

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

MICHAEL A. McGUIRE,

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Plaintiff,

)

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v.

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Civil Action No.:2:11-CV-1027-WKW

)

CITY OF MONTGOMERY, et al.,

)

)

Defendants.

)

**THIRD AMENDED COMPLAINT AND MOTION FOR INJUNCTIVE RELIEF AND
DECLARATORY JUDGMENT**

INTRODUCTION

Plaintiff brings this action, pursuant to 42 U.S.C. § 1983, to obtain declaratory, injunctive and monetary relief to redress the injuries and damages he suffered, and continues to suffer, as a direct and proximate result of the conduct of Defendants that violated rights secured to him by the United States Constitution including, but not limited to, the Fifth and Fourteenth Amendments, in violation of 42 U.S.C. § 1983, as will more fully appear herein below. Plaintiff also seeks attorney's fees and costs pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988.

JURISDICTION AND VENUE

1. Plaintiff files this Complaint and invokes the jurisdiction of this Court under and by virtue of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States, 42 U.S.C. § 1983, 42 U.S.C. § 1985, 42 U.S.C. § 1986, 42 U.S.C. § 1988, 28 U.S.C. § 1331, 28 U.S.C. § 1343, 28 U.S.C. § 2201, 28 U.S.C. § 2202, and the doctrine of supplemental jurisdiction to obtain declaratory relief and compensatory and punitive damages. Defendants violated Plaintiff's rights as guaranteed by the Constitution of the United States, by Federal law, and by the laws and Constitution of 1901 of the State of Alabama.

2. The violations of Plaintiff's rights as alleged herein occurred in Montgomery County, Alabama, and were committed within the Northern Division of the Middle District of the State of Alabama.

PARTIES¹

3. Plaintiff **Michael McGuire** (hereinafter, "McGuire" or "Plaintiff") is over the age of 19 years, and is and at all times material hereto was a citizen of the United States and the State of Alabama, residing in Montgomery County, Alabama.

4. Defendant **City of Montgomery** (hereinafter, "City") is a municipal corporation located in whole or in part in Montgomery County, Alabama.

5. Defendant **Kevin J. Murphy** (hereinafter, "Murphy"), a better denomination of whom is presently unknown to Plaintiff, is a natural person believed to be over the age of 19 years, is or was at all times material hereto an employee, officer or agent of the City and is a person whose conduct proximately and directly harmed Plaintiff. Murphy is the City of

¹ All Defendants named herein were acting within the course and scope of their employment, and under color of Alabama and/or Federal law, for their respective governmental agencies at all relevant times hereto.

Montgomery Police Chief, and is being sued in his official and individual capacities.

6. Defendant **Todd Strange** (hereinafter, "Mayor"), a better denomination of whom is presently unknown to Plaintiff, is a natural person believed to be over the age of 19 years, is or was at all times material hereto an employee, officer or agent of the City and is a person whose conduct proximately and directly harmed Plaintiff. Strange is the Mayor of the City, and is being sued in his official and individual capacities.

7. Defendant **D.T. Marshall** (hereinafter, "Marshall"), a better denomination of whom is presently unknown to Plaintiff, is a natural person believed to be over the age of 19 years, is or was at all times material hereto an employee, officer or agent of the Montgomery County Sheriff's Department and is a person whose conduct proximately and directly harmed Plaintiff. Marshall is the Sheriff of Montgomery County, and is being sued in his official and individual capacities.

8. Defendant the **Alabama Department of Public Safety** (hereinafter "ADPS") is an agency of government of the State of Alabama sited in Montgomery County, Alabama.

9. Defendant **Colonel Hugh B. McCall** (hereinafter, "McCall"), a better denomination of whom is presently unknown to Plaintiff, is a natural person believed to be over the age of 19 years, is or was at all times material hereto an employee, officer or agent of the Alabama Department of Public Safety (ADPS) and is a person whose conduct proximately and directly harmed Plaintiff. McCall is the Director of the Alabama Department of Public Safety, and is being sued in his official and individual capacities.

10. Defendant **Luther Strange** (hereinafter, "Attorney General"), a better denomination of whom is presently unknown to Plaintiff, is a natural person believed to be over the age of

19 years, is or was at all times material hereto an employee, officer or agent of the State of Alabama and is a person whose conduct proximately and directly harmed Plaintiff. Strange is the Attorney General for the State of Alabama, and is being sued in his official and individual capacities.

ADMINISTRATIVE REMEDIES

11. Plaintiff was denied any administrative remedies whatsoever, and subjected to Alabama and federal Sex Offender law before bringing his claims in this action. Plaintiff alleges he was not subject to the Alabama Act No. 507 codified in 13A-11-200 et seq. (1967) (Hereinafter, “Act 507”), the 1996 Alabama Community Notification Act, codified in 15-20-20 (2010), et seq. (Hereinafter, “ACNA”), the Alabama Sex Offender Registration and Community Notification Act, codified in 15-20A-1 et seq. (Hereinafter, “ASORCNA”), or to the Sex Offender Registration and Notification Act (Hereinafter, “SORNA”) codified at 42 U.S.C. §16913 et seq., at the time the original Complaint in this action was filed. Plaintiff was provided a post deprivation hearing on December 14, 2011, which is ineffective and moot because there were Alabama procedures set forth pursuant to the Alabama Procedures Act and Alabama administrative code that defendants intentionally failed to follow before depriving Plaintiff of his constitutionally guaranteed rights. Specifically, Defendants subjected Plaintiff to community notification, monitoring, and tracking provisions of ACNA, ASORCNA and SORNA, as well as onerous and punitive residency, employment and travel restrictions of ACNA and ASORCNA without providing Plaintiff any process whatsoever. Defendants only offered a post deprivation hearing after being sued for violating Plaintiff’s due process rights. Thus, the December 14th, 2011 post deprivation hearing and subsequent final order issued on January 25, 2012 is

ineffective and moot. Plaintiff is not required to exhaust any state of Alabama court or administrative remedies, given the nature of the claims presented herein.

GENERAL FACTUAL ALLEGATIONS

12. Plaintiff was convicted of sexual assault in the State of Colorado on or about May, 1986.

On or about November 1989, Plaintiff was released from a Colorado prison, having served his prison sentence.

13. Plaintiff was not required to register as a sex offender by the State of Colorado.

14. At the time of Plaintiff's 1986 Colorado conviction, the State of Alabama's sex offender registration requirements were set forth in the Act No. 507 (1967).

15. Act 507 was enacted to "prescribe the *punishment* for willful failure or refusal to so register" (emphasis added).

16. Plaintiff's 1986 conviction in Colorado constitutes final judgment on the crime he committed.

17. On or about April 14, 2010, Plaintiff, a disabled Veteran of the United States Armed Forces, returned to his hometown of Montgomery, Alabama due to failing health, to live and work close to his mother, who was 80 years old at the time, and to associate more closely with the rest of his family, many of whom reside in Montgomery, Alabama.

18. Plaintiff had previously heard of Alabama's "tough sex offender laws" and upon arrival to Montgomery, Alabama on or about April 14, 2010, Plaintiff *immediately* and *voluntarily* visited the Montgomery Police Department to inquire about the sex offender laws, and to confirm his belief that he was not subject to those laws. On April 14, 2010 Plaintiff had no custodial relationship with any jurisdiction and his rights as a U.S. citizen had been fully restored.

19. On or about April 14, 2010, upon arriving at the Montgomery, Alabama Police Department, Plaintiff was directed to the Criminal Investigations Division, Special Victims Unit, where he encountered Detectives Gordon, LaChance, Savell and Duckett.

20. In response to Plaintiff's inquiry with the detectives, Plaintiff was questioned by the detectives about his past crimes, the timeframe in which the crimes were committed and the State in which he committed the crimes. Plaintiff cooperated with the questioning and provided the requested information asked for by the detectives.

21. After approximately an hour, Plaintiff asked detectives Gordon and LaChance if he could leave and if they would call him or contact him by mail to inform him of their findings.

22. The detectives would not allow Plaintiff to leave the building, but required him to remain in a confined area of the Special Victims Unit of the Montgomery Police Department. Plaintiff avers that detectives of the Montgomery Police Department kept him in custody for several hours.

