Date: June 1, 2015

To: Hon. Nathan Deal, Governor
Hon. Sam Olens, State Attorney General
Jeffrey Reese Davis, Executive Director, State Bar of Georgia

From: Sherri Jefferson, Esq.
Attorney at Law

Notice of Constitutional Challenge to O.C.G.A. 17-4-40 (b)(1)(2) and (2) and 8(c) and OCGA 16-11-39.1

COMES now, Sherri Jefferson (Attorney Sherri Jefferson) and pursuant to Rule 5.1 and all other applicable rules, hereby respectfully provides this Court and Hon. Sam Olens, the State Attorney General of Georgia and Hon. Governor Nathan Deal (Executive Order powers) and the Executive Director of the State Bar of Georgia, Jeffrey Reese Davis (Executive and Legislative Powers of the Bar in drafting legislation) notice and statement regarding the due process, equal protection, vagueness and overbreath constitutional challenge to Georgia's Private Citizen Warrants pursuant to OCGA O.C.G.A. 17-4-40 (b)(1)(2) and (2) and 8(c) and OCGA 16-11-39.1 both facially and as-applied, by stating and providing the following:

Overview

1. Although the pre-warrant application could be perceived as *civil* in character, it is subject to provisions set under Title 17, which is Georgia's criminal statute and the vagueness challenge is still applicable because it would still have to meet the due process standard of certainty required of criminal statutes. The language of the statute as read is susceptible of varying interpretations

which, in turn, give rise to possibilities for novel applications of the void-for vagueness doctrine.

2. The United States Supreme Court has held that whatever label is given an act, it provided the state is precluded from depriving a defendant of his liberty or property where such language is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited (or required or in the instant matter what is actual "repeatedly" and what is deemed 'notice.') 382 U.S. at 402. See, e.g., Jordan v. DeGeorge, 341 U.S. 223, 231 (1951) (statute met void-for-vagueness requirements)

Basis of Constitutional Challenge

1. Respondent alleges that O.C.G.A. 17-4-40 (b)(1)(2) and (2) and 8(c) is unconstitutional. As the Supreme Court of Georgia held in State v. Crane, Georgia statutes must say what they mean and mean what they say and when read and considered O.C.G.A. 17-4-40 (b)(1)(2) and (2) and 8(c) violates due process, violates equal protection, and is void for vagueness and overbreath. See also Viereck v. US.

2. OCGA 16-11-39.1 is Georgia harassing telephone call statute and while there is no evidence of violation of said statute in the instant case; it is cited in the warrant. The law as written is vague and ambiguous as to the terms "repeatedly" the actual definition of "annoying" and "harassing."

Whether OCGA 16-11-39.1 is Unconstitutionally Vague

1. In evaluating whether OCGA 16-11-39.1 is unconstitutionally vague we must examine the terms which subject a person to arrest or a warrant for arrest.

(a) A person commits the offense of harassing phone calls if such person telephones another person **repeatedly**, whether or not conversation ensues, for the **purpose of annoying, harassing, or molesting another person** or the family of such other person; uses over the telephone language threatening bodily harm; telephones and intentionally fails to hang up or disengage the connection; or knowingly permits any telephone under such person's control to be used for any purpose prohibited by this subsection.

2. Thus, OCGA 16-11-39.1 does not give adequate notice of what conduct is prohibited because "repeatedly" has different meanings to different people as does what constitutes "annoying" or "harassing." Respectfully, who decides how long or how many text messages or conversations are required to convey a matter. When does the alleged harassment or annoyance start or end if in between the person is freely and willingly communicating with the alleged accused.
3. The "purpose" of the call according to the statute is subject to the interpretation of the doer or the accused, and if not, then these subjective terms place innocent people at the mercy of judges or police officers. For example, are repeatedly 5 calls within an hour, or within a 24-hour day, a week or a month? What is actual harassment or annoying, the mere act of receiving the call or the nature, tenor, mannerism and conduct of the caller and the conversation?

4. Statutes from across the country, which provide constitutional safeguards address issues of time,

whether the calls are made at inconvenient hours, the nature of the calls, whether there is an examination of good faith by the doer, but not acceptable by the receiver, whether an order of protection is exercised before authorizing criminal sanctions, etc. Other statutes require language suggesting that the recipient of the call engage with that person or another person in sexual relations, etc. While other statutes look to how often the calls ensue from the date of complaint, notice and application seeking arrest. In all but eight states, law enforcement is the final arbiter of whether an arrest warrant will be issued based on their investigation.

