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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY

Court of Common Pleas

Honorable Doyet A. Early, III, Circuit Court Judge

Case No: 2016-001677

Clifford Judge.....Appellant

v.

Mark Keel, Director of the South Carolina Law Enforcement Division (SLED) and the State of
South Carolina Respondents.

RECORD ON APPEAL

Harvey L. Kirkland, Esq.
Post Office Box 11549
Columbia, South Carolina 29211
Attorney for Respondent

Charles T. Brooks, III
Post Office Box 3512
Sumter, South Carolina 29151
Telephone: (803) 418-5708
Facsimile: (803) 934-9618
Attorney for Appellant

SLED
Adam L. Whitsett, Esq.
Post Office Box 21398
Columbia, South Carolina 29221
Attorney for Respondent

Office of SC Attorney General
ATTN: T. Parkin C. Hunter
Post Office Box 11549
Columbia, South Carolina 29211
Attorney for Respondent

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INDEX

Order Granting Judgment on the Pleadings.....	1
Summons and Complaint.....	9
Answer.....	18
Defendant's Motion for Judgment on the Pleadings.....	22
Petitioner's Return to Motion of Respondent(s).....	30
Trial Transcript from June 13, 2016.....	33
Defendant's Memorandum in Support of Motion for Judgment on the Pleadings...	44

violate the *ex post facto* clauses of the state or federal constitutions”); Hazel v. State, 377 S.C. 60, 64, 659 S.E.2d 137, 139 (2008) (holding that “the applicable [Sex Offender Registry] statute is the statute that existed at the time of respondent’s release from prison.”). The Plaintiff filed this present action in February of 2016 seeking for this Court to fashion equitable personal relief for the Plaintiff. The Defendants Answered the Complaint and filed the present Motion for Summary Judgment along with a Memorandum in support thereof.

STANDARD OF REVIEW

A motion for summary judgment shall be granted “if the pleadings... show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to a judgment as a matter of law.” George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) (citing Rule 56(c), SCRPC) (emphasis in original).

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” Bankers Trust of South Carolina v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976).

LAW/ANALYSIS

Based on the following, there is no genuine issue of material fact in dispute in this matter. Further, there is no factual dispute requiring the services of a fact finder. Accordingly, Defendants are entitled to a judgment as a matter of law. See George v. Fabri, 345 S.C. at 452, 548 S.E.2d at 874; Rule 56(c), SCRPC

The Plaintiff was properly registered as a sex offender upon being released from incarceration in accordance with SORA. S.C. Code Ann. § 23-3-430(C)(15); Walls, 348 S.C. at 31, 558 S.E.2d at 526 (holding South Carolina’s SORA “is not so punitive in purpose or effect as to constitute a criminal penalty” and that “the Act does not violate the *ex post facto* clauses of the state or federal constitutions”); Hazel, 377 S.C. at 64, 659 S.E.2d at 139 (holding that “the

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applicable [SORA] statute is the statute that existed at the time of respondent's release from prison.”).

SORA is constitutional, clear, and unambiguous and mandates lifetime registration for all sex offenders in South Carolina. S.C. Code Ann. § 23-3-460 (“A person required to register pursuant to this article is required to register biannually for life”).² In that regard, the South Carolina Supreme Court has held that “the 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.” Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003). Further, SORA also provides the only lawful avenues by which individuals can be removed from the registry.³ See S.C. Code Ann. § 23-3-430(E), (F), (G). However, there is no genuine issue of material fact to suggest that Plaintiff meets any of these statutory criteria for removal from SORA and he concedes that he does not. See Plaintiff's Complaint pp. 2-3. Accordingly, there is no legal basis for the Plaintiff to be removed from the registry and the Defendants are entitled to judgment as a matter of law. See S.C. Code Ann. § 23-3-460; S.C. Code Ann. § 23-3-430; Lozada v. South Carolina Law Enforcement Div., 395 S.C. 509, 512, 719 S.E.2d 258, 259 (2011)(acknowledging that “[w]hether an individual must be placed on the sex offender registry is a question of law.”)

The Plaintiff's argument in this matter is that his constitutional SORA registration requirement constitutes a “wrong” that would justify this Court fashioning the Plaintiff an equitable personal remedy. This argument is without merit. The constitutional application of the

² I note that South Carolina law requires registration every ninety days for persons “classified as a Tier III offender by Title I of the federal Adam Walsh Child Protection and Safety Act of 2006”; however, this registration is also “for life”.

³ In fact, the mechanisms for both placement on and removal from the registry are provided by this same code section, S.C. Code § 23-3-430.

clear and unambiguous provisions of SORA is not a "wrong" cognizable in South Carolina law. The South Carolina Supreme Court has held unequivocally that "the court's equitable powers must yield in the face of an unambiguously worded statute." Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). In addition, the South Carolina Supreme Court has also specifically held that,

[i]f a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (internal quotes and citation omitted). Instead, the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. *Id.* Moreover, "it is beyond this Court's power to effect a change in the statutes enacted by the Legislature." State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000); *see also* Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (this Court does "not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly").

Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675 (2007).

Moreover, "[i]f a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." State v. Smith, 330 S.C. 237, 240, 498 S.E.2d 648, 650 (Ct.App. 1998). Accordingly, for this Court to fashion an equitable remedy outside of the constitutional, clear, and unambiguous provisions of SORA would exceed this Court's authority and this Court's equitable powers must yield to the clear and unambiguous language of SORA.

In addition, fashioning an equitable remedy in the face of the clear and unambiguous provisions of SORA would constitute a violation of the South Carolina Constitution's mandate for the separation of powers. *See* S.C. Const. art. I, § 8. The length of an individual's sex offender registration pursuant to SORA is solely a matter of legislative prerogative and there is no judicial discretion over such without violating the South Carolina Constitution. *Id.* This

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situation is comparable to legislatively mandated minimum or maximum sentences for criminal offenses. With regard to sentencing for an offense that has a mandatory minimum or maximum sentence, the South Carolina Legislature has unilaterally prohibited judges from sentencing individuals above or below the statutorily set amounts. However, these statutory sentence provisions are, and have been consistently upheld as being, lawful. See State v. De La Cruz, 302 S.C. 13, 393 S.E.2d 184 (1990); State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2001); State v. Johnson, 350 S.C. 543, 567 S.E.2d 486 (Ct. App. 2002). In fact, the South Carolina Supreme Court conclusively resolved this issue in State v. De La Cruz indicating

[w]e have held in the past that “[t]he penalty assessed for a particular offense is, except in the rarest of cases, “purely a matter of legislative prerogative,” and the legislature’s judgment will not be disturbed.” State v. Smith, 275 S.C. 164, 167, 268 S.E.2d 276, 277 (1980) (quoting Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)). Judicial discretion in sentencing, in suspending sentences, and in designating that sentences run concurrent or consecutive is subject to statutory restriction. See Mistretta v. United States, 488 U.S. 361, ---, 109 S.Ct. 647, 650, 102 L.Ed.2d 714, 725-726 (1989), wherein the United States Supreme Court noted, “Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control.” (Citing United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 5 L.Ed. 37 (1820); Ex Parte United States, 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed. 129 (1916)).

302 S.C. 13, 15-16, 393 S.E.2d 184, 186 (1990).⁴ Similarly, the duration of an individual’s sex offender registration pursuant to SORA is purely a matter of legislative prerogative and there is no judicial discretion over this duration without violating the South Carolina Constitution and South Carolina law. S.C. Const. art. I, § 8; S.C. Code Ann. §23-3-430; S.C. Code Ann. § 23-3-460 (setting forth lifetime registration in South Carolina in an unambiguously worded statute) see also Hendrix v. Taylor, 353 S.C. at 552, 579 S.E.2d at 325 (holding that “the length of time

⁴ It is noteworthy that sex offender registration has been consistently held not to be “punitive in purpose or effect as to constitute a criminal penalty.” Walls, 348 S.C. at 31, 558 S.E.2d at 526. However, the same sentiment would apply to an administrative requirement like registration in terms of the legislative prerogative.

