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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Grace Gilchrist Knie, Circuit Court Judge

Civil Action No. 2017-CP-32-00712

John Doe, ...Appellant,

v.

Mark Keel, Chief, State Law Enforcement Division, and the State of South Carolina ... ...Respondent.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES and AUTHORITIES

CASES

CONSTITUTION

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUE ON APPEAL

I. The circuit court erred in granting summary judgment to Defendants and concluding the lifetime registration requirement for unenumerated offenders is Constitutional.

STATEMENT OF THE CASE and STATEMENT OF FACTS

The Petitioner, John Doe ("Doe"), pled guilty to Assault and Battery of a High and Aggravated Nature ("ABHAN") in 2005. See Complaint, ¶ 16. As a part of that guilty plea the Circuit Court ordered Doe to register as a sex offender pursuant to South Carolina Code Annotated Section 23-3-430(D). See Complaint, ¶¶ 17, 18. Doe has registered as a sex offender since that time – for fourteen (14) years.

Doe filed the instant declaratory judgment action on March 3, 2017, in the Court of Common Pleas for Lexington County, the county in which he registers (the "Action"). See Complaint. In the Action, Doe seeks a declaration that certain provisions of the South Carolina Sex Offender Registration Act ("SORA") are unconstitutional. Id. Specifically, Doe alleges in the Complaint that in adopting a sweeping, across the board lifetime registration requirement for all offenses, even those unenumerated offenses, without judicial review, SORA is unconstitutional. Defendants State of South Carolina and Mark Keel, Chief, State Law Enforcement Division ("State") responded, denying the allegations and thereafter moved for Summary Judgment. See Answer, Motion for Summary Judgment and Memorandum in Support Thereof.

A hearing on the State's Motion for Summary Judgment was held before the Honorable Grace Knie on December 19, 2018. See Transcript of Proceedings on December 19, 2018. Doe submitted a Memorandum in Opposition to the State's motion which included several studies regarding recidivism. Response in Opposition to Defendants' Motion for Summary Judgment. The Court heard argument from the parties and thereafter on February 11, 2019, entered its Order Regarding Defendants' Motion for Summary Judgment which ultimately granted the State's motion. See Order Regarding Defendants' Motion for Summary Judgment. Doe timely moved

for reconsideration which was denied on March 21, 2019. See Final Order Regarding Defendants' Motion for Summary Judgment. Plaintiff timely appealed. For the reasons set forth herein, SORA is unconstitutional and should be stricken.

STANDARD OF REVIEW

The scope of review in cases involving a constitutional challenge to a statute is limited because all statutes are presumed constitutional and, if possible, will be construed to render them valid. *See Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001) (citing *Davis v. Cnty. of Greenville*, 322 S.C. 73, 77, 470 S.E.2d 94, 96 (1996)).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDMGMENT TO DEFENDANTS AND CONCLUDING THE LIFETIME REGISTRATION REQUIREMENT FOR UNENUMERATED OFFENDERS IS CONSTITUTIONAL.

Originally enacted in 1994, SORA outlines its purpose is to "promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens," and "provide law enforcement with the tools needed in investigating criminal offenses." See S.C. Code Ann. § 23-3-400. This stated purposes, however, is not effectuated through the lifetime registration requirement for all offenses. The lifetime registration requirement for even unenumerated offenses eliminates the possibility of rehabilitation, a primary goal of the criminal justice system. SORA declares that once an offender, always an offender. This is where the Constitutional problems exist for SORA.

Federal law, unlike SORA, provides for a 3 tiered system, classifying offenders based upon the offense of conviction, and thereby their likelihood of reoffending. Under SORA, if a defendant is convicted of an offense not specifically listed but the presiding judge orders

registration, the defendant is subject to the lifetime registration requirement. S.C. Code Ann. § 23-3-430(D). Under the Federal version (SORNA), if a defendant is convicted of an unenumerated offense, they would be classified as a Tier 1 offender and would have their registration requirements terminate automatically after 15 years, and could have their registration terminated after 10 years. 34 U.S.C. § 20915(a)(1) and (b)(1). South Carolina is SORNA compliant by having more severe requirements than SORNA. Whether these more severe obligations, and the inability to be removed from the registry for cause, presents the problems with SORA.

