THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No.: 2019-001063
Trial Court Case No. 2016-CP-40-06960

Dennis J. Powell, Jr. Respondent,

v.

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

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. **Did the trial court err in disregarding South Carolina's clear and unambiguous statutes and binding jurisprudence in finding that the South Carolina Law Enforcement Division (SLED) is acting illegally by publishing the South Carolina Sex Offender Registry Act (SORA) registry on the internet?**

II. **Did the trial court err in disregarding South Carolina's clear and unambiguous statutes and binding jurisprudence in finding that Respondent is entitled to equitable relief in this matter?**

III. **Did the trial court err in disregarding South Carolina's clear and unambiguous statutes and binding jurisprudence in finding that SORA violates Respondent's right to equal protection under the law?**

IV. **Did the trial court err in disregarding South Carolina's clear and unambiguous statutes and binding jurisprudence in finding that SORA violates Respondent's right to due process?**

V. **Did the trial court err in disregarding South Carolina's clear and unambiguous statutes and binding jurisprudence in finding that SORA is punitive?**

VI. **Did the trial court err in disregarding South Carolina's binding jurisprudence in finding that SORA constitutes an unconstitutional *ex post facto* law?**

VII. **Did the trial court err in disregarding and mischaracterizing the evidence in this matter?**

VIII. **Did the trial court err in failing to find for the Appellants as a matter of law?**

STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

The South Carolina SORA was initiated in 1994 and officially codified into the South Carolina Code of Laws in 1996. *See* 1994 Act No. 497, Part II, § 112A; 1996 Act 444 § 16. In 1998, South Carolina Legislature specifically authorized SLED to publish SORA registry information via the "use of computerized or electronic transmission of date or other electronic or similar means" and in 1999 SLED began publishing SORA information on the internet. 1998 Act No. 384 § 1; Temple Affidavit. (R. p. 245).

Thereafter, Respondent was indicted for Criminal Solicitation of a Minor on December 1, 2008. This indictment reads:

> That Dennis Powell, Jr., on or about November 12, 2007 to February 15, 2008, did willfully and knowingly commit the crime of criminal solicitation of a minor. To wit: Dennis Powell, Jr. a person eighteen years of age or older, did knowingly through the Internet contact and communicate with a person located within the County of Lexington, State of South Carolina, whom he reasonably believed to be a twelve year-old girl, for the purpose of or with the intent of persuading, inducing, enticing, or coercing this person to engage or participate in a sexual activity as defined in Section 16-15-375(5). This is in direct violation of Section 16-15-342 of the South Carolina Code of Laws (1976), as amended.
>
> Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

See Indictment (R. pp. 182-83). In April of 2009, the Respondent pled guilty to this indictment admitting his conduct under oath. *See* Sentencing Sheet. (R. p. 184).[1]

Moreover, the specific factual basis for this plea is set forth in the plea transcript. *See* Plea Transcript. (R. pp. 185-92). This transcript indicates that the Respondent, who was 22 years old, admitted to have numerous sexually explicit conversations with an

[1] It is noteworthy that the age listed in the indictment is "twelve year-old girl"; however, the trial court erroneously found that Respondent's SORA listing "falsely" includes the age of 12 for the victim in deciding this matter. *See* Order p. 4. (R. p. 6).

individual that the Respondent admitted he believed to be a 12 or 13-year-old girl in an online Yahoo Chatroom. The clear and unequivocal intent of these communications was for the Respondent to persuade, induce, entice, and coerce this 12 or 13-year-old girl to engage and participate in sexual activities as defined by S.C. Code § 16-15-375. *See* Solicitation Chats. (R. pp. 193-242). The Respondent admitted that, among other things, he wanted to "teach" this 12 or 13-year-old girl various sex acts and the Respondent also sent pictures of his penis to this individual he believed to be a 12 or 13-year-old girl. Notably, the Respondent admitted in these conversations, "I would be in trouble, not you", yet he did it anyway. *See* Solicitation Chats. (R. pp. 193-242).

