ORAL ARGUMENT REQUESTED

RECORD NO. CR-08-1489

In The

Court of Criminal Appeals of Alabama

STATE OF ALABAMA,

Appellant,

v.

JEFFREY LEE SEAGLE,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF MONTGOMERY COUNTY
(CC-09-733)

BRIEF OF APPELLEE

David I. Schoen (SCH036)
2800 Zelda Road, Suite 100-6
Montgomery, AL 36106
(334) 395-6611
(917) 591-7586 (Fax)
DSchoen593@aol.com

Counsel for Appellee

*Gibson*Moore Appellate Services, LLC
421 East Franklin Street ♦ Suite 230 ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

STATEMENT REGARDING ORAL ARGUMENT

Appellee, Jeffrey Seagle respectfully submits that oral argument should be heard in this case because the constitutional issues involved in this appeal are important and oral argument should significantly aid the decisional process.

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Page(s):

Cases:

Statutes:

Constitutional Provisions:

Other:

SUMMARY OF THE ARGUMENT

The trial court's decision declaring § 15-20-22(a)(1) of the Code of Alabama (1975) unconstitutional on its face and as applied to Mr. Seagle and other homeless individuals under the due process clause of the Fourteenth Amendment to the United States Constitution and the due process clauses of Sections 6 and 13 of Article 1 of the Alabama Constitution of 1901 should be affirmed. The statutory section at issue is void for vagueness and violates state and federal constitutional notions of due process. It is void for vagueness for its failure to define the criminal offense with sufficient definiteness so that (1) ordinary people can understand what conduct is prohibited under it and (2) does not encourage arbitrary and discriminatory enforcement. It also violates due process because it is impossible for homeless people to comply with it as determined by the trial court and for other reasons.

The trial court's decision declaring § 15-20-22(a)(1) unconstitutional also should be affirmed because it (1) violates the constitutional ban on cruel and unusual punishment found in the Eighth and Fourteenth Amendments to the United States Constitution and in Article 1, Section 15

of the Alabama Constitution of 1901; and (2) denies Mr. Seagle and indigent homeless persons generally equal protection of the law in violation of the constitutional right to the same provided for in the Fourteenth Amendment to the United States Constitution and in Sections 6 and 13 of Article 1 of the Alabama Constitution of 1901.[1]

[1] Mr. Seagle would commend to the Court's attention two articles which provide some insight to the various constitutional rights implicated generally by such sex offender registration requirements in their various permutations and the suggestion that some such requirements do nothing to advance the enhanced security their drafters hoped they would foster. *See* Michele L. Earl-Hubbard, The ChildSex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s, 90 Nw. U.L. Rev. 788 (Winter 1996); Amy L. Van Duyn, The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes , 47 Drake L. Rev. 635 (1999). 1990sOf course, only § 15-20-22(a)(1) is at issue in this case.

ARGUMENT

I. The Trial Court Did Not Err in Granting Mr. Seagle's Pretrial Motion to Dismiss This Case On the Grounds That § 15-20-22(a)(1) of the Code of Alabama (1975) Violates State and Federal Constitutional Rights to Due Process of Law, Finding The Statute To Be Void For Vagueness On Its Face And As Applied And Because It Is Impossible For Homeless People To Comply With It.

A. Section 15-20-22(a)(1) Is Void for Vagueness On Its Face and As Applied to Homeless Sex Offenders Like Mr. Seagle

At Pages 17-26 of its Brief,[2] the State argues that the Code Section at issue is not void for vagueness on its face or as applied and that, therefore, the trial court's decision declaring otherwise should be reversed. With all due respect and notwithstanding its well written brief, the State is wrong.

The due process concept of fair warning is the underpinning of the vagueness doctrine. "The purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law." City of Chicago v. Morales, 527 U.S. 41, 58 (1999) (citing Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)). The vagueness doctrine bars enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of

[2] The State's Brief will be referred to herein as "SB …."

common intelligence must necessarily guess at its meaning and differ as to its application." United States v. Lanier, 520 U.S. 259, 266 (1997) (quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926)); accord Lanzetta, 306 U.S. at 453 ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."). "[T]he void-for-vagueness doctrine 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." Kolender v. Lawson, 461 U.S. 352, 357 (1983).[3]

Mr. Seagle challenged Code of Alabama § 15-20-22(a)(1) below as void for vagueness under the due process clauses of the Fourteenth Amendment to the United States

[3] The State recognizes both concepts included within the void for vagueness doctrine – the need to define the proscribed conduct so that it can be understood by ordinary people and the need to define it in a manner that does not encourage or lead to arbitrary or discriminatory enforcement, *See* SB at 17. However, in its discussion on this issue, the State really does not address the arbitrary enforcement aspect of the problem reflected in the Code Section at issue and this is a significant part of the problem with the Section, as demonstrated by the record below and as supported by the relevant law. This will be discussed further herein.

Constitution and the Alabama Constitution, both on its face and as applied to him and other homeless persons. U.S. Const. amend. XIV; Ala. Const. art. I, §§ 6, 13.

Two concerns -- clear notice and capricious enforcement -- form the foundation of the void-for-vagueness doctrine. See Andrew E. Goldsmith, The Void-for-Vagueness Doctrine in the Supreme Court, Revisted, 30 Am. J. Crim. L. 279 (Spring 2003); Paul H. Robinson, Fair Notice and Fair Adjudication: Two Kinds of Legality, 154 U. Pa. L. Rev. 335 (December 2005).

