THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Honorable Jean Toal, Circuit Court Judge



---

Case No: 2016-002018

---

Fred S. Davis.....Appellant

v.

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

---

# RECORD ON APPEAL

---

Charles T. Brooks, III, S.C. Bar # 11762
Post Office Box 3512
Sumter, South Carolina 29151
803-418-5708
Attorney for Appellant

Adam L. Whitsett, Esq.
Post Office Box 21398
Columbia, South Carolina 29221
803-737-9000
Attorney for the Respondent

Office of SC Attorney General
ATTN: T. Parkin C. Hunter
Post Office Box 11549
Columbia, South Carolina 29211
803-734-3970
Attorney for the Respondent

## INDEX

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FIFTH JUDICIAL CIRCUIT |
| COUNTY OF RICHLAND | ) | Case No.: 2016-CP-40-00751 |
| Fred S. Davis, | ) | |
| Plaintiff, | ) | |
| v. | ) | **ORDER GRANTING SUMMARY JUDGMENT** |
| Mark Keel, Director, South Carolina Law Enforcement Division (SLED) and the State of South Carolina, | ) | |
| Defendants. | ) | |





#1

This matter came before me on September 7, 2016 on the Defendants' Motion for Summary Judgment. The Defendants were represented at the hearing by Adam L. Whitsett, Esquire, General Counsel to the South Carolina Law Enforcement Division.[1] The Plaintiff was represented by Charles T. Brooks, III, Esquire, of The Brooks Law Office, LLC. Based upon the filings submitted in this matter, the arguments presented at the hearing, and the applicable South Carolina law; I hereby GRANT the Defendants' Motion for Summary Judgment in this matter.

**BACKGROUND**

The Plaintiff was convicted of three counts of lewd act upon a child and one count of contributing to the delinquency of a minor on or about July 12, 2006.[2]. Based on these convictions, the Plaintiff was required to, and did in fact, register as a sex offender pursuant to the South Carolina Sex Offender Registry Act, § 23-3-400 *et seq.* ("SORA"). *See* S.C. Code Ann. § 23-3-430; State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) (holding that

[1] The Defendants are additionally represented in this action by Assistant Attorney General Harley Kirkland

[2] The Plaintiff was sentenced to 10 years for the lewd act upon a child and 3 years for the contributing; however, the sentencing court suspended these sentences to the service of 90 days to be served on the weekends and 5 years' probation.

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"). 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), SCRCP) (emphasis in original).

#2

"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), SCRCP

Based on his convictions, the Plaintiff was properly registered as a sex offender upon in accordance with SORA. S.C. Code Ann. § 23-3-430; 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 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").[3] 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.[4] *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 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

[3] 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".

[4] 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.

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").

#4 805

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 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)).

#5 845

302 S.C. 13, 15-16, 393 S.E.2d 184, 186 (1990).[5] 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 one must be listed on the sex offender registry is non-punitive, and it cannot constitute a deprivation of a constitutionally protected liberty interest.")

[5] 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.

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.").[6] 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.

#6

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 (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

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

committing a lewd act on a child are treated the same; and the classification rests on a reasonable basis. Classifying individuals, like the Plaintiff, who are lawfully convicted of committing a lewd act on a child 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.**

#8

Jean Hoefer Toal
Presiding Judge
Court of Common Pleas
5th Judicial Circuit

Columbia, South Carolina
Sept. 9, 2016





8

STATE OF SOUTH CAROLINA, )
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND )

FRED S DAVIS )
Plaintiff, )

vs. )

MARK KEEL, DIRECTOR, SLED, ET AL )
Defendant. )

SUMMONS

FILE NO. 2016-CP-40-



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: February 2, 2016

Plaintiff/Attorney for Plaintiff

Address: 309 Broad Street, Sumter, SC 29150

SCCA 401 (5/02)

| | |
|---|---|
| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | FIFTH JUDICIAL CIRCUIT |
| COUNTY OF RICHLAND ) | C/A NO.: 2016-CP-40-_____ |
| ) | |
| Fred S. Davis, ) | |
| ) | |
| PETITIONER, ) | |
| ) | |
| VS. ) | PETITION FOR |
| ) | DECLARATORY JUDGMENT |
| MARK KEEL, ) | (Non-Jury) |
| DIRECTOR, SOUTH CAROLINA) | |
| LAW ENFORCEMENT ) | |
| DIVISION (SLED), AND THE ) | |
| STATE OF SOUTH CAROLINA, ) | |
| ) | |
| RESPONDENT. ) | |

**********



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 Richland, 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 §16-15-140 (Lewd Act On a Child).