23. During the period in which Plaintiff was in custody, he was placed in constant fear and intimidated by detectives Gordon, Lachance and Savell. Detective Gordon asked Plaintiff, "Who said you could live there? You can't live there!" (Referring to Plaintiff's mother's address where Plaintiff informed the detectives he would reside in Montgomery).

24. Detective Lachance told Plaintiff, "You broke federal Law by moving from Colorado to Virginia and from Virginia to D.C., and that's a felony." Detective Savell stated, "That's Federal, we need to get the D.A. on him." Plaintiff was extremely frightened by the verbal tactics of the detectives.

25. Detectives Gordon, LaChance and Savell caused Plaintiff to be fingerprinted, photographed and required Plaintiff to register with the Montgomery Police Department as a sex offender

pursuant to Act 507 and ACNA. The Detectives had no official confirmation of Plaintiff's Colorado conviction at any time on April 14, 2010.

26. Detective Savell gave Plaintiff a copy of the then current Alabama sex offender laws, which included living and work restrictions, registration requirements, reporting duties, and said to him, "This is your Bible. Keep it with you at all times, because if you violate what's in your Bible, you will be charged with a felony."

27. After several hours in custody, Plaintiff was finally told he was being released and was escorted to the Montgomery Police Department exit by detective Gordon.

28. As detective Gordon was escorting Plaintiff to the exit, Plaintiff stated to detective Gordon, "Ma'am, all I wanted to do was confirm that I was not supposed to be under Alabama sex offender law. I don't want to do anything to break the law." Detective Gordon responded, "You already broke Alabama law."

29. Detective Gordon then told Plaintiff, "You have five (5) days to move from Darien Drive and find a compliant address. You must report back to me in five days with your new address, and it better be in a compliant area of Montgomery, or you will be arrested and charged with a felony."

30. Detective Gordon further ordered Plaintiff to register with the Montgomery County Sheriff's Department immediately.

31. Out of fear of being arrested for a felony, Plaintiff desperately began searching for places he could live, while being compliant with the detectives' explicit directives.

32. Plaintiff had several telephone discussions with detectives Gordon and LaChance between April 15, 2010 and April 18, 2010, in which Plaintiff inquired about the prospect of living at a minimum of 20 (twenty) prospective residences, and was informed by detectives Gordon and

LaChance that Plaintiff could not live at either, as the prospective homes were not compliant areas per the ACNA.

33. Plaintiff returned to the Montgomery Police Department on or about April 18, 2010 to express his concern that there was nowhere for him to live in the City of Montgomery.

34. Both detectives Gordon and Lachance reviewed a map of the City of Montgomery posted in the Special Victims Unit that detailed a few parts of town in which, they told Plaintiff, convicted sex offenders subject to the ACNA may reside.

35. Detective Gordon suggested that Plaintiff move to the Regency Inn, since many sex offenders had previously held residency at that location.

36. The Regency Inn is a motel located at 1771 Dickinson Drive in Montgomery, Alabama, and was deemed to be in a compliant area of the city in which sex offenders who were subject to the ACNA could reside.

37. Detectives Gordon and LaChance reiterated that Plaintiff was required to move immediately or be charged with a felony. During the April 18, 2010 meeting at the Montgomery Police Department, Plaintiff requested from both detectives Gordon and Lachance "the due process hearing I am entitled to." Detective Lachance informed Plaintiff that she "would arrange for your due process hearing immediately", pursuant to Plaintiff's request.

38. Plaintiff moved into the Regency Inn on or about April 27, 2010 and lived there until July 19, 2010.

39. Plaintiff is a disabled veteran who currently lives on a fixed income. After depleting all of his savings on living arrangements at the Regency Inn, Plaintiff had to move as he could no longer afford to pay the weekly rental rates at Regency Inn. Plaintiff could not find employment

due to the work restrictions placed upon him when he was subjected to the ACNA. Plaintiff moved to his current residence on July 20, 2010.

40. On or about April 27, 2010, Plaintiff went to the Montgomery County Sheriff's Office to provide information of his compliant address as ordered by detectives of the Montgomery Police Department.

41. On or about April 27, 2010, Plaintiff met with Lieutenant Persky, of the Montgomery County Sheriff's Office. Persky interviewed Plaintiff and recorded the details of Plaintiff's 1986 conviction, provided by Plaintiff.

42. Persky told Plaintiff that he was required to comply with the ACNA. Persky had Plaintiff "processed" as a sex offender, requiring Plaintiff to have his photograph, fingerprints, and DNA taken. Persky had no official confirmation of Plaintiff's Colorado conviction on April 27, 2010.

43. Plaintiff was issued a "sex offender identification card" and was told to keep the card on his person at all times. Persky stated to Plaintiff, "If you ever get stopped by the police, you must show them this card, or be charged with a felony."

44. Persky instructed Plaintiff of his periodic in-person registration requirements and informed Plaintiff that his Deputy Sheriffs would periodically visit the address that he listed as his residence. Persky told Plaintiff that if it was not confirmed by his Deputy Sheriffs that the Plaintiff was living at the place he listed as his residence, or there residence was not compliant with the ACNA, he would be arrested and charged with a felony. Plaintiff was extremely frightened by the verbal tactics of Persky.

45. On or about June 25, 2010, Plaintiff complied with the restrictions of the ACNA by informing the City of Montgomery's Police Department and the Montgomery County Sheriff's

Department of his change of address. Plaintiff did so in fear of being arrested and charged with a felony.

46. Plaintiff is unable to live with his wife of eleven years, given that she is domiciled in the only home in which she and Plaintiff could afford to pay rent from his fixed income because the home is in an area of the city of Montgomery, Alabama deemed to be non-compliant for sex offenders under the ACNA and ASORCNA. The defendants have informed Plaintiff that he was and is currently required to comply with the ACNA and ASORCNA, or be charged with a felony. Pursuant to the employment restrictions of Alabama sex offender law, Plaintiff is prevented from applying for most jobs in the city of Montgomery, as it is a felony for him to do so.

47. On or about May, 2010, McCall and the other named Defendants, individually and collectively, caused Plaintiff's name, address, Colorado conviction and other personal information to be released to one or more entities, who published this information on the internet, and in other media, labeling Plaintiff as a registered "sex offender."

48. On or about May, 2010, McCall and the other named Defendants, individually and collectively have intentionally submitted and intentionally caused to be posted, Plaintiff's name, address and other personal information about Plaintiff on the Alabama and federal registries for sex offenders, and labeling Plaintiff as a "sex offender."

49. On or about June, 2010, McCall caused a "community notification flyer" to be distributed, by mail and other means, in and about the Montgomery, Alabama area, for the purposes of warning the public of Plaintiff's presence in Montgomery, Alabama, and labeling Plaintiff as a convicted "sex offender."

50. Since April 14, 2010, Defendants individually and collectively, have subjected Plaintiff to the onerous restrictions of the ACNA, ASORCNA and to SORNA, without providing any notice or opportunity for Plaintiff to be heard, or any process whatsoever, regarding the applicability of said Acts, to Plaintiff. Plaintiff has been required to register a total of four (4) times since returning home to Montgomery.

51. Plaintiff waited eighteen (18) months to receive his due process hearing, to no avail. Plaintiff was denied any process whatsoever, notwithstanding the fact that the State of Alabama currently has, and at all times relevant to this matter had, an administrative code that entitles persons convicted of a purported sex crimes in a foreign jurisdictions notice, hearing and an opportunity to be heard.

52. On or about October 15, 2011, Plaintiff called ADPS to inquire about his due process hearing before an ALJ, as set for in Alabama administrative law and supported by Attorney General opinions.

53. Lindsey Clements was the attorney employed with the ADPS responsible for matters regarding his hearing and she informed him that his "hearing had already been denied."

54. On or about October 19, 2011, Plaintiff's attorney called Lindsey Clements regarding her office's unilateral determination to deny any process whatsoever with regard to Plaintiff's 1986 foreign jurisdiction conviction, and to discuss application of the ACNA to Plaintiff.

55. Plaintiff's attorney scheduled a meeting with Clements. The meeting took place on October 20, 2011 at 2 p.m. at Clements' office at the ADPS in Montgomery, Alabama.