With respect to notice, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that the law give a citizen of ordinary intelligence fair warning as to what conduct is forbidden, so that he or she may avoid unlawful conduct and conform his or her conduct to the law. See Morales, 527 U.S. at 58; United States v. Harris, 347 U.S. 612, 617 (1954).

With respect to arbitrary enforcement, the United States Supreme Court has recognized that the failure to provide "minimal guidelines . . . may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'"

Kolender v. Lawson, 461 U.S. 352, 357 (1983) (quoting Smith v. Goguen, 415 U.S. 566 (1974)). Such personal predilections may lead to arbitrary or discriminatory enforcement. See Smith, 415 U.S. at 573.

1. The Statute Is Void for Vagueness On Its Face.

In Kolender v. Lawson, the Court struck down as unconstitutionally vague on its face a California statute that required people loitering or wandering on the streets to identify themselves by providing "credible and reliable identification" upon request of a police officer. 461 U.S. at 353. In analyzing the statute, the Court observed:

> Section 647(e), as presently drafted and as construed by the state courts, contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest.

Id. at 358. The Court concluded that the statute was invalid because it "encourages arbitrary enforcement by *failing to describe with particularity what a suspect must do in order to satisfy the statute*." Id. at 361 (emphasis added). Kolender stands for the proposition that in order to avoid encouraging arbitrary and discriminatory

enforcement, a penal statute must describe with particularity what a person must do in order to satisfy the statute.

The statute at issue here does not pass that test. Section 15-20-22(a)(1) states that, 45 days prior to release from prison,

> the responsible agency shall require the adult criminal sex offender to declare, in writing or by electronic means approved by the Director of the Department of Public Safety, the *actual address* at which he or she will reside or live upon release and the name and physical address of his or her employer, if any. Any failure to provide timely and accurate declarations shall constitute a Class C felony.

Ala. Code § 15-20-22(a)(1) (emphasis added).

No Clear Notice of the Required Conduct in Order to Comply

The statute nowhere provides a definition for the term "actual address." While the phrase "actual address" gives the initial impression of requiring a street address of the residence where a person will live, it is unclear whether a person must provide a deliverable address for mail or whether something less specific would suffice. Could a person write down the description of a specific outdoor location where he plans to sleep at night or spend most of the day, *e.g.*, "the city bench at the corner of 5th Avenue

and 21st Street in Birmingham"? Could he designate a movable vehicle parked in a specific place as a home, *e.g.*, "in my car in the empty parking lot on Decatur Street in Montgomery"? Could he give a description of a particular facility for which he doesn't have a proper street address, *e.g.*, "the homeless shelter on Bond Street in Anniston"?

Another ambiguity is what constitutes a "failure to provide timely and accurate declarations" in the case of a person who has no address to declare due to his or her homelessness. Ala. Code §15-20-22(a)(1). If a person is homeless and has nowhere to go, and there is no prospect of that changing in the future, would it be a "timely and accurate declaration" to leave the form blank, to write "homeless", or to write, as Mr. Seagle did, "Don't have an address"? Law enforcement officers are left to determine the answer to all of these unanswered questions.

The ambiguities surrounding what is required to comply and the difficulty an incarcerated homeless convicted sex offender would have in understanding what was expected to him to such an extent that the statute is unconstitutionally void for vagueness under the first prong

of that doctrine is overwhelmingly evident from the record in this case developed below.

For example, when pressed to explain to the Court what "actual address" as used in the Code Section at issue means, the State, through its prosecutor, represented to the Court the following: "Well judge it is an actual address. In other words, it's not a P.O. Box. **It's an actual building**." (R. 20)(Emphasis added). In response the Court expressed the view that that may be this prosecutor's view, but that it is not clear that this is the definition. (R. 20). Later in the hearing, the prosecutor tried again, first once more with the circular suggestion that "Actual" "defines itself" (R. 27) and later agreeing with the Court, contrary to his earlier insistence that it means an "actual building," the prosecutor said that the sex offender can comply by simply putting a "park bench" or a "street address." (R.28) The record here shows that Mr. Seagle understood that if he had listed a park bench, he would have been arrested. As the prosecutor later acknowledged, the Department of Corrections, on the other hand, interprets the Act as requiring an "approved address" and so the designation of any address which runs

afoul of the Community Notification Act's residency restrictions (a fact difficult to know for a sex offender incarcerated for the previous 14 years) would be rejected and would lead to a felony charge for failure to list an actual address 45 days in advance of release.[4] (R. 66) Similarly, some judges will not find compliance unless the address listed is a "good address." (R. 95) The fact that the statute is open to numerous interpretations, with felony consequences for choosing the wrong one, according to the particular law enforcement official or agency or court official considering it, makes it patently clear that the statute is void for vagueness.