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one must be listed on the sex offender registry is non-punitive, and it cannot constitute a deprivation of a constitutionally protected liberty interest.”)

Furthermore, the purely equitable relief sought by the Plaintiff in this matter is simply not available as a matter of law. The South Carolina Supreme Court has noted that “[e]quitable relief is generally available only where there is no adequate remedy at law” and that an “adequate legal remedy may be provided by statute.” Santee Cooper, 298 S.C. at 185, 379 S.E.2d at 123 (citing 27 *Am.Jur.* 2d, *Equity*, § 94 (1966)) (emphasis added). The Santee Cooper Court further noted that an “‘adequate’ remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity.” *Id.* This does not however mean that the person seeking relief must be eligible for the relief set forth in the statute. Rather, it means only that some certain definitive statutory relief exists. Key Corporate Capital, 373 S.C. at 55, 644 S.E.2d at 675; Santee Cooper, 298 S.C. at 185, 379 S.E.2d at 123. Ultimately, the Court in Santee Cooper noted that “the court’s equitable powers must yield in the face of an unambiguously worded statute.” 298 S.C. at 179, 379 S.E.2d at 119. The statutory language of SORA providing for lifetime registration in South Carolina is unambiguously worded. *See* S.C. Code Ann. § 23-3-460 (“A person required to register pursuant to this article is required to register biannually for life.”).⁵ Accordingly, this Court’s equitable powers must yield to the clear and unambiguous language of SORA and there is no legal or constitutional basis for the Plaintiff to be removed from the registry.

Moreover, any constitutional challenge by the Plaintiff to his SORA registration also fails. The South Carolina Supreme Court has long held that SORA passes constitutional muster. *See* Hendrix, 353 S.C. at 542, 579 S.E.2d at 320; In re Ronnie A., 355 S.C. 407, 585 S.E.2d 311

⁵ However, certain offenders must register every ninety days. S.C. Code Ann. § 23-3-460(B).

(2003); Walls, 348 S.C. at 26, 558 S.E.2d at 524. This law is rationally related to the legislative purpose sought to be effected; all members of the class. *i.e.* all those individuals convicted of Kidnapping in which there is criminal sexual conduct or attempted criminal sexual conduct are treated the same; and the classification rests on a reasonable basis. Classifying individuals, like the Plaintiff, who are lawfully convicted of Kidnapping in which there is criminal sexual conduct or attempted criminal sexual conduct as sex offenders is "reasonably related to the legitimate state purpose of protecting the public and aiding law enforcement in limiting the risk that sex offenders pose to communities." Hendrix, 353 S.C. at 549-50, 579 S.E.2d at 324; In re Ronnie A., 355 S.C. at 409, 585 S.E.2d at 312; S.C. Code Ann. § 23-3-400. Registration as a sex offender is not a punishment, but rather is a regulatory requirement imposed to promote public safety. Williams v. State, 378 S.C. 511, 516, 662 S.E.2d 615, 618 (2008); Walls, 348 S.C. at 31, 558 S.E.2d at 526. In addition, all members of the Plaintiff's class are treated identically. Further, all members of the class "are subject to uniform administrative and legal procedures." See Hendrix, 353 S.C. 542, 550-51, 579 S.E.2d 320, 324 (2003). And finally, the classification of the Plaintiff as a sex offender "is reasonable because the purpose of the law is to protect the public welfare and to assist law enforcement in accomplishing that goal." Hendrix, 353 S.C. 542, 551, 579 S.E.2d 320, 324 (2003); S.C. Code Ann. § 23-3-400. Accordingly, any challenge to the constitutionality of the Plaintiff's SORA registration is without merit.

CONCLUSION

Therefore, based on the foregoing and all applicable South Carolina law, it is hereby ORDERED, DECREED, and ADJUDGED that the Defendants' Motion for Summary Judgment is GRANTED.

AND IT IS SO ORDERED.


Doyet A. Early, III
Presiding Judge
Court of Common Pleas
2nd Judicial Circuit

Brambley, South Carolina
2016

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

CLIFFORD L. JUDGE

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2016-CP - 02- 00268

Plaintiff(s)

vs.

MARK KEEL, DIRECTOR, SLED AND STATE OF SC

Defendant(s)

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FEB 08 2016

AIKEN COUNTY CLERK OF COURT

Submitted By: Charles T. Brooks, III

Address: 309 Broad Street, Sumter, SC 29150

SC Bar #: 11762

Telephone #: 803-418-5708

Fax #: 803-934-9618

Other:

E-mail: cbrooks@ctbrooks.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|--|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ General (130)
☐ Breach of Contract (140)
☐ Fraud/Bad Faith (150)
☐ Failure to Deliver/Warranty (160)
☐ Employment Discrim (170)
☐ Employment (180)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -NI-
☐ Notice/ File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Assault/Battery (370)
☐ Slander/Libel (380)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Administrative Law/Relief
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☒ Other (699)
☐ Sexual Predator (510) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Pre-Suit Discovery (670) | | |

Submitting Party Signature:

Date: January 28, 2016

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

SCCA / 234 (12/2015)

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA,

COUNTY OF AIKEN

CLIFFORD L. JUDGE

Plaintiff,

vs.

MARK KEEL, DIRECTOR, SLED, ET AL
Defendant.

IN THE COURT OF COMMON PLEAS

SUMMONS

FILE NO. 2016-CP-02- 00268

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below; within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

SUMTER, South Carolina

Dated: January 28, 2016


Plaintiff/Attorney for Plaintiff

Address: 309 Broad Street, Sumter, SC 29150

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AIKEN COUNTY
CLERK OF COURT

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

Clifford L. Judge,)

PETITIONER,)

VS.)

MARK KEEL,)

DIRECTOR, SOUTH CAROLINA)

LAW ENFORCEMENT)

DIVISION (SLED), AND THE)

STATE OF SOUTH CAROLINA,)

RESPONDENT.)

IN THE COURT OF COMMON PLEAS

SECOND JUDICIAL CIRCUIT

C/A NO.: 2016-CP-02- 00208

PETITION FOR
DECLARATORY JUDGMENT
(Non-Jury)

C O P Y
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FEB 08 2016 / 00

AIKEN COUNTY
CLERK OF COURT

THE PETITIONER IN THIS MATTER, BY AND THROUGH HIS
COUNSEL, ALLEGES AS FOLLOWS:

1. That the Petitioner is a citizen and resident of the County of Aiken, State of South Carolina.
2. That the Respondent, Mark Keel, is the Chief of the South Carolina Law Enforcement Division (hereinafter referred to as "SLED"), maintaining the Sex Offender Registry for the State of South Carolina. The present action is an action in part for a Declaratory Judgment regarding certain provisions of the South Carolina Sexual Registry (hereinafter referred to as "Registry"), and pursuant to §23-3-410, Code of Laws for South Carolina, 1976, as amended, the Registry is under the direction of the Respondent Keel.