A. Constitutional challenge

South Carolina courts to date have found registration is not a punishment, despite the penal and punitive impact of such a requirement. *See State v. Walls,* 348 S.C. 26, 30-31, 558 S.E.2d 524, 526 (2002); *Hendrix v. Taylor*, 353 S.C. 542, 551-52, 579 S.E.2d 320, 325 (2003). As recently as 2013, in *In re Justin B.*, 405, S.C. 391, 747 S.E.2d 774 (2013), this Court evaluated an Eighth Amendment challenge to SORA following the United States Supreme Court's decision in *Smith v. Doe*, 538 U.S. 84 (2003), in the context of a lifetime electronic monitoring requirement for juvenile sex offenders pursuant to South Carolina Code Annotated Section 23-3-540. The analysis therein focused on whether the monitoring was a punishment, as defined by *Kentucky v. Mendoza-Martinez*, 372 U.S. 144 (1963). A review of the *Mendoza-Martinez* factors ultimately led to this Court concluding that the lifetime electronic monitoring for juvenile offenders was not "punishment," but noted the ability of the registrant to petition for judicial review in its analysis. *See also State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013).

More recently than *In re Justin B.*, the Sixth Circuit Court of Appeals conducted a similar

Mendoza-Martinez analysis in evaluating Michigan's sex offender registry, but the analysis was different from that in *In re Justin B* which ultimately determined that the registration was a punishment. *See Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016)(cert denied, 138 S.Ct. 55, Oct. 2, 2017).

Similar to SORA, the Michigan law outlined a stated purpose of protecting citizens and aiding law enforcement, which the *Does* Court concluded did not reveal a punitive intent. *See Does*, 834 F.3d at 700-701. Noting the lack of punitive effect in the language of the statute itself, the five (5) factors outlined in *Smith* and *Mendoza-Martinez* were addressed: history and traditions as punishment; affirmative disability or restraint; promotion of traditional aims of punishment; rational connection to non-punitive purpose; and excessiveness to this purpose. *See Does*, 834 F.3d at 701-706; *Justin B.*, 405 S.C. at 396-408; 747 S.E.2d. at 777-783.

Of note, the Justin B. Court, in addition to outlining the *Smith* Court's evaluation of the *Mendoza-Martinez*, chose to rely upon the Sixth Circuit's decision in *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007) which upheld an ex post facto challenge to Tennessee's registration act. In evaluating the Tennessee Act, much of the discussion is similar to that of *Does*, with one important distinction. In evaluating whether the statute at issue bore a rational relation to a non-punitive purpose, the *Does* Court looked to recent empirical data showing "[t]he requirement that registrants make frequent, in-person appearances before law enforcement, moreover, appears to have no relationship to public safety at all." *Does*, 834 F.3d at 704-05. This empirical data was absent in the *Bredesen* case of nine (9) years earlier. In fact, in *Bredesen*, the Court took care to note that the accuracy and relevance of the statistics cited in the Tennessee act were not contested. *Bredesen*, 507 F.3d at 1006.

Similar to both the Tennessee and Michigan statutes, the stated purpose of SORA is to "promote . . . the public health, welfare, and safety of its citizens" and "provide law enforcement with the tools needed in investigating criminal offenses." *See* S.C. Code Ann. § 23-3-400. To support this proclamation, this section goes on to recite "[s]tatistics show that sex offenders often pose a high risk of re-offending." *Id.* "Statistics" cited in the Tennessee statute were not challenged and the registration was not seen as a punishment. *See Bredesen*, 507 F.3d at 1006. "Statistics" have yet to be challenged in South Carolina. They are herein challenged.

Empirical data was submitted in *Does*, which revealed the error in the preamble, and rendered the registration a punishment. As this Court has already demonstrated reliance upon the Sixth Circuit is appropriate, in a case such as the present, where studies were presented revealing the absence of any relationship to public safety and the registration, guidance from the Sixth Circuit in *Does* is now also proper.

Based upon the record presented at the hearing in circuit court, the State of South Carolina has commissioned no studies to support the stated goals of SORA. Other states have commissioned such studies and as demonstrated in the studies presented to the circuit court, studies commissioned in other states have shown that "[t]here is no clear evidence to support that SORNA implementation has made the public safer, deterred any sexual offenses, or contributed to the arrest or discovery of any sex offender." See Ohio Criminal Sentencing Commission, Ad Hoc Committee on Sex Offender Registration, Report and Recommendation, April 2016. "The majority of SORN effectiveness studies have shown very little evidence of reduced recidivism as a result of these laws, and the few studies finding reductions attributable to SORN were conducted in states using empirically derived risk classification systems and targeted notification strategies."

See The Adam Walsh Act: An Examination of Sex Offender Risk Classification Systems, Kristen M. Zgoba, et al., Sexual Abuse: A Journal of Research and Treatment, p.7. Thus, based upon the only research provided to the circuit court, the stated purpose of SORA is not achieved through the instant vehicle. There is no rational relation to a non-punitive purpose and a lifetime registration is excessive, especially considering the absence of justification from the studies. Registration is a punishment.