56. During the meeting with Clements, Plaintiff's counsel reviewed the facts of Plaintiff's Colorado offense, the timing of the offense, and expressed Plaintiff's belief that ACNA was not

applicable to Plaintiff. Clements summarily dismissed any notion that Plaintiff's position could be correct.

57. Upon Plaintiff counsel's inquiry as to why a due process hearing was not provided Plaintiff, Clements stated, "Our office makes that determination, we denied his hearing and there is nothing further we can do for him."

58. When Plaintiff's attorney asked Clements why Plaintiff was not notified of the unilateral determination by ADPS that no process was due, Clements stated, "I notified the Montgomery Police Department many months ago."

59. When Plaintiff's attorney reiterated that *Plaintiff was not notified* of this determination, and has not been afforded an opportunity to appeal the unilateral determination of no process whatsoever, Clements said, "There is nothing else that can be done. Alabama has had registration requirements since 1967. I don't know what Colorado law is, but there is nothing else that can be done. He is subject to the Alabama law."

60. Plaintiff was required to register, once again by October 31, 2011, in compliance with the ACNA. Prior to registering, Plaintiff learned of the recent changes in Alabama law with regard to sex offenders. As a result, Plaintiff called the Montgomery County Sheriff's Department on or about October 29, 2011. Plaintiff was told that new law would require Plaintiff to suffer additional restrictions under Alabama Sex Offender law.

61. Specifically, in addition to the registering, monitoring, tracking, living, employment and travel restrictions Plaintiff was already subjected to, Plaintiff would have to relinquish his current Alabama driver's license for one "labeled" with a specific designation for sex offenders.

Plaintiff would also be required to pay the State of Alabama a fee going forward in order to

properly maintain his compliant “status” as a sex offender under Alabama sex offender law in order to avoid violation of the law.

62. Plaintiff was arbitrarily and capriciously subjected to the ACNA and SORNA by named Defendants herein, under the color and authority of Alabama State and Federal law, without any type of hearing before a fair and impartial hearing body and without any opportunity to be heard regarding the matter *before* being so subjected. Without providing any process whatsoever, Attorney General and the other defendants have informed Plaintiff that he is now subject to ASORCNA, because he presumably waived his constitutional right to due process by voluntarily subjecting himself to ACNA. Attorney General also cites an illusive, unwritten procedure that presumably required Plaintiff to ask the Attorney General directly for the due process hearing he was *entitled* to on April 14, 2010 as proof that Plaintiff waived his constitutional rights.

63. Plaintiff suffered and continues to suffer stigmatizing consequences from being labeled, identified and classified as a sex offender that imposed a typical and significant hardship on him in relation to the ordinary convicted criminals whose rights as citizens have been fully restored, including, but not limited to, the following:

- a. The loss of reputation and moral standing in the estimation of his peers based upon Defendants affirmative acts to stigmatize Plaintiff;
- b. The excitement of derogatory opinions against him that caused his peers to hold him in contempt and caused him to be in constant fear for his safety.
- c. The shame, mortification and humiliation of being subjected to the onerous and punitive restrictions and affirmative labeling of the ACNA, ASORCNA and SORNA.
- d. The scorn, ridicule and contempt of his peers to which sex offenders are subjected

in his community;

- e. The mandatory and automatic denial of citizenship attendant to a full restoral of his rights as a United States citizen, and a citizen of Alabama following the service of his prison sentence and parole in a foreign jurisdiction, and
- f. The consideration of the sex offender label, identification and classification by the McCall and all Defendants when determining the terms, conditions and level of supervision to which he would be subjected

64. Since his arrest and intimidation that occurred at Montgomery Police Department on April 14, 2010, and subsequent arrest and intimidation at the Montgomery County Sheriff's Department, Plaintiff sleeps for only brief moments at a time each night, constantly awakened with fears of being arrested and taken to jail by law enforcement. Plaintiff does not engage in activity afforded the average citizen in Alabama, fearing arrest by law enforcement. Plaintiff fears contact with any members of law enforcement and has avoided contact with law enforcement since April, 2011.

65. On or about October 30, 2011, Plaintiff filed a Temporary Restraining Order and Preliminary Injunction in the Fifteenth Judicial Circuit Court of Montgomery, Alabama, against defendants named herein, seeking redress on the Defendants' violation of procedure set forth in Alabama Administrative code.

66. The TRO was granted October 30, 2011 and on or about November 16, 2011, ordered null and void as it did not meet the requirements of Rule 65 of Alabama Civil Procedure. The court further ordered a hearing on the matter, set for November 30, 2011.

67. On or about *November 23, 2011*, Attorney General, through an employee, Administrative Law Judge, sent an Order and Notice of an ALJ Hearing to Plaintiff via his counsel, “...regarding DPS’s proposed action, to apply the offender notice requirements and restrictions, of the 1996 ACNA...” to Plaintiff. The order also states, “The hearing is being held based upon Mr. McGuire’s right to procedural due process.”

68. Plaintiff avers that postdeprivation process is not effective. Plaintiff submits that Attorney General and McCall’s post deprivation hearing that took place on December 14, 2011, and offered only after Plaintiff sued defendants for violating his due process rights, was not a gratuitous governmental accommodation.

69. Attorney General and McCall’s post deprivation hearing constitutes *explicit admission that process was due, and unilaterally denied* beginning on April 14, 2010 and ongoing, in violation of Plaintiff’s Constitutional rights. It is indisputable that Plaintiff was subjected to the classification of “sex offender” and the attendant restrictions and requirements of Alabama sex offender law and to SORNA without any process and before the illusory post deprivation hearing provided by Attorney General and McCall.

70. On or about November 25, 2011, and in order to seek adequate remedy for all of Plaintiff’s colorable claims in this Court, Plaintiff filed a motion to dismiss the action in the Fifteenth Judicial Circuit, Montgomery, Alabama, without prejudice. On November 29, 2011, Plaintiff’s Motion to Dismiss, without prejudice was granted by the state court.

71. On or about December 14, 2011, Plaintiff attended the post deprivation hearing as ordered by the Attorney General’s office. The ALJ stated at the beginning of the meeting that “the purpose was to determine if the elements of Mr. McGuire’s crime were similar to sex crimes under Alabama law” (paraphrasing). Plaintiff’s counsel disagreed and referred the court to her

order stating the purpose of the hearing as to the “applicability of the 1996 Alabama Community Notification Act, to Mr. McGuire.”

72. In a brief in support of his argument that Plaintiff was subject to the ACNA, Defendant ADPS conceded, “Alabama gives full faith and credit to Colorado’s conviction. The fact that Colorado did not require him to register is irrelevant.”

73. Plaintiff received the ALJ’s final order on January 25, 2012, one day before this Court conducted a status hearing on the matter. The ALJ held that Plaintiff was required to register under Alabama sex offender law and was now subject to the 2011 Act. The ALJ, in her final order, made brief mention of Plaintiff’s contention that Alabama sex offender law violated the *ex post facto* clause of the United States Constitution, but the ALJ offered *no relevant analysis* on that issue. The ALJ cited Article I, Section 9 of the United States Constitution as the controlling *ex post facto* law. The ALJ relied on her contention that Alabama sex offender registration requirements are “functionally indistinguishable” from federal sex offender law (SORNA) in supporting ADPS’s contention that the ASORCNA is a civil and not a punitive statute. The ALJ made no mention whatsoever of the employment, residency, travel restrictions and prohibitions or the voluminous criminal provisions contained in ASORCNA which is not only distinguishable from, but non-existent in the provisions of SORNA.

74. Defendants, each of them, were personally involved in the wrongful labeling, identification and classification of Plaintiff as a sex offender and/or the refusal to record or remove the sex offender label, identification and classification; and each of them, by, arresting, confining, intimidating and subjecting Plaintiff to the onerous restrictions of the ACNA and SORNA, acted with reckless disregard for the truth, with deliberate indifference to Plaintiff’s rights and with an utterly intolerable callousness that was beyond all bounds of decency in a civilized society.