Indeed, several courts already have considered this exact argument and have come to the same conclusion as the lower court here for the same reasons. Courts in states including Georgia, Maryland, Pennsylvania, Washington, Minnesota all have analyzed the terms using the plain meaning test and have concluded that and "address" and "residence" do not logically, as a matter of common sense, have a meaning which would include a park bench or the like

[4] If convicted of another felony, Mr. Seagle would face "imprisonment for life or for any term of not more than 99 years but not less than 15 years under the Habitual Felony Offender Act. Ala Code §§ 13A-5-9(c)(1).

and were terms which simply were not intended to apply to homeless people.[5] To the extent the State attempts to distinguish some or all of these cases, it simply turns them on their heads and offers distinctions without a difference. (e.g. SB 23-24) Indeed, the conclusion by the trial court here is completely consistent with the holding in Sellers v. State, 935 So. 2d 1207, 1212 (Ala. Crim. App. 2005), a primary case relied on by the State here; for it would require one to completely abandon common sense and logic to conclude that Mr. Seagle could have satisfied the Act by simply listing as his "actual address" some park bench somewhere (without knowing if it existed anymore after 14 years or whether it violated some other provision that would prohibit him from living there. This Court in Sellers expressly prohibited such an abandonment of common sense in statutory interpretation and application.[6]

---

[5] See e.g., Santos v. State, 668 S.E. 2d 676 (GA 2008); Twine v. Maryland, 910 A.2d 1132 (Md. 2006); Pennsylvania v. Wilgus, 975 A.2d 1183 (Pa. Super. 2009); Minnesota v. Iverson, 664 N.W. 2d 346 (Minn. 2003); Washington v. Pickett, 975 P.2d 584 (Wash. App. 1999).

[6] The State's argument defies common sense perhaps even more clearly when one considers that the Act specifically provides elsewhere that the State will use the address provided by the sex offender to mail him verification cards. See § 15-20-24. See also, Minnesota v. Iverson,

Arbitrary and Discriminatory Enforcement

Due to this lack of specificity, the statute fails to describe with particularity what an incarcerated sex offender must do to comply with the statute and leaves it in the hands of law enforcement to determine whether a particular method of completing the form is sufficient to meet the requirements of the statute, thereby encouraging arbitrary enforcement. While some law enforcement officers may decide that a description of the location where someone will live is sufficient, others may choose to prosecute anyone who does not provide a valid U.S. mail address. Accordingly, § 15-20-22(a)(1) is void on its face.

With all due respect, it is impossible, on the record developed below in this case to come to any conclusion other than that this statutory provision is void for

---

664 N.W. 2d 346, 353 (Minn. 2003). See also Ex Parte S.C.W., 826 So. 2d 844, 850 (Ala. 2001)(citing J.N.H. v. N.T.H., 705 So. 2d 448 (Ala. Civ. App. 1997)(Court should construe different sections of a statutory scheme in harmony with one another. A park bench hardly could be said to serve that purpose and the proposition becomes even more contrary to common sense when one pictures the Alabama County Sheriff who will permit the convicted sex offender to sleep, live, etc. on one of the park benches under his jurisdiction, nevermind the prohibition against the sex offender being in a place like a park frequented by children. See e.g. § 15-20-26(f) (prohibiting loitering on or within 500 feet of a park, etc.)

vagueness both because it encourages arbitrary and discriminatory enforcement and because the record establishes its actual arbitrary and discriminatory enforcement beyond any dispute – a likely reason the State chose not to address that aspect of the void for vagueness doctrine.

The transcript from the hearing conducted in the trial court in this case establishes that every participant in the process – the homeless convicted sex offender, defense counsel, counsel for the prosecution, the Montgomery County Circuit Court judge, and even the representative of the State Board of Pardons and Parole present for the hearing – described a process of completely arbitrary enforcement by every state agency charged with applying or enforcing the Act.

Consider the following: In responding to the judge's expressed concerns that there are all sorts of interpretations used by various agencies, both as to what is required for an "actual address" (to be discussed further herein in a later section) and the consequences for not filling out the notification form in a manner the given agency deems appropriate, the State, through the Assistant

District Attorney (“ADA”) expressly agreed with the that “there have been numerous interpretations of this law by different offices around the state.” (R. 21).

He then goes on to opine that the legislature just did not pass the law that the Attorney General “probably” wanted and so many problems have ensued. (R. 21-22). The consequence of requiring that some address be listed, even if violative of other provisions in the Community Notification Act (whether knowingly or by a prisoner who has no means to ascertain whether the address listed is violative) is that the person commits another felony when it turns out that the address listed violates another provision of the Act. (e.g. the address is within 2000 feet of a school) (R. 22)

According to this ADA, under § 15-20-22(a)(1), the convicted sex offender should be deemed to have satisfied the provision once he lists an address and he should not be deemed to have committed the other felony until he actually in the address he has listed as his for 3 days or more. His office’s answer to this quandary has been to “no-bill” cases in which an address was listed, but it was violative of another provision, unless and until the sex offender

actually lives at the listed address. Accordingly, one is required to list an address, encouraged to list just any address to meet this Section's provisions, without any way to know from prison if it violates other sections of the CNA, but he show do so knowing the address he has listed is someplace he cannot lawfully live. Then on top of that, he has to hope that everyone involved will enforce the provision the same way as this prosecutor and "no-bill" the case.

Of course, as the Trial Court pointed out in "nine times out of 10, it's going to be in violation. And we are going to go right back out and arrest them." To this the same ADA agreed. (R. 23-24).

