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February 29, 2016

The Honorable Scott S. Harris
Clerk of Court
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Re: *Edward Dean & Nolan Brown v. Mark Keel in his official capacity*

Dear Mr. Harris:

Enclosed please find for filing, along with certificate of filing by mail and certificate of service by mail, the original and ten (10) copies of Mr. Dean and Mr. Brown's Motion for Leave to Proceed *In Forma Pauperis* and Petition for Writ of *Certiorari* to the South Carolina Supreme Court.

By copy of this letter, via email and US Mail, to Ms. Greene and Mr. Whitsett, I am serving the State of South Carolina. By copy of this letter, I am also providing a copy to the South Carolina Supreme Court.

Thank you for your attention to this matter

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina

Marcie Greene, Esquire
S.C. Attorney General's Office

Adam Whitsett, Esquire
General Counsel, S.C. Law Enforcement Division

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2015

No. 15-

EDWARD DEAN AND NOLAN BROWN

PETITIONER,

v.

MARK KEEL IN HIS OFFICIAL CAPACITY AS CHIEF OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION

RESPONDENT.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Rule 39, Edward Dean and Nolan Brown respectfully petition this Court to proceed *in forma pauperis*, in accordance with the provisions of Title 28 U.S.C. § 1915.

Undersigned counsel was Chief Public Defender for Greenwood and Abbeville Counties, South Carolina from 1999 to 2008 and Circuit Public Defender for the Eighth Judicial Circuit (Abbeville, Greenwood, Laurens, and Newberry Counties, South Carolina) from 2008 to 2012. During counsel's tenure in these positions, he was appointed to represent Mr. Dean and Mr. Brown to defend them on their respective charges of failure to register as sex offenders. The Appointment was pursuant to the South Carolina statues providing for the Defense of Indigents, S.C. Code Ann. § 17-3-5, *et. seq.*, as amended, and Rule 602 of the South Carolina Appellate Court Rules (hereinafter "SCACR").

After successfully defending their charges for failure to register as sex offenders, counsel agreed to assist petitioners in trying to be removed from South Carolina's sex offender registry. After entering private practice counsel continued to represent petitioners *pro bono*[1] and filed the declaratory judgment action that led to the attached Petition for Writ of *Certiorari* to the South Carolina Supreme Court.

IT IS SO MOVED.

Respectfully submitted,

By _____

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Attorney of Record for Petitioners

February 29, 2016.

[1] *See* Rule 407, SCACR, Rule 6.1, RPC, which provides, "A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means."

IN THE SUPREME COURT OF THE UNITED STATES

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PETITIONER,

v.

MARK KEEL IN HIS OFFICIAL CAPACITY AS CHIEF OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION

RESPONDENT.

PETITION FOR WRIT OF *CERTIORARI*
TO THE SOUTH CAROLINA SUPREME COURT

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QUESTIONS PRESENTED

I.

Does retroactively requiring Edward Dean and Nolan Brown to register as sex offenders violate due process under the United States Constitution because, at the time of their juvenile adjudications, South Carolina guaranteed the confidentiality of their juvenile records and limited the consequences of their adjudications to their twenty-first birthdays under the doctrine of *parens patriae*, which also deprived them of the constitutional right to a jury trial?

II.

Does retroactively requiring Edward Dean and Nolan Brown to register as sex offenders violate the *ex post facto* clause of the United States Constitution because, at the time of their juvenile adjudications, South Carolina guaranteed the confidentiality of their juvenile records and limited the consequences of their adjudications to their twenty-first birthdays under the doctrine of *parens patriae*, which also deprived them of the constitutional right to a jury trial?

III.

Does retroactively requiring Edward Dean and Nolan Brown to register as sex offenders violate the prohibition against cruel and unusual punishment under the United States Constitution because South Carolina did not convene a hearing to make an individualized determination of whether they should be required to register as sex offenders?

IV.

Does retroactively requiring Edward Dean and Nolan Brown to register as sex offenders violate due process under the United States and Constitution because South Carolina did not convene a hearing to make an individualized determination of whether they should be required to register as sex offenders?

V.

Does retroactively requiring Edward Dean and Nolan Brown to register as sex offenders violate equal protection process the United States Constitution because, at the time of their juvenile adjudications, South Carolina guaranteed the confidentiality of their juvenile records and limited the consequences of their adjudications to their twenty-first birthdays under the doctrine of *parens patriae*, which also deprived them of the constitutional right to a jury trial?

LIST OF PARTIES AND CORPORATE DISCLOSURE

Petitioners Edward Dean and Nolan Brown are natural people. The respondent is the State of South Carolina. No corporations are involved in this petition.

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 15-

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PETITIONER,

v.

MARK KEEL IN HIS OFFICIAL CAPACITY AS CHIEF OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION

RESPONDENT.

PETITION FOR WRIT OF *CERTIORARI*
TO THE SOUTH CAROLINA SUPREME COURT

Edward Dean and Nolan Brown respectfully petition this Court for a writ of *certiorari* to review the judgment of the South Carolina Supreme Court.

OPINION BELOW

The South Carolina Supreme Court opinion affirming the Court of Common Pleas denial of declaratory relief is unpublished, Memorandum Opinion No. 2015-MO-065, and is reprinted in the Appendix (hereinafter "App.") at 1-3. The South Carolina Supreme Court's order denying the petition for rehearing is unreported and reprinted at App. 36.[1]

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[1] The complete record in this case can be found at http://ctrack.sccourts.org/public/caseView.do?csIID=58394 (last viewed Feb. 27, 2016).

JURISDICTION

The South Carolina Supreme Court affirmed the Court of Common Pleas on November 4, 2015, App. 1-3, and denied the timely petition for rehearing on December 2, 2015, App. 36-42.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Clause one of Article I, §10 of the Unites States Constitution prohibits the states from passing *ex post facto* laws.

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment's prohibition against cruel and unusual punishment is applicable to the states through the due process clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962).

The Fourteenth Amendment to the United States Constitution provides, "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This appeal also involves South Carolina's requirement that children register for life as sex offenders based on juvenile adjudications, found at S.C. Code Ann. §§23-3-430 and 460. App. 46-52.

STATEMENT OF THE CASE

On July 31, 1990, the Family Court adjudicated Edward Dean, a thirteen-year-old child, delinquent for first-degree criminal sexual conduct with a minor. On May 22, 1991, the Family Court adjudicated Nolan Brown, a fourteen-year-old child, delinquent of first-degree criminal sexual conduct with a minor. Stipulation of Facts, App. 43-45. At the time of these adjudications, based on the doctrine of *parens patriae*, statutory law protected the confidentiality

of juvenile records and limited the consequences of their adjudications to their twenty-first birthday. S.C. Code §§ 20-7-400, 780, and 1330.[2]

In 1994, South Carolina enacted a sex offender registry for the first time. 1994 S.C. Act 497, Part II §112A (S.C. Code Ann. §23-3-400, *et. seq.*). Initially, the Sex Offender Registry applied only to "convictions," and not juvenile adjudications. *Id. See State v. Ellis*, 345 S.C. 175, 179, 547 S.E.2d 490, 492 (2001) (a juvenile adjudication is not the same as a conviction). In 1996, when the General Assembly began requiring children adjudicated of certain offenses to register as sex offenders, the child's information remained confidential. 1996 S.C. Act 444 §16 (S.C. Code §23-3-430, 490). It wasn't until 1998 that the General Assembly authorized release of juvenile sex offender information under certain circumstances. 1998 S.C. Act 384 §1 (S.C. Code §23-3-490).

South Carolina, thus, requires petitioners to register as sex offenders. Their registration information is public and appears on the South Carolina Law Enforcement Division's (hereinafter "SLED") website.[3] They must report in person to the Sheriff's Office every ninety days and pay an annual registration fee of $150.00.

Petitioners filed a declaratory judgment action pursuant to S.C. Code Ann. §15-53-130, *et. seq.* to determine their rights under the South Carolina Sex Offender Registry, S.C. Code Ann. §23-3-400 *et. seq.*, and various provisions of the United States and South Carolina

[2] South Carolina re-codified these provisions at S.C. Code § 63-19-1410, 1440, and 2010.

[3] Found at http://scor.sled.sc.gov/ConditionsOfUse.Aspx (last viewed Feb. 27, 2016).

Constitutions.[4] The lawsuit raised the five questions presented in this petition. These Constitutional issues are summarized:

1. Based on the doctrine of *parens patriae*, South Carolina denied Petitioners the right to a jury trial, adjudicated them in the Family Court, and promised to keep their juvenile records confidential, except in limited circumstances on a need to know basis. Did South Carolina violate due process when it changed the law and required petitioners to register as sex offenders and making their juvenile records public?

2. After retroactively requiring petitioners to register as sex offenders, South Carolina requires them to register in person at the sheriff's office every ninety days and pay an annual registration fee. Petitioners' registration requirement is the same as lifetime probation, parole, or community supervision. Is this requirement punitive and, therefore, in violation of the *ex post facto* prohibition?

3. Sex offender registration in South Carolina is for life, including for children, with no opportunity to petition to be removed from the registry. Lifetime registration does not take into account a child's brain development and capacity to change. Does lifetime sex offender registration, amounting to lifetime probation, parole, or community supervision, violate this Court's interpretation of the Eighth Amendment as applied to children? And, if so, should South Carolina be required to convene a hearing to make an individualized determination whether petitioners should be required to register as sex offenders?

4. Under these circumstances, did South Carolina violate due process either by requiring petitioners to register as sex offenders or by implementing that requirement without convening a hearing to make an individualized determination whether petitioners should be required to register as sex offenders?

5. South Carolina's sex offender registry creates two classes of people: adults that can invoke the right to a jury trial and children that are deprived a right to a jury trial. Should children be recognized as a protected class? And, did South Carolina violate equal protection by requiring petitioners to register as sex offenders without offering petitioners a jury trial?

Petitioners' declaratory judgment action sought to enjoin SLED from them petitioners to register as sex offenders. The Honorable Donald B. Hocker denied relief on September 10,

[4] See *Hazel v. State*, 377 S.C. 60, 63, 659 S.E.2d 137, 139 (2008) (Court of Common Pleas has jurisdiction to adjudicate rights related to the sex offender registry).

2014,[5] App. 4-24, and denied petitioner's Rule 59(e), SCRCP motion to alter or amend the judgment on November 19, 2014, App. 25-35. Petitioners presented theses same questions to the South Carolina Supreme Court. This petition follows.

WHY THE WRIT SHOULD BE GRANTED

> Adolescence is a developmental period characterized by identity formation. Labels stick and can last a lifetime. The label of "sex offender," . . . can cause profound damage to a child's development and self-esteem. Stigmatization can also lead to fear or mistrust by others, suspicion, rejection, or isolation from family and friends.
>
> These harms are compounded by the shame that comes with registration and notification, which often lacks an endpoint. Subjecting alienated and confused youth sex offenders to long-term public humiliation, stigmatization, and barriers to education and employment exacerbates the psychological difficulties they already experience.

Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US, Human Rights Watch, May 2013, pp. 50-51. This report was part of the record below and also can be found at https://www.hrw.org/report/2013/05/01/raised-registry/irreparable-harm-placing-children-sex-offender-registries-us (last viewed Feb. 27, 2016).

This Court should grant the writ for two reasons. First, since this Court's decision in *Smith v. Doe*, 538 U.S. 84 (2003), the states and federal circuits have spilt concerning whether sex offender registries, like South Carolina's, containing mandatory, in person, reporting requirements are punitive. Punitive sex offender registration conditions invoke further analysis under the *ex post facto*, due process, and cruel and unusual punishment provisions of the Constitution. Second, this Court has recognized that "children are different" and capable of

[5] Judge Hocker did rule that the residency restrictions of S.C. Code Ann. § 23-3-535 do not apply to petitioners because that statutory provision applies only to convictions and not adjudications. App. 19.

rehabilitation, which allows states to deny jury trials for juvenile adjudications and prohibits certain punishments when children are tried as adults. Recognition of this difference invokes further analysis under the due process, equal protection, and cruel and unusual punishments provisions of the Constitution.

I. This Court should resolve a dispute between the states and federal circuits regarding when a condition of sex offender registration is punitive, thereby invoking the *ex post facto,* due process, and cruel and unusual punishment provisions of the Constitution.

The South Carolina Supreme Court steadfastly holds its state's sex offender registry to be a civil consequence and, therefore, not punitive, regardless of the registration condition involved. *State v. Nation*, 408 S.C. 474, 759 S.E.2d 428 (2014) (mandatory imposition of GPS monitoring on a sex offender convicted prior to a statute's effective date was not punitive and did not violate the *ex post facto*, equal protection, due process, double jeopardy, and cruel and unusual punishment provisions of the Constitution.); *In re Justin B.*, 405 S.C. 391, 394, 747 S.E.2d 774, 775 (2013) (satellite monitoring of a juvenile adjudicated a sex offender "is not a punishment"); *State v. Dykes*, 403 S.C. 499, 506, 744 S.E.2d 505, 509 (2013) (Decision "flows in part from the premise that satellite monitoring is predominantly civil."); *In re Ronnie A.*, 355 S.C. 407, 585 S.E.2d 311 (2003) (juvenile's due process rights were not violated by requirement that he register as sex offender on non-public registry); *Hendrix v. Taylor*, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003) ("[T]he length of time one must be listed on the sex offender registry is non-punitive, and it cannot constitute a deprivation of a constitutionally protected liberty interest."); and *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) ("We find the Act is not so punitive in purpose or effect as to constitute a criminal penalty. Accordingly, the Act does not violate the *ex post facto* clauses of the state or federal constitutions."). The court below, in fact, cited the majority of these cases in its opinion.