Ultimately, after having laid his intentional sexual "groundwork", the Respondent set up an in-person meeting with this 12 or 13-year-old girl at a skating rink in Lexington County for the express purpose of engaging in sexual activity with her. After setting up this meeting, the Respondent drove from Forest Acres to Lexington to engage in sexual activity with this 12 or 13-year-old girl. However, the Respondent did not stop at the skating rink, but instead drove by the meeting location prior to being arrested by law enforcement. Fortunately for the citizens of South Carolina, this "12 or 13-year-old girl" was actually a law enforcement officer acting in an undercover capacity who apprehended the Respondent before he could victimize a 12 or 13-year-old minor child as he admittedly intended. *See* Plea Transcript; Solicitation Chats. (R. pp. 185-92, 193-242).

Furthermore, subsequent to his conviction for Criminal Solicitation of a Minor, the Respondent was required to register on South Carolina's SORA registry and did in fact so register with the Richland County Sheriff's Department on or about February 11, 2010 and has continued to register since that time. *See* RCSO Affidavit. (R. p. 243). However, it is

noteworthy that the Respondent is not now and has never been subject to residency restrictions, work restrictions of any kind, or GPS monitoring based upon his lawful status as a sex offender in South Carolina. *See Id.*; Temple Affidavit. (R. pp. 243-44, 246). Further, the Respondent is not subject to any other restrictions, including, but not limited to, internet usage, community involvement, or any prohibitions related to where he may go or with whom he may lawfully interact. *See* RCSO Affidavit; Temple Affidavit. (R. pp. 243-44, 246). Rather, the Respondent is subject to the same regulatory and administrative requirements and is treated like all other similarly situated registrants in South Carolina. *See* Temple Affidavit. (R. p. 246).

In addition, Respondent did not appeal his 2009 conviction or sentence and Respondent did not apply for post-conviction relief. Respondent has not sought a pardon for his conviction. And, Respondent has not filed a petition for a writ of habeas corpus or a motion for new trial. (Tr. p. 7)(R. p. 380). Accordingly, Respondent's conviction has not been reversed, overturned or vacated on appeal and does not meet any of the statutory criteria for removal in South Carolina law.

Respondent filed this present action on or about November 21, 2016. Appellants' filed an initial summary judgment motion, which was denied on April 10, 2018. Subsequently, Respondent filed a summary judgment motion and a supporting memorandum. Appellants' filed a second summary judgment motion and a response in opposition to Respondent's motion. A hearing on these motions occurred on March 26, 2019. The trial court issued its order granting Respondent summary judgment on May 7, 2019. Appellants' filed a timely motion for reconsideration, which was denied June 12, 2019. This appeal follows.

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." Turner v. Milliman, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011).

"Questions of law may be decided with no particular deference to the trial court." Clardy v. Bodolosky, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009).

When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. WDW Properties v. City of Sumter, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000).

ARGUMENT

The trial court committed reversible error in disregarding clear and unambiguous South Carolina law and binding South Carolina jurisprudence in this matter. As such, based on the following, the trial court's decision must be reversed in its entirety.

HISTORY OF SEX OFFENDER REGISTRATION IN SOUTH CAROLINA

A review of the history of sex offender registration is helpful to the analysis in this matter. As noted by the South Carolina Supreme Court,

> The movement to enact sex offender registration statutes arose after Megan Kanka, a seven-year old child, was raped and murdered in New Jersey by a convicted sex offender who had moved in across the street from her family. The killer enticed the girl to come over to his house in order to see his new puppy. The New Jersey legislature responded to this highly publicized event by declaring a legislative emergency to immediately debate and enact a sexual crimes bill.
>
> On October 31, 1994, Governor Whitman signed the bill, which became known as Megan's Law. N.J. Stat. Ann. 2C:7-1 *et seq.* The law requires sexual criminals to register with local law enforcement.
>
> The United States Congress also reacted to the national outrage over sexual crimes by passing the Jacob Wetterling Crimes Against Children and