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 three counts of Lewd Act Upon A Child and one count of Contributing to the Delinquency of a Minor in Richland County on or about July 12, 2006 which were charges resulting from offenses alleged to have occurred between 1968-1971 when the Plaintiff was sixteen to nineteen years of age.

6. The Petitioner was sentenced to a term of incarceration of ten (10) years for the charges of Lewd Act Upon A Child and three (3) years concurrently for the charge of Contributing to the Delinquency of a Minor, the Court suspended the sentence to a ninety day sentence to be served on weekends and five (5) years probation.

7. 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: 1/15/2014

STATE OF SOUTH CAROLINA )
)
COUNTY OF RICHLAND )

VERIFICATION



FRED S. DAVIS 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 25th day of January, 2016 )
)
Notary Public for South Carolina )
)
My Commission expires: 03-05-2023 )

Fred S. Davis
Signature of Petitioner

Signature of Petitioner

KATINIA BELL
COM. EXP.
NOTARY
PUBLIC
03-05-23
SOUTH CAROLINA

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FIFTH JUDICIAL CIRCUIT |
| COUNTY OF RICHLAND | ) | Case No.: 2016-CP-40-00751 |
| Fred S. Davis, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | **ANSWER** |
| | ) | |
| Mark Keel, Director, South Carolina Law Enforcement Division (SLED) and the State of South Carolina, | ) | |
| | ) | |
| Defendants. | ) | |

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), SCRCP 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.



16

3. Paragraphs two (2) and three (3), to the extent they are characterizations as to the type of action this is require no response. The remaining allegations of paragraphs two (2) and three (3) are admitted upon information and belief.

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.

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").



17

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.

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<br><br>COUNTY OF RICHLAND | ) | IN THE COURT OF COMMON PLEAS<br>IN THE FIFTH JUDICIAL CIRCUIT |
| Fred S. Davis,<br><br>Plaintiff,<br><br>vs.<br><br>Mark Keel, Director, South Carolina Law Enforcement Division (SLED) and the State of South Carolina,<br><br>Defendants. | ) | Civil Action No. 2016-CP-40-00751<br><br>**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 Fred S. Davis was convicted of three counts of lewd acts upon a child and one count of contributing to the delinquency of a minor conduct with a minor on or about July 12, 2006. Compl. ¶5. He was sentenced to ten (10) years for the charges of lewd act upon a child and three (3) years concurrently for the charge of contributing to the delinquency of a minor. Compl. ¶6. The court suspended the sentence to a ninety-day sentence to be served on weekends and five (5) years of probation. 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 offender[1] pursuant to the South Carolina Sex Offender Registry Act ("SORA").

On or about February 2, 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 2006 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 | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FIFTH JUDICIAL CIRCUIT |
| COUNTY OF RICHLAND | ) | C/A NO.: 2016-CP-40-00751 |
| | ) | |
| FRED S. DAVIS, | ) | |
| | ) | |
| PETITIONER, | ) | |
| | ) | |
| VS. | ) | PETITIONER'S RETURN TO |
| | ) | MOTION OF RESPONDENT(S) |
| MARK KEEL, | ) | |
| DIRECTOR, SOUTH CAROLINA | ) | |
| LAW ENFORCEMENT | ) | |
| DIVISION (SLED), AND THE | ) | |
| STATE OF SOUTH CAROLINA, | ) | |
| | ) | |
| RESPONDENT. | ) | |



**********

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 in 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 |
| | ) | 2016-CP-40-00751 |
| COUNTY OF RICHLAND | ) | |
| | ) | |
| | ) | |
| | ) | |
| | ) | |
| | ) | |
| FRED S. DAVIS, | ) | |
| PLAINTIFF, | ) | |
| | ) | |
| vs. | ) | TRANSCRIPT OF RECORD |
| | ) | |
| S.L.E.D. and THE STATE OF SOUTH CAROLINA, | ) | |
| | ) | |
| DEFENDANT. | ) | |
| | ) | |

September 7, 2016
Richland, South Carolina

B E F O R E:

THE HONORABLE JEAN HOEFER TOAL, JUDGE

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

CHARLES THOMAS BROOKS, III, ESQ
Attorney for the Plaintiff

ADAM L. WHITSETT, ESQ
Attorney for the Defendant

CHERYL A. SMITH
Circuit Court Reporter

INDEX



EXHIBITS

| NO | DESCRIPTION | ID | EVD |
|---|---|---|---|

There were no exhibits introduced.