75. The policies, practices and customs as applied to Defendants named herein include:

- a. Defendants, through the highest ranking available supervisory personnel, or designee, decision makers and/or policy makers, approved of, acquiesced to and/or condoned the violations in general, thereby ratifying and approving the wrongful acts of their agents and employees in their respective governmental agencies. Specifically, decision makers/policy makers designed the policies that allowed its agents, subordinates, and employees to seek and obtain Plaintiff's arrest and subject Plaintiff to the onerous conditions of the ACNA in the course thereof. Defendants, respectively, ratified the conduct of its subordinates and those actions therefore became policy and/or created and instituted the policies themselves.
- b. Defendants named herein failed, through knowing and/or reckless and/or deliberate and/or conscious indifference, to instruct, supervise, control and discipline, on a continuing basis, the duties of personnel and officials to refrain from unlawful actions leading to the arrest, intimidation and detention applied against Plaintiff. Specifically, Defendants do not train and/or instruct and/or control its officers properly because its officers would not otherwise seek and obtain Plaintiffs arrest, detention, to intimidate and to subject Plaintiff to the onerous restrictions under the facts of this case.
- c. Defendants named herein failed to properly train its personnel despite actual knowledge of their deficiencies and/or through deliberate indifference and/or negligence to those deficiencies. Specifically, Defendants do not train and/or instruct and/or control its officers because its officers would not otherwise seek and obtain Plaintiff's arrest and subject Plaintiff to aforementioned onerous restrictions.

- d. Defendants named herein had the power to prevent or aid in preventing the commission of the aforementioned violations and could have done so by reasonable diligence.
- e. Instead, Defendants knowingly, recklessly and with deliberate and/or conscious indifference failed or refused to correct the constitutional violations and/or tacitly approve such wrongs.

76. Defendants City, Murphy, Mayor and Marshall have negligently, knowingly, or intentionally created and instituted policies that deny due process rights as described above.

77. The State Defendants are responsible for providing the due process hearing. The state Defendants have knowingly and intentionally condoned and ratified the other Defendants' policies, thus they participated in and caused the denial of due process. The hearings that out of state offenders are provided are always post deprivation hearings by the State Defendants because of the policies and practices of the state and county Defendants.

78. Plaintiff has been thus damaged as described herein.

CAUSES OF ACTION

79. As to each of the counts herein below set forth, Plaintiff expressly adopts as if fully set forth herein the allegations of the foregoing paragraphs.

COUNT I – Deprivation of Plaintiff's Fifth and Fourteenth Amendment

Due Process Rights (42 U.S.C. § 1983)

80. Plaintiff hereby incorporates by reference all allegations contained in all numbered paragraphs of this Complaint as if set forth fully here.

81. At all times material hereto, Defendants, or each or all of them, were acting as state, county, and municipal agents pursuant to state statutes and the ordinances, customs, and policies of the City of Montgomery, Montgomery County, and the State of Alabama.

82. Plaintiff was denied and deprived of his right to due process of law, as guaranteed by the Fifth and Fourteenth Amendment of the U.S. Constitution, in violation of 42 U.S.C. § 1983, when Defendants, under the color of law, arbitrarily and capriciously labeled, identified and classified him as a sex offender, and subjected Plaintiff to the onerous restrictions of the ACNA, the ASORCNA and the SORNA without notice, a hearing before a fair and impartial hearing body and any opportunity to be heard, whatsoever.

83. Defendants have subjected Plaintiff to the onerous restrictions of the ACNA, ASORCNA and SORNA, without proving that he was in fact subject to the Acts, and without providing him with an opportunity to challenge the accuracy of their unilateral actions; all without legitimate or reasonable purpose or goal. Plaintiff requested a hearing from officials to whom responsibility was delegated in enforcing Alabama sex offender law on or about April 18, 2010. There are no State procedures describing the method or manner which persons who may be subject to Alabama sex offender law are to request and receive due process hearings. The law in affect at the time Plaintiff's constitutional rights to due process were deprived "entitled" him to notice, a hearing and opportunity to be heard prior to being subjected to community notification and the onerous deprivations of his fundamental liberties pursuant to Alabama sex offender law.

84. Defendants knew, or should have known, that their above-described conduct prior to providing Plaintiff due process violated rights secured to Plaintiff by the Fifth and Fourteenth Amendments of the U.S. Constitution, in violation of 42 U.S.C. § 1983.

85. Plaintiff suffered, and continues to suffer, injuries and damages as a direct and proximate result of the above-described conduct of Defendants, as will more fully appear at trial.

COUNT II-DEPRIVATION OF LIBERTY (42 U.S.C. § 1983)

86. Plaintiff hereby incorporates by reference all allegations contained in all numbered paragraphs of this Complaint as if set forth fully here.

87. Plaintiff was never subject to any form of the Alabama Community Notification Act, as Act 507, ACNA and ASORCNA deprive Plaintiff of his fundamental rights to marry, to travel, to carry on familial relationships and to privacy. Because of the residency restriction of ACNA and ASORCNA, Plaintiff cannot legally live with his wife. Because of the employment restrictions, Plaintiff cannot even seek employment in most of Montgomery. Because of the restrictions, Plaintiff is prevented from carrying on close family relationships. Because of the travel restrictions, Plaintiff cannot move freely interstate or intrastate without first seeking a travel permit from the State of Alabama. Plaintiff is subject to these restrictions and eliminations of fundamental liberties for life and under threat of felony arrest and conviction by defendants.

88. Furthermore, Alabama sex offender law infringes upon Plaintiff's fundamental right to be free from affirmative stigmatization by the State. The distribution of community notification flyers, labeling Plaintiff as a sex offender and providing personal information constitutes affirmative shaming by the McCall and the other defendants. The requirement that Plaintiff's driver's license bear a "sex offender" designation infringes on Plaintiff's right to privacy.

89. Plaintiff was convicted in the State of Colorado in 1986. Plaintiff was not required by the State of Colorado to register as a sex offender upon his release from prison. The Colorado conviction constitutes a final judgment ten years before the State of Alabama codified the 1996 ACNA.

90. The Colorado final judgment that did not require Plaintiff to register as a sex offender upon his release from prison and/or parole was not offensive to Alabama law. There was no

constitutional Alabama law requiring Plaintiff to register as a sex offender at the time of Plaintiff's conviction. Alabama's unconstitutional Act 507 cannot serve as a predicate upon which Plaintiff is being deprived his fundamental liberties pursuant to purportedly valid Alabama law created many years *after* Plaintiff was released from all custodial requirements.

91. Plaintiff is entitled to the protections of Article IV, Section 1 of the United States Constitution, which states, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

92. By subjecting Plaintiff to the registration and personal restrictions of ACNA, and ASORCNA, Defendants, individually and collectively, under color of law, deprived Plaintiff of his Constitutional protections under Article IV and the Fourteenth Amendment of the United States Constitution, in violation of 42 U.S.C. §1983.

93. By subjecting Plaintiff to the ACNA, ASORCNA and SORNA, Defendants, individually and collectively, under color of law, deprived Plaintiff of his fundamental right to travel as the requirement to seek a travel permit dramatically alters Plaintiff's status as a U.S. citizen.

94. By subjecting Plaintiff to the ACNA, ASORCNA and SORNA, Defendants, individually and collectively, under color of law, deprived Plaintiff of his fundamental right to marry because the restrictions prevent him from residing with his wife.

95. By subjecting Plaintiff to the Alabama Community Notification Act, Defendants, individually and collectively, under color of law, deprived Plaintiff of his fundamental right to carry on familial relationships because the restrictions prevent Plaintiff from providing adequate care and support for his mother.

96. By subjecting Plaintiff to the ACNA, ASORCNA and SORNA, Defendants, individually and collectively, under color of law, deprived Plaintiff of his fundamental rights to free from

affirmative stigmatization by defendants and to privacy because the affirmative state dissemination of community notification flyers, the dissemination of plaintiff's personal information to state, federal and private websites and the required "sex offender" designation on Plaintiff's driver's license.

COUNT III-EQUAL PROTECTION (42 U.S.C. § 1983)

97. Plaintiff hereby incorporates by reference all allegations contained in all numbered paragraphs of this Complaint as if set forth fully here.

98. The sex offender registration, reporting and public dissemination requirements of the ACNA and now ASORCNA work an unequal result upon Plaintiff in a number of ways in violation of the Fourteenth Amendment of the United States Constitution.

