gathering document to an interrogation. C.f. City of Chi. v. Morales, 527 U.S. 41, 58 (1999) (holding a loitering law unconstitutional when it enables the police to arbitrarily implement the law); Bynum v. United States Capitol Police Bd., 93 F. Supp. 2d 50, 59 (D.D.C. 2000) (An unpublished interpretation banning prayer on Capitol Hill was unconstitutionally vague because it allowed Capitol Police to arbitrarily enforce the law and lacked sufficient definiteness to provide fair warning to the general

¹⁸ This Court finds instructive the General Assembly’s articulation of the Maryland sex offender registration law, which, unlike GORA, explicitly enumerates every item required from the registrant and does not empower its administrators to make discretionary inquires. See MD. CODE ANN., CRIM. PROC. § 11-706 (2011).

public.).¹⁹ The concerns of Reverend Bynum, *supra*, are those of Phillips. The concern, here, is not only reasonable, but also legitimate, especially in light of the Police Commissioner's remarkable position that he does not have to comply with the GORA filing requirement.²⁰

CONCLUSION

First, this Court finds that “there can be no legitimate doubt” that the registration and acknowledgement forms issued by the Police Commissioner in relation to the Gun Offender Registration Act of Baltimore City are intended regulations. Because the Police Commissioner has failed or refused to comply with the filing mandate of § 60-2(c) from GORA, the protocol for the Gun Offender Registration Act is ineffective. Secondly, this Court finds that the public has not been given constitutionally sufficient notice of the substance of the regulations of GORA. The Gun Offender Registration Act is unconstitutionally vague and overly broad. Lastly, this Court finds that the Gun Offender Registration Act lacks the specificity of regulatory language, i.e., language requisite for constitutional viability and enforcement.

Defendant's Motion to Dismiss Count I is hereby granted.

**Judge's signature appears on the
original of this document.**

JUDGE ALFRED NANCE

April 8, 2011

¹⁹ Compare to note 17, *supra*.

²⁰ Some of the original concern could have been alleviated by the Police Commissioner's compliance with the filing requirement imposed by City Council. For this reason, this Court finds the Police Commissioner's position that he does not have to perform filing not only legally incorrect but more than troublesome. The Department of Legislative Reference, itself, has contacted the Police Department seeking compliance and has been rebuffed.