PROCEEDINGS

THE COURT: All right. I have the file now, and let's just be sure we've got -- so the motion to continue has been resolved. And what we've got is a motion for summary judgment, and I've got defendant's motion for -- a motion for summary judgment, I've got defendant's memorandum, I've got petitioner's return to the motion of respondent. And the return looks like it is also in the form of a memorandum; am I correct, Counsel?

MR. BROOKS: That's correct, Your Honor. I -- like Adam said, we've argued this case. It's kind of all over the state. And so ---

THE COURT: So we've got everything we need to go forward.

MR. WHITSETT: Yes, Your Honor.

THE COURT: All right. You're the moving party.

MR. WHITSETT: Thank you, Your Honor. May it please the Court. Adam Whitsett, general counsel at SLED here on behalf of all of the defendants in this matter, both Defendant Keel and the State of South Carolina who was actually represented by the attorney general's office who are here today. But I'm arguing on behalf of all the defendants in this matter asking for summary judgment because we believe that the relief requested in this action is simply not available as a matter of law.

The plaintiff in this case, Mr. Davis, was convicted of three counts of lewd act on a minor. Each of these is a mandatory registration offense that requires registration on the South Carolina sex offender registry. Registration in this state by statute is for life, and Mr. Davis is here today asking not for this court to allow him to come off the registry pursuant to any of the statutory avenues for removal that the Legislature has set forth.

He's asked for this court to basically rewrite the statute and to add a separate avenue for removal that simply does not exist as a matter of law, and one that we believe is simply not available as a matter of law, but that for this court to rewrite a clear constitutional and unambiguous statute would in and of itself be a constitutional problem and would violate the separation of powers and will be contrary to the clear and unambiguous law of this state. Put simply that the Supreme Court and the appellate courts of this state have offered some pretty clear guidance that courts should not sit as a super legislature to rewrite the decisions or rewrite constitutional clear and unambiguous statutes. There are some things that are just in the legislative purview and that are simply matters for the Legislature, and, respectfully, Your Honor, we submit that the

available avenues for relief and the available avenues to come off of the sex offender registry fit into that category. That is simply a matter of legislative prerogative, and the Legislature has said clearly and unambiguously there are three avenues for removal from the registry. There is no -- Mr. Davis does not meet any of these avenues, So we believe for this court to simply rewrite that statute to add an equitable avenue, to just remove him outside that statutory scheme is improper, would be in violation of the law, and would actually constitute a violation of the separation of powers doctrine set forth in the constitution of this state.

Case law is abundantly clear. Equity follows the law, and the courts just must yield in the face of clear and unambiguous statutes, which is what we have here. South Carolina Code 23-3-460 indicates that all registration in South Carolina is for life. "For life" is clear. It's unambiguous. There's simply no room for further interpretation. If you are a mandatory registrant, you must register for life. Courts can't simply just disregard that level of clear and unambiguous statutory language.

The best analogy that I can come up with in this scenario is legislatively created minimum or maximum sentences. There are simply some things that the

Legislature says if you are convicted of this offense, the Court can't go below this amount if it's a minimum, the Court can't go above this amount if it's a maximum. This is sort of a very similar type request, would be akin to an individual pleading guilty to kidnapping and asking Your Honor to sentence them below the statutory minimum, or the State asking Your Honor to sentence the individual above the statutory maximum. There are some things that the Legislature has just set that courts don't have the authority or the ability to go around, and the registration and the avenues for relief are that. The Key Corporate Capital case that I have cited and quoted throughout the memorandum says that specifically. It's just beyond the Court's power to effect a change in the statutes, and courts do not sit as super legislatures.

In anticipation of opposing counsel's argument, there is some case law -- there is no appellate case law on this specific issue. This issue was brought up one time previously on a case out of, I believe, Marion County in the Johnson vs. Lloyd case. And that was a case which arose as a constitutional challenge to the registry.

Judge Seals, Circuit Court Judge Seals held that the registry was, in fact, constitutional, but then removed

Mr. Johnson from the registry asserting his equitable authority to do that. That was challenged because that wasn't really raised. It was challenged at the Court of Appeals.