> Sexually Violent Predator Act ("Jacob Wetterling Act"), which President Clinton signed on September 13, 1994. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C.A. § 14071 (West 1994). The Jacob Wetterling Act gives states incentives to enact laws that protect the public from sexual criminals by conditioning federal funding under the Public Health and Welfare Code to state enactment of a sex crimes law. 42 U.S.C.A. § 14071(g)(1) and (g)(2). The Jacob Wetterling Act also creates a national sexual offender database, in which the states are required to participate. 42 U.S.C.A. § 14071(b)(2)(B).

Hendrix v. Taylor, 353 S.C. 542, 547–48, 579 S.E.2d 320, 322–23 (2003). Thereafter, in 1996, Congress passed its own "Megan's Law" mandating the public disclosure of information about certain sex offenders and empowering the individual states to determine the appropriate confines of such disclosure. *See* "Megan's Law", 42 U.S.C. 14071(d).

In 2006, Congress passed the "Adam Walsh Child Protection and Safety Act of 2006", which included the Sex Offender Registration and Notification Act (SORNA). 42 U.S.C. § 16901 *et seq.* This federal law created a new baseline of sex offender registration and notification standards and directed the Department of Justice to establish the Dru Sjodin National Sex Offender Public Website. *Id.* As such, the U.S. Congress has mandated that states publish sex offender registry information online, and the United States Supreme Court has recently upheld this mandate. *See* Gundy v. United States, 139 S. Ct. 2116, 204 L. Ed. 2d 522 (2019).

HISTORY OF PUBLIC REGISTRATION IN SOUTH CAROLINA

The South Carolina Sex Offender Registry (hereinafter "Registry") came into existence upon the passage of 1994 Act No. 487, Part II, § 112A following the federal trend set forth above. The Registry was created to be operated "under the direction of the chief of the State Law Enforcement Division (SLED)". *Id.* In that regard, the South Carolina Legislature empowered SLED to "develop and operate" the Registry and to collect,

maintain, and make Registry information available. *Id.* Notably, the initial iteration of the Registry was **not** open to public inspection. *Id.* ("Information collected for the offender registry shall not be open to inspection by the public. The information shall be made available only to law enforcement, investigative agencies, and those authorized by the court.") However, the very first legislative change to the Registry, which came upon the passage of 1996 Act 444, changed this and specifically made Registry information open and available to the public. Specifically, S.C. Code § 23-3-490 was amended to read:

> Section 23–3–490. (A) Information collected for the offender registry **is open to public inspection**, upon request to the county sheriff. A sheriff must release information regarding a specific person who is required to register under this article to a member of the public if the request is made in writing, stating the name of the person requesting the information, and the name or address of the person about whom the information is sought. The information must be disclosed only to the person making the request. The sheriff must provide the person making the request with the full name of the offender, any aliases, the date of birth, a current home address, the offense for which the offender was required to register pursuant to Section 23–3–430, and the date, city, and state of conviction. A photocopy of a current photograph must also be provided. The provisions of this article do not authorize SLED to release information to the public unless a request is made in writing stating the name of the person making the request and the name of the person about whom information is sought. SLED is only authorized to release to the public the name of the county in which the offender is registered. Otherwise, SLED is not authorized to release any information contained in the registry to anyone other than law enforcement agencies, investigative agencies, and those agencies authorized by the court.

