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OFFICE OF THE ATTORNEY GENERAL

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Honorable Joe W. Whisante
Madison County Sheriff
Madison County Courthouse
100 North Side Square
Huntsville, Alabama 35801

Community Notification Act – Sex
Offenders – Madison County

Under the Community Notification Act, the Department of Public Safety is best suited for the task of providing procedural due process hearings for offenders convicted in other jurisdictions.

The Community Notification Act does not give an agency the authority to deny any sex offender the ability to move to a particular county or city.

A sheriff or chief of police cannot deny an offender convicted in another jurisdiction permission to establish a particular residence until the requirements of procedural due process are satisfied.

A determination through a procedural hearing that an offender is in fact subject to the Community Notification Act does not itself affect the legality or illegality of an offender's place of residence. The mere fact that an offender is later determined to be subject to the

Community Notification Act does not "grandfather" the offender's chosen place of residence.

Once an offender convicted in another jurisdiction is determined to be subject to the Community Notification Act, community notification should be effected.

Dear Sheriff Whisante:

This opinion of the Attorney General is issued in response to your request.

QUESTION ONE

Who is to administer due process hearings to persons convicted of sex offenses in other jurisdictions (other states, federal court, etc.)?

FACTS AND ANALYSIS

The class of sex offenders covered by the Community Notification Act ("the Act") (codified at sections 15-20-20 through -37 of the Code of Alabama) is defined in section 15-20-21(4), which sets forth various "criminal sex offenses." ALA. CODE § 15-20-21(4)(Supp. 2001). Generally, if an adult offender has been convicted of any of the specific statutory offenses enumerated in subsections 15-20-21(4)(a) to (k) of the Code of Alabama, the Act will automatically apply to the offender. If, however, an offender has not been convicted under Alabama law, but has rather been convicted in another state, or a federal, military, Indian or foreign-country jurisdiction, the offender can be subjected to the Act only if the crime for which he was convicted meets the definition set forth in subsection 15-20-21(4)(l). This "catch-all" provision defines a "criminal sex offense" to include all sex crimes perpetrated in other jurisdictions if, had the crime been committed under Alabama law, a conviction could have been obtained under the specific statutes enumerated in subsections 15-20-21(4)(a) to (k). ALA. CODE § 15-20-21(4)(l)(Supp. 2001).

* Before a sex offender convicted in another state or a federal jurisdiction can be subjected to the Act, subsection 15-20-21(4)(l) essentially requires one to analogize the crime for which the offender was convicted with a crime specifically enumerated under subsections 15-20-21(4)(a) to (k). If the two offenses are determined to be analogous, the Act may be enforced against the offender. This determination, however, has been held to invoke the offender's right to procedural due process. See *Doe v. Pryor*, 61 F. Supp. 2d 1224 (M.D. Ala. 1999). Thus, before any determination can be made that would definitively subject the offender to the Act, the state must give the offender an "opportunity to be heard." *Id.* This effectively gives the offender a chance to refute the state's determination that the crime for which he was convicted is indeed properly included in the Act's definition of "criminal sex offense."

Unfortunately, the Act itself does not address the procedural due process issue identified in *Doe*. Likewise, it does not specify how an offender should be afforded his opportunity to be heard, nor does it directly place responsibility on any particular agency to satisfy the requirements of procedural due process. Nonetheless, the Act does define the "responsible agency" for obtaining and transmitting information upon an offender's release. See ALA. CODE § 15-20-21(7) (Supp. 2001). Section 15-20-21(7) provides that "[f]or a criminal sex offender released from a jurisdiction outside the state and who is to reside in this state, the responsible agency is the Department of Public Safety." *Id.*

CONCLUSION

In the light of this provision, it appears that, if any agency must have responsibility for affording procedural due process to sex offenders from jurisdictions outside the state, the Department of Public Safety is best suited for the task, inasmuch as it is already charged with obtaining and transmitting information pertinent to sex offenders released from other jurisdictions.

