THE LAW OFFICE OF THE SOUTHERN CENTER FOR HUMAN RIGHTS

83 Poplar Street, NW
Atlanta, GA 30303
P. (404)688-1202
F. (404)688-9440
www.schr.org

Sara J. Totonchi
Executive Director

Stephen B. Bright
President and Senior Counsel

Charles J. Ogletree
Harvard Law School
Chair, Board of Directors

Overview of *Whitaker v. Perdue*, Civil Action No. 4:06-cv-140-CC (N.D. Ga. 2006)

Thank you for contacting us about Georgia's sex offender residency and employment restrictions. Due to the large volume of mail and telephone calls we have received from people on the registry and their families, we regret that we are unable to provide an individualized response to your inquiry. We are writing to you today to: (1) provide some background information about Georgia's sex offender residency requirements; (2) describe Ga. Code Ann. § 42-1-15, the sex offender residency and employment law; (3) tell you about the lawsuit we filed, *Whitaker v. Perdue*, Civil Action No. 4:06-cv-140-CC (N.D. Ga. 2006); and (4) provide answers to some frequently asked questions. **This overview was updated on April 12, 2010**. We hope this information is helpful.

1. Background on Georgia's Sex Offender Residency & Work Restrictions: The Law Before July 1, 2006

In June 2003, Georgia's General Assembly passed a law prohibiting people on the sex offender registry from living in certain locations. According to this law, no one on the registry could live within 1,000 feet of: schools, child care facilities, or areas where minors congregate, including public and private parks, recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, and similar facilities providing programs or services directed towards persons under 18. Several people on the registry challenged this law. The courts, however, upheld the law each time it was challenged.

2. The Law After July 1, 2006

In April 2006, the General Assembly passed another law, HB 1059, that imposed even *more* restrictions on where people on the registry could live. It added the requirement that no one on the registry could live within 1,000 feet of a church, swimming pool, or school bus stop. (The 1,000 feet is measured from the *property line* of the restricted location to the *property line* of the residence where the person on the registry lives). In addition, under HB 1059, no one on the registry could work at or within 1,000 feet of a child care facility, school, or church. The penalty for living or working in any of the prohibited locations is 10-30 years in prison for a first offense.

HB 1059 went into effect on July 1, 2006. HB 1059's residency restrictions can be found in the Georgia Code at Ga. Code Ann. § 42-1-15. There are many aspects of this law that are unfair and, we believe, illegal. Ga. Code Ann. § 42-1-15 applies to all people on the sex offender registry. There is no procedure to apply for a hardship exemption based on illness, advanced age, financial hardship, or disability. In addition, Ga. Code

Ann. § 42-1-15 does not provide for individualized justice. It provides no process to distinguish between people on the registry who are dangerous to children and those who are not. The same residency restrictions apply to teenagers convicted of consensual sex as to persons convicted of crimes such as rape.

3. Whitaker v. Perdue

a. What the Lawsuit Is About

On June 20, 2006, the Southern Center for Human Rights ("SCHR"), and the American Civil Liberties Union ("ACLU") filed a lawsuit on behalf of everyone on the registry challenging the residency and working restrictions of HB 1059. The lawsuit was filed in the United States District Court for the Northern District of Georgia in Atlanta. The defendants in the case are Governor Sonny Perdue, Attorney General Thurbert Baker, and all sheriffs in Georgia.

The named plaintiffs are eight people on the registry. They brought the lawsuit on behalf of all persons on the registry. The Court certified the plaintiff class on July 28, 2006. **If you are on the registry, you are automatically a part of the plaintiff class. You do not need to request to be included in the lawsuit**.

In the lawsuit, the plaintiffs claim that Georgia's residency and work restrictions violate many provisions of the United States Constitution, including: the Ex Post Facto Clause, the Due Process Clause, the Takings Clause, and the Free Exercise Clause.