The Court of Appeals issued an opinion, which I would like to hand up to Your Honor, that actually went into the merits of that decision and ruled that that was an improper exercise and that Judge Seals did not have the authority to do it. Unfortunately, the Supreme Court ultimately reversed that decision on issue preservation grounds, and I think it was abundantly clear it was an issue preservation situation only. And I have given those -- I would like to hand them up just because ---

THE COURT: Yes, sir.

Copies of Johnson against Lloyd, Supreme Court decision April 23, 2014, was received. A copy of Johnson vs. Lloyd decision by the Court of Appeals June 6, 2012, also received.

MR. WHITSETT: Thank you, Your Honor.

And the Court of Appeals went into, as I stated -- I mean, certainly it's not precedent. We don't sit here and argue that this is controlling. It has clearly been reversed on preservation grounds. But I think the analysis that the Court of Appeals set forth is the analysis that should be applied in this case, and we

believe that it was a correct analysis in terms of what the law in this state says.

And the Court of Appeals -- I know I submitted it, I know Your Honor will read it, but just to quote a couple of things, the Court of Appeals went in specifically and noted it's well-known that equity follows the law. And while equitable relief is generally available when there is no adequate remedy at law, an adequate legal remedy may be provided by statute, and when providing equitable remedies, courts may not ignore statutes, rules and other precedent. And they went on to say, "Indeed, a court's equitable powers must yield in the face of an unambiguously worded statute."

They went on further to acknowledge in Mr. Johnson's situation, very similar to the situation with Mr. Davis here, Mr. Johnson did not seek to avail himself of any of these statutory remedies available in the statute, and I submit to the Court I don't believe that Mr. Davis has submitted or availed himself of these remedies. I know he will assert that it's unlikely that he would prevail on any of those, but the Court of Appeals in Johnson dealt with that as well. It says just because you're not entitled to the relief available in the law does not affect whether or not the legislative relief is an adequate remedy. If the statute provides a remedy, it is

and can be adequate even if it doesn't apply to you.

And so, I mean, we would submit that that -- despite the fact that Mr. Davis has not even availed himself of the appropriate statutory avenues, it really doesn't matter. The Legislature has set them in the statute, has provided avenues of relieve, and that that is an adequate remedy, and that for this court to simply go beyond that relief would be in excess of this court's powers and that this court simply cannot do that.

If there's a push in the Legislature to expand it, if there's a sentiment across this state that the Legislature should do more, that's certainly something the Legislature can undertake and can endeavor to get into. But short of the Legislature changing this clear and unambiguous statute, there's simply not equitable relief available to an individual in this particular circumstance.

23-3-430(E)(F) and (G) set forth the specific avenues of relief for an individual. Mr. Davis did not avail himself of any of these possible avenues. I believe his position will be that he wouldn't be able to take advantage of any of them anyway. But simply put, the Legislature has spoken on the available avenues of relief. Mr. Davis concedes he does not meet them, cannot avail himself of them, so we believe ---

THE COURT: And that's why he seeks a remedy in equity. He says the statutes don't allow me to pursue removal unless the offense for which I was put on the registry is reversed, overturned or vacated on appeal. That's the only thing in the statute that gives you relief from registration or allows you to be removed. He said that doesn't take into account the other equitable situations that exist out there, so he's making the argument that convinced Judge Seals. And so far, our court has not spoken on that.

I don't know whether the Dean and Brown against Keel case that came right at the end of my service on the Court denying removal is any kind of straw in the wind, but that case, again, removal was denied for procedural reasons. That was an attempt to just get the Court directly to do it. But that doesn't preclude bringing these issues forward on an appellate process or otherwise, because the equity matter has been ruled on by the Court of Appeals but has not yet been ruled on by the Supreme Court. Is that the landscape as you understand it?

MR. WHITSETT: Yes, Your Honor. And I can assert that we do have several of these very similar cases on appeal and in the appellate process, and ---

THE COURT: Nine Circuit judges have already denied

-- have already granted summary judgment on similar cases. There are other cases, I guess, in the pipeline. Have you got any where the relief has been granted?

MR. WHITSETT: No, Your Honor. Not in this specific context.

THE COURT: Not in this group. You've got the old Seals ruling, and that's about it.

MR. WHITSETT: That's correct, Your Honor. That's as I understand it.