1996 South Carolina Laws Act 444 (S.B. 1286) (emphasis added).

Thereafter, in 1998, the South Carolina Legislature again amended the statute to expand the information that SLED was authorized to disseminate. Specifically, S.C. Code § 23-3-490 was expanded to provide that:

> (B) A person may request on a form prescribed by SLED a list of registered sex offenders residing in a city, county, or zip code zone or a list of all registered sex offenders within the State from SLED. A person may request information regarding a specific person who is required to register under

> this article from SLED if the person requesting the information provides the name or address of the person about whom the information is sought. **SLED shall provide the person making the request with the full names of the requested registered sex offenders, any aliases, any other identifying physical characteristics, each offender's date of birth, the home address on file, the offense for which the offender was required to register pursuant to Section 23–3–430, and the date, city, and state of conviction....**

1998 South Carolina Laws Act 384 (H.B. 4805) (emphasis added).

In addition, in 1998, as the internet was increasing in nationwide popularity and use, the South Carolina Legislature specifically authorized SLED to publish Registry information on the internet. Specifically, S.C. Code Ann. § 23-3-490(E) was added, which states, "**For purposes of this section, use of computerized or electronic transmission of data or other electronic or similar means is permitted.**" *Id.* (emphasis added). As such, the South Carolina Legislature specifically authorized SLED to publish Registry information online through electronic means in 1998. To that end, SLED first published Registry information on the internet on or about **November 22, 1999** and has published said Registry information on the internet continuously since. *See* Temple Affidavit. (R. p. 245).

Thereafter, the South Carolina Legislature acknowledged that the media could access and publish Registry information in newspapers. *See* 1999 South Carolina Laws Act 110 (H.B. 3075). Moreover, the current version of S.C. Code Ann. § 23-3-490(C) states "[n]othing in subsection (A) prohibits a sheriff from disseminating information contained in subsection (A) regarding persons who are required to register under this article if the sheriff or another law enforcement officer has reason to believe the release of this information will deter criminal activity or enhance public safety."

Additionally, S.C. Code § 23-3-535(F)(1)(b) specifically requires that "[a]t the beginning of each school year, each school district must provide:... the hyperlink to the sex offender registry web site on the school district's web site...". Clearly, this Legislative mandate for a **hyperlink** to SORA Registry website indicates a clear Legislative intent that SORA Registry information be accessible on the internet.

Furthermore, as recognized by the Fourth Circuit Court of Appeals in the *United States v. Under Seal* case, the federal Sex Offender Registration and Notification Act (SORNA) also

> requires that a sex offender registry include the name, address, physical description, criminal history and status of parole, probation, or supervised release, current photograph, and other identifying information. 42 U.S.C. § 16914. SORNA further requires that "each jurisdiction shall make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry." 42 U.S.C. § 16918(a).

United States v. Under Seal, 709 F.3d 257, 262 (4th Cir. 2013). As such, in order to comply with SORNA, South Carolina law enforcement entities are required to make certain information "available on the Internet" and available for public access.

Finally, throughout the history of the Registry, SLED has been empowered to determine the form of public requests for Registry information and the appropriate form for law enforcement to provide responsive information. *See* S.C. Code Ann. §§ 23-3-410, 490. To that end, SLED has determined that online publication through internet websites available on SLED's website or the individual Sheriff's Department websites is the appropriate form of both requests for and dissemination of Registry information, and has utilized this medium for dissemination since November of 1999. *See* Temple Affidavit. (R. p. 245). Further, SLED in exercising its statutory discretion has determined that the

current level of security, which notifies requesters of the criminal penalties for improper use of Registry information and which seeks to prohibit non-humans from accessing the Registry, is sufficient. *See* Temple Affidavit (R. p. 247) *see also* S.C. Code Ann. §§ 23-3-400 *et. seq.* This level of security is more robust than that necessary to access SLED criminal records (SLED CATCH) or the general public index. *See* Temple Affidavit. (R. p. 247). Accordingly, the trial court's order finding that the internet access and the SORA website somehow does not constitute a "form prescribed by SLED" is both factual and legal error that should be reversed. *See* Order p. 4. (R. p. 6).

I. The trial court erred in disregarding South Carolina's clear and unambiguous statutes and binding jurisprudence in finding that the South Carolina Law Enforcement Division (SLED) is acting illegally by publishing the South Carolina Sex Offender Registry Act (SORA) registry on the internet.