Please note: The *Whitaker* lawsuit does not challenge the law requiring people to *register* as a sex offender. The U.S. Supreme Court has considered this matter. The Supreme Court upheld laws requiring people to register as sex offenders, even if the conviction occurred before the registration law went into effect. The Supreme Court also decided that people convicted of certain sexual crimes don't need to be given a hearing, an opportunity to be heard, or other process before being placed on the registry. The Court found that the "process" given to people in their criminal cases is sufficient to support a finding that they should be on the registry.[1] While we do not agree with many of the findings in these cases, they are binding legal precedent.

b. The Temporary Restraining Order ("TRO") from June 29-July 25, 2006

On June 22, 2006, SCHR and the ACLU filed a Motion for a Temporary Restraining Order ("TRO") to stop the enforcement of the portion of the law that prohibited registered sex offenders from living within 1,000 feet of a school bus stop or a church. On June 29, Judge Clarence Cooper temporarily stopped the school bus stop provision from being enforced.

The TRO was only a temporary measure designed to stop enforcement of the law until the Court could hold a hearing. On July 11 and 12, 2006, we went before Judge Cooper again,

[1] *See Smith v. Doe*, 538 U.S. 84 (2003) (Alaska's sex offender registration statute did not violate ex post facto clause); *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003) (Connecticut's sex offender registration statute did not violate due process clause).

this time for a preliminary injunction hearing. Over two days, Judge Cooper heard testimony from law enforcement officers, school board officials, persons on the registry, and mental health professionals. At this hearing, we sought to show the Court that enforcement of the law's residency restrictions – particularly the school bus stop provision – would render most of Georgia off-limits to people on the registry. We argued that the law would force thousands of families from their homes unjustly.

c. Court Rules: No "Designated" School Bus Stops in Georgia

On July 25, 2006, Judge Cooper denied our Motion for Preliminary Injunction, but did so in a way that prevented the school bus stop provision from immediately evicting people from their homes. HB 1059 defines "school bus stop" as "a school bus stop as designated by local school boards of education or by a private school." Judge Cooper ruled that our Motion was "premature" because there was no evidence that any school board in Georgia had officially "designated" its school bus stops. The Court explained that law enforcement officers could not enforce the school bus stop provision until the *actual members of the school board* (as opposed to other school board employees) officially designated bus stops. As a result of this order, people on the registry who had been notified that they would have to move because they were within 1,000 feet of a school bus stop did not have to move from their homes.

d. Bus Stops "Designated" in Bulloch, Chatham, and Columbia Counties

On July 25, 2006, the board of education in Columbia County voted to designate its school bus stops. At least 30 people in Columbia County were on the verge of being evicted. The next day, we asked Judge Cooper to prevent the Columbia County Sheriff from enforcing the school bus stop provision. We reached an agreement with the Sheriff of Columbia County that he would not enforce the school bus stop provision until the Court ruled on whether it is constitutional. We obtained a "consent order" to that effect. It remains in place today.

On August 10, 2006, the school board in Bulloch County voted to designate its county's school bus stops. Again, we asked the Court to stop Bulloch County from enforcing the school bus stop provision. On August 15, 2006, the attorney for the Bulloch County Sheriff entered a consent decree stating that the Sheriff would not enforce the school bus stop provision pending a ruling on whether the law is constitutional. On September 6, 2006, the school board of Chatham County designated several thousand school bus stops. On September 11, 2006, the plaintiffs obtained a consent order stating that the Sheriff of Chatham County would not enforce the school bus stop provision until further order of the Court.

e. Current Status of the School Bus Stop Restriction

To date, only three school boards of education (Chatham, Columbia, and Bulloch) have officially designated their school bus stops. The Sheriffs in those counties have been restrained from enforcing the school bus stop provision until further notice from the Court. **For now, no one on the registry can be forced to move from his or her home for living within 1,000 feet of a school bus stop in Georgia.**

f. The Court Permits the Case to Proceed

In August 2006, the State asked the Court to dismiss the *Whitaker* case. On March 30, 2007, the Court ruled on the State's motion to dismiss the case. Some of the legal claims were dismissed, but the lawsuit survived the motion largely in tact. The ex post facto, substantive due process, takings clause, and free exercise claims remain in the case.

4. *Mann v. Georgia Dep't of Corrections*

On November 21, 2007, the Supreme Court of Georgia held Georgia's sex offender residency restrictions unconstitutional in a case called *Mann v. Georgia Department of Corrections*. Mr. Mann, a person on the registry, purchased a home in an area that was originally not within 1,000 feet of a prohibited location. Later, two child care centers opened within 1,000 feet of his home. Law enforcement authorities ordered him to move. The Supreme Court stopped the eviction, holding that Ga. Code Ann. § 42-1-15 violated the takings clause of the state and federal constitutions. The takings clause prohibits the government from taking someone's property (actually taking it, or, as here, placing substantial regulations on it) without adequately compensating him for the property loss. Mr. Mann was permitted to stay in his home. After the Supreme Court found the residence restrictions unconstitutional, sheriffs throughout the State stopped enforcing them for a time.