THE COURT: And, of course, I'm sure your opposing counsel is going to educate me much more fully on this whole matter.

MR. WHITSETT: That's correct.

THE COURT: Have you completed your presentation?

MR. WHITSETT: Essentially, Your Honor. And I would only further -- that the final point that I would make is his entire equitable argument is that his constitutional registry requirement, his nonpunitive registration requirement is somehow a wrong in need of a remedy. And put simply, the constitutional application of a constitutional nonpunitive statute is simply not a wrong in which the Court needs to create an equitable remedy.

It's not -- I mean, so I would submit that for the Court to exercise equitable powers, there would have to be some finding that the application of a constitutional

statute to this individual is somehow a wrong cognizable in South Carolina law, and we submit that it is simply not a wrong. This is a constitutional application of a constitutional nonpunitive statute. It's no wrong in need of the Court to step in and exercise equitable jurisdiction and to rewrite a constitutional clear and unambiguous statute.

THE COURT: Speaking from memory now, but my recollection is that there have been some cases that have recently been decided by the South Carolina Supreme Court that deal with due process implications of lifetime registration and whether a person had an adequate ability to be reviewed every now and then.

MR. WHITSETT: Your Honor, in the Dykes case, and, I believe -- and that's one that I believe opposing counsel will touch on. And Dykes was a lifetime monitoring case. It was an electronic monitoring case. And the issue in the Dykes case is that the statute did provide for review for several of the offenses that required electronic monitoring, but did not provide review for the host of others.

And the issue in Dykes was -- that was -- the Court ultimately -- that's arbitrary decision. The decision to have some available for review, some not when there seems to be no real correlation, I mean, on the scale of

egregiousness of charges, you had some that were lower on that scale that were available for review, you had some that were higher on that scale that were not, and so the decision in Dykes ultimately came down to, well, it's arbitrary to allow review for some, not to allow review for others, and that situation simply does not exist in this context. Everyone who is required to register in this state is treated the same, has the same possible avenues for relief, and so you've got sort of an apples-and-oranges situation in Dykes.

THE COURT: Well, the treatment is there is no review.

MR. WHITSETT: That is a lifetime registration, and that is what the Legislature has enacted, that's the law of this state as put forth by the Legislature. So Dykes is really sort of a different scenario. And I don't believe that the Dykes' decision is applicable in this case because you don't have that arbitrary distinction concern in this case. Everyone in this case is treated the same, everyone registers for life and the process ---

THE COURT: And we do have decisions with respect to lifetime registration, do we not?

MR. WHITSETT: That's correct, Your Honor. There's multiple decisions.

THE COURT: And then we have multiple cases that

have challenged the overall constitutionality of the statutory scheme and have found that lifetime registration is constitutional.

MR. WHITSETT: That's correct. It's not a violation of due process and is not even a deprivation of any constitutionally guaranteed liberty. I believe that the Hendrix vs. Taylor case that I've cited -- I mean Hendrix and In RE Ronnie A., there's several cases across, you know, the spectrum that have upheld the constitutionality of lifetime registration.

THE COURT: Well, we've got a new twist which is the equitable argument. And so far the South Carolina Supreme Court has not spoken.

MR. WHITSETT: That's correct, Your Honor.

THE COURT: Very good. Thank you, Mr. Whitsett. Let's hear from your opposing counsel.

MR. BROOKS: Thank you, Judge. I have to admit, a lot of the things you said already kind of feeding into the arguments that I was going to present to the Court.

But just by background information, as Mr. Whitsett had indicated, we've had -- I don't know if this is the 9th, 10th case, maybe he has an accurate count of it. We've done them in Florence, Sumter, Aiken, what have you. But basically, Judge, our position is that it needs to be an equitable remedy. That's what Judge Seals had

found and determined to be in the Johnson case. And although the Court of Appeals overturned him, the Supreme Court overturned them, and obviously, Mr. Johnson, in his case, was on the registry, is no longer on the registry, which is similarly situated as Mr. Davis, my client.

Judge, our position, and just by background in handling these cases, is we feel, as you've indicated, that the South Carolina Supreme Court has not ruled specifically on that issue, but the South Carolina Supreme Court is not in a vacuum. They knew that we published this decision for all to see in regards to Johnson where there's issue preservation or some other legal issue who knew that now we are -- the Supreme Court is stepping in, and I have carved out or opened the door slightly for a potential equity argument. And, obviously, in this situation, Judge, we are opposing the defense motion to slam the door on Mr. Davis. We're asking to at least have a hearing as to determine whether or not Mr. Davis would have any equitable arguments or positions or evidence as to him being taken off the registry.