The trial court's decision to disregard the clear and unambiguous language of SORA and the abundance of binding precedent in this matter is legally incorrect and should be reversed in its entirety. This decision rests largely on the fundamentally flawed premise that the South Carolina Legislature did not intend for SORA Registry information to be published on the internet or accessible online. Further, the trial court disregarded the aforementioned history of statutory public sex offender registration in South Carolina.

In South Carolina, courts have consistently held that "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute."). Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). Further, the South Carolina Supreme Court recently reaffirmed that "we read the statute as a whole and in a manner consonant and in harmony with its purpose. We therefore should not concentrate on isolated phrases within

the statute." Senate by & through Leatherman v. McMaster, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018). The decision in this case is based on a flawed and incorrect isolation of phrases in SORA that, if true, would negate the intent of SORA and would lead to a manifestly absurd result.

The intent of SORA is clear and unequivocal. SORA was created "to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens." S.C. Code Ann. § 23-3-400. To that end, it is inarguable that protecting the public, which is achieved by providing the public access to individual sex offender's information, is a stated intent of SORA. *Id.* The Legislature also specifically acknowledged that the "sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses" finding that "law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction." S.C. Code Ann. § 23-3-400.

In 2003, the Supreme Court specifically acknowledged that "the purpose of the law is to protect the public welfare and to assist law enforcement in accomplishing that goal." Hendrix v. Taylor, 353 S.C. 542, 551, 579 S.E.2d 320, 324 (2003). The Court went on to specifically note that SORA "reasonably protects South Carolinians **because the registry notifies them of Appellant's sex offense**." *Id.* (emphasis added). As such, the Supreme Court has unequivocally held that providing notice and information about sex offenders to the public is a vital intent and purpose of SORA. The Supreme Court has also noted that the "**purpose of the sex offender registry has nothing to do with retribution, and any deterrent effect of registration derives from the availability of information**, not from

punishment." In the Interest of Justin B., 419 S.C. 575, 583, 799 S.E.2d 675, 679, *cert. denied sub nom. J.D.B. v. South Carolina*, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017) (emphasis added). As such, as has been acknowledged in binding precedent, public access to sex offender information is SORA's mechanism to protect the public health, welfare, and safety of South Carolina citizens – the stated purpose of the entire SORA scheme. *See* S.C. Code Ann. § 23-3-400; Hendrix v. Taylor, 353 S.C. 542, 551, 579 S.E.2d 320, 324 (2003); In the Interest of Justin B., 419 S.C. 575, 583, 799 S.E.2d 675, 679, *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017) (emphasis added).

Nevertheless, the trial court found that SLED is acting *ultra vires* by providing **too much** information to the public, and that the South Carolina Legislature actually intended to limit the public's access to SORA information, both in the means of access and in the source of information. This contention is directly contrary to the intent of the Legislature. To that end, the South Carolina Supreme Court has held

> However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing Stackhouse v. Rowland, 86 S.C. 419, 68 S.E. 561 (1910)). Moreover, the decision does not acknowledge the totality of S.C. Code Ann. § 23-3-410, which states unequivocally that

> The [SORA] registry is under the direction of the Chief of the State Law Enforcement Division (SLED) and shall contain information the chief considers necessary to assist law enforcement in the location of persons

> convicted of certain offenses. SLED shall develop and operate the registry to: collect, analyze, and maintain information; make information available to every enforcement agency in this State and in other states; and establish a security system to ensure that only authorized persons may gain access to information gathered under this article.

On that issue, the isolation of the decision to the last sentence of this statute fatally disregards the remainder of the statute. This isolated reading leads to the argument that, despite putting the SORA registry under the direction of the Chief of SLED and despite mandating that the registry contain information necessary to assist law enforcement in the location of persons convicted of certain offenses, the Legislature actually intended to limit SLED's ability to provide access to SORA registry information and seeks to prohibit the public for accessing information from which the public can assist law enforcement in solving crimes. This is an incorrect reading that is inapposite to the intent of SORA.