Although not citing it in the opinion in this case, the South Carolina Supreme Court frequently relies on *Smith v. Doe*. *E.g. Nation, Justin B.* and *Dykes*. In *Smith v. Doe*, this Court considered an *ex post facto* challenge to Alaska's adult sex offender registry. Although finding the statue not to be punitive, the majority noted, "The Alaska statute, on its face, does not require these updates to be made in person." 538 U.S. at 101. This Court, therefore, reserved for another day "[w]hether other constitutional objections can be raised to a mandatory reporting requirement, and how those questions might be resolved." *Id.* at 102. Alaska, however, subsequently recognized that its sex offender registration requirement "treats offenders not much differently than the state treats probationers and parolees subject to continued state supervision." *Doe v. State*, 189 P.3d 999, 1009 (Alaska 2008) (holding sex offender registry violates *ex post facto* clause of state constitution).

Other states have reached the same conclusion as Alaska. Oklahoma applied the "analytical framework used in *Smith v. Doe* and later in *Doe v. State*" and held retroactive application of punitive provisions of that state's sex offender registry violated the *ex post facto* prohibition. *Starkey v. Oklahoma Dep't of Corr.*, 2013 OK 43, 305 P.3d 1004, 1019 (2013). Maryland, likewise, held, "The application of the statute has essentially the same effect upon Petitioner's life as placing him on probation and imposing the punishment of shaming for life, and is, thus, tantamount to imposing an additional sanction for Petitioner's crime." *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535, 568, 62 A.3d 123, 143 (2013).

The nationwide evolution of sex offender registration requirements is significant. Ohio recognized, "The statutory scheme has changed dramatically since this court described the registration process imposed on sex offenders as an inconvenience 'comparable to renewing a

driver's license'" and held its statute violated the *ex post facto* clause of the Ohio Constitution. *State v. Williams*, 129 Ohio St. 3d 344, 348, 952 N.E.2d 1108, 1112 (2011).

Maine held retroactive application of SORNA[6] of 1999 violated *ex post facto* prohibitions by increasing the registration duty of certain offenders from 15 years to their entire lifetimes and imposing a quarterly an in-person verification requirement, without affording an opportunity for relief from those duties at discretion of sentencing court. *State v. Letalien*, 2009 ME 130, 985 A.2d 4 (2009).

The nature of the requirement under review is also important. In *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996), Kansas held registration requirements of its Sex Offender Registration Act remedial and thus constitutional, but retroactive application of the public disclosure provision of the act imposed punishment in violation of *ex post facto* clause.

Applying the seven factors listed in *Kennedy v. Mendoza–Martinez*, 372 U.S. 144 (1963), Indiana held retroactive application of sex offender registry "violates the prohibition on *ex post facto* laws contained in the Indiana Constitution because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed when his crime was committed." *Wallace v. State*, 905 N.E.2d 371, 384 (Ind., 2009). That Court summarized:

> [O]f the seven factors identified by *Mendoza–Martinez* as relevant to the inquiry of whether a statute has a punitive effect despite legislative intent that the statute be regulatory and non-punitive, only one factor in our view—advancing a non-punitive interest—points clearly in favor of treating the effects of the Act as non-punitive. The remaining factors, particularly the factor of excessiveness, point in the other direction.

Id. at 384. The Indiana statute is very similar to the South Carolina scheme.

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[6] Sex Offender Registration and Notification Act, 42 U.S.C.A. §16911, *et. seq.*

Additionally, at least two states hold requiring children to register as sex offenders to be punitive and violate the prohibition against cruel and unusual punishment. *People v. Dipiazza*, 286 Mich. App. 137, 778 N.W.2d 264 (2009) (requiring sex offender registration in a public registry constituted punishment of defendant, who had successfully completed a juvenile diversion program for criminal defendants under the age of 21); *In re C.P.*, 131 Ohio St. 3d 513, 967 N.E.2d 729 (2012) (held that its statute that imposed automatic, lifelong registration and notification requirements on juvenile sex offenders who were tried within the juvenile system violated prohibition against cruel and unusual punishment.). *In re C.P.'s* analysis will be discussed in more detail in Section II below.

In additional to *ex post facto* considerations, retroactively applying the sex offender registration requirement raises does process and Eighth Amendment considerations. This Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488 (1980) (involuntary transfer of a prisoner to a mental hospital implicates a liberty interest protected by the Fourteenth Amendment's due process clause). *And see e.g. Morrissey v. Brewer*, 408 U.S. 471 (1972) (due process required before revoking parole); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (due process required before revoking parole); and *Wolff v. McDonnell*, 418 U.S. 539 (1974) (due process protected state created liberty interest in good time credits). The Eighth Amendment considerations are discussed in detail in Section II.

This Court should grant the writ and resolve the split between the states and federal circuits regarding when sex offender registration requirements are punitive.

II. This Court should provide guidance about whether the states must consider a child's developing brain and capacity for rehabilitation before requiring a child to register as a sex offender for life.

This Court has two lines of cases recognizing children are different and entitled to special protections. The first involves juvenile adjudications where the state can restrict some, but not all, constitutional rights. The second involves Eighth Amendment limitations on sentencing children to death or life imprisonment without the possibility of parole. Both lines of cases are rooted in concepts of rehabilitation. This petition presents this Court with a perfect opportunity to consider the interdependence of these two lines of cases.

A. Juvenile Adjudications.

Although the Fourteenth Amendment affords children tried in Family Court certain due process protections—including notice, an opportunity to be heard, and the right to counsel—states do not have to provide children a jury trial. *Application of Gault*, 387 U.S. 1 (1967). This Court has long recognized the public policy goals promoting juvenile rehabilitation. *Kent v. U.S.*, 383 U.S. 541 (1966) observed that juvenile court jurisdiction "confers special rights and immunities" including being "shielded from publicity," detention under limited circumstances "but only until he is 21 years of age," and protection "against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment." *Gault* noted historical differences between adult and juvenile court systems were tolerated because of the juvenile courts' goal of rehabilitation and not affixing punishment.

"South Carolina, as *parens patriae*, protects and safeguards the welfare of its children. Family Court is vested with the exclusive jurisdiction to ensure that, in all matters concerning a child, the best interest of the child is the paramount consideration." *Harris v. Harris*, 307 S.C. 351, 353, 415 S.E.2d 391, 393 (1992). "The state is vitally interested in its youth, for in them is

the hope of the future. It may therefore exercise large powers in providing for their protection and welfare." *State v. Cagle*, 111 S.C. 548, 96 S.E. 291, 292 (1918). As this Court has long recognized, the Family Court's "objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment." *Kent*, 383 U.S. at 554.

The consequences of a juvenile adjudication in South Carolina typically do not extend beyond the twenty-first birthday. S.C. Code §§63-19-1410, 1440. In South Carolina, the "family court does not conduct jury trials." *In re Vincent J.*, 333 S.C. 233, 237, fn. 3, 509 S.E.2d 261, 263, fn. 3 (1998). *See also In re Stephen W.*, 409 S.C. 73, 761 S.E.2d 231 (2014). As mandated by *Gault* and *Kent*, South Carolina recognizes the distinction between a juvenile adjudication and a criminal conviction. *State v. Ellis*, 345 S.C. at 179, 547 S.E.2d at 492. The South Carolina Supreme Court in *dicta* warned:

> Although the issue is not before the Court, we note the inconsistent positions of the General Assembly to limit the negative civil parameters of adjudication proceedings but permit the consequences of an adjudication to continue for the lifetime of one who is adjudicated delinquent for sex offenses. If this state retains the doctrine of *parens patriae* in juvenile proceedings, then the consequences of these proceedings should expire when the individual reaches the age of twenty-one years old. *See* S.C.Code Ann. § 63-19-1410(A)(5) (2010) (providing that commitment "must be for an indeterminate period but in no event beyond the child's twenty-first birthday").

In re Kevin R., 409 S.C. 297, 306 (fn. 10), 762 S.E.2d 387, 391 (fn. 10) (2014)

B. Eighth Amendment Cases.

In a separate line of cases involving children tried as adults, this Court recognizes that children are different when it comes to punishment. Children cannot be sentenced to death. *Roper v. Simmons*, 543 U.S. 551 (2005). Children cannot be sentences to life imprisonment

without the possibility of parole for a non-homicide offense. *Graham v. Florida*, 560 U.S. 48 (2010). Children cannot be sentenced to life imprisonment with the possibility of parole even for a homicide offense except in the rarest circumstances and only after an individualized sentencing hearing where all mitigation evidence is considered. *Miller v. Alabama*, 132 S. Ct. 2455 (2012). These holdings are substantive constitutional decisions. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). These holdings recognize that a child's brain is still developing and the children have a tremendous capacity for change and rehabilitation.

This same reasoning can be applied to the sex offender registry. *In re C.P., supra*, Ohio held the sex offender registry that imposed automatic, lifelong registration and notification requirements on children who were tried within the juvenile system violated prohibition against cruel and unusual punishment under the Ohio and United States Constitutions. The Ohio Supreme Court reviewed the Ohio statute under *Roper* and *Graham*.[7] Although recognizing that death or life imprisonment without the possibility of parole did not apply, the Ohio Supreme Court concluded, "Registration and notification requirements for life, with the possibility of having them lifted only after 25 years, are especially harsh punishments for a juvenile." 131 Ohio St. 3d at 525, 967 N.E.2d at 741. The Court continued:

> [T]he registration and notification requirements are different from such a penalty for adults. For juveniles, the length of the punishment is extraordinary, and it is imposed at an age at which the character of the offender is not yet fixed. Registration and notification necessarily involve stigmatization. For a juvenile offender, the stigma of the label of sex offender attaches at the start of his adult life and cannot be shaken. With no other offense is the juvenile's wrongdoing announced to the world. Before a juvenile can even begin his adult life, before he has a chance to live on his own, the world will know of his offense. He will never have a chance to establish a good character in the community. He will be

[7] The Ohio Supreme Court decided *In re C.P.* less than three months before this Court decided *Miller*.

> hampered in his education, in his relationships, and in his work life. His potential will be squelched before it has a chance to show itself. A juvenile—one who remains under the authority of the juvenile court and has thus been adjudged redeemable—who is subject to sex-offender notification will have his entire life evaluated through the prism of his juvenile adjudication. It will be a constant cloud, a once-every-three-month reminder to himself and the world that he cannot escape the mistakes of his youth.

Id. 131 Ohio St. 3d at 525-27, 967 N.E.2d at 741-43.

The Ohio Supreme Court, moreover, observed that nationwide concerns about juvenile sex offender registration led the United States Attorney General to issue "Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed.Reg. 1630. . . . not[ing] that one of the largest barriers to compliance by states was the fact that SORNA includes as covered sex offender[s] juveniles at least 14 years old who are adjudicated delinquent for particularly serious sex offenses." *In re C.P.*, 131 Ohio St. 3d at 521, 967 N.E.2d at 738 (internal quotations omitted). Additionally "[i]n 2008, the Council of State Governments promulgated a resolution against the application of SORNA to juveniles, stating that "[t]he Council of State Governments strongly opposes SORNA's application to juvenile sex offenders and urges Congress to revise the law to more accurately address the needs of juvenile offenders." *Id.* *In re C.P.* thus concluded, "The assumption that a national consensus favored publication of juvenile sex offenders' personal information had collapsed." 131 Ohio St. 3d at 522, 967 N.E.2d at 739.

The Governmental Accountability Office supports the Ohio Supreme Court's conclusion. In a recent study, sixteen (16) jurisdictions identified applying the juvenile registration requirements as a major challenge to not implementing SORNA. An additional five (5) jurisdictions identified the juvenile registration requirements as a minor challenge to implementing SORNA. Of these 21 jurisdictions, seven opposed registering sex offenders because of "policy differences." GAO-13-211, Report to the Subcommittee on Crime,

Terrorism, and Homeland Security, Sex Offender Registration and Notification Act, Jurisdictions Face Challenges to Implementing the Act, and Stakeholders Report Positive and Negative Effects, February 2013, pp. 22, 46.

The Ohio Court then considered the penological justifications of the registration requirement in the context of "the goals of juvenile disposition," concluding "[l]ifetime registration and notification requirements run contrary to . . . goals of rehabilitating the offender and aiding his mental and physical development." Following the reasoning of *Graham*, retribution and deterrence did not justify the application of such a harsh penalty, and incapacitation was not applicable to the analysis. 131 Ohio St. 3d at 522, 967 N.E.2d at 739.

Some jurisdictions require special procedures before the state can place a child on the sex offender registry. Georgia, for example, excludes "conduct which is adjudicated in juvenile court" from its sex offender registration requirements." Ga. Code Ann. §42-1-12(9)(C) and (10)(C).

In New Jersey, the sex offender registration requirement for a child under age fourteen at the time of the offense cannot extend into adulthood. *In re Registrant J.G.*, 169 N.J. 304, 777 A.2d 891 (2001). For older children, "[t]he level of disclosure is carefully geared to the level of danger posed to the public, based on the seriousness of the offense and the characteristics and proclivities of the offender. . . . subject to a case-specific determination by the Superior Court by clear and convincing evidence." *State ex rel. J.P.F.*, 368 N.J. Super. 24, 44, 845 A.2d 173, 185 (N.J. Super. Ct. App. Div. 2004).

Virginia prohibits sex offender registration, except for children "over the age of 13 at the time of the offense" but only "upon motion of the attorney for the Commonwealth" and if the court "find[s] that the circumstances of the offense require offender registration" after

"consider[ing] . . . the age and maturity of the offender . . . and any other . . . mitigating factors relevant to the case." Va. Code Ann. §9.1-902(G). The Virginia statute, thus, mirrors the this Court's requirement of "individualized sentencing decisions" that "consider mitigating circumstances" prior to sentencing a child to life imprisonment without parole. *Miller*, 132 S. Ct. at 2475.