Looking to the other factors, as acknowledged in other courts, registration has both civil and penal goals. As such, little weight was accorded this factor. *See Does*, 834 F.3d at 704.

The remaining factors, historical punishment and affirmative restraint, would also reveal registration is a punishment. As discussed in *Does*, the Michigan statute, by including more information than publically available to include published tier classification without any individual assessment and which cannot be appealed resembles public shaming, akin to the ancient punishment of banishment. *See Does*, 834 F.3d at 702-03. Regarding restraint, *Does* notes that regulations regarding where registrants may live, work and "loiter," together with the requirement that the registrant appear in person is a direct restraint on personal conduct. *See id*, at 703. A correlation between the restraint required and the absence of a nexus between the regulatory purposes is noted. *See id.* at 704.

Similar to the Michigan statute in *Does*, SORA publishes information about the registrant that is not available publically. The offense of conviction is published, but for the unenumerated offenses, there is nothing inherent in the count of conviction which would, by itself, reveal a sexual offense. SORA requires biannual registration in person at the law enforcement office where the registrant resides. SORA publishes all known addresses of the registrant and all known vehicles

associated with the registrant. Multiple photographs are published of the registrant and a Tier classification is also published and because the dates of said photographs are also published the public is notified when a registrant's next registration is required. Such information outlines when and where a registrant will be. Furthermore, nothing published therein is subject to challenge or judicial review. These are the same types of items the Sixth Circuit regarded as punishment.

B. **Cruel and Unusual**

As requiring registration, viewed now with empirical data, is punishment, it must be reasonable. The Eighth Amendment to the United States Constitution mandates "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. XIII. The Eighth Amendment, and specifically the cruel and unusual punishment clause, prevents a punishment from being grossly disproportionate with the severity of the crime. *See State v. McKnight,* 352 S.C. 635, 652, 576 S.E.2d 168, 177 (2003). Most recently, South Carolina Courts have recognized that "what constitutes cruel and unusual punishment, and thus, what violates the Eighth Amendment, is determined by 'evolving standards of decency that mark the progress of a maturing society.' " *State v. Williams*, 380 S.C. 336, 346, 669 S.E.2d 640, 645–46 (Ct. App. 2008)(*citing State v. Pittman,* 373 S.C. 527, 562, 647 S.E.2d 144, 162 (2007), *cert. denied,* 552 U.S. 1314, 128 S.Ct. 1872, 170 L.Ed.2d 751 (2008)). Courts are to look to objective evidence of how society views a particular punishment today. *See id.* (*citing State v. Wilson,* 306 S.C. 498, 509-10, 413 S.E.2d 19, 26 (1992). Additionally, the "'proportionality' bedrock of Eighth Amendment jurisprudence" is equally important a principle as the "evolving standards of decency," and " 'it is a precept of

justice that punishment for crime should be graduated and proportioned to [the] offense.'" *See id.*, 380 S.C. at 347, 669 S.E.2d at 646 (*citing Pittman,* 373 S.C. at 564-65, 647 S.E.2d at 163 (quoting *Atkins v. Virginia,* 536 U.S. 304, 311, 122 S.Ct. 2242, ___ (2002)).

As noted, while it was originally perceived that registration under SORA might have some legitimate purpose, studies have more recently shown the absence of any such correlation. Views have thereby evolved to a point where a lifetime registration requirement without any possibility of judicial review for those unenumerated offenses is disproportionate. Requiring a lifetime of registration, without any data to support a benefit to the public, is cruel and unusual and cannot withstand Constitutional muster.

C. **Due Process and Equal Protection**

In addition to violating the Eighth Amendment's prohibition against cruel and unusual punishment, SORA also violates the due process and equal protection clauses of the state and federal constitutions. The United States Constitution provides that "[no state] shall []deprive any person of life, liberty, or property, without due process of law; no state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; *see also* S.C. Const. art. I, § 3. Both clauses are implicated here as Plaintiff has no opportunity for review of any risk of re-offense and he is not provided equal protection under the law as his unenumerated offense conviction is treated identically to those enumerated offenses to include criminal sexual conduct in the first degree. The two offenses are not the same and any risk of re-offense is not the same. While the punishment is "equal" the protections under the law are not.