There can be no question that assistance from the public, which includes any and all non-law enforcement witnesses or sources of information, is vital to law enforcement efforts throughout the state in solving all crimes and protecting the public. As such, SLED making SORA information available for the public to access protects both the public and assists law enforcement on a daily basis. As noted in the fact affidavit provided by Laura Hudson, Executive Director of the South Carolina Victim Assistance Network, which is in the record in this matter, yet was apparently disregarded by the trial court:

> South Carolina's passive Sex Offender law allows law enforcement and the public to inquire into an individual's offender status or determine the presence of sex offenders in a geographic location. It is not designed as a punishment for convicted offenders. Rather, it is designed to assist law enforcement in the protection of the public and it reduces the volume of inquiries that local law enforcement agencies would otherwise need to field from the public regarding sex offenders living in their neighborhoods. Public access to this information can prevent victimization and protect communities from sex crimes by encouraging them to remain vigilant and attentive without actively promoting the convictions of offenders.... A

> publically accessible Sex Offender Registry promotes community awareness and engagement. If residents, especially parents of young children, can learn of sex offenders' presence in their community, they can take steps to prevent victimization.... If offenders know that community members are aware of their identity and presence, they may be less likely to re-offend, considering the increased likelihood of detection, apprehension, and conviction. This provides peace of mind for parents and individuals living in a community where sex offenders are present.

See Victims' Advocate Affidavit. (R. pp. 411-12).

Similarly, SLED Major Jennie Temple acknowledged that the registry, including Respondent's information, provides law enforcement the tools and information needed in investigating criminal offenses and that law enforcement uses Registry information on a daily basis. Major Temple went on to acknowledge that the registry "also provides the public with vital information about certain offenders and their past conduct, which protects the public at large and provides information from which the public can make a host of informed decisions." *See* Temple Affidavit. (R. p. 246). Thus, the trial court's decision, which rests on the factually incorrect assertion that the Appellants provided no factual support whatsoever, is simply wrong and cannot survive appellate scrutiny.

The trial court's incorrect interpretation of SORA also impermissibly limits the public's access to SORA information, thereby adversely affecting "law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses" in direct contravention of S.C. Code Ann. § 23-3-400. This is contrary to the entire purpose of SORA and must be rejected. *See* Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing Stackhouse v. Rowland, 86 S.C. 419, 68 S.E. 561 (1910)).

Furthermore, the trial court's decision misapprehends the intent of the last sentence of S.C. Code Ann. § 23-3-410 in any event. The "security system" addressed therein is

simply a recognition that the Legislature has created a "private" registry for certain juveniles adjudicated delinquent of certain offenses. The Legislature has in fact determined that this SORA information should be limited to certain requestors and should not be available to the general public. Specifically, S.C. Code Ann. § 23-3-490(D)(2) states that certain juvenile SORA information "shall only be made available, upon request, to victims of or witnesses to the offense, public or private schools, child day care centers, family day care centers, businesses or organizations that primarily serve children, women, or vulnerable adults, as defined in Section 43-35-10(11) ...." This limitation in access stands in stark contrast to the openness of all other SORA information, which is mandated to be made available to the general public. As such, SLED was mandated to create a "security system" to accommodate this limited access to the "private" registry and has done such. This in no way bears on the Respondent as there is no dispute that he was convicted as an adult and that § 23-3-490(D)(2) has no applicability to him.