5. In the instant matter there exist no calls, text, or emails after both parties issued cease and desist notifications in January 2015; there was a four month lapse between the last communications and the issuance of the warrant and arrest. Examination of whether warnings are communicated and what actions transpire after the warning or notification period is required by other state statutes.

6. Vague laws which delegate basic policy matters to police, judges or juries for resolution or an ad hoc on a subjective basis with the attendant dangers of arbitrary and discriminatory application is unconstitutional. The current legislation is drafted in a manner that fosters arbitrary or discriminatory enforcement. The term “repeatedly” is not subject to a common sense standard. Furthermore, in an era where text communication is essential and the norm, who dictates how many calls, emails or text messages are deemed harassing or annoying, which are respectfully emotionally driven responses on any given moment and not measured by any legal standard.

7.The void-for-vagueness doctrine has also been extensively applied to statutes affecting the exercise of first amendment freedoms. However, there is an additional inquiry in this area, for the vagueness in such statutes is also violative of substantive due process. Where the defect is procedural, the state is not without power to prohibit the conduct which is deemed unlawful but the means selected violate due process by failing to furnish adequate notice and adjudicative standards. See Lanzetta v. New Jersey, 306 U.S. 451 (1939).

8. Where the defect is substantive, the state in prohibiting harmful conduct has framed the statute in terms so broad that it prohibits or may prohibit conduct which is constitutionally protected and which, therefore, the state is without power to make punishable. See, e.g., Cox v. Louisiana, 379 U.S. 536 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Thornhill v. Alabama, 310 U.S. 88 (1940)..

9.OCGA 16-11-39.1 is overly broad when its prospective reach includes constitutionally protected activity. Surely, Georgia may legitimately prohibit or regulate both unprotected and protected speech whose suppression is justified by a compelling governmental interest, but where a person may communicate with another differently than the norm, or where one prefers calls over text messages or emails over calls or text messages, or where one may be more likely to be longwinded in communications versus another, the law forbids the drafting of statues and/or ordinances so broadly that they also prohibit, or could prohibit substantial amounts of constitutionally protected expression.

Whether OCGA 17-4-40 and Private Citizen Warrants are Unconstitutional

1. The Supreme Court of the United States held in Linda RS v. Richard D, that private citizens lack judicially cognizable interest in prosecution or non prosecution of another. The government is vested with said interest. 410 US 614 (1973). However, Georgia authorizes private citizen warrants.

2. O.C.G.A. 17-4-40 authorizes private citizens to initiate criminal action against other citizens without law enforcement intervention or oversight. The code authorizes private citizens to swear-out a warrant subjecting ordinary citizens to arrest and detention. Such arrest subjects the person to loss of income, employment, housing, educational opportunities and funding as well as shame, embarrassment, humiliation, public contempt and ridicule all at the signing of a warrant based on allegations of a penal offense.

Challenges

The following are the Constitutional Challenges to O.C.G.A. 17-4-40. In addition to the fact that private citizens lack judicially cognizable interest in prosecution or non prosecution of another, respondent makes the following additional challenges.

1. Due Process, Vagueness and Overbroad

O.C.G.A. 17-4-40 (2) proscribes in pertinent part,

> (2) Except as otherwise provided in paragraph (6) of this subsection, a warrant application hearing shall be conducted only after **attempting to notify the person whose arrest is sought by any means approved by the judge or other officer** which is reasonably calculated to apprise such person of the date, time, and location of the hearing.

is void for vagueness and violates and runs afoul of the due process clause because under the vagueness doctrine, OCGA 17-4-40 (2) the legislature's delegation of authority to judges and/or administrators is so extensive that it would lead to arbitrary and discriminatory issuance of warrants and eventually prosecutions. Vague laws which delegate basic policy matters to police, judges or juries for resolution or an ad hoc on a subjective basis with the attendant dangers of arbitrary and discriminatory application is unconstitutional. See Grayned v. City of Rockford and In Village of Hoffman Estates.

Where a person does not receive notice of the hearing, the Court shall not proceed at his discretion. As a general rule, due process requires that an individual be given notice and an opportunity for a hearing before the state may permanently deprive someone of life, liberty, or property. As applied here, Judge Robert Turner presumed based on some purported and unsubstantiated telephone call that the Respondent had notice of the pre-warrant application hearing.