As a fundamental right is implicated with SORA, strict scrutiny applies. Article I, Section 10 of the South Carolina Constitution provides that South Carolinians have a recognized right to

privacy. Such would be a fundamental right which implicates strict scrutiny. While in *Hendrix v. Taylor*, 353 S.C. 542, 579 S.E.2d 320 (2003), this Court rejected a similar claim of a fundamental privacy right, the facts of that case are much different from the instant situation. There, the defendant was convicted of criminal sexual assault in the third degree in Colorado, which our Supreme Court recognized as a public record. Certainly, public records outlining that a defendant was convicted of a sex offense would reduce or eliminate any expectation of privacy in the fact of conviction. Here, however, as an unenumerated offense, the public records only reveal that Plaintiff was convicted of common law ABHAN, an offense that can be committed in a plethora of ways. Unlike in *Hendrix*, where the mere fact of conviction revealed the sexual nature of the crime, the conviction at issue here reveals no such circumstance.

As a fundamental right, "[t]o survive strict scrutiny the Act must meet a compelling state interest and be narrowly tailored to effectuate that interest." *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 140-41, 568 S.E.2d 338, 347 (2002)(*citing Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997)). Based upon the foregoing studies, while the stated purpose of SORA might be a worthwhile and noble goal, the implementation is not narrowly tailored and does not effectuate that interest. This is especially true where, as here, the offense is an unenumerated one which the Federal Government has concluded fifteen (15)[1] years is a sufficient period of supervision.

Even if the Court concludes that a fundamental interest is not implicated and a rational basis test applies, the lifetime registration fails. In *Hendrix*, supra, the Court analyzed a conviction under third degree sexual assault from Colorado, in upholding the law under the

[1] Or ten (10) years, depending upon whether the conditions are satisfied.

rational basis test. No discussion is given, however, to the actual empirical studies cited herein. Instead, the Court merely cites to the language of Section 23-3-400 which proclaims ""[s]tatistics show that sex offender often pose a high risk of reoffending." *Hendrix*, 353 S.C. at 550, 579 S.E.2d at 324. As previously noted, no evidence has been submitted that South Carolina has not conducted any studies to reveal any relation, rational or otherwise, to the stated purposes of SORA. The studies commissioned by other states clearly reveal that "[t]he requirement that registrants make frequent, in-person appearances before law enforcement, . . ., appears to have no relationship to public safety at all." *See Does*, 834 F.3d at 705.

In addition to the foregoing, in 1994, when SORA was originally adopted, under one of the original drafts of SORA adopted in Amendment 125 of House Bill 4820, Plaintiff would not have been required to register, as only the list of enumerated offenses required registration. See Senate Journal for May 11, 1994, Amendment 125, HB 4820. Thus, despite proclaiming the same boilerplate "statistics" analysis, it was not deemed necessary for unenumerated offenses to register. Thus, it hardly seems justifiable that the current registration requirement for unenumerated offenses "bears a reasonable relation to the legislative purpose" or "rests on some reasonable basis." *See Hendrix*, 353 S.C. at 550, 579 S.E.2d at 324 (*citing Curtis v. State*, 345 S.C. 557, 574, 549 S.E.2d 591, 599-600 (SC 2001)). While "members of the class" could be seen as being treated equally because of the "one size fits all" determination for registration in South Carolina, nothing supports a conclusion that those convicted of unenumerated offenses and those convicted of violent, forcible rape present the same risk of recidivism. Nothing supports a conclusion that both situations present the same likelihood of reoffending. Nothing supports a conclusion that both situations present the same need for protection of the public. Nothing

supports a conclusion that both situations are reasonably related to the stated purpose of SORA.

Beyond the foregoing, because SORA fails to provide a way for an unenumerated offender, such as Plaintiff, to be removed from the registry, his due process rights are violated. He is given no opportunity to a procedure whereby he can demonstrate the lack of a likelihood for recidivism. No opportunity is provided to demonstrate good cause why registration is no longer required. No opportunity for the registrant to petition for removal. Even in *Justin B.,* it was noted in affirming the validity of electronic monitoring, that the registrant had the ability for judicial review. *See Justin B.*, 405 S.C. at 408, 747 S.E.2d at 783. No such opportunity is afforded here. Appellant's due process rights are violated, as are those similarly situated. As with the Eighth Amendment analysis herein, SORA fails to pass Constitutional muster.

CONCLUSION

For the reasons stated, the circuit court erred in granting Respondent summary judgment. As outlined herein, SORA violates both the United States and South Carolina Constitutions. Appellant is entitled to a determination that SORA, and the lifetime registration requirement for those convicted of unenumerated offenses, without the possibility of removal or judicial review, is unconstitutional.

Respectfully submitted,

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