"Texas juveniles are required to register for 10 years after they leave the juvenile system. The state, however, gives judges discretion to waive or remove a juvenile from the register. They also can defer a decision until after the juvenile successfully completes therapy." Because those options would be removed under the federal law, Texas did not implement SORNA. Renee Lee, "Texas Won't Participate in National Sex Offender Registry," *Houston Chronicle*, Oct. 5, 2012;[8] Tex. Crim. Proc. Code Ann. art. 62.351, *et. seq.* (providing exemption from registration for certain juveniles).

C. Interdependence of the Two Lines of Cases.

Both lines of cases are based on concepts of rehabilitation. Treating children different in Family Court promotes rehabilitation, avoids lifelong consequences of a conviction, and offers a fresh start in adulthood. When children are tried as adults, children must be offered an opportunity for rehabilitation except in the most unusual circumstances. Characteristics of children are constitutionally relevant throughout the criminal justice system. *E.g. J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (a child's age properly informs the *Miranda* custody analysis, so long as the child's age was known to the officer at the time of police questioning, or would have be objectively apparent to a reasonable officer).

[8] Available at http://www.chron.com/default/article/Texas-won-t-participate-in-national-sex-offender-3923910.php (last viewed June 30, 2014).

The lifelong impact of juvenile sex offender registration is undeniable and contrary to rehabilitation goals. This Court, therefore, has an opportunity to consider the differences between adults and children for purposes of sex offender registration. For example, does due process limit a state's ability to require children to register as sex offenders based solely on a juvenile adjudication procedure where the child cannot ask for a jury trial? Even if states can impose this requirement based on an adjudication, then does due process and the Eighth Amendment require the state's to convene a hearing and make an individualized determination after considering youth and all available information about the uniqueness of the particular child? If the state can require children to register as sex offenders, then does the Constitution require the state to provide the child an opportunity to be removed from the registry. And, should a juvenile sex offender registry be public?

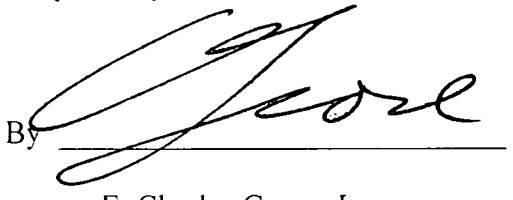
Additionally, this Court recognizes that children are constitutionally different that adults and entitled to special protections. As a result, are children a protected class? Even if children are not a protected class, should states be allowed to impose lifelong, adult consequences on children without offering the child a jury trial? This Court should provide guidance about whether the Equal Protection Clause of the Fourteenth Amendment is implicated by requiring children to register as sex offenders without offering a child an opportunity for a jury trial.

This Court should grant the writ and consider these constitutional questions.

CONCLUSION

When it comes to requiring children to register as sex offenders, other states have reached different conclusions than South Carolina. This Court, therefore, should grant the writ and consider the various constitutional issues presented in this case.

Respectfully submitted,

By 

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February 29, 2016

APPENDIX

Appendix Page 1

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Edward Dean and Nolan Brown, Appellants,

v.

Mark Keel, in his Official Capacity as Chief of the South Carolina Law Enforcement Division, Respondent.

Appellate Case No. 2014-002721

Appeal from Greenwood County
Donald B. Hocker, Circuit Court Judge

Memorandum Opinion No. 2015-MO-065
Heard October 7, 2015 – Filed November 4, 2015

AFFIRMED

E. Charles Grose, Jr., of Greenwood, for Appellants.

Attorney General Alan Wilson, Assistant Attorney General Marcie E. Greene, Assistant Attorney General Courtney E. Lowell, and General Counsel Adam Whitsett, all of Columbia, for Respondent.

PER CURIAM: In this direct appeal, Appellants Edward Dean and Nolan Brown appeal the circuit court's denial of relief as to various constitutional challenges to

Appendix Page 2

the South Carolina Sex Offender Registry Act (the Act),[1] under which they are both required to register as sex offenders as a result of being adjudicated delinquent as juveniles for criminal sexual conduct with a minor in the first degree. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities:
Constitutional Issues. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 6–8 (2003) (rejecting the argument that the Due Process Clause of the Fourteenth Amendment required the State of Connecticut to afford sex offenders a pre-registration hearing to determine whether they are "currently dangerous" before requiring them to register, finding Connecticut's statutory scheme required registration based solely on the fact of a previous conviction—not the fact of current dangerousness—and therefore due process does not require the opportunity to prove a fact that is not material to the state's statutory scheme); *Schall v. Martin*, 467 U.S. 253, 264–65 (1984) (stressing that "crime prevention is 'a weighty social objective,'" and noting that "this interest persists undiluted in the juvenile context" as "[t]he harm suffered by the victim of a crime is not dependent upon the age of the perpetrator" (footnote and citation omitted)); *In re Stephen W.*, 409 S.C. 73, 75–79, 761 S.E.2d 231, 232–33 (2014) (explaining the "important distinctions" between the family court juvenile adjudication process and the traditional criminal justice process and holding that neither the federal nor the state constitution entitles juveniles to a jury trial in family court adjudication proceedings); *In re Ronnie A.*, 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003) (finding "sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated," and concluding the mandatory registration of sex offenders, including juveniles who have proved themselves capable of certain sex offenses, is rationally related to achieving the legitimate state objective of protecting the public from those who may re-offend); *Hendrix v. Taylor*, 353 S.C. 542, 549, 579 S.E.2d 320, 324 (2003) (holding the right to privacy does not extend to information about sexual offenses and finding the Act bears a rational relationship to the "legitimate state purpose of protecting the public and aiding law enforcement"); *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) (finding where the offender was convicted of a sexual offense in 1973, the imposition of registry requirements in 1998 did not constitute a violation of the ex post facto clause of either the state or the federal constitution because the registration requirements are "not so punitive in purpose or effect as to constitute a criminal penalty"); *see also In re Justin B.*, 405 S.C. 391, 409 n.3, 747 S.E.2d 774, 783 n.3 (2013) (finding the Act's satellite monitoring provisions were a civil, non-punitive remedy and therefore the Court did not need to reach the issue of whether such monitoring constituted cruel and unusual punishment, "regardless of the age of the offender"); *cf. United States v. Under Seal*, 709 F.3d 257, 261–62

[1] S.C. Code Ann. §§ 23-3-400 to -555 (2007 & Supp. 2014).

(4th Cir. 2013) (finding that although the federal Sex Offender Registration and Notification Act (SORNA) makes public certain offender information that would otherwise remain confidential under the Federal Juvenile Delinquency Act (FJDA), the registration provisions of the SORNA are more specific than those of the FJDA, and those specific provisions evince the legislative determination that the appropriate balance to be struck between the competing interests of juvenile confidentiality and public safety is the one "in favor of protecting victims, rather than protecting the identity of juvenile sex offenders"); *United States v. Juvenile Male*, 670 F.3d 999, 1007–09 (9th Cir. 2012) (noting neither age nor status as a juvenile sex offender constitutes a protected class and concluding the SORNA registration requirements apply to juvenile offenders notwithstanding confidentiality provisions in the FJDA, explaining that although the offenders may, as a policy matter, disagree with the provisions of the SORNA, particularly with regard to confidentiality, legislative intent is clear, and thus, the Court's review "is limited to interpreting the statutes").[2] **Equitable Relief**. S.C. Code Ann. § 23-3-430(F)–(G) (2007 & Supp. 2014)(enumerating specific circumstances under which a person's name may be removed from the registry); *Key Corporate Capital, Inc. v. Beaufort Cnty.*, 373 S.C. 55, 61, 644 S.E.2d 675, 678 (2007) (reversing the grant of equitable relief where an adequate legal remedy was set forth by statute, explaining "a 'court's equitable powers must yield in the face of an unambiguously worded statute'" (citation omitted)).

AFFIRMED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

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[2] We emphasize that the Act's satellite monitoring provisions are not implicated in this case. Thus, Appellants do not raise, and we do not reach, any issues addressed by the United States Supreme Court in its recent decision in *Grady v. North Carolina*, 135 S.Ct. 1368, 1371 (2015) (noting North Carolina's sex offender satellite monitoring program was "plainly designed to obtain information," and finding "since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search").

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF GREENWOOD	)	
Edward Dean and Nolan Brown,	)	Civil Action No. 2013-CP-24-00167
Plaintiffs,	)	
vs.	)	**ORDER**
Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division,	)	
Defendant.	)	

Plaintiffs Edward Dean and Nolan Brown filed a Complaint for declaratory judgment pursuant to S.C. Code Ann. Sections 15-53-130, *et seq.*, for a determination of the Plaintiffs' rights under the South Carolina Sex Offender Registry ("Registry") and the Constitutions of the United States and South Carolina. The Plaintiffs and Defendant Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division (SLED)[1], agreed to submit to the Court stipulated facts and legal briefs.

After full consideration of the briefing, and for the reasons set forth below, the Court denies the Plaintiffs' requested relief.

STIPULATED FACTS

The underlying facts were stipulated by the Parties and are not in dispute. Plaintiff Edward Dean is a citizen and resident of Greenwood County, State of South Carolina. On July 31, 1990, the Family Court for Greenwood County adjudicated Mr. Dean delinquent for first-degree criminal sexual conduct with a minor. Mr. Dean was thirteen (13) years old.

[1] The South Carolina Sex Offender Registry "is under the direction of the Chief of the State Law Enforcement Division (SLED)" in his official capacity. S.C. Code Ann. §23-3-410(A).

#1 Dark

Subsequent to Mr. Dean's Family Court adjudication, South Carolina enacted the Sex Offender Registry Act Section 23-3-490(D)(1)(c) requires that a person adjudicated delinquent in family court for criminal sexual conduct with a minor in the first degree must register as a sex offender, and that the information be available to the public. Accordingly, SLED determined that Mr. Dean was required to register as a sex offender, and his sex offender registration information is public and can be found on the SLED sex offender website.

Nolan Brown is a citizen and resident of Greenwood County, South Carolina. On May 22, 1991, the Greenwood Country Family Court adjudicated Mr. Brown delinquent of first-degree criminal sexual conduct with a minor. He was fourteen (14) years old.

Subsequent to Mr. Brown's Family Court adjudication, South Carolina enacted the Sex Offender Registry Act. Section 23-3-490(D)(1)(c) requires that a person adjudicated delinquent in family court for criminal sexual conduct with a minor in the first degree must register as a sex offender, and that the information be available to the public. Accordingly, SLED determined that Mr. Nolan was required to register as a sex offender, and his sex offender registration information is public and can be found on the SLED sex offender website.

ANALYSIS

The Complaint seeks declaratory relief alleging that requiring Mr. Dean and Mr. Brown to register as sex offenders under the applicable law:

1. violates the *ex post facto* prohibitions in the United States and South Carolina Constitutions;
2. violates the substantive and procedural due process provisions of the United States and South Carolina Constitutions;
3. is an improper application of the statutory language regarding residency restrictions;

#2 DSA

4. violates the equal protection provisions of the United States and South Carolina Constitutions; and,
5. violates the cruel and unusual punishment provisions of the United States and South Carolina Constitutions.

As a threshold matter, the Court notes that "[w]hen the issue is the constitutionality of a statute, every presumption will be made in favor of its validity and no statute will be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it conflicts with the constitution." *State v. Walls*, 348 S.C. 26, 29, 558 S.E.2d 524, 525 (2002) (citing *State v. Jones*, 344 S.C. 48, 543 S.E.2d 541 (2001)). All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. *Davis v. Cnty. of Greenville*, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996). "This presumption places the initial burden on the party challenging the constitutionality of the legislation to show it violates a provision of the Constitution." *State v. White*, 348 S.C. 532, 536–37, 560 S.E.2d 420, 422 (2002). The desirability of the legislation is not the issue before this Court. *See Keyserling v. Beasley*, 322 S.C. 83, 470 S.E. 2d 100 (1996). The Court "does not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly." *Id.* at 86, 470 at 101. Furthermore, "[a] legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt." *Westvaco Corp. v. S.C. Dep't of Revenue*, 321 S.C. 59, 62, 467 S.E.2d 739, 741 (1995).

As discussed below, after full consideration of the facts and law the Court finds the arguments of the Plaintiffs unpersuasive and they have failed to meet their burden, and therefore the relief sought in the Complaint must be denied.

#3

I. The South Carolina Sex Offender Registry is not punitive and does not violate the *ex post facto* laws under the Constitutions of the United States and South Carolina.

The Constitutions of the United States and of South Carolina specifically prohibit the passage of *ex post facto* laws. U.S. Const. art. 1, § 10; S.C. Const. art. 1, § 4. For a law to fall within *ex post facto* prohibitions, two critical elements must be present: (1) the law must be retrospective so as to apply to events occurring before its enactment; and (2) the law must disadvantage the offender affected by it. *State v. Wilson*, 315 S.C. 289, 292, 433 S.E.2d 864, 866 (1993) (internal citations omitted).

The Plaintiffs allege that *ex post facto* prohibitions are violated by registration as sex offenders. Plfs. Compl. ¶¶24-30. However, precedent establishes that this argument is without merit because the registry is rationally related to achieving a legitimate objective. *In re Ronnie A.*, 355 S.C. 407, 409-10, 585 S.E.2d 311, 312 (2003) (internal citations omitted). Thus, the Registry and any amendments are Constitutional and are not meant to punish, but are intended for investigative, statistical, and public safety purposes.