3. That the State of South Carolina, a sovereign State and body politic, enacts its legislation through its State Legislature (the South Carolina General Assembly and Senate) and the Governor. The present action is an action in part for a Declaratory Judgment regarding the constitutionality of provisions of the South Carolina Code of Laws, as amended, specifically §23-3-430, Sex Offender Registry legislation, as it applies to §16-15-130(A) (Indecent Exposure) and §16-3-190 (Kidnapping).
4. This Honorable Court has jurisdiction over the parties to, and subject matter of, the present action.
5. The Petitioner in this matter was convicted in the State of South Carolina of Kidnapping and Indecent Exposure in 2001 in Aiken County.
6. The Petitioner was sentenced to a term of incarceration of twelve (12) years for the charge of Kidnapping and three (3) years for the charge of Indecent Exposure, with those sentenced to be served concurrently with the South Carolina Department of Corrections. The Petitioner was released from incarceration on or about 2011.
7. In 2003, after the conviction of the Petitioner and after the Petitioner relocated to Sumter County, the Petitioner was required to begin to Register as a Sex Offender in accordance with "Megan's Law" which was enacted subsequent to the release of the Petitioner from the Department of Corrections.
8. That, under §23-3-430(F), even if Petitioner was pardoned by the Governor, Petitioner "may not be removed" from the Registry unless the

Attorney General notified a Defendant that the conviction "was reversed, overturned, or vacated on appeal". §23-3-430(E), South Carolina Code of Laws, as amended.

9. That the Petitioner did not file a timely appeal of his conviction, nor did he timely file an application for Post-conviction Relief.
10. That, upon information and belief, Petitioner has suffered and continues to suffer grievous consequences as a result of being a registered sex offender, including:
 - a. Permanent ban from volunteering with most youth events, including any involving his own minor relatives (nieces, nephews, etc.) or any children he may father in the future.
 - b. Limited employment opportunities; and
 - c. Embarrassment and humiliation for himself and his relatives.

FOR A FIRST CAUSE OF ACTION
Equity

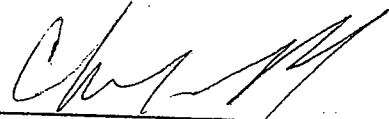
11. The above set forth facts are made part of this cause of action through incorporation by reference.
12. That the Petitioner is entitled to equitable personal relief in this matter.
13. That the Petitioner is informed and believed that equity is reserved for situations where there is no adequate remedy of law.

14. That the purpose of the Sex Offender Registry is to protect the public from those sex offenders who may re-offend and to aid Law Enforcement in solving sex crimes.
15. That the Petitioner is informed and believes the facts before this Court do not support a finding that he Petitioner is or ever was a predator or child molester.
16. That the Petitioner is informed and believes that the requirement of lifelong Sex Offender Registry is wildly disproportionate to the underlying conduct.
17. That the Petitioner is informed and believes that justice compels a remedy for this particular situation and that justice is served by granting the Petitioner personal relief.
18. That Petitioner is entitled to an Order of this Court directing Defendant Keel to remove his name from the South Carolina Sex Offender Registry immediately.

WHEREFORE, Petitioner prays this Court for an Order:

1. Declares the Petitioner has established his claim for relief by evidence satisfactory to this Court; and
2. Ordering the Defendants to remove the Petitioner from the Sex Offender Registry; and

3. For any such other and further relief as may be deemed appropriate by this Court.



CHARLES T. BROOKS, III

Attorney for the Petitioner

309 Broad Street

Sumter, South Carolina 29150

(803) 418-5708

cbrooks@ctbrooks.com

Dated: _____

1 / 7 / 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)

VERIFICATION

CLIFFORD L. JUDGE and , being duly sworn, say that they are the Petitioners herein, and have read the foregoing Petition and know the contents thereof, that the same is true of their own knowledge, except as matters therein stated to be alleged on information and belief; and to those matters they believe them to be true.

SWORN to and Subscribed before me)

this 19th day of January, 2016)

[Signature]

Signature of Petitioner

Ashley K Kelly)
Notary Public for South Carolina)

My Commission expires: 02-19-23)

Signature of Petitioner

ASHLEY K KELLY
NOTARY PUBLIC
SOUTH CAROLINA
MY COMMISSION EXPIRES 2-19-23

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FEB 08 2016 / *[Signature]*

AIKEN COUNTY
CLERK OF COURT

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

Clifford L. Judge,)

Plaintiff,)

v.)

Mark Keel, Director, South Carolina Law
Enforcement Division (SLED) and the
State of South Carolina,)

Defendants.)

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
Case No.: 2016-CP-02-00268

ANSWER

Defendant Mark Keel, properly identified as the Chief of the South Carolina Law Enforcement Division (SLED) and Defendant State of South Carolina, hereby answer the Plaintiffs' Complaint as follows:

FOR A FIRST DEFENSE

Failure to State a Claim

The Complaint fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SECOND DEFENSE

Insufficient Service of Process

The Complaint in this matter was not served on Defendant Keel in accordance with the South Carolina Rules of Civil Procedure. As such, pursuant to Rule 12(b)(5), SCRCF this action should be dismissed due to insufficiency of service of process.

FOR A THIRD DEFENSE

Response to Allegations

1. The Defendants deny each and every allegation of the Plaintiffs' Complaint not herein specifically admitted, qualified, or explained.
2. Paragraph one (1) is admitted upon information and belief.

3. Paragraphs two (2) and three (3), to the extent they are characterizations as to the type of action this is require no response. However, to the extent that either paragraph alleges that § 23-3-430 of the South Carolina Code of Laws is unconstitutional in any respect, such allegation is denied.
4. Paragraphs four (4), five (5), and six (6) are admitted upon information and belief.
5. The Defendants are without information or knowledge to admit or deny the allegations of paragraph seven (7) and would therefor deny the same. However, the Defendants would aver that the Plaintiff's inclusion on the South Carolina Sex Offender Registry was proper, was in accordance with South Carolina law, and was constitutional.
6. The Defendants deny the allegations of paragraph eight (8) in that the allegations mischaracterize South Carolina law. The Defendants would crave reference to the actual text of §§ 23-3-430(E) and 23-3-430(F) of the South Carolina Code of Laws for a proper recitation of these statutes and would deny any allegation that conflicts therewith.
7. The Defendants are without information and belief to admit the allegations of paragraph nine (9); however, the Defendants would admit these allegations.
8. The Defendants deny the allegations of paragraph ten (10).
9. As to paragraph eleven (11), the Defendants incorporate the responses to each of preceding paragraphs by reference.
10. Paragraph twelve (12) is denied.
11. Paragraph thirteen (13) is denied. Further, the Defendants would aver that § 23-3-430 sets forth an adequate remedy for Plaintiff, that § 23-3-430 is an unambiguously worded statute, and that equity follows the law. *See Key Corporate Capital, Inc. v. Cnty. of Beaufort*, 373 S.C.

55, 61, 644 S.E.2d 675, 678 (2007) (holding that a "court's equitable powers must yield in the face of an unambiguously worded statute").

12. As to paragraph fourteen (14), the Defendants would aver that the purpose of South Carolina's Sex Offender Registry Statute is set forth in § 23-3-400 and, to the extent inconsistent with this statute, paragraph fourteen (14) is denied.

13. Paragraphs fifteen (15), sixteen (16), seventeen (17), and eighteen (18) are denied.

14. To the extent inconsistent with the foregoing, Defendant denies the requests for relief set forth in the "WHEREFORE" section of the complaint.

FOR A FOURTH DEFENSE
Proper Inclusion on the Registry

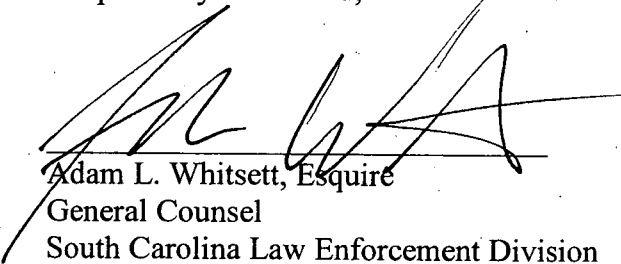
15. The Defendants would aver that the Plaintiff's inclusion on the South Carolina Sex Offender Registry is proper, constitutional, and in accordance with South Carolina law. Accordingly, the Defendants are informed and believe that this action should be dismissed.