The discussion in the record in this case then turned the completely different view on enforcement used by the Department of Corrections ("DOC"). While the prosecutor expressed his understanding that the incarcerated convicted homeless sex offender can just list any address, whether he actually can or intends to live there or not and thereby complies with this Code Section, the DOC takes the opposite view. That agency's practice is to check out the address listed by the inmate. If the inmate lists an address that

violates another provision of the CNA, the DOC refuses to accept it and requires that another form be filled out and repeats that same process each time the inmate, unable to ascertain on the outside whether the address selected meets the other restrictions of the CNA, lists a violative address, until the 45 days in advance period has run and then the inmate is charged with the felony of not complying with § 15-20-22(a)(1).[7] (R.24-25)

The ADA admitted that this is the process that goes on for the incarcerated sex offender, but that if he were presented with such a case, he would "no bill it in the

[7] The facts in the instance case undercut the prosecutor's view that listing any address 45 days in advance, whether accurate, violative of another restriction in the CNA or otherwise, satisfies this Code Section, for the record shows that Mr. Seagle actually listed an address for a shelter in Oklahoma City that initially had agreed to take him (but later was too full) during the requisite period. When the DOC learned that the Oklahoma City shelter was full and could not actually take Mr. Seagle, they rejected his notification form and found him to be in violation of this Code Section. (R. 52-66). To this the ADA responded that it now appears to him that he would have no billed Mr. Seagle's case and that he actually had complied with the law – rather a procedural anomaly here one would think. Once again, the State advised the Court that it was the "people" at the DOC who are "confusing" things by understanding or interpreting the Code Section to require an "approved address" rather than an "actual address." (R. 66). This, of course, simply proves up Mr. Seagle's argument both on the fair notice and the arbitrary enforcement elements of the void for vagueness issue.

grand jury" if it came to his office. (R. 25) He followed that up by advising the Court that "(he did not) care what DOC is - - how they are interpreting it right now." He argued that if they are wrong, the Court should just order them to establish guidelines to enforce the law properly. ((R. 26) Later during the hearing below, when the Judge found that one of the problems is that if a sex offender lists a park bench, as was at one point suggested by the State as qualifying (see discussion herein in later section), they simply will not be released from prison (R. 32), and then defense counsel pointed out that this is exactly what demonstrates the arbitrary enforcement problem (R. 33-34), the ADA acknowledged that different prisons around the state interpret and enforce the Act differently. (R. 34)

On this question of whether the listing of an address that is an "actual address" but violates other restrictions of the CNA, the representative of the State Board of Pardons and Parole who attended the hearing, advised the Court that it just depends on who the judge is who is assigned to the case in Montgomery County Circuit Court as to whether the person listing an actual address, but one

that violates another restriction, will be released from jail or not. (R. 94-95) This further proves the arbitrary and discriminatory enforcement of the Act at each level in the system – explaining what the void for vagueness doctrine does not permit.[8]

2. The Statute Is Void for Vagueness as Applied To Mr. Seagle and Other Indigent Homeless Sex Offenders.

Section 15-20-22(a)(1) is also void for vagueness as applied to Mr. Seagle and other similarly situated homeless sex offenders because it does not provide sufficient notice of what they need to do to comply with the statute. Mr. Seagle refers the Court here to the transcript from the hearing held below, the Statement of Facts in the State's Brief and the discussion in the previous section of this Brief referring to the record below.

As the Alabama Supreme Court has made clear,

> In enacting a criminal statute, there is an obligation on the State to so frame it that those who are to administer it and those to whom it is to be administered may know what standard of conduct is intended to be required, and *legislation may run afoul of the due process*

[8] Toward the end of the hearing, the ADA summed up the problem as a result of the Act "creat(ing) a special class of people who can't comply because they are homeless." (R. 84) This rather starkly makes Mr. Seagle's argument for him both under this issue and under Section I. B. herein.

> *clause because of a failure to set up any sufficient guidance to those who would be law-abiding*, or to advise a defendant of the nature and cause of an accusation he is called on to answer, or to guide the courts in the law's enforcement.

Ex parte Cobb, 703 So. 2d 871 (Ala. 1996) (quoting Kahalley v. State, 48 So. 2d 794, 795 (1950)) (emphasis added); State v. Gooden, 570 So. 2d 865, 867 (Ala. Crim. App. 1990).

The Supreme Court of Georgia struck down a portion of that state's sex offender registration statute for this reason in Santos v. State, 668 S.E.2d 676 (Ga. 2008). In Santos, the defendant, a homeless convicted sex offender, was charged with failing to register a new residence address under Georgia Code § 42-1-12. The Georgia statute requires convicted sex offenders to register with the sheriff of the county in which they reside and to provide the sheriff with the address of the offender's residence. Id. at 678. It defined the term "address" as "the street or route address of the sexual offender's residence" and specifically stated that it did not include "a post office box, and homeless does not constitute an address." Id. (quoting O.C.G.A. § 41-1-12(a)(1)). The law required sex offenders to provide new address information 72 hours prior

to a change of residence address to the sheriff in the county where they have been living and within 72 hours after moving to the sheriff in the county of the new residence. Id. (citing O.C.G.A. § 41-1-12(f)(5)).

Santos had properly registered his address as a homeless shelter, but was asked to leave the shelter and remained homeless until his arrest several months later. He did not have an address that complied with the requirements of the statute during that time. As a result, he was charged with failing to register an address within 72 hours prior to leaving the shelter.

The Georgia court analyzed whether the reporting requirements of the statute "provided sufficient notice to Santos of what conduct was mandated by the statute when he left his previous residence… but possessed no new permanent or temporary residence with a street or route address." Id. at 678. The court noted that the plain language of the statute requires offenders to register a change of residence by providing the sheriff of their county a specific street or route address, but "contains no objective standard or guidelines that would put homeless sexual offenders without a street or route address on

notice of what conduct is required of them, thus leaving them to guess as to how to achieve compliance with the statute's reporting provisions." Id. at 679.