QUESTION TWO

May a sheriff's department or police department deny such convicted sex offender permission to move to an Alabama county and/or city until such time as the offender has requested and received a due process hearing by an

appropriate "hearing body" to determine which, if any, Alabama statute contained in the Community Notification Act applies to said offender?

FACTS AND ANALYSIS

The Act does not give an agency the authority to deny any sex offender the ability to move to a particular county or city. Moreover, according to *Doe*, a sex offender from another jurisdiction must be afforded an opportunity to be heard before the Act's provisions are applied to him such that he would suffer the deprivation of a liberty or property interest.

CONCLUSION

To deny an offender the ability to move to a particular county or city would amount to the deprivation of a liberty or property interest. Therefore, a sheriff or chief of police cannot deny an offender permission to move to a county or city pending the completion of procedural due process measures.

QUESTION THREE

If a convicted sex offender, convicted under another jurisdiction's statute(s) (another state, federal court, etc.), presents himself /herself at the office of a sheriff of a county or to the chief of police of a city, without first being afforded a due process hearing, may said agency deny permission to establish a residence at any address he/she desires, even though said address may or may not be prohibited under the Community Notification Act if the offense(s) had been committed in Alabama?

FACTS AND ANALYSIS

Again, procedural due process requires that an offender must be given an opportunity to be heard before being deprived of a liberty or property interest.

CONCLUSION

Consequently, a sheriff or chief of police cannot deny an offender permission to establish a particular residence until the requirements of procedural due process are satisfied.

QUESTION FOUR

If the answer to question number three is "No," and the offender does establish a residence which would otherwise be prohibited under the Community Notification Act pending a due process hearing, may a sheriff's department or police department, following a due process hearing which establishes another jurisdiction's statute(s) to be the same as an Alabama statute covered under the Act, require the offender to move from the residence he/she has established regardless of whether the offender is renting or has purchased the residence?

FACTS AND ANALYSIS

As this Office has consistently stated, the legality of a residence is determined only at the time the residence is established. See, e.g., Attorney General's Opinion to Honorable William C. Young, dated October 29, 1998, A.G. No. 99-00029 at 3. Therefore, the legality of an offender's place of residence is not affected by the timeframe in which the state determines, through a procedural hearing, that the offender is subject to the Act.

Stated differently, a determination through a procedural hearing that an offender is in fact subject to the Act does not itself affect the legality or illegality of an offender's place of residence. Rather, it is merely a *post hoc* (after-the-fact) determination as to the applicability of the Act's provisions, including those regarding residency. Any offender who has established a residence in violation of section 15-20-26's residency restrictions will have been in violation since the time the residence was established. The mere fact that the offender was later determined to in fact be subject to the Act does not mitigate the violation, nor does it "grandfather" the offender's chosen place of residence.

CONCLUSION

Law enforcement agencies remain free to take measures to ensure that offenders do not maintain residences that have been illegally established.

QUESTION FIVE

If the answer to question number four is "No," must a sheriff's department or police department make community notification, following a finding through a due process hearing that the statute of another state does equate to a covered Alabama statute, regardless of the fact that the offender's address is within 2,000 feet of a school and/or child care facility?

CONCLUSION

Once a sex offender convicted in another jurisdiction is determined to be subject to the Act, the appropriate law enforcement agency should effect community notification as required by section 15-20-25 of the Code of Alabama.

QUESTION SIX

If the answer to question number five is "Yes," must said community notification contain a statement that the offender must be allowed to continue to live at the address which otherwise would have been prohibited and that the notification is being made pursuant to a due process hearing?

CONCLUSION

As was stated in answering your fourth question, offenders from other jurisdictions, once they have been afforded due process, cannot be allowed to maintain residences that were illegally established. Therefore,


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there would be no need to include in a community notification flyer the type of statement you describe.

I hope this sufficiently answers your questions. If this Office can be of further assistance, please contact Scott L. Rouse of my staff.

Sincerely,

BILL PRYOR
Attorney General
By:

A handwritten signature in cursive script that reads "Carol Jean Smith". The signature is written in black ink and is positioned above the printed name and title.

CAROL JEAN SMITH
Chief, Opinions Division

BP/CJS/SLR
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