5. Changes to the Sex Offender Law in 2008

In 2008, the General Assembly made some modifications to the sex offender law. The 2008 law did the following things:

- Reinstated all of the same residence restrictions as were in effect under Ga. Code Ann. § 42-1-15 (2006), with the following exceptions for **some homeowners**.
    - A homeowner who established ownership of his residence before July 1, 2006 will not be required to move.
    - A homeowner will not be required to move if a child care center, church, park, etc. moves in within 1,000 feet of his residence.
- Reinstated all of the same employment restrictions as were in effect under Ga. Code Ann. § 42-1-15 (2006), with the following exceptions for **some employees**.
    - A person who was employed at a location before July 1, 2006 will not be required to change employment.
    - A person will not be required to change employment if a child care center, church, park, etc. moves in within 1,000 feet of his employment.
- Added "public libraries" to the list of "areas where minors congregate," meaning that people on the registry cannot live within 1,000 feet of a public library.
- Forbade anyone on the registry from volunteering at or within 1,000 feet of a school, church, or child care center
- Prohibited people on the registry from intentionally photographing a minor without the consent of the minor's parent or guardian.

In other words, with the exception of the homeowners described above, people on the sex offender registry must comply with all of the same residence restrictions as in § 42-1-15 (2006). (This does not, however, include the school bus stop restriction, which is not being enforced at this time).

On May 14, 2008, we asked the Court to amend the complaint in *Whitaker* to challenge the current version of the law. The current sex offender law suffers from many of the same problems as HB 1059, and will likely similarly be struck down by the courts for the following reasons:

- *No Provision for Renters:* People who enter into a valid lease to rent property have rights to that property protected by the takings clause of the state and federal constitutions. SB 1 carves out an exemption for homeowners who purchased property, but makes no provision for renters. Under SB 1, the moment a child care center or a church opens within 1,000 feet of a sex offender's residence, that person is required to break his lease and move. Because it makes no provision for renters, SB 1 will be held unconstitutional under *Mann,* the very case that struck down the previous sex offender residency law.

- *All Offenders Treated the Same:* Under SB 1, a 17-year-old who engages in consensual sex with a 15-year-old is subject to the same residency and employment restrictions as a serious sexual offender.

- *No Exemption for Nursing Home Residents and Others Who Do Not Pose a Threat:* SB 1 makes no exemption for people in nursing homes, hospice care facilities, and others who no longer pose a danger and may not be able to safely relocate due to health problems.

6. <u>Two Opinions From the Supreme Court of Georgia (2008)</u>

The Supreme Court of Georgia recently issued two important opinions on the sex offender law. The 2006 sex offender law made it illegal for people on the registry to be homeless. In *Santos v. State*, Case No. S08A1296 (Oct. 27, 2008) the Court held unconstitutional the address registration requirement "as applied to homeless sex offenders who . . . possess no street or route address for their residence." The Court held that this provision was vague when applied to homeless persons because the law failed to give them fair warning of what to do when asked to give their "address." The Supreme Court noted that its ruling "does not exempt such offenders from reporting other information required under the statute and it does not exempt homeless sex offenders who are able to provide a street or route address, such as the address of a shelter at which they are staying." In *Bradshaw v. State*, Case No. S08A1057 (Nov. 25, 2008), the Court struck down the law mandating life imprisonment for a second "failure to register" conviction. The Court held that this punishment was out of proportion to the nature of the crime, in violation of the prohibition against cruel and unusual punishment.

7. Court Stops State From Criminalizing Protected Religious Activity (March 2009)

On June 24, 2008, SCHR filed a filed a *Motion for a Preliminary Injunction* to halt the implementation of the portion of the law that criminalizes religious activities by prohibiting people on the registry from "volunteer[ing]" at places of religious worship. Under this vague law, it was unclear whether people on the registry could sing in an adult church choir, prepare for revivals at church, or cook meals in a church kitchen.