99. Specifically, Plaintiff's right to marry, right to carry on familial relationships, right to privacy and rights to intrastate and interstate travel were restricted or eliminated when he was subjected to the onerous restrictions of ACNA and ASORCNA with no determination of Plaintiff's risk to the public and children.

100. Plaintiff is being treated unequally under the laws of Alabama.

101. The Plaintiff has constitutionally protected interests in being treated equally under the law and in not being subjected to unequal treatment without justification. The Plaintiff's interest in such equal treatment arises from the Fourteenth Amendment of the United States Constitution.

102. The conduct of the Defendants arresting, detaining, requiring Plaintiff to register as a sex offender, requiring the Plaintiff to report as a sex offender, restricting Plaintiff's employment, travel, marriage and familial relationships and disseminating information through the use of the Internet, as well as other methods of public notification, pursuant to the ACNA, ASORCNA and SORNA has treated and continues to treat the Plaintiff in an unequal manner as to others who are

similarly situated, without legal justification or any factual basis for such unequal treatment, in violation of 42 U.S.C. §1983 and Plaintiff has no adequate remedy at law.

COUNT IV-APPLICATION OF EX POST FACTO LAWS (42 U.S.C. § 1983)

103. Plaintiff hereby incorporates by reference all allegations contained in all numbered paragraphs of this Complaint as if set forth fully here.

104. Plaintiff was convicted of sexual assault in 1986. Act 507 (1967), that set forth the registration requirements for sex offenders, who were convicted in a foreign jurisdiction, was unconstitutional.

105. The express language of the 1967 Act requiring sex offenders to register was “...to prescribe *punishment* for willful failure or refusal to so register.” (Emphasis added). The Act was punitive on its face and unconstitutional.

106. Defendants McCall and Attorney General conducted a post deprivation hearing to determine if the *1996 Alabama Community Notification Act, as amended* is applicable to Plaintiff.

107. Because Alabama had registration requirements that were unconstitutional at the time of Plaintiff’s conviction in Colorado, and Alabama did not enact subsequent legislation until 1996 which imposes punitive restrictions and criminal penalties upon those who are subject to it, ACNA as amended, and subsequent codified sex offender law (ASORCNA) are *ex post facto laws* that deprive Plaintiff of his constitutional protections, in violation of 42 U.S.C. § 1983.

108. The United States Constitution protects criminal defendants against and *ex post facto* laws. Despite this protection, Attorney General, Mayor, McCall, and the other Defendants have intentionally subjected Plaintiff to sex offender law and SORNA after acknowledging a change in the law. Such actions by Defendants should preclude the application of qualified and

sovereign, immunity, respectively, and should further relieve Plaintiff from these onerous conditions.

109. By requiring Plaintiff, under threat of criminal penalty, to endure additional onerous restrictions and prohibitions of liberty than required by the terms of his prison sentence and subsequent full restoral of rights as a United States citizen, Defendants, individually and collectively, under color of law, infringed upon Plaintiffs protection against the application of *ex post facto* of laws.

110. The effective date of the SORNA as to pre-SORNA predicate convictions is the statutory enactment date, July 27, 2006. SORNA makes it a crime to violate its registration requirements. The Act provides that a person who is (1) “required to register under” SORNA, (2) “travels in interstate or foreign commerce” or is a sex offender under federal, tribal, D.C., or U.S. territorial law, and (3) “knowingly fails to register or update registration as required by [SORNA] shall be fined” and/or imprisoned for up to ten years. Plaintiff fell within a group of individuals that were unable to comply with SORNA. The U.S. Attorney General was given authority to specify the applicability for the requirements of registration to those unable to comply with SORNA. Because the U.S. Attorney General has not so specified, SORNA is inapplicable to Plaintiff. By subjecting Plaintiff to the publication of his name, address and other information on the SORNA website, as well as the requirements and restrictions of SORNA, with ramifications of criminal prosecution, Attorney General, McCall and the other defendants applied an *ex post facto* law to Plaintiff, in violation of 42 U.S.C. §1983.

COUNT V-ILLEGAL SEIZURE/FALSE IMPRISONMENT (42 U.S.C. § 1983)

111. Plaintiff hereby incorporates by reference all allegations contained in all numbered paragraphs of this Complaint as if set forth fully here.

112. The Defendants, City, Mayor, Murphy, and Marshall acting under color of law, caused the Plaintiff to be arrested, detained and imprisoned on and after April 14, 2010, even though they were devoid of any justifiable basis and lacked probable cause for said arrest, detention and imprisonment in violation of the Fourth Amendment of the United States Constitution. The defendants false imprisonment of the Plaintiff constituted an unlawful seizure as described above.

113. At all times material hereto, Mayor, Murphy and Marshall were acting as a municipal law agents, officials, or employees pursuant to State statute and the ordinances, customs, and policies of the City of Montgomery and/or the State of Alabama and/or Montgomery County, Alabama.

114. Case law is clear that a detention, the inability to come and go as you please, is an arrest/seizure. Section 6-5-170, *Code of Alabama* (1975) describes the tort of false imprisonment: "False imprisonment consists in the unlawful detention of the person of another for any length of time whereby he is deprived of his personal liberty." Any exercise of force, or the express or implied threat of force, by which in fact the other person is deprived of his liberty, compelled to remain where he does not wish to remain, or to go where he does not wish to go, is an imprisonment. *Big B., Inc. v. Cottingham*, 634 So.2d 999, 1001 (Ala.1993); *Daniels v. Milstead*, 221 Ala. 353, 128 So. 447 (1930).

115. In *Whiting v. Traylor*, 85 F.3d 581 (11th Cir. 1996), the 11th Circuit noted, "Justice Rehnquist observed in *Albright* that Albright's '**surrender to the State's show of authority**' (that is, his voluntary surrender following the issuance of an arrest warrant) 'constituted a seizure for purposes of the Fourth Amendment.' So, Whiting's initial surrender was a 'seizure;' he subjected himself physically to the force of the state in response to an arrest warrant. And, we have no doubt that the forceful arrest of Whiting at the courthouse was a

‘seizure.’” *Whiting*, 85 F.3d at 585(citation omitted); citing *Albright v. Oliver*, 510 U.S. 266 (1994) (emphasis added).

116. These Defendants arrested and seized Plaintiff in the absence of an arrest warrant and/or probable cause.

117. Plaintiff had a protectable interest in his freedom under the Fourth Amendment to the United States Constitution to be secure in their person against unreasonable searches and seizures.

118. Plaintiff had a protectable interest in their freedom under the Fourth and Fourteenth Amendments to the United States Constitution to be free from arrest without probable cause.

119. Any reasonable law municipal officer knows or should know that arresting and seizing an individual in the absence of an arrest warrant, probable cause, or due process is violative of such person’s rights to be free from arrest and imprisonment.

120. These Defendants falsely caused the detention/arrest of Plaintiff without probable cause in violation of the Fourth Amendment to the United States Constitution.

121. The rights of Plaintiff to be free from arrest and imprisonment without probable cause were clearly established in the law at the time of the events giving rise to this complaint.

122. Any reasonable law enforcement officer would have known that the conduct described herein would be violative of such rights to be free from arrest and imprisonment without probable cause.

123. The rights of Plaintiff under the Fourth Amendment were thus impermissibly abridged and violated.

124. The aforesaid conduct proximately caused damage to Plaintiff in that it caused them to experience serious physical damage, embarrassment, humiliation, extreme mental anguish and severe emotional distress.

125. The aforementioned actions of the Defendants proximately caused the Plaintiff to be deprived of his Fourth Amendment right to be free from arrest and imprisonment lacking probable cause and caused him to be unlawfully detained and imprisoned against his will, causing the Plaintiff damage, in violation of 42 U.S.C. §1983.

COUNT VI-DELIBERATE INDIFFERENCE/FAILURE TO TRAIN

(42 U.S.C. § 1983)

126. Plaintiff hereby incorporates by reference all allegations contained in all numbered paragraphs of this Complaint as if set forth fully here.

127. By and through the policies promulgated by Defendants, each or all of them, as described above deprived Plaintiff of clearly established rights secured by the United States Constitution and laws of the United States, including but not limited to his Fourth and Fourteenth Amendment rights to not be arrested falsely and without probable cause; and not to be maliciously prosecuted, and to not be subjected to onerous restrictions of liberty.