WHEREFORE, having fully answered the Plaintiff's complaint, Defendants pray that this Honorable Court:

- A. dismisses the Plaintiff's Complaint entirely;
- B. denies any and all relief sought by the Plaintiff; and
- C. grants such other and further relief as the Court may deem just and proper.

[SIGNATURE PAGE ATTACHED]

Respectfully Submitted,



Adam L. Whitsett, Esquire

General Counsel

South Carolina Law Enforcement Division

Post Office Box 21398

Columbia, South Carolina 29221-1398

Phone: (803) 896-0647

Fax: (803) 896-7588

Email: awhitsett@sled.sc.gov

S.C. Bar Number: 74888

Courtney E. Lowell, Esquire

Assistant Attorney General

Office of the Attorney General

State of South Carolina

Post Office Box 11549

Columbia, SC 29211-1549

Phone: (803) 734-3177

Fax: (803) 734-33677

Email: clowell@scag.gov

S.C. Bar No.: 77175

Marcie Green, Esquire

Assistant Attorney General

Office of the Attorney General

State of South Carolina

Post Office Box 11549

Columbia, SC 29211-1549

Phone: (803) 734-3759

Fax: (803) 734-3677

Email: mgreen@scag.gov

S.C. Bar No.: 101041

ATTORNEYS FOR THE DEFENDANTS

COLUMBIA, SOUTH CAROLINA
MARCH 28, 2016

STATE OF SOUTH CAROLINA)

COUNTY OF AIKEN)

Clifford L. Judge)

vs.)

Mark Keel, Director, South Carolina Law
Enforcement Division (SLED) and the
State of South Carolina)

Defendant.)

IN THE COURT OF COMMON PLEAS
2ND JUDICIAL CIRCUIT

CASE NO.: 2016-CP-02-00268

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

_____, Bar No. _____

Address: _____

Phone: _____ Fax _____

E-mail: _____ Other: _____

Defendant's Attorney:

Harley L. Kirkland, Bar No. 100382

Address: _____

Post Office Box 11549

Columbia, SC 29211

Phone: 803-734-0406 Fax 803-734-3677

E-mail: HKirkland@scag.gov Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**

☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment

Estimated Time Needed: 15 mins

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant

Date submitted _____

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ 25.00

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Clifford L. Judge,

Plaintiff,

vs.

Mark Keel, Director, South Carolina Law
Enforcement Division (SLED) and the
State of South Carolina,

Defendants.

) IN THE COURT OF COMMON PLEAS
) IN THE SECOND JUDICIAL CIRCUIT

) Civil Action No. 2016-CP-02-00268

) **NOTICE OF MOTION AND**
) **MOTION FOR SUMMARY JUDGMENT**

TO: CHARLES T. BROOKS, III, ESQUIRE, ATTORNEY FOR PLAINTIFF

PLEASE TAKE NOTICE THAT the Defendants Chief Mark Keel, South Carolina Law Enforcement Division ("SLED"), and the State of South Carolina, through the undersigned attorneys, will move before this Court within ten (10) days of the date hereof (or at such other time and place as the Court determines) for summary judgment pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure.

BACKGROUND

The Plaintiff Clifford L. Judge was convicted of kidnapping and indecent exposure in 2001. Compl. ¶5. He was sentenced to twelve (12) years for the charge of kidnapping and three (3) years for the charge of indecent exposure. Compl. ¶6. The sentences were to be served concurrently with the South Carolina Department of Corrections. Compl. ¶6. The Petitioner was released from incarceration in 2011. Compl. ¶6. Plaintiff did not appeal his conviction, nor did he file a post-conviction relief application. Compl. ¶9. Upon being released from incarceration,

Plaintiff was required to register as a sex offender¹ pursuant to the South Carolina Sex Offender Registry Act ("SORA").

On or about January 28, 2016, Plaintiff filed this "Petition for Declaratory Judgment" against Defendants Chief Keel, SLED and the State of South Carolina, regarding certain provisions governing the Registry. The Plaintiff contends that "equity is reserved for situations where there is no adequate remedy at law;" "the facts before this Court do not support a finding that he is or ever was a predator or child molester;" "the lifelong Registry requirement is wildly disproportionate to the underlying conduct;" "justice compels a remedy...and that justice is served by granting the Petitioner personal relief;" and "Petitioner is entitled to an Order ... remov[ing] his name from the South Carolina Sex Offender Registry immediately." Compl. ¶¶13, 15-18.

STANDARD OF REVIEW

"Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Rule 56(c), SCRCP; *Knight v. Austin*, 396 S.C. 518, 521-22, 722 S.E.2d 802, 804 (2012). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Englert, Inc. v. Leafguard USA, Inc.*, 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008). In determining whether summary judgment is appropriate, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

¹ Plaintiff is classified as Tier III offender pursuant to the Sex Offender Registration and Notification Act (SORNA) based on his 2001 conviction and must register every ninety (90) days. S.C. Code Ann. 23-3-460(B).

ARGUMENT

“A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue.” *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 191, 684 S.E.2d 541, 543 (2009). “Whether an individual must be placed on the sex offender registry is a question of law.” *Lozada v. S.C. Law Enforcement Div.*, 395 S.C. 509, 512, 719 S.E.2d 258, 259 (2011).

The South Carolina Sex Offender Registry Act (“SORA”) lists the only mechanisms and avenues by which an individual can be removed from the Sex Offender Registry.² Pursuant to § 23-3-430(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.” S.C. Code Ann. § 23-3-430(E). Pursuant to § 23-3-430(F), an offender who receives a pardon “based on a finding of not guilty specifically stated in the pardon” shall be removed from sex offender registry. S.C. Code Ann. § 23-3-430(F). And finally, § 23-3-430(G) mandates removal for individuals exonerated subsequent to filing a petition for a writ of habeas corpus or a motion for a new trial. S.C. Code Ann. § 23-3-430(F). These are the only lawful avenues by which an individual who is properly placed on the Registry can be removed.

Equitable relief sought by the Plaintiff in this matter is simply not available. The South Carolina Supreme Court has noted that, “[e]quitable relief is generally available *only* where there is no adequate remedy at law” and that an “adequate legal remedy may be provided by statute.” *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm’n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123

² In fact, the mechanisms for both placement on and removal from the South Carolina sex offender registry are provided by this same code section. See S.C. Code § 23-3-430.

(1989) (emphasis added). The Court further noted that an, “adequate’ remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity.” *Id.* at 621. This does not, however, mean that the person seeking relief must be eligible for the relief set forth in the statute. Rather, it means only that some certain definitive statutory relief exists. *Key Corp. Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 644 S.E.2d 675 (2007); *Santee Cooper Resort, Inc.*, 298 S.C. at 185, 379 S.E.2d at 123. Ultimately, the Supreme Court in *Santee Cooper* noted that “the court’s equitable powers must yield in the face of an unambiguously worded statute.” 298 S.C. at 185, 379 S.E.2d at 123 (emphasis added).

Moreover, it is well known and undisputed that “equity follows the law.” This maxim alone is a basis for denying equitable relief in this case. *See Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 254-55, 715 S.E.2d 348, 355 (Ct. App. 2011); *Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 319–20, 659 S.E.2d 263, 267 (Ct. App. 2008). Furthermore, South Carolina law is also clear that, “[w]hether an individual must be placed on the sex offender registry is a question of law.” *Lozada*, 395 S.C. at 512, 719 S.E.2d at 259.