On November 13, 2008, the Court conducted a hearing at which the Court heard testimony from people on the registry who had to stop their faith-based activities because they feared the potential penalty of 10-30 years in prison. Attorneys from SCHR argued that the law should be struck down as unconstitutional because it is vague, overbroad, and in violation of the First Amendment to the United States Constitution. On March 30, 2009, the Court **granted** our motion and enjoined O.C.G.A. § 42-1-15(c)(1) "to the extent that it restricts registered sex offenders from engaging in volunteer activities at churches." The court stated:

> The lack of definition of the term "volunteer" authorizes discriminatory and arbitrary enforcement, and the significant criminal penalties associated with violating the statute have led . . . class members to forgo certain religious activities. Because the Church Volunteer/Employment Provision fails to provide fair warning to Plaintiffs or adequate guidance to law enforcement, it is substantially likely that it is unduly and unconstitutionally vague.
>
> Allowing Plaintiffs to continue to participate in their faith communities will further public safety by providing support, stability, and a grounded sense of right and wrong.

The Court's March 30, 2009 order was a preliminary ruling, but we have asked the Court to make its ruling final. We are waiting on the Court's decision on this matter.

8. Summary Judgment (Fall 2009)

Whitaker is still pending before Judge Cooper in the U.S. District Court for the Northern District of Georgia. In September 2009, SCHR filed five motions for summary judgment in *Whitaker v. Perdue*. In these briefs, SCHR asked the Court to strike down as unconstitutional various parts of Georgia's sex offender law, including the prohibition against living within 1,000 feet of churches, school bus stops, and swimming pools and the prohibition against working within 1,000 feet of churches, schools, and child care centers. The motions, which are all available at www.schr.org, are as follows:

- Plaintiffs' Motion for Summary Judgment and for a Permanent Injunction to Enjoin Enforcement of the "School Bus Stop Provision" of O.C.G.A. 42-1-15(b);
- Plaintiffs' Motion for Summary Judgment on Takings Clause Claim;
- Plaintiffs' Motion for Summary Judgment to Stop the State From Criminalizing Protected Religious Activity;
- Plaintiffs' Motion for Summary Judgment on Vagueness and Overbreadth;
- Plaintiffs' Motion for Summary Judgment on Behalf of Ex Post Facto Subclass.

On October 30, 2009, the State filed its response to our summary judgment motions. On November 9, we filed our reply brief. These briefs have been posted to www.schr.org. We must now await the Court's ruling. **We do not know when the Court will rule. It may be several months still before we receive a ruling**.

9. 2010 Legislative Term -- HB 571

During the 2010 legislative term, the House of Representatives passed HB 571, a bill that, if it becomes law, will make some significant changes to Georgia's sex offender law. HB 571 contains a number of proposed changes to the law. HB 571:

- revises the reporting requirements for homeless individuals on the registry;
- changes the punishment imposed on persons on the registry for "failure to register" as a sex offender;
- revises the church "volunteer" provision that subjects persons on the registry to prosecution for participating in protected religious activity (while maintaining a prohibition on persons volunteering with children at church;
- protects renters on the registry from eviction (for the duration of his/her lease) if a prohibited location moves within 1,000 feet of the person's residence;
- provides a mechanism for certain persons to apply to a superior court to be exempted from the registration, employment, or residence requirements, if they meet certain criteria.

HB 571 will now be considered in the Georgia Senate. Please note that the contents of HB 571 may change as it moves through the Senate. For this reason, and due to our limited staff resources, we cannot, at this time, provide individual responses to inquiries about who would be eligible to apply for release from the residence/registration requirements under HB 571. If the General Assembly passes HB 571, we will post a much more detailed description of the legislation on our website at that time. If you have access to the internet, you can read the text of HB 571 here: http://www.legis.state.ga.us/legis/2009_10/sum/hb571.htm

We hope this overview has been helpful. Please know that we are continuing to work to challenge this poorly drafted and unjust law.

Sincerely,

The *Whitaker* legal team at the
Southern Center for Human Rights

By: _____
Sarah Geraghty
Attorney

Sara Totonchi
Executive Director

Gerald Weber
Senior Staff Attorney

Mica Doctoroff
Paralegal/Investigator