128. All of the actions undertaken by Defendants', as described in the preceding paragraphs of this claim for relief, officers, agents or employees, were under color of law and pursuant to the official custom, course and policy of said Defendants.

129. As a result of the unlawful and/or unreasonable and/or malicious attempt to deprive Plaintiff of his rights guaranteed to by the laws of the United States, the Defendants named in the above paragraphs of this claim for relief are each liable under 42 U.S.C. section 1983 because of a policy of custom of their respective agencies.

COUNT VII - DEPRIVATION OF CIVIL RIGHTS UNDER COLOR OF STATE LAW

42 U.S.C. § 1983 - FAILURE TO PREVENT VIOLATION OF RIGHTS

130. At all times material hereto, Defendants, each or all of them, individually or jointly, were acting as law enforcement officers pursuant to state statute and the ordinances, customs, and policies of the State of Alabama, Sheriff of Montgomery County, and the City of Montgomery.

131. Plaintiff had a right to due process.

132. Each and every Defendant had knowledge that Plaintiff's rights were being violated and had the power to prevent or aid in preventing the wrongful acts made the subject of the violations.

133. Each and every Defendant knew of and/or witnessed the other individual Defendants' wrongful conduct, as stated hereinabove, but failed or refused to prevent it or aid in preventing it and are therefore liable to Plaintiff for the damages he suffered.

134. Plaintiff was damaged and injured as otherwise described herein.

COUNT VIII-FALSE IMPRISONMENT/FALSE ARREST-STATE LAW²

135. Plaintiff hereby incorporates by reference all allegations contained in all numbered paragraphs of this Complaint as if set forth fully here.

136. Defendants City, Mayor, and Murphy detained and/or allowed the detention of Plaintiff, prohibited him from leaving, circumscribed his physical liberty, ordered him and compelled him to go from place to place without a warrant and with neither reasonable suspicion nor probable cause to do so.

137. Plaintiff was placed under arrest and imprisoned without warrant and without probable cause.

² See paragraphs 114 and 115 above for specific Federal and Alabama law.

138. The false arrest/false imprisonment was carried out maliciously or in bad faith.

139. The Defendants are liable over to the Plaintiff for all harm and damages caused by the false arrest/false imprisonment complained of herein.

140. Plaintiff has been damaged thereby, as set forth hereinabove.

COUNT IX-OUTRAGE/INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

141. Plaintiff hereby incorporates by reference all allegations contained in all numbered paragraphs of this Complaint as if set forth fully here.

142. Defendants the City, Mayor and Murphy, individually and collectively, and in their official capacities, under color of state law, intentionally and deliberately inflicted emotional distress on Plaintiff by maliciously prosecuting Plaintiff, or by abusing the lawful process by unlawful purpose, or by violating Plaintiff's constitutional rights, or by falsely arresting and imprisoning the plaintiff, by conspiring against Plaintiff, or by interfering with Plaintiff's civil rights by threats, coercion, or intimidation, or knew or should have known that emotional distress was the likely result of their conduct.

143. Defendants' conduct was extreme and outrageous, beyond all possible bounds of decency and utterly intolerable in a civilized community.

144. The actions of the Defendants were the cause of Plaintiff's distress.

145. The emotional distress sustained by Plaintiff was severe and of a nature that no reasonable man could be expected to endure.

146. As a result of the Defendants' extreme and outrageous conduct, Plaintiff was, is, and, with a high degree of likelihood, will continue to be emotionally distressed due to the intentional exclusion.

147. As a result of the Defendants' extreme and outrageous conduct, Plaintiff has suffered and will continue to suffer mental pain and anguish, severe emotional trauma, embarrassment, and humiliation.

COUNT X-NEGLIGENT FAILURE TO TRAIN AND SUPERVISE

148. Plaintiff hereby incorporates by reference all allegations contained in all numbered paragraphs of this Complaint as if set forth fully herein.

149. Mayor and Murphy, as described above, committed the acts complained of herein while working within the line and scope of their employment with the City of Montgomery.

150. As such, Mayor and Murphy are agents acting in furtherance of the business enterprise/municipal affairs of the City of Montgomery.

151. Mayor and Murphy were aware of or should have known of the unconstitutionality of the policies that they trained the detectives as described above.

152. As a direct and proximate cause of Mayor and Murphy's negligence, Plaintiff has been caused to suffer emotional distress and mental anguish.

153. Specifically, Defendant City's decision makers and policy makers are Defendants Mayor and Murphy. The actions of subordinate detectives who followed the policies, practices,

procedures, and customs instituted/taught by the

Defendants caused the deprivations Plaintiff suffered. The City, Mayor and Murphy are liable to Plaintiff for their actions.

COUNT XI MUNICIPAL OFFICERS' LIABILITY

154. As agents, employees, or officers of the City, Murphy and Mayor carried out their duties creating the policies and practices that injured Plaintiff on the date and at the time in the conduct giving rise to this action in a neglectful, unskillful, or careless manner.

155. The neglectfulness, unskillfulness, or carelessness of these Defendants, as agents, employees, or officers of the City of Montgomery, directly and proximately damaged Plaintiff in the manner and to the degree as hereinabove recited.

156. These Defendants are individually liable to Plaintiff for their neglectfulness, unskillfulness, or carelessness as agents, employees, or officers of the City of Montgomery for the resulting damages to Plaintiff.

COUNT XII -NEGLECTFULNESS, UNSKILLFULNESS OR CARELESSNESS

MUNICIPAL LIABILITY

157. Murphy and Mayor, as agents, employees, or officers of the City of Montgomery carried out their duties creating the policies and practices that injured Plaintiff on the date and at the time in the conduct giving rise to this action in a neglectful, unskillful, or careless manner.

158. The neglectfulness, unskillfulness, or carelessness of these Defendants, as agents, employees, or officers of the City of Montgomery directly and proximately damaged Plaintiff in the manner and to the degree as hereinabove recited.

159. Ala. Code § 11-47-190 states, "No city or town shall be liable for damages for injury done to or wrong suffered by any person or corporation, unless such injury or wrong was done or suffered through the neglect, carelessness or unskillfulness of some agent, officer or employee of the municipality engaged in work therefor and while acting in the line of his or her duty ... and whenever the city or town shall be made liable for damages by reason of the unauthorized or wrongful acts or negligence, carelessness or unskillfulness of any person or corporation, then

such person or corporation shall be liable to an action on the same account by the party so injured."

160. Neglect, carelessness and unskillfulness have been legislatively removed from the general tort protections of Ala.Code (1975) §6-5-338. When a plaintiff alleges a factual pattern that demonstrates neglect, carelessness, or unskillfulness of an agent of the city, the plaintiff has stated a cause of action against a municipality. *Hawkins v. City of Greenville*, 101 F. Supp. 2d 1356 (M.D. Ala.2000).

161. The City is liable to Plaintiff for the neglectfulness, unskillfulness, or carelessness of these Defendants as agents, employees, or officers of the City of Montgomery.

DECLARATORY RELIEF

162. Plaintiff hereby incorporates by reference all allegations contained in all numbered paragraphs of this Complaint as if set forth fully here.

163. Plaintiff brings this claim for declaratory relief under Federal Rule of Civil Procedure 57 and 28 U.S.C. §§2201, 2202.

164. Plaintiff requests a declaratory judgment establishing that:

- a. Ala. Admin. Code 760-X-1-.21 was clearly established law setting forth procedure due persons convicted of sex crimes in foreign jurisdictions.
- b. SORNA is clearly established federal law setting forth persons who were subject to the Act.
- c. Plaintiff's 1986 Colorado conviction entitled him to the procedure set forth in Alabama administrative code as of April 14, 2010.
- d. Defendants failed to provide Plaintiff the process he was entitled to.