Based on the lack of direction for offenders who do not have a street or route address, the court concluded that the statute "does not provide fair warning to persons of ordinary intelligence as to what is required to comply with the statute," and held the registration requirement unconstitutionally vague under the due process clause of the United States Constitution as applied to Santos and other homeless sex offenders who possess no street or route address. Id. at 679-680. See also Minnesota v. Iverson, 664 N.W. 2d 346 (2003)(Striking down registrations requirement as to homeless sex offender which required 5 days advance notice of place he would live; applying plain meaning for "address");[9] Twine v. Maryland, 910 A.2d 1132 (Md. 2006)(striking down Maryland's requirement to register change in residence as applied to homeless people);

[9] In 2005, after its Act was struck down as unconstitutional in Iverson, the Minnesota legislature amended its registration requirements, "creating registration requirements specific to the unique challenges that homeless offenders might have in registering their location." Minnesota v. Thompson, 2009 Minn. App. Unpub. LEXIS 415, *6 (Minn. App., April 21, 2009).

Jeandell v. Maryland, 910 A.2d 1141 (Md. 2006)(Same); Washington v. Pickett, 975 P.2d 584 (Wash. App. 1999)(striking down requirement as to homeless sex offenders that they provide notice of new residence at least 14 days in advance of change of residence); Pennsylvania v. Wilgus, 975 A.2d 1183 (Pa. Super. 2009)(striking down registration requirement as to homeless sex offenders absent express legislative intent to apply Act to homeless people; applying plain meaning of "residence"); ACLU v. City of Albequerque, 137 P.3d 1215 (New Mex. App. 2006)(striking down various sex offender registration requirements); Matthew Luzuriaga, Twine v. State: Sex Offenders who become homeless will not necessarily be subject to prosecution when they fail to notify Maryland sex offender registry that they have changed residence, 37 U. Balt. L. F. 174, 176 (Spring 2007)(noting that despite some structural differences, Maryland, Washington, and Minnesota courts have held that plain meanings of "residence" and "address" do not encompass homeless people); People v. North, 5 Cal. Rptr. 3d 337 (Cal. App. 2003) (holding sex offender registration

statute requiring transients to register their "location" void for vagueness).

Section 15-20-22(a)(1) suffers from the same constitutional flaw as the statute at issue in Santos and the other cases cited above. The Alabama statute commands imprisoned sex offenders, 45 days prior to release, to provide an "actual address at which he or she will reside or live upon release." Ala. Code § 15-20-22(a)(1). In addition to providing no definition of the phrase "actual address," § 15-20-22(a)(1) provides no guidance as to how offenders who have nowhere to live can comply with the statute. Furthermore, complying with the Alabama statute at issue here is much more difficult than complying with the Georgia statute. Whereas Georgia's statute only requires notice 72 hours in advance of moving, Alabama's statute requires prisoners to identify a place to stay 45 days before release. While Georgia's sex offenders are free to travel around looking for a place to live, make unlimited phone calls, and possibly even search the internet for options, the imprisoned sex offenders in Alabama are supposed to identify a place to live with very limited access to communications, very limited information

about housing options, and no ability to travel around looking for a place to live. In sum, § 15-20-22(a)(1) provides Alabama's homeless sex offenders with no guidance on how to comply with a law that, for a person in their situation, is exceedingly difficult to comply with.

Because it provides so little guidance as to the meaning of "actual address" that it encourages arbitrary enforcement, and because it provides no notice as to how a homeless sex offender can comply with the statute, Code of Alabama § 15-20-22(a)(1) is void for vagueness under the due process clauses of the Fourteenth Amendment to the United States Constitution and the Alabama Constitution. U.S. Const. amend. XIV; Ala. Const. art. I, §§ 6, 13.

B. Section 15-20-22(a)(1) Offends Due Process Because It Is Fundamentally Unfair to Punish a Defendant for Failure to Perform an Act When It Is Impossible for the Defendant to Comply

The trial court found § 15-20-22(a)(1) unconstitutional under the due process clauses of the federal and state constitutions as noted specifically because it is impossible for homeless individuals (like Jeffrey Seagle) to comply with it. (C.53) That finding and the legal conclusion flowing from it were correct and must be affirmed by this Court. Indeed, it is fully consistent

with the well-reasoned decisions from our sister states. See e.g., Washington v. Pickett, 975 P.2d 584, 586-87 (Wash. App. 1999)(homeless sex offender could not comply with Act by providing new address 14 days in advance of moving); Twine v. Maryland, 910 A.2d 1132 (Md. 2006); Jeandell v. Maryland, 910 A.2d 1141, 1142 (Md. 2006)(it is not possible for a homeless person to comply); Minnesota v. Thompson, 2009 Minn. App. Unpub. LEXIS 415 (Minn. App., April 21, 2009). The State's Brief at 26-30 misapprehends this issue and the clear authority from these other jurisdictions explaining it in a manner consistent with the lower court in the instant case.