South Carolina’s statutory lifetime registration requirement is set forth in an unambiguously worded statute. *See* S.C. Code Ann. § 23-3-460 (“A person required to register pursuant to this article is required to register biannually for life.”).³ As such, South Carolina law mandates that there is *no equitable jurisdiction* in this matter. The Defendants respectfully assert that this Court’s powers must yield in the face of South Carolina’s unambiguously worded SORA, which sets forth lifetime registration. Removal of an individual, by another means other than one of the enumerated avenues, is a violation of the South Carolina Constitution’s mandate

³ Certain offenders must register every ninety days. S.C. Code Ann. § 23-3-460(B).

for the separation of powers. *See* S.C. Const. art. I, § 8; *Key Corp. Capital, Inc.*, 373 S.C. 55, 644 S.E.2d 675 (2007) (finding error in fashioning an equitable remedy in the face of an unambiguously worded statute setting forth certain remedies); *Santee Cooper Resort, Inc.*, 298 S.C. at 185, 379 S.E.2d at 123.

This situation is analogous to legislatively mandated minimum sentences for criminal offenses. *See* S.C. Code Ann. § 16-11-330 (10 years); S.C. Code Ann. § 44-53-370 (various mandatory minimums for distribution or trafficking illegal drugs); S.C. Code Ann. § 16-3-30 (30 years). Following convictions of these offenses, the General Assembly has prohibited judges from sentencing individuals below the statutorily set amount, and these statutory minimums have been consistently upheld as being lawful. *See State v. De La Cruz*, 302 S.C. 13, 393 S.E.2d 184 (1990); *State v. Jones*, 344 S.C. 48, 543 S.E.2d 541 (2001); *State v. Johnson*, 350 S.C. 543, 567 S.E.2d 486 (Ct. App. 2002). There is no equitable allowance for a lighter sentence. The South Carolina Supreme Court has also noted the following:

[u]nder the mandatory sentencing guidelines, the prosecutor can still choose not to pursue the triggering offenses or to plea the charges down to non-triggering offenses. Choosing which crime to charge a defendant with is the essence of prosecutorial discretion, not choosing which sentence the court shall impose upon conviction. **Further, we found the matter of sentencing if convicted of a triggering offense to be a matter within the province of the legislature.**

Jones, 344 S.C. at 56, 543 S.E.2d at 545 (internal citations omitted) (emphasis added).

Similarly, the duration of an individual's sex offender registration is purely a matter of legislative prerogative and there is no judicial discretion over this duration without violating the South Carolina Constitution. *See* S.C. Const. art. I, § 8 ("In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and

distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.”).

Plaintiff asserts that he “is entitled to equitable relief in this matter” and that “equity is reserved for situations where there is no adequate remedy at law.” Compl. ¶¶12-13. However, the law in South Carolina is clear; the Plaintiff does not meet any of these statutory criteria in § 23-3-430 such that he is entitled to removal. In fact, there is no indication that he have even attempted to avail himself of any of the statutory avenues for removal. Since the Plaintiff does not qualify for removal, he is simply asking this Court to legislate and create a remedy for him that does not exist in the statute. Therefore, the requested relief asks that this Court impermissibly act as a super legislature and to add language to an unchallenged constitutional and unambiguously worded statute, which would violate the South Carolina Constitution. Essentially, the Plaintiff argues that if a statute does not include him, he is entitled to equitable relief to obtain indirectly what he cannot obtain directly.

Since there is no legal basis for the Plaintiff’s removal from the Registry, the Plaintiff is not entitled to removal through equitable relief.

CONCLUSION

For the reasons stated above, and all those the State will advance at the future hearing of this matter, judgment should be granted to the Defendants Chief Keel, SLED, and the State of South Carolina.

[Signature Page Follows]

Respectfully submitted,

Harley Kirkland

Harley Kirkland, Esquire (S.C. Bar No.: 100382)

Assistant Attorney General

Office of the Attorney General

State of South Carolina

Post Office Box 11549

Columbia, South Carolina 29211-1549

Phone: 803.734.0406

Fax: 803.734.3677

Email: hkirkland@scag.gov

Adam L. Whitsett, Esquire (S.C. Bar No.: 74888)

General Counsel

South Carolina Law Enforcement Division

Post Office Box 21398

Columbia, South Carolina 29221-1398

Phone: 803.896.0647

Fax: 803.896.7588

Email: awhitsett@sled.sc.gov

ATTORNEYS FOR CHIEF KEEL AND THE STATE OF SOUTH
CAROLINA

COLUMBIA, SOUTH CAROLINA
MAY 11, 2016

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

CLIFFORD L. JUDGE,

PETITIONER,

VS.

MARK KEEL,
DIRECTOR, SOUTH CAROLINA
LAW ENFORCEMENT
DIVISION (SLED), AND THE
STATE OF SOUTH CAROLINA,

RESPONDENT.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
C/A NO.: 2016-CP-02-00268

PETITIONER'S RETURN TO
MOTION OF RESPONDENT(S)

C O P Y
ORIGINAL FILED

MAY 23 2016

AIKEN COUNTY
CLERK OF COURT

To: Harley L. Kirkland, Attorney for the Respondent(s):

The Petitioner, by and through his counsel, Charles T. Brooks III, responds to the Respondent's Motion for Summary Judgment as filed with this Court as follows:

The Respondent's Motion for Summary Judgment should be denied for the following grounds;

Equitable personal relief is an appropriate request here because there is not a complete remedy available at law. "Equity abhors a wrong without a remedy." *Key Corp. Capital, Inc. v. County of Beaufort*, 360 S.C. 513, 602 S.E.2d 104 (S.C. App. 2004) citing *State ex. rel. Daniel v. Strong*, 185 S.C. 27, 43, 192 S.E. 671, 678 (1937). "Equity is reserved for situations where there is no adequate remedy at law." *Id.* at 107 (citing *Santee Cooper Resort, Inc. v. South Carolina Public Serv. Comm'n.*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989)).

The issue here is not whether the Petitioner should be placed on the sex offender registry, which is a question of law, but rather and most importantly here, whether the Petitioner should

be removed from the sex offender registry based on the principles of equity, for which there is no complete remedy provided at law for such removal.

The Respondent argues there is an adequate remedy at law that governs the facts herein because South Carolina Code Ann. Section 23-3-430 (Supp. 2013) provides the procedure for placement on and removal from the sex offender registry. The question here is certainly not placement on the sex offender registry, but rather, removal therefrom. Section 23-3-430(E) provides "SLED shall remove a person's name and any 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." S.C. Code Ann. Sec. 23-3-430(E) (Supp. 2013).

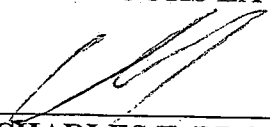
Section 23-3-430(E) provides for the "resulting action" of "when" a person's name may be removed from the sex offender registry and it is strictly limited to an appeal. S.C. Code Ann. Sec. 23-3-430(E) (Supp. 2013). Further, the code section does not provide for a complete remedy at law for removal from the sex offender registry, and the code section does not restrict the ability to pursue an equitable relief action for removal since it only provides a remedy relating to an appeal. S.C. Code Ann. Sec. 23-3-430(E) (Supp. 2013). Therefore, there is not an adequate and complete remedy available at law for the removal from the sex offender registry, especially as in the case herein, when the qualifying offense occurred decades ago from any appealable time frame.

The other subsections of Section 23-3-430, do not provide other remedies at law for the removal from the sex offender registry that would and could afford the Petitioner herein complete relief at law such as the pardon procedure or the new trial procedure. S.C. Code Ann.

Sec. 23-3-430(E) (Supp. 2013). Therefore, there is no complete remedy at law and equitable relief is appropriate.

For all of the foregoing reasons, the Respondent's Motion for Summary Judgment should be denied.