But, Judge, I want to give you a little bit of background of some of these other cases that may not necessarily be applicable in this case is that what we have done, which is different than the Johnson case, is

what we've done is we've had some clients actually go and see a forensic psychiatrist. Now, I don't know -- I don't think we have an affidavit in this case, but what we've done is -- and I'm sure Your Honor's obviously familiar with the sexual violent predator program. We came up with the idea the reason you have a sexual violent predator program and the reason you have evaluations is to determine whether or not somebody is likely to do it again.

What our thought process is the reason you have the sexual registry in existence is because the State has determined that they are the certain class of individuals that were convicted of certain sexual offenses that are likely to do it again, and as a result, we want to make sure we use it as an investigative tool, and in addition to that, we want to alert the public to this individual and that individual's presence.

Well, what we did was we've submitted -- we would have our clients evaluated by Dr. Thomas Martin who's done a great deal of these on the SVP cases, and he would render an opinion as far as in an affidavit form. I don't think I have one in this case because we -- Adam and I've had a wide latitude of cases, but I think it's important for the Court to know what the overall position is and why we've had a number of these cases and why we

feel like that ultimately, there needs to be some equitable remedy for these class of individuals.

If a person does something in their past and they plea, obviously, they need to have some mechanism to be able to go back and live a wholly productive live. We understand there's a need for registry and the courts have said that the registry passes constitutional muster, but we feel like the statute is incomplete and does not provide for an equitable remedy where the statute does not apply any remedy for a vast number of individuals, one of which happens to be Mr. Davis in this case.

We do acknowledge that a great deal of Circuit Court judges have pretty much sided with my friend, Mr. Whitsett here, and that is of no surprise to us. But we do acknowledge and we do realize that the South Carolina Supreme Court has not specifically said in equitable argument, but we feel that they are -- how should I say it? They're kind of scurrying around the edges of it. Because if they didn't want to do it, then they didn't have to do it. Or even if they wanted to do it on the grounds of issue preservation, that didn't necessarily have to be published.

But we feel like when the Court says we're taking a guy off the registry, we -- I said that the people on the Supreme Court are very, very wise, and they know when we

make a decision, that it's going to have significant ramifications no matter what the rationale we give for that decision. And that's what we think happens in this case with the Johnson case, and we feel like Mr. Davis and a wide number of other individuals should have the option to be able to have some equitable remedy where there's statutorily one does not exist.

That's the crux of our argument, Judge. We put it in our response to Mr. Whitsett's brief, and I think I'll be brief, Judge.

THE COURT: Very good. Thank you, very much.

Counsel, Mr. Whitsett?

MR. WHITSETT: Very, very briefly. I don't want to belabor the point, but I think the Supreme Court, in the Johnson case, was abundantly clear in ruling that the Court of Appeals should not have touched the merits and said, and I quote, "Because the State failed to argue that the petitioner was not entitled to equitable relief until its brief to the Court of Appeals, the issue was not preserved for appellate review. We therefore reverse the Court of Appeals' opinion on preservation grounds."

I do not believe that that case stands for the precedent that the Supreme Court is mandating hearings on these types of cases or is mandating that the Court of Appeals', you know, decision was somehow incorrect on the

law. I submit that the analysis by the Court of Appeals was in accordance with the law, the cases cited therein are all still good law, applicable law and that that is the law that applies to this hearing regardless of the fact as whether the Supreme Court has specifically ruled on this or not.

The law relied upon by the Court of Appeals in the Johnson case still exists as the law today. The Santee Cooper case that they -- that the Court of Appeals cited is the same Santee Cooper case that I cite. I've additionally cited the Key Corporate Capital Supreme Court opinion. That is still good law. That is still applicable law. And those cases stand for the proposition that the equitable powers of the Court must yield in the face of clear and unambiguous statute, and put simply, the argument that the statute's incomplete or should have been rewritten is simply not enough for this court to rewrite a constitutional clear and unambiguous statute and does not justify this court acting as a super legislature and rewriting an otherwise clear, unambiguous and constitutional statute. So we would ask for summary judgment on behalf of all the defendants in this matter.

