

NOTICE OF MOTION TO DISMISS THE ACCUSATORY INSTRUMENT ON THE
GROUND THAT, ON ITS FACE AND AS APPLIED, CORRECTION LAW § 168-f(4) IS
UNCONSTITUTIONALLY VAGUE, AND VIOLATES EQUAL PROTECTION

CAPTION

PLEASE TAKE NOTICE, that, upon the annexed affirmation and the prior papers and proceedings herein, the undersigned will move this Court at Part ____, to be held at the Courthouse at ____, on _____, 20 __, at ____, or as soon thereafter as counsel can be heard, for an order:

1. Dismissing the [accusatory instrument] on the ground that, on its face and as applied, Correct. Law § 168-f(4) is unconstitutionally vague, and violates equal protection under the state and federal constitutions;
2. Reserving to defendant the right to make additional motions as necessary; and for such other relief as this Court may deem just and proper.

DATED: _____, New York
_____, 20__

Your name
Attorney for Defendant
Address and tel. Number
Email address

TO: [Parties to be served]

AFFIRMATION IN SUPPORT OF MOTION TO DISMISS [ACCUSATORY INSTRUMENT]
ON DUE PROCESS AND EQUAL PROTECTION GROUNDS

CAPTION

[Your name], being duly admitted to practice in the Courts of this State, hereby affirms under the penalties of perjury that the following statements are true, except those made on information and belief, which s/he believes to be true:

1. I am the attorney for the defendant herein and am personally familiar with the facts stated herein.
2. The defendant is charged with violating Correct. Law § 168-f(4). Section 168-f(4) requires registration “no later than ten calendar days after any change of address” for those subject to the New York State Sex Offender Registration Act (“SORA”).
3. [give procedural history - date of arrest, arraignment in criminal court/ arraignment in supreme court, Part and date, any further proceedings]
4. The defendant now moves this Court for dismissal of the [accusatory instrument] on the grounds that (a) on its face and as applied, Correct. Law § 168-f(4) is unconstitutionally vague in violation of federal and state due process, because it fails to provide an ordinary person with reasonable notice as to the prohibited conduct, and homeless or transient SORA registrants are subject to arbitrary or discriminatory enforcement; and (b) the statute violates state and federal guarantees of equal protection of the laws, because a SORA registrant who is homeless or transient as a result of indigency is subject to criminal sanctions that a SORA registrant of means who has stable housing is not.
5. The defendant has attached a Memorandum of Law in support of this Motion to Dismiss.
6. For the foregoing reasons, the defendant respectfully requests that this Court dismiss the accusatory instrument.

WHEREFORE, the undersigned respectfully requests that this Court grant the relief sought herein and reserve to defendant the right to amend or supplement this motion for such other and further relief as this Court may deem just and proper.

DATED: _____, New York
_____, 20__

Your Name

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

CAPTION

[CLIENT NAME], through his/her attorney, _____, submits this Memorandum of Law in Support of the defendant's motion to dismiss the [accusatory instrument].

STATEMENT OF FACTS

[Brief summary of allegations]

The issue before this Court is the constitutionality of the vague statute that criminalizes the failure of a SORA registrant to register after changing his address, without defining the terms of compliance, and which imposes criminal sanctions on indigent, homeless SORA registrants, but not on registrants who have stable housing.

ARGUMENT

CORRECT. LAW § 168-f(4) VIOLATES DUE PROCESS AND EQUAL PROTECTION. U.S. CONST. AMENDS. V, XIV; N.Y. CONST. ART.1, §§ 6, 11.

A. Correct. Law § 168-f(4) Is Unconstitutionally Vague On Its Face and as Applied, and Encourages Arbitrary Enforcement.

The Due Process Clause protects criminal defendants against the enforcement of laws that are insufficiently definite, either on their face or as applied to a specific person or circumstance. U.S. Const. amend. XIV, § 1; Grayned v. City of Rockford, 408 U.S. 104, 108 (1983). A statute is impermissibly vague if it provides “no distinction between conduct calculated to harm and that which is essentially innocent.” People v. Diaz, 4 N.Y.2d 459, 471 (1958); People v. Bright, 71 N.Y.2d 376, 383 (1988)(“[T]he Legislature may not criminalize conduct that is inherently innocent . . . since [doing] so would not fairly inform the ordinary citizen that an otherwise

innocent act is illegal.”). Where terms remain undefined, a vague statute “fails to give specific notice” to those to whom the law applies. Cunney v. Board of Trustees of Village of Grand View, N.Y., 660 F.3d 612, 621 (2d Cir. 2011) (finding a town building restriction “remarkably unclear” and lacking any objective standard of compliance under a reduced vagueness standard). For an indigent registrant who lacks notice or instruction as to how to remain compliant with SORA, becoming homeless or leaving a homeless shelter (when, for example, there are no empty beds), is just the kind of “inherently innocent act” due process is meant to protect.