The South Carolina Code provides:

> The intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens. Notwithstanding this legitimate state purpose, these provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws.
>
> The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

S.C. Code Ann. § 23-3-400 (2007 & Supp. 2013).

#4

The South Carolina Supreme Court considered whether requiring sex offender registration based on a 1973 conviction was unconstitutional as a violation of the *ex post facto* clauses of the United States and South Carolina Constitutions. *Walls*, 348 S.C. at 30, 558 S.E.2d at 525. In order for a law to be prohibited by the *ex post facto* clause, two elements must be present: (1) the law must be retrospective so as to apply to events occurring before its enactment; and (2) the law must disadvantage the offender affected by it. *Miller v. Florida,* 482 U.S. 423, 430 (1987). However, before this two part analysis can even begin, the statute in question must be found to be punitive in nature such that it inflicts punishment merely by requiring the conduct called for in the law. *Walls,* 348 S.C. at 30, 558 S.E.2d at 526. Without such a finding, the *ex post facto* clause has not been violated. *Smith v. Doe,* 538 U.S. 84, 106 (2003).

While the Court in *Walls* found that the act met the first prong of determining whether it falls within *ex post facto* prohibitions as it applied to events occurring prior to the enactment, the Court upheld the constitutionality of the act, finding that sex offender registration requirements did not "disadvantage the offender affected by it" as required by the second prong of the test. *Walls*, 348 S.C. at 31, 585 S.E.2d at 526. In reaching its decision, the Court considered the statutory construction and legislative history of the Registry, and found that "it is clear that the General Assembly did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes. Hence, the language indicates the General Assembly's intention to create a non-punitive act." *Id.* "Thus, a likelihood of re-offending lies at the core of South Carolina's civil statutory scheme." *State v. Dykes*, 403 S.C. 499, 507, 744 S.E.2d 505, 510 (2013). Requiring registration as a sex offender is non-punitive, such that the length of time an individual is required to register is non-punitive, and thus the length of time on the Registry was not a deprivation of a

constitutionally protected liberty interest for purposes of a due process analysis. *Hendrix v. Taylor*, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003). Thus, binding precedent on this Court dictates that the Plaintiffs have failed to establish that the legally mandated registration is punitive for purposes of the *ex post facto* prohibition.

Moreover, the sex offender registry is rationally related to the stated goals of protecting the public and assisting law enforcement because the likelihood to re-offend is inherent and universally recognized for the type of offenders required to register. *Smith*, 538 U.S. at 103 ("The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness *as a class*. The risk of recidivism posed by sex offenders is 'frightening and high.'" (citing *McKune v. Lile*, 536 U.S. 24, 33-34 (2002) ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault" (citing U.S. Dep't of Justice, Bureau of Justice Statistics, *Sex Offenses and Offenders* 27 (1997); U.S. Dep't of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983* (1997))).

With regard to the Plaintiffs' requirement to register with the Registry, Section 23-3-460(A) of the South Carolina Code of Laws states in pertinent part:

> A person required to register pursuant to this article is required to register biannually *for life*.... The person required to register *shall register and must reregister at the sheriff's department in each county where he resides, owns real property, is employed, or attends any public or private school,* including, but not limited to, a secondary school, adult education school, college or university, and any vocational, technical, or occupational school....

S.C. Code Ann. Section 23-3-460(A) (2013) (emphasis added). Furthermore, the Plaintiffs are classified as Tier III offenders pursuant to the Sex Offender Registration and Notification Act ("SORNA") based on their adjudicated offense of criminal sexual conduct with a minor in the

first degree. Therefore, the Plaintiffs must register *quarterly* instead of biannually. S.C. Code Ann. § 23-3-460(B) ("A person classified as a Tier III offender ... is required to register every ninety days.").

Additionally, as part of registration, "[t]he State Law Enforcement Division may charge a reasonable fee to cover the cost of copying and distributing sex offender registry lists as provided for in this section...the sole purpose of offsetting the cost of providing sex offender registry lists." S.C. Code Ann. Section 23-3-490(B).

Plaintiffs claim that legislative amendments to the Registry, since its inception in 1994, have made it "increasingly punitive," but have not demonstrated that these amendments transform the Registry from a regulatory scheme to a criminal penalty, particularly where several of the allegedly "punitive" effects do not apply in this case, such as the registration process. Plfs. Compl. ¶¶24-30; Plfs. Br. at 4-12. The Defendant contends that as Tier III offenders, which includes those adjudicated delinquent of criminal sexual conduct with a minor in the first degree, South Carolina law requires the Plaintiffs to register, in person, at the Sheriff's Department "every ninety days." Defs. Br. at 7; S.C. Code Ann. § 23-3-460(B). The Court agrees with the Defendant.

As a matter of law, the length and manner of registration in and of itself cannot be punitive, nor can it be a post-sentence obligation or probation, as these are mere administrative implementations of the Registry. Additionally, there is a reasonable and rational basis between juvenile sex offender registration and protecting the public and aiding law enforcement. The duration of the registration requirement is not excessive in relation to the legitimate non-punitive purpose. And the intended purpose is to protect the public from those sex offenders who may re-

#7

offend; therefore, protecting the public now or in the future accomplishes the purpose of the sex offender registry.

The Court finds that the South Carolina Sex Offender Registry is not punitive and as a result does not violate the *ex post facto* laws under the Constitutions of the United States or South Carolina.

II. **The South Carolina Sex Offender Registry does not violate substantive and procedural due process under the Constitutions of the United States and South Carolina.**

The Plaintiffs argue that required lifetime sex offender registration violates their right to due process because, as juveniles, they were not afforded the same constitutional safeguards that would have been afforded to an adult who was convicted of the same crime (criminal sexual conduct with a minor in the first degree), before being subject to the requirements of the Registry. Plfs. Compl. ¶¶32-35; Plfs. Br. at 23-24. Using a combination of substantive and procedural due process theories, the Plaintiffs contend the Registry has, through legislative changes, become increasingly punitive and deprives the Plaintiffs of an alleged protected liberty interest. Plfs. Compl. ¶¶14-23; Plfs. Br. at 3-6.

As the South Carolina appellate have determined on prior occasions, the Registry requirements for juvenile sex offenders who have been adjudicated delinquent are in accordance with both substantive due process and procedural due process under the Constitutions of the United States and South Carolina.

A. Substantive Due Process

The Constitutions of the United States and South Carolina provide that "no person shall be deprived of life, liberty, or property without due process of law." U.S. Const. Amend. XIV, § 1, S.C. Const. Art. I, § 3. The *first* step in any substantive due process analysis is "to determine

whether the claimed violation involves one of 'those fundamental rights and liberties which are, objectively, deeply rooted in the Nation's history and tradition,' and 'implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999) (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997) & *Palko v. Connecticut*, 302 U.S. 319 (1937)).

The next step depends for its nature upon the result of the first. *Id.* at 739. If the asserted interest has been determined to be "fundamental," it is entitled in the second step to the protection of strict scrutiny judicial review of the challenged legislation. *Id.* If the interest is determined not to be "fundamental," it is entitled only to the protection of rational-basis judicial review. *Id.* Accordingly, the South Carolina Supreme Court has noted that, at a minimum, "the substantive due process guarantee requires a rational basis for legislation depriving a person of life, liberty or property." *In re Ronnie A.*, 355 S.C. at 409, 585 S.E.2d at 312.

The United States Supreme Court in *Washington v. Glucksberg* noted "we [the court] ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." 521 U.S. at 720 (citing *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125). "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Id.* at 720 (citing *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502 (1977)).

#9

The Plaintiff contends that South Carolina did not convene a hearing to determine whether the Plaintiffs met the specified criteria in order to be required to register as sex offenders thereby violating substantive due process which "protects citizens against arbitrary or capricious actions by the government regardless of the procedures used to carry out that action." Plfs. Compl. ¶¶62-3. Moreover, the Plaintiffs cite *Dykes* arguing that "the lifetime sex offender registration violates due process unless South Carolina offers plaintiffs' a hearing to determine whether they should be required to continue registering as sex offenders." Plfs. Compl. ¶¶64. This due process analysis discussed in *Dykes* was in regard to GPS monitoring, ***not registration***.

With regard to the GPS monitoring, the Sex Offender Accountability and Protection of Minors Act, also known in South Carolina as "Jessica's Law," was enacted in part as a result of the abduction, rape, and murder of Jessica Lunsford by a convicted sex offender in Florida. *Dykes*, 403 S.C. at 502, 744 S.E.2d at 507. After considering the circumstances surrounding the Lunsford case, the Florida legislature and subsequently the South Carolina legislature and other states created laws that heightened criminal sentences and post-release monitoring of child sex offenders. *Id.* Therefore, in 2006 the Sex Offender Accountability and Protection of Minors Act (Jessica's Law) was enacted, S.C. Code Ann. § 23-3-540(A) (Supp. 2013).

Pursuant to Jessica's Law, any person convicted or adjudicated delinquent for the offenses of criminal sexual conduct in the first degree with a minor or committing or attempting a lewd act on a child under sixteen, with an *offense date on or after July 1, 2006*, was required to be ordered by the court to be monitored with an active electronic monitoring (GPS) device for the duration of the time that individual was required to register as a sex offender. S.C. Code Ann. § 23-3-540(A) (Supp. 2013). Further, as recently as August of 2013, the South Carolina Supreme Court held that the imposition of lifetime electronic monitoring for a juvenile did not constitute

punishment. *In re Justin B.*, 405 S.C. at 406, 747 S.E.2d at 782. In that case, the court specifically noted that "Section 23-3-540's electronic monitoring requirement is a civil obligation similar to other restrictions the state may lawfully place upon sex offenders." (internal citations omitted). *Id.*, 405 S.C. at 395-96, 747 S.E.2d at 776.

In *Dykes*, the South Carolina Supreme Court found that only the non-reviewable lifetime monitoring requirement in Section 23-3-540(H) is unconstitutional. *Dykes*, 403 S.C. at 509, 744 S.E.2d at 510. "Notwithstanding the absence of a fundamental right, we do find that lifetime imposition of satellite monitoring implicates a protected liberty interest to be free from permanent, unwarranted governmental interference." *Id.*, 403 S.C. at 506, 744 S.E.2d at 509. In that case, the Court found that other similarly situated sex offenders must comply with the monitoring requirement mandated by Section 23-3-540(C), but "persons convicted of [criminal sexual conduct in the first degree and lewd act] on a minor are entitled to avail themselves of the Section 23-3-540(H) judicial review process as outlined for the balance of the offenses enumerated in Section 23-3-540(G)." *Id.*, 403 S.C. at 510, 744 S.E.2d at 511.

The GPS monitoring of the Sex Offender Accountability and Protection of Minors Act *does not apply* to the Plaintiffs as they were adjudicated delinquent on July 31, 1990 and May 22, 1991, for criminal sexual conduct with a minor in the first degree. However, this Court finds that even if the Plaintiffs were required to wear the GPS monitoring, Section 23-3-540(A) of the Sex Offender Registry would not violate the Plaintiffs substantive due process.

This Court holds that the Registry does not violate the Plaintiffs' substantive due process under the Constitutions of the United States or South Carolina.

#11

B. Procedural Due Process

Procedural due process claims challenge the constitutionality of the specific procedures used to deny a person's life, liberty or property. The fundamental requirements of due process are fair notice and standards for adjudication. *State v. Green*, 397 S.C. 268, 279, 724 S.E.2d 664, 669 (2012). Due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and, (4) the right to confront and cross-examine witnesses. *Clear Channel Outdoor v. City of Myrtle Beach*, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007). Procedural due process requirements are not technical, and no particular form of procedure is necessary. *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 485, 636 S.E.2d 598, 615 (2006). Rather, due process is flexible and calls for such procedural protections as the particular situation demands. *Id.* The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *S.C. Dep't of Soc. Servs. v. Beeks*, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997).

The United States Supreme Court has held that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971). Several procedural safeguards applicable to criminal proceedings are also constitutionally mandated in juvenile delinquency proceedings, including the right to notice, the right to counsel, the right confront witnesses, the privilege against self-incrimination, and the standard of proof beyond a reasonable doubt. *Id.* at 532. Therefore, the Court reasoned that a juvenile delinquency proceeding is fundamentally different from a criminal proceeding and cannot be equated to a criminal prosecution within the meaning of the Sixth Amendment. *Id.* at 541-51.

#12

Furthermore, the United States Supreme Court has held that injury to reputation, does not implicate a liberty interest for the purposes of due process analysis. *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. at 1-2 (2003). The Registry does not render the entire juvenile adjudication process public. Juvenile sex offenders can still avail themselves of closed hearings, sealed records, and the other procedural protections of the juvenile process.

Most recently, the South Carolina Supreme Court held that the "...the South Carolina Constitution ***does not entitle*** juveniles to a jury trial in family court adjudication proceedings." *In Re Stephen W.*, Op. No. 27413, Shearouse Adv. Sh. No. 28 at 29-34 (S.C. Sup. Ct. July 16, 2014) (emphasis added). The Court turned to *McKeiver v. Pennsylvania*, which held that juveniles are not constitutionally entitled to a jury trial in adjudication proceedings. *Id.* (citing *McKeiver*, 403 U.S. at 530-57).

The Plaintiff alleges that lifetime public registration and residency restrictions exceed the ordinary scope of the family court and "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt." Plfs. Compl. ¶¶33. The Plaintiffs rely in part on the distinction recognized by the South Carolina Supreme Court in *Ronnie A.* that Ronnie's registry information "will not be made available to the public because of appellant's age at the time of his adjudication." Plfs. Compl. ¶¶18; Plfs. Br. at 4; *In re Ronnie A.*, 355 S.C. at 410, 585 S.E.2d at 312.