"Fundamental fairness is the touchstone of due process." Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973) (internal citations omitted). Due process aims to ensure "fairness between the State and the individual dealing with the State," Ross v. Moffitt, 417 U.S. 600, 609 (1974); accord Bearden, 461 U.S. at 665, and "must be respected in periods of calm and in times of trouble." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring). If a law, "as applied in [a particular] case," falls short of "the requirements of fair

procedure guaranteed by the Due Process Clause," it is unconstitutional. Ross, 417 U.S. at 610; see also Brooks v. Ala. State Bar, 574 So. 2d 33, 34 (Ala. 1990) (noting that due process protections of §§ 6 and 13 of Alabama Constitution instruct that unreasonable laws be struck down). Due process and fundamental fairness require that a defendant not suffer punishment as a result of acts which he cannot perform. Section 15-20-22(a)(1) offends due process because it contains no exception or alternative for persons who cannot provide an "actual address" prior to release from prison because they are homeless, indigent, and imprisoned. By penalizing people for failure to perform an act which is impossible for them, the statute is unconstitutional as applied to indigent homeless persons.

The Supreme Court has established that it offends due process to incarcerate a defendant for failure to perform an act he is incapable of performing. In Bearden v. Georgia, 461 U.S. 660 (1983), the Court found that a sentence of imprisonment for an indigent probationer's failure to pay a court-imposed fine, absent evidence and findings that he was somehow responsible for the failure, violates due process. The Court held that to "deprive the

probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment." Id. at 672-73. Bearden stands for the rule that a state may not punish someone for failing to perform an act made impossible by one's indigence, unless that person has "willfully refused to [comply] or failed to make sufficient bona fide efforts legally to acquire the resources . . . " necessary to comply. Id. at 672.

Statutes cannot impose criminal liability for noncompliance with requirements with which a defendant has no ability to comply. In Denoncourt v. Commonwealth, 470 A.2d 945 (Pa. 1983), the defendants sought to enjoin enforcement of a criminal statute that required all public officials to provide extensive financial information about their spouses. The defendants complained that state law did not guarantee married people access to information about their spouses' finances, so they could not necessarily comply with the challenged statute. Noting that criminal liability under the challenged statute could result from non-compliance with requirements with which the

defendants "may have no ability to comply," the Pennsylvania Supreme Court held that the statute violated due process. Id. at 947. As the court explained, "Imposition of such criminal liability offends due process, for it is axiomatic that criminal liability may not be imposed for the failure to perform acts which a person has no power to perform." Id.; see also id. n.4 (quoting Snider v. Thornburgh, 436 A.2d 593, 606 (Pa. 1981) ("Where … criminal liability result[s] not from unwillingness, but from inability to comply with the … act's requirements, the imposition of these sanctions is fundamentally unfair and clearly violates the due process requirements of the Constitutions of the United States…")).

Mr. Seagle cannot comply with the requirements of § 15-20-22(a)(1). This is not a case where the defendant willfully refused to comply with the law or failed to make sufficient bona fide efforts to comply. Mr. Seagle is homeless. His efforts at obtaining a place to live while in prison during the relevant time period were established in the Court below, are not disputed, and are set out in the Appellant's Brief at Pages 5-10, as are the corroborating efforts of a paralegal. Those undisputed

facts establish the factual impossibility of compliance for Mr. Seagle.

Compounding the problem is the inflexible framework of § 15-20-22(a)(1), which requires the designation of an address where the offender will live *45 days* prior to release, and not allowing sex offenders even a week outside of prison to look for housing. Furthermore, § 15-20-22(a)(1) provides no mechanism by which a court can determine if a homeless sex offender, such as Mr. Seagle, has made "sufficient bona fide efforts to" find a place to live. See Bearden, 461 U.S. at 661. Consequently, Mr. Seagle, and others like him are faced with the devastating prospect of a sentence of life imprisonment for failing to provide an address he does not have and could not obtain.

To avoid the serious constitutional issues inherent in Alabama's sex offender registration law, several of Alabama's sister states have provided safety valves for homeless sex offenders. See, e.g., Cal. Penal Code § 290.011 (West 2007) (providing a safety valve for transients, or people "who [have] no residence," to comply with the sex offender registration laws); Ohio Rev. Code Ann. § 2950.05(A) (West 2008) ("If a residence address

change is not to a fixed address, the offender . . . shall include in that notice a detailed description of the place or places at which the offender . . . intends to stay . . . ."); Wash. Rev. Code Ann. § 9A.44.130(6)(b) (West 2008) ("A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. . . . The county sheriff's office may require the person to list the locations where the person has stayed during the last seven days."); Wash. Rev. Code. Ann. § 9A.44.130(3)(a)-(b) (substituting "where he or she plans to stay" for "complete residential address" in cases where offender "lacks a fixed residence"). Code of Alabama § 15-20-22(a)(1) provides no such safety valve or alternative for homeless sex offenders.

In conclusion, § 15-20-22(a)(1) violates the due process clauses of the United States and Alabama constitutions because it punishes an individual for failure to complete an act that is impossible for him to perform or it forces him to complete it in a manner which as a matter of fact and law will subject him to prosecution for another felony with devastating consequences.