THE BROOKS LAW OFFICES



CHARLES T. BROOKS, III

Attorney for the Petitioner

309 Broad Street

Sumter, South Carolina 29150

(803) 418-5708

cbrooks@ctbrooks.com

Dated: 5/17/2016

State of South Carolina

Court of Common Pleas

County of Aiken

Clifford L. Judge,)

Plaintiff,)

v.)

SLED, The State of South)

Carolina, and Mark Keel,)

Defendants.)

Transcript of Record
2016-CP-02-00268

June 13, 2016
Aiken, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge.

A P P E A R A N C E S:

Charles T. Brooks, Esquire
Attorney for the Plaintiff

Adam L. Whitsett, Esquire
Attorney for the Defendants

Bethanie K. Creppon
Circuit Court Reporter

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P R O C E E D I N G S

* * *

THE COURT: All right. The next one is Clifford Judge vs. Mark Keel.

MR. WHITSETT: Thank you, Your Honor. May it please the Court. Adam Whitsett, general counsel of SLED, here on behalf of all of the defendants. This is our motion for summary judgment. This is a declaratory judgment action whereby the plaintiff is seeking removal from the South Carolina Sex Offender Registry.

There are no material facts in dispute in this case because it's a case where the plaintiff is seeking to come off outside the statutory scheme. He admits and acknowledges that his registration is proper. There's a kidnapping conviction and an indecent exposure conviction, and those are mandatory registry offenses. There's a lifetime registration in this state.

There's no -- does not meet the statutory criteria for removal; however, he's just asking this Court to pull him off using this Court's equitable powers, and that's something we don't feel that the law in this state, jurisprudence in this state, nor the constitution of this state would allow. So we

1 do feel summary judgment is appropriate because
2 there are no material facts or no facts whatsoever
3 in dispute in this case.

4 THE COURT: Thank you.

5 Mr. Brooks, how in the world can I do that?

6 MR. BROOKS: Judge --

7 THE COURT: Yes, sir.

8 MR. BROOKS: I have an interesting argument
9 before you. There was a case in Johnson where this
10 individual was taken off the registry, and the judge
11 cited issue of equity. That case --

12 THE COURT: Well, show me the case, show me the
13 order, show me the --

14 MR. WHITSETT: Your Honor, it's a little more
15 complicated than that. It's a case where Judge --

16 THE COURT: Hold on now. I'm asking him to
17 show me the order.

18 MR. BROOKS: Show you an order?

19 THE COURT: That you're relying on, yes.

20 MR. BROOKS: Judge, I'm relying on the case
21 of -- sorry, Judge. Give me one second.

22 THE COURT: Who is the judge?

23 MR. BROOKS: Judge Seals.

24 THE COURT: Who?

25 MR. BROOKS: Judge William Seals out of Marion

1 County.

2 THE COURT: Okay. And was it appealed?

3 MR. BROOKS: Yes, sir.

4 THE COURT: And what did the appellate court
5 say?

6 MR. BROOKS: The Court of Appeals overturned
7 his decision and went through an analysis that I'm
8 sure my comrade Adam is going to go through. But
9 the South Carolina Supreme Court overturned the
10 Court of Appeals' decision taking Mr. Johnson off of
11 the registry.

12 I have a different interpretation, and I'm sure
13 Adam is going to have an opportunity to explain to
14 you his interpretation, show you his interpretation.
15 But it's our belief that --

16 THE COURT: Well, show me the case.

17 MR. WHITSETT: I've got both the Court of
18 Appeals and the Supreme Court. And the Court of
19 Appeals did rule on the merits. The Supreme Court
20 found the issue was not reserved, and so the Supreme
21 Court did reserve it solely on issue preservation
22 grounds, and it's set forth very clearly. So the
23 Court of Appeals is the only court that's actually
24 analyzed --

25 THE COURT: Go ahead, Mr. Brooks.

1 MR. BROOKS: It's our position that the Court
2 of Appeals' ruling is no longer law in this case;
3 that the only law out there is Judge Seals' order
4 taking this gentleman off of the registry because
5 the Court of Appeals -- I mean, the state's Supreme
6 Court overturned the Court of Appeals which left
7 Judge Seals' order as law in the case.

8 And in that case, Judge Seals determined that
9 it was out of an issue of fairness and equity that
10 this individual should have the opportunity to be
11 taken off the registry and he, indeed, did so, and
12 that gentleman has been taken off the registry.

13 He was convicted of lewd act, got probation,
14 did everything that he was supposed to do on
15 probation, there was a hearing. And, Judge, it's
16 our position we should be allowed to have a hearing,
17 have testimony for the Court to determine whether or
18 not our client meets a similar situation that Judge
19 Seals ruled in Mr. Johnson's case taking him off the
20 registry.

21 The defendant is basically saying we should not
22 even be allowed to have that hearing. And that's --
23 that's basically the simplest way that we can put
24 these arguments.

25 THE COURT: Anything else?

1 MR. BROOKS: That's it from us, Judge.

2 MR. WHITSETT: Thank you, Your Honor. I'm
3 happy to go into the details. I mean, Johnson was a
4 very, very different case. It was brought as a
5 constitutional challenge only, and so there were two
6 causes of action alleged; they were both
7 constitutional challenges to the registry.

8 Judge Seals upheld the constitutionality of the
9 registry, but then sort of took the extraordinary
10 step, despite the fact that it had not been
11 specifically requested, had not been litigated, and
12 then just said, I'm going to remove Mr. Johnson from
13 the registry.

14 That's a starkly different factual situation
15 than we've got here. That was a case involving a
16 victim who was present and willing to talk and
17 willing to -- for that to happen.

18 Unfortunately, there was a motion for
19 reconsideration filed that did not challenge sort of
20 the 800-pound gorilla in the room, which was that
21 the judge did not have the legal authority or the
22 ability to do that.

23 The first time that was raised was at the Court
24 of Appeals, and the Court of Appeals, the only court
25 having actually analyzed the issues, said they did

1 not have the ability to do it, there is no equitable
2 distribution, there was no wrong to remedied, there
3 was -- that the statutory scheme and the statutory
4 mechanism put forth by the legislature is the only
5 lawful avenue of relief.

6 Mr. Johnson just did not meet the criteria
7 similar to Mr. Judge, so there was no equitable --
8 there was no jurisdiction, no ability to do it. The
9 Supreme Court said, well, the first time that was
10 ever raised was on briefs at the Court of Appeals.
11 So they did kick it on issue preservation grounds,
12 and had said that, very specifically, because the
13 State failed to argue that the Petitioner was not
14 entitled to equitable relief, until its brief in the
15 appeals, that the issue was not preserved, we,
16 therefore, reverse on preservation grounds.

17 So we don't feel that that is the Supreme Court
18 passively authorizing this avenue of relief; it's
19 simply the Supreme Court saying the determinative
20 issue on that case was not properly preserved and so
21 it's not enough for the court.

22 We don't have that here; we've got an
23 individual properly registered -- registration is
24 for life -- does not meet the statutory criteria for
25 removal, and so we feel there's no equitable

1 jurisdiction and no ability for this Court to just
2 rewrite the law, you know, on that issue. We feel
3 that would be a separation of powers issue. We feel
4 there's a host of jurisprudence saying that courts
5 cannot just act as a super-legislature and rewrite
6 the law, as is being asked here today. So we do
7 feel summary judgment is appropriate.

8 THE COURT: Thank you. I'll take it under
9 advisement and get you a decision out shortly.

10 MR. BROOKS: Thank you, Judge.

11 MR. WHITSETT: Thank you, Your Honor.

12 -- END OF TRANSCRIPT OF RECORD --
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C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Second Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Aiken County, South Carolina, on the 13th of June, 2016.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

September 28, 2016

s/Bethanie K. CrepponBethanie K. Creppon
Circuit Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Clifford L. Judge,

Plaintiff,

v.