However, *Ronnie A.* is clearly distinguishable as the Court's due process analysis depended upon Ronnie being under the age of twelve (12) at the time of his adjudication. The Court relied upon S.C. Code Ann. Section 23-3-490(D)(3) holding that Ronnie's registry requirement does not violate due process and his information would not be made public due to his age. In contrast, and in this case, the Plaintiffs were *13 and 14 years of age* at the time of

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adjudication, obviously over the age of twelve; therefore, their registry information would be made public. Moreover, in 2013 the South Carolina Supreme Court affirmed that a juvenile's sex offender registration does not violate rights to due process and equal protection. *In Re David L.*, Op. No. 2013–MO–013, 2013 WL 8600262 (S.C. Sup. Ct. April 24, 2013) (unpublished).

While the Plaintiffs may be subject to the same sex offender registration requirements as an adult convicted of criminal sexual conduct with a minor in the first degree, the impact on their liberty is simply not comparable to the actual punishment an adult would receive for a conviction. Criminal sexual conduct with a minor in the first degree is a class A felony and has been deemed by the General Assembly to be a "violent" and a "most serious" offense. S.C. Code Ann. §§ 16-1-60, -90(A), 16-3-655(A), & 17-25-45 (2003 & Supp. 2013). When the victim is less than eleven (11) years of age, an adult convicted of criminal sexual conduct with a minor in the first degree "must be imprisoned for a mandatory minimum of twenty-five years, no part of which may be suspended or probation granted, or must be imprisoned for life." S.C. Code Ann. § 16-3-655(C) (Supp. 2013). An *adult felony conviction* for the offense involved carries a much greater punishment than the adjudication imposed on the Plaintiffs, or any possible sanction that could be imposed on a juvenile.

If the purpose of due process is to ensure that specific procedures used to deny a person's liberty are sufficient as the particular situation demands, a juvenile's rights are protected at their adjudication by the "fundamental fairness" standard when the juvenile is required to register. *United States v. Juvenile Male*, 670 F.3d 999, 1014 (9th Cir. 2012) (citing *McKeiver*, 403 U.S. at 543).

This Court holds that the Registry does not violate the Plaintiffs' procedural due process under the Constitutions of the United States or South Carolina.

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III. **The residency restriction prohibiting sex offenders from residing in campus student housing at a public institution of higher learning (Section 23-3-465) does apply to juvenile adjudications and such restrictions are a proper application of the statutory language of the Registry.**

As stated previously, the Constitutions of the United States and South Carolina provide that "no person shall be deprived of life, liberty, or property without due process of law." U.S. Const. Amend. XIV, § 1, S.C. Const. Art. I, § 3.

With regard to residency, the Registry only limits sex offenders from residing in campus student housing at a public institution of higher learning (Section 23-3-465), and adult sex offenders from residing within one thousand (1,000) feet of certain proscribed areas (Section 23-3-535). The student housing restriction would apply to the Plaintiffs as "any person required to register under this article." S.C. Code Ann. §§ 23-3-465, -535 (2007).

The Plaintiffs do not argue that the residency requirement was a burden or unconstitutional, but only that the residency requirement did not apply to sex offenders who were adjudicated since the statute states those "convicted" of an offense and that sometimes the Greenwood Sheriff's Department applies residency restrictions. Plfs. Compl. ¶¶68-69; Plfs. Br. at 28. As stated above on Page 6 of this Order, Section 23-3-460(A) of the South Carolina Code of Laws states in pertinent part:

> A person required to register pursuant to this article is required to register biannually *for life*.... The person required to register *shall register and must reregister at the sheriff's department in each county where he resides, owns real property, is employed, or attends any public or private school,* including, but not limited to, a secondary school, adult education school, college or university, and any vocational, technical, or occupational school....

S.C. Code Ann. Section 23-3-460(A) (2013) (emphasis added). Furthermore, the Plaintiffs are classified as Tier III offenders pursuant SORNA based on their adjudicated offense of criminal sexual conduct with a minor in the first degree. Therefore, the Plaintiffs must register *quarterly*

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instead of biannually. S.C. Code Ann. § 23-3-460(B) ("A person classified as a Tier III offender ... is required to register every ninety days.").

The Defendant agrees that the Plaintiffs are correct insofar as the 1,000 foot restriction would *not* apply here because it only applies to "a sex offender that has been *convicted* of any of the following offenses to reside within one thousand feet of a school, daycare center, children's recreational facility, park, or public playground...." Defs. Br. at 8-9; S.C. Code Ann. § 23-3-535(B) (Supp. 2013) (emphasis added). Since juveniles are adjudicated delinquent rather than convicted, the residency restrictions in Section 23-3-535 complained of by the Plaintiffs do not appear to apply to offenders (such as the Plaintiffs) that are required to register due to juvenile adjudications. Moreover, as a matter of law, these residency restrictions are constitutional.

The Court finds that the Plaintiffs' requirement to register and the residency restriction prohibiting sex offenders from residing in campus student housing at a public institution of higher learning (Section 23-3-465) do apply under the plain language of the law.

IV. **The South Carolina Sex Offender Registry does not violate the Equal Protection Clause under the Constitutions of the United States and South Carolina.**

The Equal Protection Clauses of the Constitutions of the United States and South Carolina provide that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1, S.C. Const. Art I, § 3. Equal protection requires that "all persons be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." *G.T.E. Sprint Communications Corp. v. Pub. Serv. Comm'n*, 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986).

"If a statutory provision 'does not involve a suspect classification or a fundamental right ... the question under equal protection analysis is whether the legislation is rationally related to a legitimate state purpose.'" *Hendrix*, 353 S.C. at 549, 579 S.E.2d at 323 (citing *Curtis v. State*,

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345 S.C. 557, 574, 549 S.E.2d 591, 600 (2001)). Convicted sex offenders are not a suspect class. *Id.* Likewise, delinquent juvenile sex offenders would not be a suspect class. Age is not a suspect classification. *Gregory v. Ashcroft,* 501 U.S. 452, 453 (1991); *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976), *Arnold v. Ass'n of Citadel Men,* 337 S.C. 265, 272, 523 S.E.2d 757, 761 (1999).

The Court in *Hendrix* explicitly rejected the argument of a fundamental right to privacy in the context of the sex offender registry, reasoning that '[a]lthough the U.S. Supreme Court has recognized a right to privacy in limited circumstances, the privacy protections do not extend to information about a sexual offense ... which became a matter of public record when Appellant registered as a sex offender...." *Hendrix*, 353 S.C. at 549, 579 S.E.2d at 324.

Thus, as the statute does not impact a suspect class or burden a fundamental right, equal protection is satisfied if: (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and, (3) the classification rests on some reasonable basis. *Skyscraper Corp. v. County of Newberry,* 323 S.C. 412, 417, 475 S.E.2d 764, 767 (1996); *Duke Power Co. v. S.C. Pub. Serv. Comm'n,* 284 S.C. 81, 94, 326 S.E.2d 395, 402 (1985). "The fact that the classification may result in some inequity does not render it unconstitutional." *Davis v. County of Greenville,* 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994).

A. <u>The classification bears a reasonable relation to the legislative purpose sought to be effected.</u>

The South Carolina Supreme Court has previously found that the registration of juvenile sex offenders is rationally related to achieving a legitimate legislative purpose. *In re Ronnie A.*, 355 S.C. at 409, 585 S.E.2d at 312. The Court in *Ronnie A.* rejected the claim by a juvenile offender that the lifelong "stigma" of sex offender registration violates the due process clause. *Id.*

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The Court reasoned that "[t]he intent of the legislature in enacting the sex offender registry law is to protect the public from those offenders who may re-offend. The registration of offenders, *including juveniles* who have proved themselves capable of certain sex offenses, is rationally related to achieving this legitimate objective." *Id.* (emphasis added).

B. The members of the class are treated the same under the same or similar circumstances.

All persons who are twelve (12) years of age and older at the time of adjudication for a first offense of any offense listed in 23-3-430(C) are treated the same; they are required to register as sex offenders, and their information is available to the public. Moreover, since the Plaintiffs are classified as Tier III offenders pursuant to Section 23-3-460(B) of the South Carolina Code, the Plaintiffs must register quarterly.

C. The classes rest on a reasonable basis.

The purpose of Section 23-3-490 reasonably relates to the stated goals of protecting the public and assisting law enforcement because the likelihood to re-offend is inherent and universally recognized for the type of offenders required to register. South Carolina Code Section 23-3-400 found that "[s]tatistics show that sex offenders often pose a high risk of reoffending. S.C. Code Ann. Section 23-3-400 (2013). Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction." *Id.* Ultimately, there is a reasonable relationship as the General Assembly has related the Registry to protecting the public.

This Court holds that the Registry does not violate the Plaintiffs right to equal protection under the Constitutions of the United States or South Carolina.

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V. <u>The South Carolina Sex Offender Registry does not violate the cruel and unusual punishment clauses under the Constitutions of the United States and South Carolina.</u>

The Eighth Amendment to the United States Constitution provides: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. Similarly, the South Carolina Constitution provides: "[e]xcessive bail shall not be required; nor shall excessive fines be imposed; nor shall cruel, nor corporal, nor unusual punishment be inflicted...." S.C. Const. Art. I, § 15. The bar for cruel and unusual punishment is high. *Juvenile Male*, 670 F.3d at 1010. The United States Supreme Court notes that the core of the Eighth Amendment prohibits excessive sanctions. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). Punishment is "excessive," and therefore prohibited by Eighth Amendment, only if it is not graduated and proportioned to the offense. *Id.* at 304.

Thus, for Eighth Amendment purposes, the court conducts a proportionality analysis to determine whether the punishment is disproportionate to the crime committed. *Id.* at 311; *Solem v. Helm*, 463 U.S. 277, 285 (1983) (instructing that it is a precept of justice that punishment for a crime should be graduated and proportioned to the offense). Likewise, in analyzing the prohibition against cruel and unusual punishment in the South Carolina Constitution, our courts have recognized the concept of requiring a sentence to be in proportion to the crime. *Jones*, 344 S.C. at 55, 543 S.E.2d at 545; *Stockton v. Leeke*, 269 S.C. 459, 462, 237 S.E.2d 896, 897 (1977). Indeed our Courts have held that a sentence, though not cruel and unusual in kind, may be so severe in duration as to be cruel and unusual. *State v. Kimbrough*, 212 S.C. 348, 353, 46 S.E.2d 273, 275 (1948). However, the prohibitions of the Eighth Amendment only forbid extreme sentences that are grossly disproportionate to the crime. *Harmelin v. Michigan*, 501 U.S. 957,

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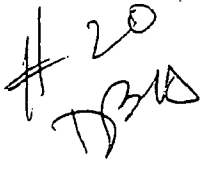
1001 (1991); *State v. McKnight*, 352 S.C. 635, 652, 576 S.E.2d 168, 177 (2003) (must determine if the duration of the sentence is not grossly disproportionate with the severity of the crime).

The South Carolina Supreme Court has previously concluded that the Registry is not so punitive in purpose or effect so as to constitute a criminal penalty. *Walls*, 348 S.C. at 31, 558 S.E.2d at 526. The non-punitive "purpose" of the statute is certainly no different whether the Registry is applied to an adult or a juvenile.

The mere fact that the Legislature enacted a law requiring lifetime registration for all individuals, adult or juvenile, who were found to have committed a sex crime is not punishment. Even if it were deemed punishment, lifetime registration is not excessive and is graduated and proportioned to the offense. Moreover, when viewing an adult's conviction of the same crime as the Plaintiffs, criminal sexual conduct with a minor in the first degree, appearing on the Registry due to a juvenile adjudication creates less of a burden to reputation than appearing due to an adult conviction.

Therefore, the Court finds registration, even by juveniles, does not constitute punishment of any kind, much less unconstitutional cruel and unusual punishment clauses of the United States or South Carolina Constitutions.



Accordingly, it is hereby,

ORDERED for the reasons set forth above, the Plaintiffs' request for declaratory relief is **DENIED**.

AND IT IS SO ORDERED.

~~The Honorable~~ Donald B. Hocker,
Eighth Judicial Circuit

September 10, 2014
Greenwood, South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF GREENWOOD	)	
Edward Dean and Nolan Brown,	)	Civil Action No. 2013-CP-24-00167
Plaintiffs,	)	
vs.	)	**ORDER**
Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division,	)	
Defendant.	)	

Plaintiffs Edward Dean and Nolan Brown filed a Complaint for declaratory judgment pursuant to S.C. Code Ann. Sections 15-53-130, *et seq.*, for a determination of the Plaintiffs' rights under the South Carolina Sex Offender Registry ("Registry") and the Constitutions of the United States and South Carolina. The Plaintiffs and Defendant Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division (SLED)[1], agreed to submit to the Court stipulated facts and legal briefs.

On September 11, 2014, this Court denied the Plaintiffs' request for declaratory relief. On September 18 2014, the Plaintiffs filed a Motion to Alter or Amend Judgment under Rule 59(e) (Motion). On September 30, 2014, Defendant Chief Keel filed a Response in Opposition to Plaintiffs' Motion to Alter or Amend the Judgment and on the same day the Plaintiffs filed a Reply to Defendant's Response in Opposition to Plaintiff's Motion to Alter or Amend the Judgment (Rule 59(e), SCRCP).

[1] The South Carolina Sex Offender Registry "is under the direction of the Chief of the State Law Enforcement Division (SLED)" in his official capacity. S.C. Code Ann. §23-3-410(A).

As discussed below, after full consideration of the briefing, motion, responsive pleadings and for the reasons set forth below, the Court denies the Plaintiffs' Motion.