Correct. Law § 168-f(4) provides, in relevant part:

Any sex offender shall register with the division no later than ten calendar days after any change of address. . . .

Failing to register a change of address within the time period provided is a class E felony; conviction of a second or subsequent offense is a class D felony. See Correct. Law § 168-t.

Correct. Law § 168-f(4) does not define “address,” nor does it provide any definitions related to residency status. As a result, SORA registrants who are homeless, or become homeless, and thus have no fixed address, have “no objective standard or guidelines that would put [them] on notice of what conduct is required of them, thus leaving them to guess as to how to achieve compliance with the statute’s reporting provisions.” Santos v. State, 668 S.E.2d 676 (Ga. 2008)(voiding Georgia’s change of residency requirement for sex offenders).

Referencing the common meaning of the term “address” does not cure the constitutional defect. The term “address” is commonly defined as “a place where a person or organization may be communicated with.” Webster's Dictionary, Unabridged Online (<https://www.merriam-webster.com/dictionary>). “Change” can be reasonably understood to mean an “exchange” or “switch” within the context of the statute. Id. Applying these

definitions, the statute fails to provide notice to a registrant who does not have an “address” at which he can be contacted, or whose homelessness is constant and unchanging, that failing to register an “address” he doesn’t have will subject him to a criminal sanction.

Relatedly, Correct. Law § 168-f(4) lacks any separate, explicit provision outlining proper compliance for persons without a fixed address, either in that section or any other section of the statute. This distinguishes New York from other states’ provisions, including Alabama. Cf. Alabama Code 1975 § 15-20A-12 (providing instructions for homeless sex offenders); cf. also California Penal Code § 290.011(a), (d) (stating that “transient offenders must register every 30 days” and “report all places where he or she sleeps, eats, works, frequents, and engages in leisure activities”); Illinois § 730 ILCS 150/6 (requiring an offender who lacks fixed residence to report weekly to law enforcement where offender is located); Washington Rev. Code 9A.44.130(3)(b) (permitting offenders who lack a fixed residence to register the location where they plan to stay). This impermissible gap in the law leaves defendant—and all homeless registrants—completely without direction as to how to comply with their registration requirements.

In addition to lacking sufficient notice for homeless or transient persons, § 168-f(4) provides enforcement agencies with “absolutely no guidelines governing the determination as to whether a person is engaged in [the prohibited conduct].” People v. Berck, 32 N.Y.2d 567, 571 (1973). Legislation must “‘provide explicit standards for those who apply’ them to avoid ‘resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.’” Thibodeau v. Portuondo, 486 F.3d 61, 66 (2d Cir. 2007)(quoting Grayned, 408 U.S. at 108–109). To satisfy this prong, the statute must provide “police, judges and juries with ‘clear standards for enforcement.’” People v. Fox, 17 Misc.3d 281 (Sup. Ct. Kings Co. 2007) (quoting People v. Stuart, 100 N.Y.2d 412, 420 (2003)). If a statute leaves

enforcement agencies “‘necessarily guess[ing] at its meaning and differ[ing] as to its application,’” the law “‘violates the first essential of due process of law.’” Stuart, 100 N.Y.2d at 419 (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

That is the case with Correct. Law § 169-f(4), where the statute has resulted in inconsistent enforcement across jurisdictions and even within a single law enforcement office. For example, in Medina v. Cuomo, 2015 WL 13744627 (N.D.N.Y. 2015), adopted by Medina v. Cuomo, 2016 WL 756539 (N.D.N.Y. 2016), Medina, a SORA registrant, became homeless. For a significant period of time, he was permitted to register as “homeless” during his mandated Level-3 check-ins, with which he was compliant for at least five years. Id. This practice—deemed appropriate by at least one law enforcement agent—was soon met with disdain by another. During a check-in with a Jefferson County police officer, Mr. Medina was “subjected to an hour long interview by the interrogating officer” who “demanded that [Medina] provide his address.” Id. When Medina explained that a previous officer found the “homeless” designation sufficient for compliance with SORA, the new officer refused to follow this practice and wrote in a non-compliant public housing address, leaving Medina vulnerable to federal and state prosecution. Id.