- e. Plaintiff has suffered harm including restrictions and eliminations of his fundamental liberties as a result of Defendants' actions in subjecting him to ACNA, ASORCNA and SORNA.
- f. Defendants ADPS and Attorney General's post deprivation hearing and Final Order is moot as it is untimely and does not comport with procedural due process.
- g. Plaintiff is not subject to ACNA, ASORCNA or SORNA as his constitutional right to due process was violated.
 - 1. Defendants, Murphy, Mayor, City and Marshall under color of law violated Plaintiff's constitutional rights to procedural due process on or about April 14 and 29 respectively by detaining, arresting, fingerprinting, extracting his DNA and requiring Plaintiff to register as a sex offender.
 - 2. All Defendants failed to follow clearly established law as set forth in the Alabama Procedures Act and Alabama administrative code 760-x-1-.21 which entitled Plaintiff, who was convicted of a sex offense in a foreign jurisdiction in 1986, to a hearing and opportunity to be heard prior to being subjected to Alabama sex offender law.
 - 3. Plaintiff was not given notice of Defendants' unilateral denial of due process. As a result, Plaintiff had no opportunity to be heard, or to appeal the unilateral determination prior to being subjected to Alabama sex offender law.
 - 4. Defendants provided a post deprivation hearing on or about December 14, 2011 only after Plaintiff sued Defendant's in Alabama Circuit Court. The post deprivation hearing and Final Order (**issued January 25, 2012**) is moot as it was untimely and irreparable harm has already resulted, providing Plaintiff with no

remedy at law. The post deprivation hearing is ineffective due to actual bias inherent in the process because the ALJ is an employee of Defendant Attorney General Strange and the “findings” in the ALJ’s Final Order contain no relevant legal analysis regarding Plaintiff’s Constitutional challenges to Alabama sex offender law.

5. Defendants had no reason to “act quickly” in subjecting Plaintiff to Alabama sex offender law and it was not impractical to provide Plaintiff pre-deprivation process. A hearing prior to deprivation is required unless time-sensitive issues call for immediate action. Time sensitive issues were not at stake in this case.
6. Plaintiff has a private interest in his fundamental liberties that were restricted or eliminated by the deprivation of process. Defendants’ actions changed Plaintiff’s status as a U.S. citizen because Alabama sex offender law imposed a set of legal duties which are sufficient in and of themselves to implicate a liberty interest.
7. The risk of erroneous deprivation is high given the fundamental liberties involved. Ensuring Plaintiff is or is not subject to Alabama sex offender law is a difficult task and should be conducted by persons capable of administering the difficult legal issues.
8. Because Plaintiff was unilaterally denied due process and subjected to the restrictions of Alabama sex offender law, there is no value in the post deprivation process as Plaintiff had been subjected to the restrictions for over 19 months and offered process only after commencing a lawsuit challenging the deprivation.
9. The interest of the Defendants in keeping procedures the same is low. Defendants have a strong interest in keeping its citizenry safe, but there are procedures it can

follow to achieve those goals. Additional administrative burdens are likely to be low, as relatively few individuals are affected by Alabama sex offender provisions. This is supported by the fact that once sued, Defendants offered a post deprivation hearing within 5 (five) days.

- i. *See Gilbert v. Homar*, 520 U.S. 924 (1997) for post deprivation analysis.
- ii. *See Paul v. Davis*, 424 U.S. 693 (1976) for stigma plus test establishing that Plaintiff has been deprived of a liberty interest in reputation sufficient to implicate the procedural protections of the due process clause, a plaintiff must show stigma plus the alteration or extinguishment of some other right or status.
- iii. “Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.” *Doe v. Pryor*, 61 F. Supp. 2d 1224, 1234 (M.D. Ala. 1999) (quoting *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)).

INJUNCTIVE RELIEF

MOTION FOR PRELIMINARY INJUNCTION

COMES NOW the Plaintiff, Michael A. McGuire, moves the Court for a preliminary injunction preventing from defendants from subjecting Plaintiff to the registration requirements, restrictions, posting of Plaintiff’s name, address and any other information about Plaintiff whatsoever on State and Federal sex offender registries and websites, and the attendant criminal prosecution for failing to register as a sex offender pursuant to ASORCNA or SORNA pending further findings and order(s) of this Court. The reasons supporting this motion are set forth below and in Plaintiffs full brief in support of this motion which will be filed contemporaneously to this complaint.

165. Plaintiff hereby incorporates by reference all allegations contained in all numbered paragraphs of this Complaint as if set forth fully here.

166. **IRREPERABLE INJURY:**

Plaintiff has suffered and will likely suffer irreparable injury if Defendants are not enjoined during the pendency of this lawsuit from subjecting Plaintiff to the registration, notification monitoring, tracking and onerous restrictions and continuous affirmative stigmatization attendant to the ASORCNA and SORNA. The nature of Plaintiff's injuries include a deprivation of fundamental rights to travel, to marry, to carry on familial relationships, to be free from affirmative stigmatization, and his right to privacy. Specifically, if defendants are not enjoined, Plaintiff cannot live with his wife, as the only home in which they can afford to live is in an area deemed to be non-compliant with ASORCNA. If defendants are not enjoined, Plaintiff will not be able to travel freely in intrastate or interstate travel without permission from defendants, although Plaintiff has no custodial relationship with any jurisdiction and has travelled freely for over 20 years. Plaintiff may not legally seek employment practically anywhere in Montgomery to supplement his limited fixed income due to the employment restrictions of ASORCNA and if the defendants are not enjoined, Plaintiff will continue to suffer irreparable financial hardship and imminent homelessness. Plaintiff is prevented from providing adequate care and comfort to his mother due to the residency restrictions of ASORCNA and each day that passes, Plaintiff suffers irreparable harm as his mother is aged and in failing health. If defendants are not enjoined, Plaintiff will suffer irreparable injury each day as more persons in the community view Plaintiff's name and other personal information on state, federal and private websites to which defendants have posted this information. If defendants are not enjoined,

Plaintiff is subject to voluminous criminal provisions in ASORCNA which carry felony penalties, whether or not Plaintiff is aware that he violated the provisions.

NO ADEQUATE REMEDY AT LAW:

There is no adequate remedy at law for Defendants' actions as Plaintiff was afforded a hearing only after Defendants deprived him of his constitutional right to due process, and after restricting and eliminating his constitutionally protected fundamental liberties for over 19 months. *Sampson v. Murray*, 415 U.S. 61, 88-89, 94 S. Ct. 937, 952-53 (1974); *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 417 (4th Cir. 1999).

167. Plaintiff was provided no process whatsoever, before being subjected to the actions of the defendants on April 14 and 29, respectively. Plaintiff's due process was unilaterally denied by the named defendants. There were administrative procedures that Plaintiff was entitled to and set forth in Ala. Administrative Code 760-X-1-.21. As such, Plaintiff has not been afforded due process, but only a post deprivation hearing on or about December 14, 2011 before an ALJ who is an employee of defendant Strange. The administrative law judge made a determination that ASORCNA applied to Plaintiff after setting the hearing to determine if 1996 Alabama Community Notification Act, as amended applied to Plaintiff. There is no adequate remedy at law, because the post deprivation hearing conducted by Defendant Strange was merely illusory, as it was only offered after Plaintiff challenged the unilateral denial of process, and no effective legal relief can be obtained apart from this lawsuit. Plaintiff is not subject to any form of the ACNA, as he has not been afforded due process. As such, Plaintiff seeks this preliminary injunction to maintain the status quo of the parties until the merits of his claims have been completely adjudicated.

168. **PLAINTIFF HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS:**

There is a substantial likelihood that plaintiff will prevail on the merits because Plaintiff was never subject to any form of the ACNA or to SORNA, and has already and will continue to be deprived of his constitutional rights to due process, equal protection and from the application *ex post facto* laws. *U.S. v. Microsoft Corp.*, 147 F.3d 935, 943 (D.C. Cir. 1998); *DSC Comm Corp. v. DGI Tech., Inc.*, 81 F.3d 597, 600 (5th Cir. 1996).

169. While the legislative intent of the ACNA, and now ASORCNA is stated either explicitly or implicitly, and only in part, to be civil in nature, the practical effect of the provisions of the statute transforms the ASORCNA into a criminal statute, thus violating Plaintiff's constitutional protection against *ex post facto* laws as guaranteed by Article I Section 10 of the United States Constitution. Plaintiff establishes the practical effect of ASORCNA as punitive by the clearest proof as follows:

170. ASORCNA was effective in 2011. It is arguably the most restrictive legislation of its type in the United States and has become progressively more restrictive on those to which it applies as it has replaced previous legislation. The Act requires persons deemed by the state of Alabama to be sex offenders to register every three months, to update registration each time they intend to move, and their name, addresses and other personal information is posted on the State, Federal and other sex offender registries and websites. Worse however, the ASORCNA has onerous restrictions that greatly inhibit constitutionally protected individual liberties, which transform the codification of the Act into a criminal statute.