Perhaps the State, through its prosecutor in this case put it best when he advised the trial court that the problem here is that as a result of the Act, the State has created a "special class of people who can't comply because they are homeless. (R. 84)

II. The Trial Court's Decision Declaring §15-20-22(a)(1) Unconstitutional Under the State and Federal Constitutions Was Correct and is Due to be Affirmed for Additional Constitutionally Cognizable Reasons

A. Section 15-20-22(a)(1) Inflicts Cruel and Unusual Punishment Because It Penalizes Mr. Seagle for His Status as an Indigent Homeless Person

Aside from limiting the type and length of punishments the state can impose on the convicted, the Eighth Amendment to the United States Constitution also "imposes substantive limits on what can be made criminal and punished as such." Ingraham v. Wright, 430 U.S. 651, 667 (1977). It is well established that criminal laws punishing a person's status run afoul of the Eighth Amendment. Robinson v. California, 370 U.S. 660 (1962). As applied to Mr. Seagle and others in his predicament, Code of Alabama § 15-20-22(a)(1) violates the constitutional ban on cruel and unusual punishment because it punishes them for the status of being indigent homeless persons. U.S. Const. amend. VIII, XIV; Ala. Const. art. I, § 15.

In Robinson, the Supreme Court reviewed the conviction of a defendant under a California statute that criminalized being "addicted to the use of narcotics." 370 U.S. at 660. The Court overturned the conviction, concluding that the Eighth Amendment prohibited punishing the "status" of being addicted to narcotics, absent any accompanying illegal conduct. Id. at 667.

A few years later, in Powell v. Texas, 392 U.S. 514 (1968) (plurality opinion), the Court considered a Texas statute that made it a crime to be in a state of intoxication in a public place. This time, a majority of the Court upheld the statute, finding that the law did not violate Robinson's prohibition on punishing for status, but rather punished conduct.

The controlling opinion[10] by Justice White reasoned that laws prohibiting public intoxication punished conduct and not status because most chronic alcoholics could drink in their homes and thereby could avoid breaking the law. Id. at 549-550 (White, J, concurring in the result).

[10] Four justices concurred in the reasoning of the main opinion of the Court, four dissented, and Justice White issued an opinion concurring only in the result. Therefore, Justice White's concurrence is the controlling opinion, and his areas of agreement with four other Justices constitute the holding of the decision.

Expanding on this reasoning, Justice White noted that if a homeless chronic alcoholic could show that he could not avoid getting drunk in public, the public drunkenness law at issue would violate his Eighth Amendment rights. Id. at 551. On this point, he had the agreement of the four dissenters. Id. at 567-68. Therefore, in reconciling *Robinson* and *Powell,* it follows that the Eighth Amendment prohibits criminalizing an act or omission that is an involuntary consequence of one's status.

Relying on Robinson and Powell, several courts have invalidated criminal laws that punished people for acts caused by their status as homeless. In Johnson v. City of Dallas, the court invalidated a statute that prohibited sleeping in public because the law "punishes the homeless for their status as homeless, a status forcing them to be in public." 860 F. Supp. 344, 349-351 (N.D. Tex. 1994), rev'd on other grounds, 61 F.3d 442 (5th Cir. 1995). Similarly, in Jones v. City of Los Angeles, a case in which homeless people were arrested for sitting, lying, or sleeping in public places at night, the court held that under the Eighth Amendment the city could "not make it an offense to be idle, indigent, or homeless in a public

place[,] [n]or may [it] criminalize conduct that is an unavoidable consequence of being homeless . . . ." Jones, 444 F.3d 1118, 1137 (9th Cir. 2006), withdrawn pursuant to settlement of the parties, 505 F.3d 1006 (2007). See also Pottinger v. City of Miami, 810 F. Supp. 1551, 1561-1565 (S.D. Fla. 1992) (declaring that arresting the homeless for sleeping, sitting and eating in public violates Eighth Amendment).

In Joel v. City of Orlando, the Eleventh Circuit reaffirmed Robinson's holding that it is illegal to "apply[] [criminal laws] to punish status." 232 F.3d 1353, 1361 (11th Cir. 2000). The Florida statute at issue in Joel prohibited "camping on public property." Id. In answering the question of whether the plaintiffs were being punished for conduct or status, the court followed Justice White's approach of analyzing whether the plaintiffs' conduct—camping in public—was a voluntary act. The court determined that the act of camping on public property under the facts of that case constituted conduct rather than status, relying on the City's unrefuted evidence that a large homeless shelter in the vicinity had never reached capacity. Id. at 1362. The court held that while it would

be illegal to punish status or involuntary conduct, persons prosecuted under the public camping law in that jurisdiction had the opportunity to comply with the law because adequate shelter space existed, and the plaintiffs simply chose not to use the shelter space available. Id.

That is not the case here. Unlike the Joel plaintiffs, Mr. Seagle did not choose to ignore a readily available shelter option that he could have easily accessed. He did not know of a shelter with beds available that prisoners could reserve more than 45 days in advance of release. He wrote letters in an effort to find a shelter where he could stay upon release, but was unsuccessful. Mr. Seagle was not in the position of a free homeless person who can visit social services agencies, walk or take public transportation around town, and search the internet at a public library to find available shelter options.

Section 15-20-22(a)(1), as applied to Mr. Seagle, punishes him for his status, rather than conduct. Unlike the defendant in Powell, Mr. Seagle is being punished for the involuntary results of his status, not for an affirmative choice to engage in certain conduct. Whereas the defendant in Powell committed the illegal act of going

into public after getting drunk, Mr. Seagle has not performed any affirmative act that violates the law. Instead, as a result of his homeless status, Mr. Seagle was unable to provide the information required by the statute. He tried to comply with the law, and filled out the required form to the best of his ability, but compliance was simply not possible for him. Unlike the law at issue in Powell, § 15-20-22(a)(1) would unconstitutionally punish Mr. Seagle for his status, rather than his conduct.