STIPULATED FACTS

The underlying facts were stipulated by the Parties and are not in dispute. Plaintiff Edward Dean is a citizen and resident of Greenwood County, State of South Carolina. On July 31, 1990, the Family Court for Greenwood County adjudicated Mr. Dean delinquent for first-degree criminal sexual conduct with a minor. Mr. Dean was thirteen (13) years old.

Subsequent to Mr. Dean's Family Court adjudication, South Carolina enacted the Sex Offender Registry Act Section 23-3-490(D)(1)(c) requires that a person adjudicated delinquent in family court for criminal sexual conduct with a minor in the first degree must register as a sex offender, and that the information be available to the public. Accordingly, SLED determined that Mr. Dean was required to register as a sex offender, and his sex offender registration information is public and can be found on the SLED sex offender website.

Nolan Brown is a citizen and resident of Greenwood County, South Carolina. On May 22, 1991, the Greenwood Country Family Court adjudicated Mr. Brown delinquent of first-degree criminal sexual conduct with a minor. He was fourteen (14) years old.

Subsequent to Mr. Brown's Family Court adjudication, South Carolina enacted the Sex Offender Registry Act. Section 23-3-490(D)(1)(c) requires that a person adjudicated delinquent in family court for criminal sexual conduct with a minor in the first degree must register as a sex offender, and that the information be available to the public. Accordingly, SLED determined that Mr. Nolan was required to register as a sex offender, and his sex offender registration information is public and can be found on the SLED sex offender website.

ANALYSIS

The Plaintiffs' Motion is rejected for two principle reasons. First, the Motion reargues the same claims that were rejected by this Court and have been repeatedly rejected by the South Carolina Supreme Court. This Court is bound to follow Supreme Court precedent.[2] Second, the Plaintiffs cling to a footnote which is *dicta* in a recent South Carolina Supreme Court opinion, but a review of the Supreme Court's opinion reveals that it fully supports this Court's order and decision and rejects the arguments proffered by the Plaintiffs.

The Motion states that "[a]lthough citing our Supreme Court's recent decision in *In re Stephen W.*, 409 S.C. 73, 761 S.E.2d 231 (2014), this Court overlooked that Court's more recent observation in *Kevin R.*" and then quotes footnote 10 of the opinion. Motion at 5. The Plaintiffs rely heavily on the footnote, but the fundamental problem is that the opinion, taking the footnote in context rather than in isolation as presented by the Plaintiffs, fully supports the Order. For example, the very next sentence in the opinion states: "[W]e reaffirm the analysis in *Stephen W.* that addressed the issues raised by Appellant in the instant case." *In re Kevin R.*, 409 S.C. 297, 762 S.E.2d 387, 391 (2014).

Further, the Plaintiffs attempt underscore the *parens patriae* language in the footnote—which is mere *dicta* in any event—as creating a contradiction with governing law. However, the Supreme Court directly addressed the "apparent tension" claim by the Plaintiffs.

> The apparent tension between the State's power as *parens patriae* and a juvenile's state constitutional right to a jury trial must be reconciled. ***Reconciliation is found by recognizing that the two are not mutually exclusive*** and that they are in fact dual tracks for

[2] The Plaintiffs' cite to Rule 268 for the proposition that memorandum opinions should not be cited. Motion at 4, fn. 2. However, while that rule is found in the Appellate Court Rules (as opposed to the Rules of Civil Procedure applicable in this Court), the citation is not offered for precedential value so much as to show that the Supreme Court has consistently rejected the Plaintiffs' arguments time and time again.

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> handling juvenile transgressions. Although a juvenile is not entitled to a jury trial in an adjudication proceeding, the juvenile should be permitted to remove his case from the family court to a court of competent jurisdiction where a jury trial may be conducted. However, when this election is made, the juvenile forfeits the benevolent treatment of the *parens patriae* adjudication proceeding.

In re Kevin R., 409 S.C. 297, 762 S.E.2d 387, 394 (emphasis added).

Moreover, the Motion tries to direct the Court to follow law from other states where a jury trial is required, but here again, the South Carolina Supreme Court has rejected such arguments on the basis of the *parens patriae* doctrine that the Plaintiffs underscored, and did so most recently in *Kevin R.*

> Furthermore, as analyzed in *Stephen W.*, the General Assembly has created a system for juveniles that is distinctly different from adult offenders based on the premise that "South Carolina, as *parens patriae*, protects and safeguards the welfare of its children." ... ***The continued recognition of the parens patriae doctrine distinguishes South Carolina from those jurisdictions that have found a juvenile is constitutionally entitled to a jury trial.***

409 S.C. 297, 762 S.E.2d 387, 390-91 (emphasis added) (internal citations omitted).

The Plaintiffs claim the "Order does not address the implications related to South Carolina not offering Plaintiffs a jury trial." Motion at 7; *but see* Motion at 5 ("[T]he Court addresses Plaintiffs' complaint that South Carolina requires them to register as sex offenders without ever having offered them a jury trial."). But there are no implications to address, because the Plaintiffs are not entitled to a jury trial, and on this point the Order goes into great detail. Specifically, the Order stated that the "United States Supreme Court has held that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement" and that "the South Carolina Supreme Court held that the "the South Carolina Constitution ***does not entitle*** juveniles to a jury trial in family court adjudication proceedings." Order at 13 (citing *McKeiver v.*

Pennsylvania, 403 U.S. 528 (1971) *and In re Stephen W.*, 409 S.C. 73, 761 S.E.2d 231, 234 (2014) ("Because the federal and state constitutions do not entitle a juvenile to a jury trial in a family court delinquency proceeding, the judgment of the family court is affirmed.")).

In fact, *Kevin R.* affirmed the South Carolina Supreme Court's prior holdings and offered additional precedential authority for the Court's order in holding that "***any assertion that juveniles should be entitled to a jury trial because they are subject to registering as a sex offender if they are adjudicated delinquent for certain sex offenses is without merit***" and reaffirmed the analysis in *Stephen W.*, which was relied upon as authority by this Court in its Order. 409 S.C. 297, 762 S.E.2d 387, 391 (emphasis added).

But while the complaint alleges and the briefs argued a right to a jury trial, now the Plaintiffs concede that it is not really an issue they are concerned with. The Motion states that"[i]t is not so much that Plaintiffs want a jury trial. Under the circumstances of their cases, it is too late to offer them one anyway." Motion at 5. In other words, the Plaintiffs concede that they lack standing because there is no redressability to raise the claim in the first instance.

The Plaintiffs also complain that the Court did not address their claims of "adequate and independent state grounds," but this argument is confused. The Court held that under the South Carolina Constitutions and South Carolina law the regulatory scheme was lawful. The adequate and independent state grounds doctrine is used by *Federal* courts as a limitation on jurisdiction. *See Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983). In other words, it is nonsensical for the Plaintiffs to try and use a Federal court jurisdictional doctrine as a sword in a state complaint against a state official under state law in state court. The Order unequivocally applies South Carolina Supreme Court precedent in finding South Carolina's statute constitutional.

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As discussed below, after full consideration of the facts and law the Court finds the arguments of the Plaintiffs unpersuasive and they have failed to meet their burden, and therefore the Motion must be denied.

I. **The South Carolina Sex Offender Registry is not punitive and does not violate the *ex post facto* laws under the Constitutions of the United States or South Carolina.**

The Constitutions of the United States and of South Carolina specifically prohibit the passage of ex post facto laws. U.S. Const, art. 1, § 10; S.C. Const, art. 1, § 4. For a law to fall within *ex post facto* prohibitions, two critical elements must be present: (1) the law must be retrospective so as to apply to events occurring before its enactment; and (2) the law must disadvantage the offender affected by it. *State v. Wilson*., 315 S.C. 289, 292, 433 S.E.2d 864, 866 (1993) (internal citations omitted).

The South Carolina Supreme Court considered whether requiring sex offender registration based on a 1973 conviction was unconstitutional as a violation of the *ex post facto* clauses of the United States and South Carolina Constitutions. *State v. Walls*, 348 S.C. 26, 30, 558 S.E.2d 524, 525 (2002). The Court in *Walls* upheld the constitutionality of the act, finding that sex offender registration requirements did not "disadvantage the offender affected by it" as required by the second prong of the test. *Id.* at 31, 585 S.E.2d at 526.

The Plaintiffs state that "[a]lthough not cited in the order, our [South Carolina] Supreme Court decided *State v. Nation*, 408 S.C. 474, 759 S.E.2d 428 (2014), during the briefing process in this case." Motion at 1. The Plaintiffs failed to address the issue before the South Carolina Supreme Court in *State v. Nation*, which was whether the mandatory imposition of global positioning system (GPS) monitoring on a sex offender convicted prior to a statute's effective date violates the South Carolina and United States Constitutions. 408 S.C. 474, 478-79, 759

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S.E.2d 428, 430 (2014). The Court ultimately rejected each of the constitutional challenges. *Id.* at 481, 759 S.E.2d at 432.

The Court finds that the South Carolina Sex Offender Registry is not punitive and as a result does not violate the *ex post facto* laws under the Constitutions of the United States or South Carolina.

II. **The South Carolina Sex Offender Registry does not violate due process under the Constitutions of the United States or South Carolina.**

The Constitutions of the United States and South Carolina provide that "no person shall be deprived of life, liberty, or property without due process of law." U.S. Const. Amend. XIV, § 1, S.C. Const. Art. I, § 3.

The Plaintiffs acknowledge that the Court addressed the issue and simply disagrees. Motion at 4 ("[T]he Court addresses Plaintiffs' complaint that they were denied due process because the statute does not provide an individualized determination to determine whether they should be required to register as sex offenders."). Disagreeing with the outcome, especially when the outcome is based on United States and South Carolina Supreme Court precedent, is insufficient to warrant reconsideration.

While the Plaintiffs state that this Court erred by concluding that South Carolina's Sex Offender Registry is not punitive, there is an overwhelming number of precedential South Carolina cases that support the Order. For example, the South Carolina Supreme Court has held that the sex offender registry is *not* considered punitive; therefore, due process does not apply. *Hendrix v. Taylor,* 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003). Requiring registration as a sex offender is non-punitive, such that the length of time an individual is required to register is non-punitive, and thus the length of time on the registry was not a deprivation of a constitutionally protected liberty interest for purposes of a due process analysis. *Id.*

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This Court holds that the Registry does not violate the Plaintiffs' due process under the Constitutions of the United States or South Carolina.

III. **The South Carolina Sex Offender Registry does not violate the Equal Protection Clause under the Constitutions of the United States or South Carolina.**

The Equal Protection Clauses of the Constitutions of the United States and South Carolina provide that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1, S.C. Const. Art I, § 3. Equal protection requires that "all persons be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed." *G.T.E. Sprint Communications Corp. v. Pub. Serv. Comm'n*, 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986).

The Plaintiffs allege that the "Order never addresses the distinction between juveniles and adults"; however, the Court specifically addresses this distinction in its Order. The impact on the Plaintiffs' liberty is simply ***not*** comparable to the actual punishment an adult sex offender would receive for a conviction. Criminal sexual conduct with a minor in the first degree is a class A felony and has been deemed by the General Assembly to be a "violent" and a "most serious" offense. Order at 14; S.C. Code Ann. §§ 16-1-60, -90(A), -3-655(A), & 17-25-45 (2003 & Supp. 2013). When the victim is less than eleven (11) years of age, an adult convicted of criminal sexual conduct with a minor in the first degree "must be imprisoned for a mandatory minimum of twenty-five years, no part of which may be suspended or probation granted, or must be imprisoned for life." S.C. Code Ann. § 16-3-655(C) (Supp. 2013). An ***adult felony conviction*** for the offense involved carries a much ***greater punishment*** than the adjudication imposed on the Plaintiffs, who committed criminal sexual conduct with a minor under the age of 11—or any possible sanction that could be imposed on a juvenile.

#8 DBS

This Court holds that the Registry does not violate the Plaintiffs right to equal protection under the Constitutions of the United States or South Carolina.

IV. **The South Carolina Sex Offender Registry does not violate the cruel and unusual punishment clauses under the Constitutions of the United States or South Carolina.**

The Eighth Amendment to the United States Constitution provides: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. Similarly, the South Carolina Constitution provides: "[e]xcessive bail shall not be required; nor shall excessive fines be imposed; nor shall cruel, nor corporal, nor unusual punishment be inflicted...." S.C. Const. Art. I, § 15. The bar for cruel and unusual punishment is high. *Juvenile Male*, 670 F.3d at 1010. The United States Supreme Court notes that the core of the Eighth Amendment prohibits excessive sanctions. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). Punishment is "excessive," and therefore prohibited by Eighth Amendment, only if it is not graduated and proportioned to the offense. *Id.* at 304.

The South Carolina Supreme Court has previously concluded that the Registry is not so punitive in purpose or effect so as to constitute a criminal penalty. *Walls*, 348 S.C. at 31, 558 S.E.2d at 526. The non-punitive "purpose" of the statute is certainly no different whether the Registry is applied to an adult or a juvenile.

Furthermore, Plaintiffs cite to *State v. Nation*, which affirmed the South Carolina Supreme Court's previous decision in *Justin B.* where the Appellant argued that GPS monitoring constituted cruel and unusual punishment in violation of the Eighth Amendment. *Nation*, 408 S.C. at 481, 759 S.E.2d at 432 (citing *In re Justin B.*, 405 S.C. 391, 394-95, 747 S.E.2d 774, 776 (2013)). The Court held in *Justin B.* that the legislative intent behind Jessie's Law and in applying the *Mendoza–Martinez* factors, the "electronic monitoring is *not a punishment*," but a civil requirement. *Justin B.*, 405 S.C. at 404–08, 747 S.E.2d at 781–83 (emphasis added).