In another instance, a homeless defendant charged with failure to register told the trial court during his plea allocution that he was forced to spend some nights on the streets rather than in his registered shelter. This admission—rather than harm the defendant—was sufficient for the Second Department to find reversible error on the ground that his statements at the plea “tended to demonstrate that the defendant did not, in fact, change his address and thus, was not required to notify the Division.” People v. Wright, 174 A.D.3d 547 (2d Dep’t 2019). As these examples illustrate, a registrant known to be homeless is subject to the subjective interpretations of

individual units, officers, or agents, “impermissibly delegat[ing] basic policy determinations to the police (and eventually to judges and juries).” Stuart, 100 N.Y.2d at 421.

B. Correct. Law § 168-f(4) violates Equal Protection.

The core of the constitutional guarantee of Equal Protection is that all persons similarly situated must be treated alike. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985); Bower Associates v. Town of Pleasant Valley, 2 N.Y.3d 617, 631 (2004). The New York State Equal Protection Clause is modeled after its federal counterpart, and is thus analyzed similarly. Under 21, Catholic Home Bur. for Dependent Children v. City of New York, 65 N.Y.2d 344, 360 n.6 (1985). Defendant does not contest the validity of the State’s interest in protecting the public through the registration of persons convicted of sex crimes, but challenges the constitutionality of the statute as an indigent, homeless offender who is burdened by a heightened level of enforcement and prosecution, unlike those housing-secure registrants with whom he is similarly situated.

In a criminal action, “a State can no more discriminate on account of poverty than on account of religion, race, or color.” Griffin v. Illinois, 351 U.S. 12, 17 (1956). The New York Court of Appeals has further recognized that “disparity of treatment, occasioned only by differing financial situations, deprives the indigent defendant of the fair and equal treatment guaranteed him by the Constitution.” People v. Pride, 3 N.Y.2d 545, 550 (1958). The Supreme Court has treated indigency as a suspect class where access to court process essential to a fair trial in a criminal proceeding is at issue. See, e.g., Griffin, 351 U.S. 12. Here, whether or not indigency is considered a suspect class with respect to enforcement of a SORA statute, there is neither a compelling reason nor a rational basis to justify the distinction Correct. Law § 168-f(4) draws between indigent and non-indigent residents. New York’s interest in tracking sex offenders does

not justify creating impossible standards of compliance for indigent residents who lack fixed residency.

There can be no doubt that offenders of means who enjoy stable housing and those plagued by poverty or homelessness belong to a similarly situated group of SORA registrants who are required to abide by Section 168-f(4). See Bower, 2 N.Y.3d at 631 (in determining whether persons are similarly situated, the test is “whether a prudent person, looking objectively at the incidents, would think them roughly equivalent”). Correct. Law § 168-f(4) requires that any person subject to SORA is legally required to register a change of address. Nor can there be any doubt that indigent SORA registrants are subject to disparate treatment. An indigent individual is subject to arrest, conviction, and imprisonment for failing to register an address change, merely because, as a result of their financial status, they are homeless and so unable to comply with the law.

An equal protection violation was found in State v. Adams, 91 So.3d 724 (Ala. Ct. App. 2010), for essentially the reasons discussed above. There, the Alabama Court of Criminal Appeals invalidated a previous version of its registration statute as applied to indigent, homeless sex offenders, holding that the legislature had “created separate consequences . . . based on wealth.” Id. at 742. While the statute did not facially distinguish between offenders, the chances that a homeless sex offender would be able to secure approved housing following completion of his sentence was “virtually nil,” the court found, meaning that they would either remain incarcerated, or would eventually be sentenced as felons and habitual felons for violating the registration provision. The ultimate defect in the statute was its provision requiring the registration of a fixed address, under which compliance “would be impossible for an indigent homeless offender.” Vann v. State, 143 So.3d 850, 862 (Al. Ct. App. 2013). Clearly, the same

defect infects Correct. Law § 168-f(4), which subjects indigent SORA registrants to felony prosecution and confinement, perhaps repeatedly, simply because they do not have the money necessary to comply with the statute's change-of-address registration requirement.

Accordingly, for all of the above reasons, the accusatory instrument must be dismissed.

CONCLUSION

FOR THE REASONS STATED ABOVE, THIS COURT SHOULD DECLARE CORRECT. LAW § 168-f(4) UNCONSTITUTIONAL ON DUE PROCESS AND EQUAL PROTECTION GROUNDS AND DISMISS THE [ACCUSATORY INSTRUMENT].

Respectfully submitted,

YOUR NAME