In addition, the language of S.C. Code Ann. § 23-3-490(B) belies the trial court's ruling in this matter. This statute states in pertinent part,

> A person may request on a form prescribed by SLED a list of registered sex offenders residing in a city, county, or zip code zone or a list of all registered sex offenders within the State from SLED. A person may request information regarding a specific person who is required to register under this article from SLED if the person requesting the information provides the name or address of the person about whom the information is sought. **SLED shall provide the person making the request with the full names of the requested registered sex offenders, any aliases, any other identifying physical characteristics, each offender's date of birth, the home address on file, the offense for which the offender was required to register pursuant to Section 23-3-430, and the date, city, and state of conviction.**

The clear and unequivocal language of this statute actually mandates that SLED provide requestors with access to specific information about sex offenders – "SLED shall provide

the person making the request with the full names of the requested registered sex offenders, any aliases, any other identifying physical characteristics, each offender's date of birth, the home address on file, the offense for which the offender was required to register pursuant to Section 23-3-430, and the date, city, and state of conviction." S.C. Code Ann. § 23-3-490(B). In fact, based on the language set forth in S.C. Code Ann. § 23-3-490(B), if SLED were to disregard this unambiguous mandate and not make information available to requestors, SLED would in fact be acting *ultra vires* in violation of state law. Notably, S.C. Code Ann. § 23-3-490(B) does not contain any limitation on who the "requestor" could be in direct contrast to S.C. Code Ann. § 23-3-490(D)(2), which does. This plain language of these statutes is contrary to the trial court's decision in this case.

In addition, the fact that S.C. Code Ann. § 23-3-490(A) is limited to sheriffs is of no consequence and must not be read to restrict or limit SLED's ability to disseminate information. Rather, the separation of these two paragraphs stems only from the evolution of the statute throughout the legislative history. The legislative history of S.C. Code Ann. § 23-3-490 shows that this statute has evolved over the years. Initially, SLED was in fact prohibited from releasing information, and S.C. Code Ann. § 23-3-490 provided that:

> The provisions of this article do not authorize SLED to release information to the public unless a request is made in writing stating the name of the person making the request and the name of the person about whom information is sought. SLED is only authorized to release to the public the name of the county in which the offender is registered. Otherwise, SLED is not authorized to release any information contained in the registry to anyone other than law enforcement agencies, investigative agencies, and those agencies authorized by the court.

1996 South Carolina Laws Act 444 (S.B. 1286). As such, if this statute still existed, SLED would be acting *ultra vires*.

However, this statute was amended and no longer contains this limitation. In 1998, Legislature specifically expanded the information that SLED was authorized to disseminate to the current form of the statute, to wit:

> (B) A person may request on a form prescribed by SLED a list of registered sex offenders residing in a city, county, or zip code zone or a list of all registered sex offenders within the State from SLED. A person may request information regarding a specific person who is required to register under this article from SLED if the person requesting the information provides the name or address of the person about whom the information is sought. **SLED shall provide the person making the request with the full names of the requested registered sex offenders, any aliases, any other identifying physical characteristics, each offender's date of birth, the home address on file, the offense for which the offender was required to register pursuant to Section 23–3–430, and the date, city, and state of conviction**....

1998 South Carolina Laws Act 384 (H.B. 4805) (emphasis added). As such, the trial court's determination that SLED is acting *ultra vires* is simply wrong and cannot withstand scrutiny.

In addition, it was in this same bill - 1998 South Carolina Laws Act 384 (H.B. 4805) that the Legislature specifically authorized both the sheriffs' offices and SLED to transmit Registry information to requestors via the internet. Specifically, S.C. Code Ann. § 23-3-490(E) was clearly added to expand on the media and format with which both the sheriffs' office and SLED disseminate information and tacitly authorizes both the sheriffs' offices and SLED to use computerized or electronic transmission of data or other electronic or similar means. Notably, S.C. Code Ann. § 23-3-490(E) begins "[f]or the purposes of this section", which is a direct indication that (E) applies to both (A) and (B) and is simply an authorization to specifically allow both the sheriffs and SLED to use electronic means – *i.e.* computers and the internet – as the means of making information available to the public. The trial court's mischaracterization of the effect of Paragraph (E) inaccurately represents