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Therefore, the Court finds registration, even by juveniles, does not constitute punishment of any kind, much less unconstitutional cruel and unusual punishment clauses of the United States or South Carolina Constitutions.

V. **The Plaintiffs' right to privacy is not violated by being required to register on the South Carolina Sex Offender Registry.**

The Supreme Court in *Hendrix* explicitly rejected the argument of a fundamental right to privacy in the context of the sex offender registry, reasoning that "[a]lthough the U.S. Supreme Court has recognized a right to privacy in limited circumstances, the privacy protections do not extend to information about a sexual offense ... which became a matter of public record when Appellant registered as a sex offender...." *Hendrix*, 353 S.C. at 549, 579 S.E.2d at 324.

This Court finds that the Registry does not violate the Plaintiffs' right to privacy under the Constitutions of the United States or South Carolina.

VI. **The Plaintiffs are not entitled to removal from the South Carolina Sex Offender Registry through equitable relief.**

South Carolina law is equally clear that "[e]quitable relief is generally available only where there is no adequate remedy at law." *Santee Cooper Resort, Inc. v. South Carolina Pub. Service Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). "Whether an individual must be placed on the sex offender registry is a question of law." *Lozada v. South Carolina Law Enforcement Div.*, 395 S.C. 509, 512, 719 S.E.2d 258, 259 (2011) (citing *Noisette v. Ismail*, 299 S.C. 243, 247, 384 S.E.2d 310, 312 (Ct. App. 1989)).

Plaintiffs are not entitled to the equitable relief sought because the statute governing removal from the Registry provides an adequate remedy at law. The mechanism for both placement on and removal from the Registry is provided by statute. *See* S.C. Code Ann. § 23-3-430 (Supp. 2013). Under Section 23-3-430(E), SLED shall remove a person from the Registry if

#10

that person's adjudication, conviction, guilty plea, or plea of nolo contendere for an offense listed in subsection (C) was reversed, overturned, or vacated on appeal and a final judgment has been rendered. S.C. Code Ann. § 23-3-430(E) (Supp. 2013). Other subsections provide for removal if the person receives a pardon based on a finding of not guilty specifically stated in the pardon, or if he or she receives a new trial following the discovery of new evidence and a verdict of acquittal is returned. S.C. Code Ann. § 23-3-430(F), (G) (Supp. 2013).

Plaintiffs are not entitled to equitable relief merely because they do not qualify for removal under the current law. Here, the Plaintiffs' conviction has not been reversed, overturned, or vacated on appeal nor has he received a pardon or been acquitted after receiving a new trial. S.C. Code Ann. § 23-3-430(E), (F), (G) (Supp. 2013).

This Court finds the Plaintiffs' Motion for equitable relief is in contradiction to the statute and must be denied.

Accordingly, it is hereby,

ORDERED for the reasons set forth above, the Plaintiffs' Motion to Alter or Amend Judgment is **DENIED**.

AND IT IS SO ORDERED.

Judge Donald B. Hocker
Eighth Judicial Circuit

November 19, 2014
Greenwood, South Carolina

#11

The Supreme Court of South Carolina

Edward Dean and Nolan Brown, Appellants,

v.

Mark Keel, in his Official Capacity as Chief of the South Carolina Law Enforcement Division, Respondent.

Appellate Case No. 2014-002721

ORDER

The Petition for Rehearing filed in the above entitled matter is denied.

C.J.

J.

J.

J.

J.

Columbia, South Carolina

December 2, 2015

Appendix Page 37

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY

Donald B. Hocker, Circuit Court Judge

RECEIVED
NOV 19 2015
S.C. Supreme Court

Appellate Case Number: 2014-002721

Edward Dean and Nolan Brown — Appellants

v.

Mark Keel in his official capacity as Chief of the South Carolina Law Enforcement Division — Respondent

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, the appellants, Edward Dean and Nolan Brown, petition this Court for rehearing because the Court overlooked or misapprehended the following:

1. **Doctrine of *parens patriae.***

The Court's opinion did not address the doctrine of *parens patriae*. Our state's adherence to this doctrine is the only reason why the State was allowed to treat Edward Dean and Nolan Brown differently from adults based on juvenile adjudicaitons. This case, therefore, presents the perfect opportunity for this Court to address the problem it recognized in *In re Kevin R.*, 2012-212655, 2014 WL 3844076 (fn. 10) (S.C. Aug. 6, 2014), which is:

> Although the issue is not before the Court, we note the inconsistent positions of the General Assembly to limit the negative civil parameters of adjudication proceedings but permit the consequences of an adjudication to continue for the lifetime of one who is adjudicated delinquent for sex offenses. If this state retains the doctrine of *parens patriae* in juvenile proceedings, then the consequences of these proceedings should expire when the individual reaches the age of twenty-one years old. *See* S.C.Code Ann. § 63–19–1410(A)(5) (2010) (providing that commitment "must be for an indeterminate period but in no event beyond the child's twenty-first birthday").

Deciding this matter under the doctrine of *parens patriae* allows this Court to address this issue without having to decide that the sex offender registry is punitive. South Carolina, having guaranteed the confidentiality of Dean and Brown's juvenile records, thereby creating a liberty interest, cannot take away the protections without due process of law.

2. Our states sex offender registry is punitive.

This Court steadfastly holds every sex offender registry condition is civil and not punitive. *State v. Nation*, 408 S.C. 474, 759 S.E.2d 428 (2014); *In re Justin B.*, 405 S.C. 391, 747 S.E.2d 774 (2013); *State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013); *Hendrix v. Taylor*, 353 S.C. 542, 579 S.E.2d 320 (2003); *In re Ronnie A.*, 355 S.C. 407, 585 S.E.2d 311 (2003); and *State v. Walls*, 348 S.C. 26, 558 S.E.2d 524 (2002). This Court adheres to this position even though our state's sex offender registry has evolved over time and become punitive. *See* Final Brief of Appellants, Argument I, Section A, pp. 7-9 and Argument III, pp. 15-21. *And see Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US*, Record on Appeal, pp. 85-199. Even though Dean and Brown had every right to believe that the consequences of their juvenile adjudications ended at their twenty-first birthday, South Carolina passed

the sex offender registry and placed them on lifetime probation, requiring them to report monthly, provide information, and pay fees to the state.

Once this Court recognizes the sex offender registry is punitive, the need to reverse the trial court, based on the constitutional issues presented in this case, becomes apparent. *See* Section 3, *infra*.

3. State and Federal Constitutional issues.

In Argument III, pp. 15-21, appellants asked this Court hold retroactive application of the sex offender registry to juveniles violates the *ex post facto* prohibition. As part of that argument, appellants asked this Court to

> determine an issue left unresolved by the Supreme Court of the United States, to wit: whether the mandatory, in person, reporting requirement, combined with the annual fee, renders the sex offender registration requirement punitive, thereby implicating *ex post facto* clauses and the Eighth Amendment. As Tier III offenders, South Carolina requires Dean and Brown to register, in person, at the Sheriff's Department "every ninety days." S.C. Code Ann. §23-3-460(B). They also must pay an annual registration fee of $150.00. Sex offender registration in South Carolina is for life, and the statute does not allow any opportunity to apply to be removed from the registry. South Carolina's sex offender registry, therefore, is equivalent to lifetime probation.

Appellants pointed to the Supreme Court of the Unites States' opinion in *Smith v. Doe*, 538 U.S. 84 (2003), reserving this issue, and to how other states have addressed situations similar to the case before the Court in the aftermath of *Smith v. Doe*. This Court's opinion did not address *Smith v. Doe* or these other cases. Once these authorities are considered, the need to reverse the trial court becomes apparent.

Retroactively requiring Dean and Brown to register as sex offenders based on juvenile adjudications takes on added significance because our state treated them

differently than it would have treated them if they had been adults. Only because of the rehabilitation objectives of the Family Court—including the promise that their juvenile records would remain confidential—was South Carolina allowed to deny them jury trials and other constitutional safeguards. This different treatment, combined with the retroactive registration requirement, raises due process, *see* Final Brief of Appellant, Argument I, pp. 5-12, and equal protection, *see* Final Brief of Appellant, Argument II, pp. 13-14, concerns that, once recognized, require this Court to reverse the trial court.

That South Carolina applied the sex offender registry retroactively to Dean and Brown without providing them a hearing and opportunity to be heard raises additional due process considerations. *See* Final Brief of Appellant, Argument IV, pp. 22-15. This Court, accordingly, should reconsider and reverse the trial court.

The Supreme Court of the United States has recognized the children are different for purposes of the cruel and unusual punishment provisions of the Eighth Amendment. This recognition results form the extraordinary capacity of children to change and rehabilitate themselves. As a result other jurisdictions oppose requiring juveniles to register as sex offenders. *See* Final Brief of Appellant, Argument V, pp. 26-33. This Court, accordingly, should reconsider and reverse the trial court.

4. Right to Privacy.

In their Final Brief of Appellant, Argument VI, p. 34, Dean and Brown argued that their rights to privacy in the South Carolina Constitution requires our state to keep their juvenile adjudications confidential, especially in light of the State's promise to do so at the time of the adjudications. This Court, accordingly, should reconsider and reverse the trial court.

5. Equitable Relief.

In Argument VII of their Final Brief of Appellant, p. 35, Dean and Brown ask this Court for equitable relief. The Court's opinion implies that appellants are not entitled to equitable relief because they have and adequate remedy at law, but the opinion does not identify that remedy. There is not an adequate remedy at law for Dean and Brown. Once the Court recognizes no adequate remedy at law exists for Dean and Brown, the need to reverse the trial court becomes apparent.

Conclusion

For the foregoing reasons, this Court should reconsider its opinion, grant rehearing, and reverse the trial court.

IT IS SO MOVED.

Respectfully Submitted,

By 

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(864) 538-4466

Attorney for Appellants

November 19, 2015
Greenwood, South Carolina

Appendix Page 42

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENWOOD COUNTY

Donald B. Hocker, Circuit Court Judge

Appellate Case Number: 2014-002721

Edward Dean and Nolan Brown — Appellants

v.

Mark Keel in his official capacity as Chief of the South Carolina Law Enforcement Division — Respondent

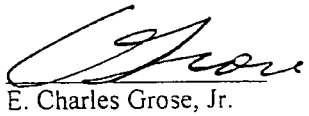
---

Certificate of Service

I certify that I have served the Petition for Rehearing on the Respondent, by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

Marcie E. Greene , Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Adam L. Whitsett, Esquire
General Counsel
South Carolina Law Enforcement Division
PO Box 21398
Columbia, SC 29221



E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646

November 19, 2015
Greenwood, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	EIGHTH JUDICIAL CIRCUIT
COUNTY OF GREENWOOD	)	CASE NO.: 2013-CP-24-00167
	)	
Edward Dean and Nolan Brown,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**STIPULATION OF FACTS**
	)	
Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division,	)	
	)	
Respondent.	)	

The Parties stipulate to the following facts:

Edward Dean

Plaintiff Edward Dean is a citizen and resident of Greenwood County, State of South Carolina.

On July 31, 1990, the Family Court for Greenwood County adjudicated Mr. Dean delinquent for first-degree criminal sexual conduct with a minor. Mr. Dean was thirteen (13) years old.

Subsequent to Mr. Dean's Family Court adjudication, South Carolina enacted the Sex Offender Registry Act Section 23-3-490(D)(1)(c) requires that a person adjudicated delinquent in family court for criminal sexual conduct with a minor in the first degree must register as a sex offender, and that the information be available to the public. Accordingly, Mr. Dean was required to register as a sex offender, and his sex offender registration information is public and can be found on the SLED sex offender website.

South Carolina requires Mr. Dean to register as a sex offender based solely on a juvenile adjudication for criminal sexual conduct with a minor, first degree.

Nolan Brown

Nolan Brown is a citizen and resident of Greenwood County, South Carolina.

On May 22, 1991, the Greenwood Country Family Court adjudicated Mr. Brown delinquent of first-degree criminal sexual conduct with a minor. He was fourteen (14) years old.

Subsequent to Mr. Brown's Family Court adjudication, South Carolina enacted the Sex Offender Registry Act. Section 23-3-490(D)(1)(c) requires that a person adjudicated delinquent in family court for criminal sexual conduct with a minor in the first degree must register as a sex offender, and that the information be available to the public. Accordingly, Mr. Nolan was required to register as a sex offender, and his sex offender registration information is public and can be found on the SLED sex offender website.

South Carolina requires Mr. Brown to register as a sex offender based solely on a juvenile adjudication.

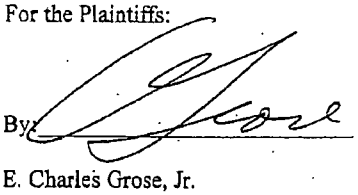
Chief Mark Keel

The Respondent, Mark Keel, is the Chief of SLED, duly appointed by the Governor. He is sued in his official capacity. The Sex Offender Registry "is under the direction of the Chief of the State Law Enforcement Division (SLED)" in his official capacity. S.C. Code Ann. §23-3-410(A).

IT IS SO STIPULATED.

[Signature Page Follows]

For the Plaintiffs:

By: 

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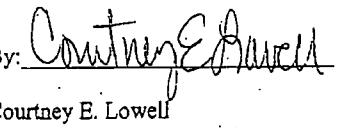
Attorney for Plaintiffs

For the Respondent:

By: 

Courtney E. Lowell
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Post Office Box 11549
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Attorney for Respondent

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Code of Laws of South Carolina 1976 Annotated
Title 23. Law Enforcement and Public Safety
Chapter 3. South Carolina Law Enforcement Division
Article 7. Sex Offender Registry (Refs & Annos)

Code 1976 § 23-3-430

§ 23-3-430. Sex offender registry; convictions and not guilty by reason of insanity findings requiring registration.