Mark Keel, Director, South Carolina Law
Enforcement Division (SLED) and the
State of South Carolina,

Defendants.

IN THE COURT OF COMMON PLEAS

SECOND JUDICIAL CIRCUIT

Case No.: 2016-CP-02-00268

**DEFENDANTS' MEMORANDUM IN
SUPPORT OF SUMMARY JUDGMENT**

In support of the Motion for Summary Judgment previously filed in this matter, the Defendants would submit the following:

STANDARD OF REVIEW

A motion for summary judgment shall be granted "if the pleadings... show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to a judgment as a matter of law." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001) *citing* Rule 56(c), SCRCF (emphasis in original).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Bankers Trust of South Carolina v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976).

ARGUMENT

Based on the following, there is no genuine issue of material fact in dispute in this matter. Further, there is no factual dispute requiring the services of a fact finder. Accordingly, Defendants are entitled to a judgment as a matter of law. *See* George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001); Rule 56(c), SCRCF.

South Carolina's Sex Offender Registry statutes, S.C. Code § 23-3-400 *et seq.*, list the only mechanisms and avenues by which an individual can be removed from the Sex Offender Registry.¹ See S.C. Code Ann. § 23-3-430(E), (F), (G). As such, these are the only lawful and permissible avenues by which an individual who is properly placed on the Registry can be removed. However, there is no genuine issue of material fact to suggest that Plaintiff meets any of these statutory criteria. Rather, the Plaintiff was convicted of kidnapping and indecent exposure in 2001, and these convictions mandate lifetime registration. See S.C. Code Ann. § 23-3-430; S.C. Code Ann. § 23-3-460 (setting forth lifetime registration in South Carolina in an unambiguously worded statute - "for life"). Accordingly, there is no legal or constitutional basis for the Plaintiff to be removed from South Carolina's Sex Offender Registry and the Defendants are entitled to judgment as a matter of law. See S.C. Code Ann. § 23-3-460 (mandating lifetime registration in South Carolina); S.C. Code Ann. § 23-3-430 (setting forth the only avenues for removal).

The Plaintiff's entire argument in this matter is that his constitutional registration requirement is still somehow a "wrong" in need of an equitable remedy. This argument is without merit. The constitutional application of a non-punitive statute is not a "wrong" cognizable in the law. Further, it is well-known that "equity follows the law". See Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 254-55, 715 S.E.2d 348, 355 (Ct. App. 2011). Moreover, South Carolina law is clear: "[w]hether 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).

¹ In fact, the mechanisms for both placement on and removal from the South Carolina sex offender registry are provided by this same code section. See S.C. Code § 23-3-430.

The South Carolina Supreme Court has also held unequivocally that “the court’s equitable powers must yield in the face of an unambiguously worded statute.” Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm’n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989)(emphasis added); *see also* Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007) (finding error in fashioning an equitable remedy in the face of an unambiguously worded statute setting forth certain remedies).

Furthermore, for a Court to fashion an equitable remedy in the face of an unambiguously worded statute would be a clear violation of the South Carolina Constitution’s mandate for the separation of powers. *See* S.C. Const. art. I, § 8. The South Carolina Constitution specifically provides that “the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.” S.C. Const. art. I, § 8. The duration of sex offender registration is a matter of public policy that is solely in the province of the South Carolina Legislature. As such, any attempt by any court to invade the Legislature’s exclusive province is a violation of the separation of powers and is unconstitutional. *Id.* In addition, the South Carolina Supreme Court has specifically held that

[i]f a statute’s language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (internal quotes and citation omitted). Instead, the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute’s operation. *Id.* Moreover, “**it is beyond this Court’s power to effect a change in the statutes enacted by the Legislature.**” State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000); *see also* Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (this Court does “**not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly**”).

Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675 (2007) (emphasis added). This entire action seeks for this Court to impermissibly and unconstitutionally act as a “superlegislature” and to add language to an unambiguously worded constitutional statute. As such, this request must fail and the Defendants are entitled to summary judgment in this matter.

This situation is comparable to legislatively mandated sentences for criminal offenses, whether minimums or maximums. With regard to sentencing for an offense that has a mandatory sentence range, the South Carolina Legislature has unilaterally prohibited judges from sentencing individuals outside the statutorily set amounts. However, these statutory ranges, and more specifically the statutorily mandated minimum sentences are, and have been consistently upheld as being, lawful. See State v. De La Cruz, 302 S.C. 13, 393 S.E.2d 184 (1990); State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2001); State v. Johnson, 350 S.C. 543, 567 S.E.2d 486 (Ct. App. 2002). In fact, the South Carolina Supreme Court conclusively resolved this issue in *State v. De La Cruz* indicating

[w]e have held in the past that “[t]he penalty assessed for a particular offense is, except in the rarest of cases, **“purely a matter of legislative prerogative,”** and the legislature’s judgment will not be disturbed.” State v. Smith, 275 S.C. 164, 167, 268 S.E.2d 276, 277 (1980) (quoting Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980)). Judicial discretion in sentencing, in suspending sentences, and in designating that sentences run concurrent or consecutive is subject to statutory restriction. See Mistretta v. United States, 488 U.S. 361, ---, 109 S.Ct. 647, 650, 102 L.Ed.2d 714, 725-726 (1989), wherein the United States Supreme Court noted, *16 “Congress, of course, has the power to fix the sentence for a federal crime, and the scope of judicial discretion with respect to a sentence is subject to congressional control.” (Citing United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 5 L.Ed. 37 (1820); Ex Parte United States, 242 U.S. 27, 37 S.Ct. 72, 61 L.Ed. 129 (1916)).

302 S.C. 13, 15-16, 393 S.E.2d 184, 186 (1990) (emphasis added).² Similarly, the duration of an individual's sex offender registration is **purely a matter of legislative prerogative** and there is no judicial discretion over this duration without violating the South Carolina Constitution and South Carolina law. S.C. Const. art. I, § 8; S.C. Code Ann. §23-3-430; S.C. Code Ann. § 23-3-460 (setting forth lifetime registration in South Carolina in an unambiguously worded statute).

Furthermore, the purely equitable relief sought by the Plaintiff in this matter is simply not available as a matter of law. The South Carolina Supreme Court has noted that "[e]quitable relief is generally available **only** where there is no adequate remedy at law" and that an "adequate legal remedy may be provided by statute." Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989) *citing* 27 *Am.Jur.* 2d, *Equity*, § 94 (1966) (emphasis added). The *Santee Cooper* Court further noted that an "'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." *Id.* This does not however mean that the person seeking relief must be eligible for the relief set forth in the statute. Rather, it means only that some certain definitive statutory relief exists. Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007); Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). Ultimately, the Court in *Santee Cooper* noted that "the court's equitable powers **must yield** in the face of an unambiguously worded statute." Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989)(emphasis added). Similarly, the Defendants respectfully assert that this Court's

² It is noteworthy that sex offender registration has been consistently held not to be "punitive in purpose or effect as to constitute a criminal penalty." State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). However, the same sentiment would apply to an administrative requirement like registration in terms of the legislative prerogative.

equitable powers must yield in the face of South Carolina's unambiguously worded Sex Offender Registry laws, which set forth lifetime registration.

OTHER CIRCUIT COURT RULINGS

While not binding authority in this action, the Defendants wish to notify this Court of several recent circuit court rulings on the issue at bar.³ Copies of such orders are available.

On May 1, 2015, The Honorable Clifton Newman ruled that "there is no equitable remedy or equitable jurisdiction applicable to this matter" in a case involving identical arguments to those being set forth in this case. Order of The Honorable Clifton Newman, Kenneth W. Signor v. Mark Keel, Chief of the South Carolina Law Enforcement Division, and the State of South Carolina, Civil Action No(s): 2014-CP-43-00968, May 1, 2015 (unpublished).