THE COURT: Thank you, Mr. Whitsett.

MR. WHITSETT: Thank you.

THE COURT: All right. Now, just so my records are

complete, appearing for the plaintiff is?

MR. BROOKS: Charles Brooks.

THE COURT: Brooks.

MR. BROOKS: Yes.

THE COURT: They have Charles Thomas here.

MR. BROOKS: My middle name is Thomas, Charles Thomas Brooks.

THE COURT: Oh. Wait a minute. Oh, I see. I'm sorry. I have to go to the next page. I said, Gosh, what in the world? Okay. We've got -- I've got my records straight then.

Gentlemen, I will take this under advisement. And I haven't taken many cases under advisement so far, but I think your arguments are thoughtful and that I actually consider them thoughtfully and come forward with something that takes into account what each of you has cited, and I'll do that.

MR. BROOKS: Thank you, Judge.

THE COURT: Thank you very much.

MR. WHITSETT: Thank you, Your Honor.

THE COURT: I'll tell you what you all could do. I am sure that in the course of your argument of these matters before that you've each been asked to submit proposed orders. All right. If you'd like to pick out one you like the best, you don't need to prepare one

specially for this one, if you want to just send me one of the ones that -- because I'd like to go on and jump on this and get it done promptly for you. So if each of you would just e-mail it to Amelia Waring, my law clerk, when you get back to the office today a copy of the one you like the best or ones you like the best, then that's all you need to do and I can take it from there.

MR. BROOKS: Yes, ma'am.

MR. WHITSETT: Happy to.

THE COURT: All right. Let's be sure you have the correct e-mail address. It's awaring, W-A-R-I-N-G, @sccourts, C-O-U-R-T-S, .org.

MR. BROOKS: Yes, ma'am.

THE COURT: If you want to copy me you can as well, and that's jtoal@sccourts.org.

Thanks so much to each of you for a very thoughtful presentation.

MR. BROOKS: Thank you, Judge.

**********END OF TRANSCRIPT OF RECORD**********

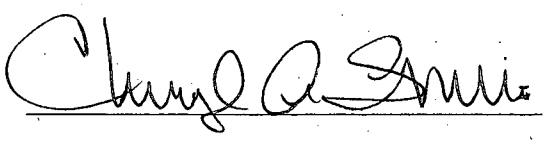
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA )
COUNTY OF GREENVILLE )

I, CHERYL A. SMITH, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 7th day of September, 2016.

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

October 3, 2016



Cheryl A. Smith, CVR-M
Court Reporter

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | ***** JUDICIAL CIRCUIT |
| COUNTY OF RICHLAND | ) | C/A NO: 2016-CP-40-751 |
| | ) | |
| FRED SHEPARD DAVIS | ) | AFFIDAVIT OF THOMAS V. MARTIN, M.D. |
| PETITIONER | ) | |
| VS | ) | |
| MARK KEEL | ) | |
| DIRECTOR, SOUTH CAROLINA | ) | |
| LAW ENFORCEMENT | ) | |
| DIVISION (SLED), AND THE | ) | |
| STATE OF SOUTH CAROLINA | ) | |
| RESPONDENT | ) | |

I, Thomas V. Martin, M.D., am a licensed physician (psychiatrist) in the state of South Carolina. I am Board Certified in General and Forensic Psychiatry by the American Board of Psychiatry and Neurology and the American Board of Forensic Psychiatry. My practice is located at 1330 Richland Street, Columbia, SC. My practice includes the care and treatment of patients from childhood to geriatrics. I have been qualified to testify in numerous counties in South Carolina as well as the United States Federal Courts. My practice of twenty five years includes the assessment and treatment of many sexual offenders from all counties in South Carolina.