All other sectors of civil and criminal proceedings specify in the statute that “statutory mail” be used in the form of registered mail, certified mail or special deliveries. Here, where liberty interest are at stake, the law lowers the burden to authorize a judge to make a discretionary, arbitrarily and discriminatory decision to proceed with a hearing fully aware that notice was not perfected.

Furthermore, a fair reading of the statute itself gives not the slightest hint to alleged accused who are subject to attendance at the hearing of their rights concerning notice of penal offense because the statute does not require the applicant seeking the warrant to specify the alleged crime or penal offense violated by statute or element; it does not afford notice of the penal offense and the accused should not have to guess at the criminal offense or presume a violation of an

offense. The statute shall provide that the crime alleged be specified in the application with facts supporting so that the accused is apprise not merely of a time, date and place of hearing, but are given notice of the penal violation. The statute lacks definitiveness and specificity; the statute fails to give the accused notice that he may be represented by counsel or may have the right to remain silent or present his response to the allegations within the application in a responsive pleading.

2. Substantive Due Process

Finally, the doctrine of substantive due process accords that the Due Process Clause protects substantive rights and arrest based upon freedom of speech is unauthorized and substantive due process protect the public from arbitrary governmental action, regardless of the exercise of private citizen warrant procedures used to implement it.

3. Equal Protection

OCGA 17-4-40 (8) proscribes in pertinent part,

> c) Any warrant for the arrest of a peace officer, law enforcement officer, teacher, or school administrator for any offense alleged to have been committed while in the performance of his or her duties may be issued only by a judge of a superior court, a judge of a state court, or a judge of a probate court.

Either all citizens of the State of Georgia including professionals and non-professionals alike have the same and equal right to defend against private citizen warrants and protect their "basic civil rights" with judges of superior knowledge and skill, or OCGA 17-4-40 (8) fails for a contrary result that creates unequal classes of citizens in the exercise of "basic civil rights" who are at the mercy of magistrate court judges

whom may or may not process a law degree or legal skill set based upon their jurisdictional requirements.

Under the current law, attorneys, doctors, accountants and other professionals are not accorded the same protections as other professions. Equal to members of law enforcement, EMS and hospital officials have daily interactions with a multitude of people as do attorney and public defenders and judges. These professions are subject to the same or great scrutiny. Furthermore, these professions require constitutional safeguards to avoid abuse and misuse of private citizen warrants by unscrupulous individuals seeking to ascertain financial gain or leverage. Toward that end, the law is facially unconstitutional in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution and Georgia.

In the instant matter, the Georgia General Assembly has given preferential treatment to two groups or classes based upon their social and economic status and have disregarded the legal rights, protections and safeguards of others. The Equal Protection Clause is part of the 14th Amendment to the U.S. Constitution that prohibits discrimination and the intent of the clause is to grants all people "equal protection of the laws," which means that the states must apply the law equally and should not give preference to one person or class of persons over another unless it can meet the burdens established by law.

Finally, the statute as written does not protect citizens of Georgia from abuse of process or malicious prosecution. The code is silent as to a uniform or standard pre-warrant application guideline which would ask questions about whether the applicant is involved in a martial dispute, civil action, civil dispute, whether a notice of intent or demand for money has been made against the person whose arrest is sought; whether police have investigated the matter and if so their

findings, applicants would be required to proffer a certified copy of court proceedings against the person and a certified copy of a complete police report; to require dates, times and locations of the alleged offenses, etc. The law requires four corner warrants (even search warrant) by police officers seeking arrest, but not private citizens.

Wherefore, having given notice or and made these challenges, Respondent deems the laws to be constitutionally void for vagueness and unconstitutional facially and as-applied. Therefore, until the Georgia General Assembly or the State Attorney General address this challenge alternatively, until Hon. Governor Nathan Deal issues an Executive Order placing a moratorium and directive halting all warrants, arrest, prosecutions, convictions and sentencing under these code sections, no citizen of this State should be subject to warrants, arrest, prosecutions, convictions and sentencing under these laws or in concert with OCGA 17-4-40 et seq. and OCGA 16-11-39.1 et seq.

This 1st day of June 2015

/s/
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