Even if Mr. Seagle's inability to designate an address could somehow constitute conduct, that conduct must be considered an involuntary consequence of his status. Mr. Seagle is indigent and homeless. As a result, he cannot identify an actual address where he will live when released from prison. He has no family who are legally able to take him in, and he has no money to pay for housing in an apartment or motel. He tried to find a place to stay while in prison but did not succeed. The unchanging nature of his status is demonstrated by the fact that, almost a year after the end of his sentence in state prison, he is still in the same position, with nowhere to go should he be released from jail.

Because of his status, Mr. Seagle cannot comply with § 15-20-22(a)(1). His lack of compliance is completely involuntary and a direct result of his status as an indigent homeless person. Just like the homeless people in the cases discussed above who could not avoid sleeping in public due to their lack of a home, Mr. Seagle cannot provide an address where he will live upon release because he is homeless and indigent.

Because it criminalizes the status of being an indigent homeless person, § 15-20-22(a)(1) violates the Eighth Amendment to the United States Constitution and Section 15 of the Alabama Constitution as applied to Mr. Seagle and other indigent homeless people. U.S. Const. amend. VIII, XIV; Ala. Const. art. I, § 15.

B. Criminalizing the Defendant's Inability to Provide an Address Because of His Indigence Violates the Right to Equal Protection Under the Law.

Section 15-20-22(a)(1) of the Alabama Code denies Mr. Seagle, and indigent homeless persons in general, equal protection under the law, because it will keep the defendant incarcerated because of indigence. A court must find that a law deprives an individual of equal protection if it "invidiously denie[s] one class of defendants a

substantial benefit available to another class of defendants." Bearden, 461 U.S. at 665. Section 15-20-22(a)(1) denies the substantial benefit of freedom to a class of defendants — indigent homeless sex offenders — that it grants those sex offenders who have the financial wherewithal to purchase living accommodations. Accordingly, the statute violates Mr. Seagle' right to equal protection under the United States and Alabama constitutions. U.S. Const. amend. XIV; Ala. Const. art. I, §§ 6, 13..

"To imprison an indigent when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection of the laws." Crutcher v. State, 439 So. 2d 725, 726 (Ala. Crim. App. 1983) (quoting Barnett v. Hopper, 548 F.2d 550, 554 (5th Cir. 1977). Federal and Alabama case law hold that it is impermissible to hold a person criminally responsible for involuntarily breaking the law when the violation occurred because of the person's indigence, or to punish an indigent defendant more harshly than a person of means due to indigence. See, e.g., Bearden, 461 U.S. at 665. See also State v. Esdale, 45 So. 2d 865, 867-68 (Ala. 1950);

Hartwell v. State, 142 So. 678, 678 (Ala. 1932); In re Muery, 247 So. 2d 123, 127 (Ala. Crim. App. 1971); Crowden v. Bowen, 734 F.2d 641, 642 (11th Cir. 1984) (per curiam) (holding variations in prisoners' sentences arising solely from their financial condition to violate Equal Protection Clause); Williams v. Illinois, 399 U.S. 235, 242 (1970) (holding that a state cannot "subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency").

The legal conundrum facing the Defendant fits easily into this rubric. He attempted to comply with the address registration requirements of the statute prior to the expiration of his prison sentence. Nevertheless, because of his poverty, he could not afford to obtain an "actual address" where he could live upon his release and, therefore, could not provide an "actual address" on his Sex Offender Notification Worksheet. Where an otherwise similarly situated individual with the means to pay for housing would now be free, Mr. Seagle remains imprisoned by the State indefinitely and faces a Class C felony conviction, because he is too poor to a obtain a place to live. Indeed, Mr. Seagle may receive a life sentence as a

habitual offender if convicted for not having an "actual address." See Ala. Code § 13A-5-9. As in Crutcher, this case is not one of a defendant who, though financially capable of compliance, has refused to comply with the law. See Crutcher, 439 So. 2d at 726. Section 15-20-22(a) violates equal protection as applied to Mr. Seagle and other indigent individuals because it punishes individuals for inability to comply with law due to indigence.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the trial court's decision declaring § 15-20-22(a)(1) of the Code of Alabama (1975) unconstitutional is due to be affirmed.

Respectfully submitted,

/s/ David I Shoen
David I. Schoen (SCH036)
2800 Zelda Road, Suite 100-6
Montgomery, AL 36106
(334) 395-6611
Fax: (917) 591-7586
DSchoen593@aol.com
Counsel for Appellee
Jeffrey Lee Seagle

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on the 24th day of November, 2009, four copies of the foregoing Appellee's Brief were sent via U.S. Express Mail for delivery to the Clerk; Court of Criminal Appeals of Alabama; Judicial Building; 300 Dexter Avenue; Montgomery, AL 36104, and that one copy of said Brief was sent via U.S. Express mail addressed to the following:

Beth Slate Poe
Office of the Attorney General
500 Dexter Avenue
Montgomery, AL 36130

Counsel for Appellant

I further certify that an electronic copy was filed with the Clerk of the Court and served on the Counsel for Appellant by email as follows

Beth Slate Poe
bpoe@ago.state.al.us

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ Tracy Moore Stuckey
Tracy Moore Stuckey
Gibson Moore Appellate Services, LLC
421 East Franklin Street, Suite 230
Richmond, VA 23219