Being duly sworn I do swear and affirm the following:

1) Mr. Fred Shepard Davis is a 63 year old self-employed, married Caucasian male from Columbia, South Carolina. He carries a mental health history of ***Alcohol Dependence, in full remission*** and ***Mood Disorder due to Alcohol Dependence*** each requiring inpatient and outpatient therapeutic treatment. Mr. Davis' mental health condition has been stable for many years. He was arrested and charged with multiple sexual offences against minors in 2004, and pled guilty in 2006 to *Lewd Act on a Minor* and *Contributing to the Delinquency of a Minor* in Richland County General Sessions Court. He was sentenced to 10 years suspended to 90 days weekend incarceration, five years' probation, and submission to the SC Sex Offender Registry. He committed no probation violations, had no positive drug screens, and successfully completed his probationary sentence in 2011. Mr. Davis has never failed to comply with the SC Sex Offender Registry requirements. He is now petitioning to have this requirement removed and be taken off the lifetime registry.
2) This Examiner's assessment of Mr. Davis' case and petition included a two and one half hour interview with Mr. Davis, consultation with his spouse, Ms. Betsy Hackett-Davis, a review of his criminal record and plea transcript. Furthermore, Mr. Davis was twice evaluated by this Examiner; first on May 20, 2005 pursuant to the request by the SC Department of Probation, Parole, and Pardon Services; and second on August 16, 2006 pursuant to the request of his attorney, Mr. John Delgado, Esq.
3) Mr. Davis presented with a long, consistent history of serious alcohol dependence. His condition was fraught with disturbed relationships and depressive symptoms that led to

suicidal ideations and psychiatric hospitalization. He required multiple psychiatric admissions and residential treatment at a substance abuse rehabilitation facility. Mr. Davis has maintained healthy sobriety and mood stability since 2000. He became an active participant and motivational speaker both at Alcoholics Anonymous and at the local rehabilitation facility. As a significant part of his rehabilitation, Mr. Davis purposefully contacted prior victims that while intoxicated, he sexually offended between 1969 and 1981. This ultimately led to his arrest in 2004.

4) Diagnostically and after three forensic psychiatric evaluations, Mr. Davis does not meet the criteria for a current major mental illness, nor does he meet the criteria for a sexual perversion disorder (Paraphilia). He still does not require sex offender-specific therapy.
5) In conclusion, Mr. Davis has maintained a laudable demeanor, and has made valiant efforts to reintegrate into the community as a productive citizen. Mr. Davis consistently demonstrates appropriate behavior in his church and with his spouse and family.
6) It is pertinent to note that Mr. Davis' quarterly re-registry as a sexual offender has only proven to be detrimental to his sense of integrity, is preventing him from maintaining relationships with friends, instills fear of violent community retaliation, and adversely impacts his own business. He and his wife wish to move into an upscale neighborhood, yet the SC Sex Registry has precluded his family transition in the community. Mr. Davis feels haunted by the fact that his name remains on the registry and when friends and customers have incidentally seen his name, many have become inquisitive, guarded, or avoidant.
7) It is the opinion of this Examiner to a reasonable degree of medical and psychiatric certainty that Mr. Davis poses a very low risk to sexually reoffend. Mr. Davis does not need any deterrent to prevent him from sexual acting out behavior. The SC Sex Offender Registry serves to assist law enforcement and the community in monitoring those dangerous individuals who do not manage their aberrant sexual behaviors and fail to follow our social and community mores. Mr. Davis does not meet these criteria, nor does he require such monitoring.

Further affiant sayeth not.

Thomas V. Martin, M.D.

Sworn to before me this 24th day of March 2016

Joy G. Covington Grimsley

Joy G. Covington Grimsley
A Notary Public for South Carolina
My Commission Expires: 12-15-2017

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | FIFTH JUDICIAL CIRCUIT |
| COUNTY OF RICHLAND | ) | Case No.: 2016-CP-40-00751 |
| Fred S. Davis, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | **DEFENDANTS' MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT** |
| v. | ) | |
| | ) | |
| Mark Keel, Director, South Carolina Law Enforcement Division (SLED) and the State of South Carolina, | ) | |
| | ) | |
| Defendants. | ) | |

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), SCRCP (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), SCRCP.

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 multiple counts of lewd act committed upon a child and each of these convictions mandates 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 statue 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

[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.

that this Court's 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.



59

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).

On June 16, 2016, the Honorable Doyet A. Early, III, notified the parties that he was granting summary judgment on an identical issue argued in the Aiken County Court of Common Pleas. A written order on this matter is forthcoming. Clifford Judge. v. Mark Keel, Director of the South Carolina Law Enforcement Division, and the State of South Carolina, Civil Action No(s).: 2016-CP-02-0268.

**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 22, 2016

**THE STATE OF SOUTH CAROLINA**

**In the Court of Appeals**

---

RECEIVED

MAR 16 2017

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Honorable Jean Toal, Circuit Court Judge

---

Case No: 2016-002018

---

Fred S. Davis.....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