Effective: April 2, 2015
Currentness

(A) Any person, regardless of age, residing in the State of South Carolina who in this State has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere to an offense described below, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere, or found not guilty by reason of insanity in any comparable court in the United States, or a foreign country, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere, or found not guilty by reason of insanity in the United States federal courts of a similar offense, or who has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere, or found not guilty by reason of insanity to an offense for which the person was required to register in the state where the conviction or plea occurred, shall be required to register pursuant to the provisions of this article. A person who has been found not guilty by reason of insanity shall not be required to register pursuant to the provisions of this article unless and until the person is declared to no longer be insane or is ordered to register by the trial judge. A person who has been convicted, adjudicated delinquent, pled guilty or nolo contendere, or found not guilty by reason of insanity in any court in a foreign country may raise as a defense to a prosecution for failure to register that the offense in the foreign country was not equivalent to any offense in this State for which he would be required to register and may raise as a defense that the conviction, adjudication, plea, or finding in the foreign country was based on a proceeding or trial in which the person was not afforded the due process of law as guaranteed by the Constitution of the United States and this State.

(B) For purposes of this article, a person who remains in this State for a total of thirty days during a twelve-month period is a resident of this State.

(C) For purposes of this article, a person who has been convicted of, pled guilty or nolo contendere to, or been adjudicated delinquent for any of the following offenses shall be referred to as an offender:

(1) criminal sexual conduct in the first degree (Section 16-3-652);

(2) criminal sexual conduct in the second degree (Section 16-3-653);

(3) criminal sexual conduct in the third degree (Section 16-3-654);

(4) criminal sexual conduct with minors, first degree (Section 16-3-655(A));

(5) criminal sexual conduct with minors, second degree (Section 16-3-655(B)). If evidence is presented at the criminal proceeding and the court makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct, as contained in Section 16-3-655(B)(2) provided the offender is eighteen years of age or less, or consensual sexual conduct between persons under sixteen years of age, the convicted person is not an offender and is not required to register pursuant to the provisions of this article;

(6) criminal sexual conduct with minors, third degree (Section 16-3-655(C));

(7) engaging a child for sexual performance (Section 16-3-810);

(8) producing, directing, or promoting sexual performance by a child (Section 16-3-820);

(9) criminal sexual conduct: assaults with intent to commit (Section 16-3-656);

(10) incest (Section 16-15-20);

(11) buggery (Section 16-15-120);

(12) peeping, voyeurism, or aggravated voyeurism (Section 16-17-470);

(13) violations of Article 3, Chapter 15, Title 16 involving a minor;

(14) a person, regardless of age, who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in this State, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in a comparable court in the United States, or who has been convicted, adjudicated delinquent, pled guilty or nolo contendere in the United States federal courts of indecent exposure or of a similar offense in other jurisdictions is required to register pursuant to the provisions of this article if the court makes a specific finding on the record that based on the circumstances of the case the convicted person should register as a sex offender;

(15) kidnapping (Section 16-3-910) of a person eighteen years of age or older except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense;

(16) kidnapping (Section 16-3-910) of a person under eighteen years of age except when the offense is committed by a parent;

(17) trafficking in persons (Section 16-3-2020) except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense;

(18) criminal sexual conduct when the victim is a spouse (Section 16-3-658);

(19) sexual battery of a spouse (Section 16-3-615);

(20) sexual intercourse with a patient or trainee (Section 44-23-1150);

(21) criminal solicitation of a minor if the purpose or intent of the solicitation or attempted solicitation was to:

(a) persuade, induce, entice, or coerce the person solicited to engage or participate in sexual activity as defined in Section 16-15-375(5);

(b) perform a sexual activity in the presence of the person solicited (Section 16-15-342); or

(22) administering, distributing, dispensing, delivering, or aiding, abetting, attempting, or conspiring to administer, distribute, dispense, or deliver a controlled substance or gamma hydroxy butyrate to an individual with the intent to commit a crime listed in Section 44-53-370(f), except petit larceny or grand larceny.

(23) any other offense specified by Title I of the federal Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. 109-248), the Sex Offender Registration and Notification Act (SORNA).

(D) Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person of an offense not listed in this article, the presiding judge may order as a condition of sentencing that the person be included in the sex offender registry if good cause is shown by the solicitor.

(E) SLED shall remove a person's name and any other information concerning that person from the sex offender registry immediately upon notification by the Attorney General that the person's adjudication, conviction, guilty plea, or plea of nolo contendere for an offense listed in subsection (C) was reversed, overturned, or vacated on appeal and a final judgment has been rendered.

(F) If an offender receives a pardon for the offense for which he was required to register, the offender must reregister as provided by Section 23-3-460 and may not be removed from the registry except:

(1) as provided by the provisions of subsection (E); or

(2) if the pardon is based on a finding of not guilty specifically stated in the pardon.

(G) If an offender files a petition for a writ of habeas corpus or a motion for a new trial pursuant to Rule 29(b), South Carolina Rules of Criminal Procedure, based on newly discovered evidence, the offender must reregister as provided by Section 23-3-460 and may not be removed from the registry except:

(1) as provided by the provisions of subsection (E); or

(2)(a) if the circuit court grants the offender's petition or motion and orders a new trial; and

(b) a verdict of acquittal is returned at the new trial or entered with the state's consent.

Credits

HISTORY: 1994 Act No. 497, Part II, § 112A; 1996 Act No. 444, § 16; 1998 Act No. 384, § 1; 1999 Act No. 74, § 1; 2000 Act No. 363, § 2; 2004 Act No. 208, § 14; 2005 Act No. 141, § 2; 2008 Act No. 335, § 16, eff June 16, 2008; 2010 Act No. 212, § 3, eff June 7, 2010; 2010 Act No. 289, § 8, eff June 11, 2010; 2012 Act No. 255, § 5, eff June 18, 2012; 2015 Act No. 7 (S.196), § 6.D, eff April 2, 2015.

Editors' Notes

FEDERAL ASPECTS

For the Sex Offender Registration and Notification Act (SORNA), Title I of the Adam Walsh Child Protection and Safety Act of 2006, see 42 U.S.C.A. § 16901 et seq.

Notes of Decisions (21)

Code 1976 § 23-3-430, SC ST § 23-3-430
Current through End of 2015 Reg. Sess.

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KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Code of Laws of South Carolina 1976 Annotated
Title 23. Law Enforcement and Public Safety
Chapter 3. South Carolina Law Enforcement Division
Article 7. Sex Offender Registry (Refs & Annos)

Code 1976 § 23-3-490

§ 23-3-490. Public inspection of offender registry.

Effective: April 2, 2015
Currentness

(A) Information collected for the offender registry is open to public inspection, upon request to the county sheriff. A sheriff must release information regarding persons required to register under this article to a member of the public if the request is made in writing, on a form prescribed by SLED. The sheriff must provide the person making the request with the full names of the registered sex offenders, any aliases, any other identifying physical characteristics, each offender's date of birth, the home address on file, the offense for which the offender was required to register pursuant to Section 23-3-430, and the date, city, and state of conviction. A photocopy of a current photograph must also be provided. The sheriff must provide to a newspaper with general circulation within the county a listing of the registry for publication.

A sheriff who provides the offender registry for publication or a newspaper which publishes the registry, or any portion of it, is not liable and must not be named as a party in an action to recover damages or seek relief for errors or omissions in the publication of the offender registry; however, if the error or omission was done intentionally , with malice, or in bad faith the sheriff or newspaper is not immune from liability.

(B) A person may request on a form prescribed by SLED a list of registered sex offenders residing in a city, county, or zip code zone or a list of all registered sex offenders within the State from SLED. A person may request information regarding a specific person who is required to register under this article from SLED if the person requesting the information provides the name or address of the person about whom the information is sought. SLED shall provide the person making the request with the full names of the requested registered sex offenders, any aliases, any other identifying physical characteristics, each offender's date of birth, the home address on file, the offense for which the offender was required to register pursuant to Section 23-3-430, and the date, city, and state of conviction. The State Law Enforcement Division may charge a reasonable fee to cover the cost of copying and distributing sex offender registry lists as provided for in this section. These funds must be used for the sole purpose of offsetting the cost of providing sex offender registry lists.

(C) Nothing in subsection (A) prohibits a sheriff from disseminating information contained in subsection (A) regarding persons who are required to register under this article if the sheriff or another law enforcement officer has reason to believe the release of this information will deter criminal activity or enhance public safety. The sheriff shall notify the principals of public and private schools, and the administrator of child day care centers and family day care centers of any offender whose address is within one-half mile of the school or business.

(D) For purposes of this article, information on a person adjudicated delinquent in family court for an offense listed in Section 23-3-430 must be made available to the public in accordance with the following provisions:

(1) If a person has been adjudicated delinquent for committing any of the following offenses, information must be made available to the public pursuant to subsections (A) and (B):

(a) criminal sexual conduct in the first degree (Section 16-3-652);

(b) criminal sexual conduct in the second degree (Section 16-3-653);

(c) criminal sexual conduct with minors, first degree (Section 16-3-655(A));

(d) criminal sexual conduct with minors, second degree (Section 16-3-655(B));

(e) engaging a child for sexual performance (Section 16-3-810);

(f) producing, directing, or promoting sexual performance by a child (Section 16-3-820);

(g) kidnapping (Section 16-3-910); or

(h) trafficking in persons (Section 16-3-2020) except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense.

(2) Information shall only be made available, upon request, to victims of or witnesses to the offense, public or private schools, child day care centers, family day care centers, businesses or organizations that primarily serve children, women, or vulnerable adults, as defined in Section 43-35-10(11), for persons adjudicated delinquent for committing any of the following offenses:

(a) criminal sexual conduct in the third degree (Section 16-3-654);

(b) criminal sexual conduct: assaults with intent to commit (Section 16-3-656);

(c) criminal sexual conduct with a minor: assaults with intent to commit (Section 16-3-656);

(d) criminal sexual conduct with minors, third degree (Section 16-3-655(C));

(e) peeping (Section 16-17-470);

(f) incest (Section 16-15-20);

(g) buggery (Section 16-15-120);

(h) violations of Article 3, Chapter 15 of Title 16 involving a minor, which violations are felonies; or

(i) indecent exposure.

(3) A person who is under twelve years of age at the time of his adjudication, conviction, guilty plea, or plea of nolo contendere for a first offense of any offense listed in Section 23-3-430(C) shall be required to register pursuant to the provisions of this chapter; however, the person's name or any other information collected for the offender registry shall not be made available to the public.

(4) A person who is under twelve years of age at the time of his adjudication, conviction, guilty plea, or plea of nolo contendere for any offense listed in Section 23-3-430(C) and who has a prior adjudication, conviction, guilty plea, or plea of nolo contendere for any offense listed in Section 23-3-430(C) shall be required to register pursuant to the provisions of this chapter, and all registry information concerning that person shall be made available to the public pursuant to items (1) and (2).

(5) Nothing in this section shall prohibit the dissemination of all registry information to law enforcement.

(E) For purposes of this section, use of computerized or electronic transmission of data or other electronic or similar means is permitted.

Credits

HISTORY: 1994 Act No. 497, Part II, § 112A; 1996 Act No. 444, § 16; 1998 Act No. 384, § 1; 1999 Act No. 110, § 2; 2010 Act No. 289, § 9, eff June 11, 2010; 2012 Act No. 255, § 6, eff June 18, 2012; 2015 Act No. 7 (S.196), § 6.E, eff April 2, 2015.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2015

No. 15-

EDWARD DEAN AND NOLAN BROWN

PETITIONER,

v.

MARK KEEL IN HIS OFFICIAL CAPACITY AS CHIEF OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION

RESPONDENT.

CERTIFICATE OF FILING BY MAIL

I hereby certify that I am a member of the Bar of this Court and that on February 29, 2016, I filed the petitioners' Motion to for Leave to Proceed *In Forma Pauperis* and Petition for writ of *certiorari* to the South Carolina Supreme Court, by causing the originals and ten copies of the same to be deposited in the United States Mail, postage prepaid, and properly addressed to the Clerk of this Court.

By _____

E. Charles Grose, Jr.
Attorney of Record for Petitioners

SUBSCRIBED TO AND SWORN TO before me
This 29th day of February, 2016.

Laura Wingard

Notary Public for South Carolina
My Commission Expires: My Commission Expires May 31, 2023

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2015

No. 15-

EDWARD DEAN AND NOLAN BROWN

PETITIONER,

v.

MARK KEEL IN HIS OFFICIAL CAPACITY AS CHIEF OF THE SOUTH CAROLINA LAW ENFORCEMENT DIVISION

RESPONDENT.

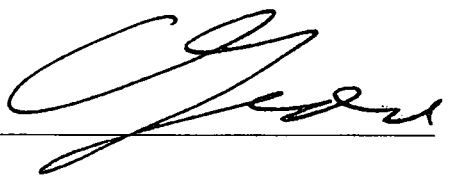
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the petitioners' Motion to for Leave to Proceed *In Forma Pauperis* and Petition for writ of *certiorari* to the South Carolina Supreme Court has been served upon opposing counsel by mailing one (1) copy in an envelope properly addressed with postage prepaid this 29th day of February, 2015, to:

Marcie E. Greene , Esquire
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Adam L. Whitsett, Esquire
General Counsel
South Carolina Law Enforcement Division
PO Box 21398
Columbia, SC 29221

(signature on next page)

By 

E. Charles Grose, Jr.
Attorney of Record for Petitioners

SUBSCRIBED TO AND SWORN TO before me
This 29th day of February, 2015.

Laura Wingard

Notary Public for South Carolina
My Commission Expires: My Commission Expires May 31, 2023