171. The restrictions of the ASORCNA effectively banish sex offenders to very limited areas of the outer fringes of the city of Montgomery in which sex offenders may live in compliance. Sex

offenders are subject to distance requirements from schools, daycare centers, and public parks. Sex offenders are subject to employment restrictions, limiting areas of Montgomery in which they may even seek employment. Because of the residency restrictions attendant to the ASORCNA, Plaintiff cannot live with his wife, who resides in an area of Montgomery deemed to be non-compliant with ASORCNA.

172. These restrictions and requirements are regarded in our history and traditions as punishment, as Plaintiff's right to marry, to carry on familial relationships, to travel freely and to be free from stigmatization are restricted or eliminated by the ASORCNA's restrictions and requirements. The effect of the statute is banishment, shaming, parole-like reporting and monitoring requirements and rigorous restrictions on travel and personal movement.

ASORCNA's requirements include the circulation of Community notification flyers sent to residents in the area in which Plaintiff resides, labeling Plaintiff as a sex offender and providing personal information about Plaintiff. The defendants' actions in actively distributing community notification flyers constitute affirmative "shaming" of Plaintiff by defendants. The defendants' affirmative actions make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme of the ACNA.

173. In addition, if defendants are not restrained from subjecting Plaintiff to the ASORCNA, Plaintiff will be subject to the attendant registration tracking and monitoring requirements as well as the onerous residency, employment and travel restrictions and personal movement prohibitions for life, which impose affirmative disabilities and restraints on Plaintiff's fundamental rights to travel, to marry, to carry on familial relationships, to be free from affirmative stigmatization by the state and his right to privacy.

174. The ASORCNA living restrictions, affirmative shaming and restrictions of Plaintiff's fundamental rights to carry on familial relationships and to privacy constitutes promoting traditional aims of punishment, as banishment, "scarlet letters" and separation from one's family have been traditionally used as forms of deterrence and retribution. ASORCNA also subjects Plaintiff to a \$250 fine as "punishment" for the commission of his 1986 crime that cannot be waived, suspended or remitted.

175. ASORCNA restrictions and requirements are excessive with regard to the legislative stated intent. The Alabama legislature expressed its intent in passing the Act. *Ala. Code* § 15-20-20.1. This section, in pertinent part, states that: "The Legislature declares that its intent in imposing *certain reporting and monitoring requirements* on criminal sex offenders and requiring community notification of the residence and workplace of criminal sex offenders is to protect the public, especially children, from convicted criminal sex offenders." Further, the Legislature cited the need to protect the public from sex offenders due to the danger of recidivism in establishing the ACNA's restrictions and requirements.

176. The restrictions and requirements of the ASORCNA are overbroad and excessive. 24 of the 48 codified provisions in ASORCNA expose sex offenders to felony convictions, the vast majority of which carry no finding of scienter, but are "strict liability" felonies, which incorporate both the lowest burden of civil and harsh punishment of criminal laws. The duration of the ASORCNA registration and restrictions are lifetime. Courts Empirical research on child molesters has shown that, "[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release," but may occur "as late as 20 years following release." *Parker v. King*, 2008 WL 901087 (M.D. Ala. 2008)(citing National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, Child Sexual Molestation: Research Issues

14 (1997)). Plaintiff had no criminal history prior to his conviction in 1986. In over 25 years since Plaintiff's conviction, Plaintiff has committed no crimes, whatsoever. Further, Plaintiff was not convicted of a sex offense involving a minor, stranger or child.

177. Plaintiff was never required to register as a sex offender pursuant to his 1986 final judgment in Colorado. To require Plaintiff to register and comply with ASORCNA restrictions constitutes additional punishment upon Plaintiff, as the restrictions are well beyond the scope of his final judgment in Colorado. Plaintiff's 1986 Colorado conviction cannot be a predicate upon which defendants apply additional restrictions to Plaintiff. Because Plaintiff was never required to register as a sex offender, ASORCNA is inapplicable to Plaintiff, and the restrictions placed upon Plaintiff pursuant to ASORCNA constitute an application of *ex post facto* laws.

178. **HARM TO PLAINTIFF OUTWEIGHS HARM TO DEFENDANTS:**

The threatened harm to plaintiff outweighs the harm a preliminary injunction would inflict on defendants. Specifically, the onerous restrictions of Plaintiff's fundamental liberties are not outweighed by any harm to defendants by enjoining their continuing affirmative deprivation of said liberties. *See Hoechst*, 174 F.3d at 417; *Microsoft*, 147 F.3d at 943.

Defendants are not prejudiced in any way, by awaiting the outcome of this Court's findings. The State has an interest in protecting its citizenry. However, there were and are well established procedures defendants can follow to do so. Harm created by violating Plaintiff's constitutional rights should not inure to the benefit of defendants, but to Plaintiff who suffers the harm of deprivations of liberty caused by the defendants' intentional failure to follow well established procedure.

179. **THE PRELIMINARY INJUNCTION WOULD NOT ADVERSELY AFFECT THE PUBLIC INTEREST:**

Issuance of a preliminary injunction would not adversely affect public interest, but would serve the public interest because the preliminary injunction will ensure that citizens are not arbitrarily and capriciously prosecuted, detained, arrested and subjected to onerous restrictions of liberty, without first, being provided Constitutional due process rights which are afforded citizens of the United States and of every State. Therefore, the public interest is served by ensuring defendants follow or establish procedures in order to prevent the violation of constitutionally protected rights of U.S. citizens and citizens of the State of Alabama.

180. **BOND:**

Plaintiff is willing to post a bond in the amount the court deems appropriate.

181. **PRAAYER:**

Plaintiff asks the court to set his application for preliminary injunction for hearing at the earliest possible time and, after hearing the request, issue a preliminary injunction against defendants.

REQUEST FOR PERMANENT INJUNCTION

182. Plaintiff respectfully requests this Court to set his application for injunctive relief for a full trial on the issues in this application and, after the trial, to issue a permanent injunction against defendants.

183. Issue a permanent injunction requiring Defendants to expunge from all the files and records of the State and Federal Registries for Sex Offenders and any other entities to which Defendants caused Plaintiff's information to be posted, any and all documents pertaining to or referencing in

any manner the classification of Plaintiff as a sex offender and requiring those documents be provided to Plaintiff for destruction.

184. Permanently restrain Defendants from subjecting Plaintiff to any further requirements and/or restrictions, whatsoever, of the ACNA or ASORCNA.

185. Permanently restrain Defendants from subjecting Plaintiff to any further requirements and/or restrictions, whatsoever, of SORNA.

PRAYER FOR RELIEF

WHEREFORE Plaintiff prays judgment against Defendants, and each of them, as follows:

1. Enter a declaratory judgment that the policies and practices complained of herein are unlawful and violative of the Fourth, Fifth and Fourteenth Amendments, Ex Post Facto Laws, and the Equal Protection Clause of the United States Constitution, as addressed by and through 42 USC.A §§ 1983, 1985, and 1986, and the common and statutory law of Alabama;
2. For declaratory relief as specifically requested herein;
3. For preliminary injunctive relief as described herein;
3. For permanent injunctive relief as described herein;
4. For general and special damages in an amount to be more precisely proven at trial;
5. Grant Compensatory damages in favor of Plaintiff as against each Defendant of \$500,000;
6. Grant Punitive damages to Plaintiff against each Defendant in the amount of \$500,000;
7. Grant Plaintiff the cost of this action including reasonable attorneys' fees;
8. Grant as to Plaintiff such other, further and different relief as this Court may deem just and proper, including all equitable relief, the awarding of which is within the jurisdiction of the Court.

RESPECTFULLY SUBMITTED on this the 9th day of February, 2012.

PLAINTIFF DEMANDS TRIAL BY JURY

/s/ J Mitchell McGuire
J Mitchell McGuire (MCG044)
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Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2012, I electronically filed with the Clerk of the Court the foregoing document through the CM/ECF system, which will send notification of such filing to the following individuals:

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