On May 20, 2015, The Honorable Thomas A. Russo granted a Judgment on the Pleadings to these same Defendants in a case that is identical to this case.⁴ Specifically, Judge Russo ruled that "there is simply no equitable remedy or equitable jurisdiction application to this matter and the Defendants are entitled to judgment on the pleadings. Furthermore, I find and conclude that for this court to act as a 'superlegislature' and to unilaterally add language to an unchallenged, unambiguously worded statute would violate South Carolina law and the South Carolina Constitution." Melvin T. Roberts v. Mark Keel, Chief of the South Carolina Law Enforcement Division, and the State of South Carolina, Civil Action No(s): 2014-CP-21-01973, May 20, 2015 (unpublished).

³ Upon information and belief, all of these orders have been appealed and are currently awaiting adjudication at the South Carolina Court of Appeals.

⁴ Judge Russo signed this Order on April 16, 2015; however, it was not filed until May 20, 2015.

On June 16, 2015, The Honorable Clifton Newman ruled again that there was no equitable jurisdiction applicable to remove an individual from South Carolina's Sex Offender Registry. Marty Lee Barnes v. Mark Keel, Chief of the South Carolina Law Enforcement Division, and the State of South Carolina, Civil Action No(s): 2012-CP-43-00535, June 16, 2015 (unpublished).

On October 11, 2015, The Honorable Tanya Gee ruled that the constitutional application of the clear and unambiguous provisions of the Sex Offender Registry Act is not a "wrong cognizable in South Carolina law and that her equitable powers must yield in the face of South Carolina's clear and unambiguous sex offender registry statutes. As such, Judge Gee granted the Defendants' summary judgment. Edward L. Green v. Mark Keel, Chief of the South Carolina Law Enforcement Division, and the State of South Carolina, Civil Action No(s): 2015-CP-40-00590, October 11, 2015 (unpublished).

On November 3, 2015, the Honorable G. Thomas Cooper granted summary judgment on a similar case and ruled that the constitutional application of the clear and unambiguous provisions of the Sex Offender Registry Act is not a "wrong cognizable in South Carolina law". Judge Cooper also ruled that fashioning a remedy outside the clear and unambiguous provisions of SORA would exceed his equitable powers and that his equitable powers must yield in the face of South Carolina's clear and unambiguous sex offender registry statutes. David Johnson v. Mark Keel, Chief of the South Carolina Law Enforcement Division, and the State of South Carolina, Civil Action No(s): 2015-CP-43-0033, November 6, 2015 (unpublished).

On November 13, 2015, The Honorable D. Craig Brown ruled that the constitutional application of the clear and unambiguous provisions of the Sex Offender Registry Act is not a "wrong cognizable in South Carolina law" and that his equitable powers must yield in the face of

South Carolina's clear and unambiguous sex offender registry statutes. As such, Judge Brown granted the Defendants' summary judgment. Mansy McNeil v. Mark Keel, Chief of the South Carolina Law Enforcement Division, and the State of South Carolina, Civil Action No(s): 2014-CP-21-2220, November 13, 2015 (unpublished).

On December 16, 2015, the Honorable Carmen T. Mullen ruled that "equitable relief if not available" to a Plaintiff seeking to come off of the South Carolina Sex Offender Registry. Citing to Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007) and Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 379 S.E.2d 119 (1989); Judge Mullen found that there was no equitable jurisdiction for such removal. Leonard Kyles v. South Carolina Law Enforcement Division and Beaufort County Sheriff's Office, Civil Action No(s): 2013-CP-07-02828, December 21, 2015 (unpublished).

On February 23, 2016, the Honorable Paul M. Burch granted summary judgment on a similar case and ruled that the constitutional application of the clear and unambiguous provisions of the Sex Offender Registry Act is not a "wrong cognizable in South Carolina law". Judge Burch also ruled that fashioning a remedy outside the clear and unambiguous provisions of SORA would exceed his equitable powers and that his equitable powers must yield in the face of South Carolina's clear and unambiguous sex offender registry statutes. John Gregory v. Mark Keel, Director of the South Carolina Law Enforcement Division, and the State of South Carolina, Civil Action No(s): 2015-CP-16-0301, February 23, 2015 (unpublished).

On May 2, 2016, the Honorable George C. James, Jr. granted summary judgment on a similar case and ruled that the constitutional application of the clear and unambiguous provisions of the Sex Offender Registry Act is not a "wrong cognizable in South Carolina law". Judge James also ruled that fashioning a remedy outside the clear and unambiguous provisions of

SORA would exceed his equitable powers and that his equitable powers must yield in the face of South Carolina's clear and unambiguous sex offender registry statutes. Mack Paul, Jr. v. Mark Keel, Director of the South Carolina Law Enforcement Division, and the State of South Carolina, Civil Action No(s): 2015-CP-43-02548, May 2, 2015 (unpublished).

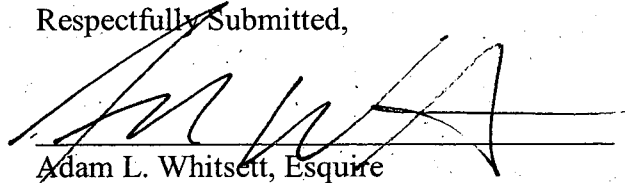
UNPUBLISHED SUPREME COURT OPINION

In addition, while having no precedential value on this action in accordance with Rule 268(d)(1), SCACR, the South Carolina Supreme Court issued an unpublished opinion on November 4, 2015 denying the request of several individuals to be removed from the SORA registry in equity citing S.C. Code Ann. § 23-3-430(F)-(G) as "enumerating specific circumstances under which a person's name may be removed from the registry" and citing to Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 61, 644 S.E.2d 675, 678 (2007) while acknowledging that "a court's equitable powers must yield in the face of an unambiguously worded statute." Dean and Brown v. Keel, 2015-MO-065 (filed November 4, 2015) *r' hrg denied* December 2, 2015.

CONCLUSION

Accordingly, for the reasons stated above and all those to be advanced at the hearing of this matter, summary judgment should be granted to the Defendants.

Respectfully Submitted,



Adam L. Whitsett, Esquire

General Counsel

South Carolina Law Enforcement Division

Post Office Box 21398

Columbia, South Carolina 29221-1398

Phone: (803) 896-0647

Fax: (803) 896-7588

Email: awhitsett@sled.sc.gov

S.C. Bar Number: 74888

Harley Kirkland, Esquire

Assistant Attorney General

Office of the Attorney General

State of South Carolina

Post Office Box 11549

Columbia, SC 29211-1549

Phone: (803) 734-0406

Fax: (803) 734-3677

Email: hkirkland@scag.gov

S.C. Bar No.: 100382

ATTORNEYS FOR THE DEFENDANTS

COLUMBIA, SOUTH CAROLINA

JUNE 10, 2016

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM AIKEN COUNTY

Court of Common Pleas

Honorable Doyet A. Early, III, Circuit Court Judge

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SC Court of Appeals

Case No: 2016-001677

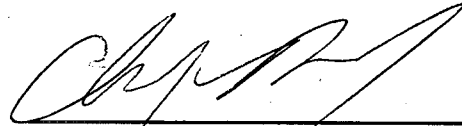
Clifford Judge.....Appellant

v.

Mark Keel, Director of the South Carolina Law Enforcement Division (SLED) and the State of
South Carolina Respondent

CERTIFICATE OF COUNSEL

I certify that the Record on Appeal contains all material proposed to be included by any
of the parties and not any other material.



Charles T. Brooks, III
The Brooks Law Offices, LLC
Post Office Box 3512
Sumter, South Carolina 29150
803-418-5708
Attorney for Appellant

Sumter, South Carolina