its role in the statute relative to Paragraphs (A) and (B). These paragraphs all work in conjunction with one another to form a single harmonious result, which results in a specific authorization for both SLED and the various sheriffs' offices to each make SORA Registry information available for access by the public through electronic or similar means - *i.e.* the internet. This Legislative policy finding is determinative in this matter as South Carolina Courts have also held that "[o]nce the legislature has made [a] choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy." Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005); South Carolina Farm Bureau Mut. Ins. Co. v. Mumford, 299 S.C. 14, 19, 382 S.E.2d 11, 14 (Ct. App. 1989). The trial court's incorrect isolation of the different sections of 490 also does not comport with the rules of statutory interpretation. *See* Senate by & through Leatherman v. McMaster, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018). ("we read the statute as a whole and in a manner consonant and in harmony with its purpose. We therefore should not concentrate on isolated phrases within the statute."). As such, the trial court should be reversed.

Moreover, if, as incorrectly held by the trial court, SLED was not authorized to make information available to the public on the internet, the Supreme Court would have addressed such in the Hendrix v. Taylor case. In that case, the Supreme Court specifically addressed SLED's internet publication of SORA information. Rather than acknowledge the prohibition espoused by this Court, the Supreme Court in Hendrix in fact found the opposite and specifically directed that

> under the "Offense" heading on the registry, SLED should provide (1) the state where the offense was committed; (2) the citation of that state's statute that was violated; (3) the name of the crime committed; and (4) the date of

> conviction. For example, in this case, Appellant's offense would appear under the "Offense" heading as follows:
>
> Colorado
> § 18-3-404: Third Degree Sexual Assault
> 2000-03-08

Hendrix v. Taylor, 353 S.C. 542, 551–52, 579 S.E.2d 320, 325 (2003). Accordingly, it is inarguable that SLED is authorized to utilize the internet as a means of providing any and all public requestors information, and the binding precedent of this State indicates precisely that. *See* State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003); In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003); Williams v. State, 378 S.C. 511, 516, 662 S.E.2d 615, 618 (2008); In the Interest of Justin B., a Juvenile under the Age of Seventeen, 419 S.C. 575, 799 S.E.2d 675 (2017) *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017). Each and every one of these of the aforementioned cases was decided after SLED made SORA information available for access to the public by electronic or other similar means, *i.e.* the internet. As such, this precedent mandates reversal.

Furthermore, a plain reading of SORA as a whole reveals a clear and unequivocal intent that SLED make SORA information available to the public and that SLED is authorized to make such information available on the publically accessible internet. *See* Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994); Senate by & through Leatherman v. McMaster, 425 S.C. 315, 322, 821 S.E.2d 908, 912 (2018) ("we read the statute as a whole and in a manner consonant and in harmony with its purpose. We therefore should not concentrate on isolated phrases within the statute."); S.C. Code Ann. § 23-3-535(F)(1)(b) (specifically requiring school districts to provide a hyperlink to the sex offender registry website).

In addition, even assuming that SLED was in fact acting *ultra vires* and was providing the public with **too much information** in **too convenient a manner** (which SLED is not), the remedy for such would never be removal of the Respondent from the SORA registry, as this would be in direct contravention of the plain language of the SORA removal provisions – S.C. Code Ann. § 23-3-430(E), (F), and (G), which set forth the only lawful avenues of removal. The South Carolina Supreme Court has held that a "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); *see also* Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007). As such, even a finding that SLED were acting *ultra vires* (which SLED is not) would not authorize the trial court to re-write SORA's clear and ambiguous removal provisions and order that the Respondent be removed from the SORA registry entirely. *Id.* Accordingly, the trial court should be reversed.

In fact, every South Carolina appellate decision upholding the constitutionality of SORA, including all of the decisions finding that SORA is a civil and non-punitive statute, also found that SORA does not violate the equal protection or due process clauses of the constitution, and those decisions finding that SORA is not punishment (much less cruel and unusual punishment) were issued and decided after SLED's online publication of Registry information on the internet. *See* State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003) (finding 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."); In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003) (finding that "sex offender

registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated."); Williams v. State, 378 S.C. 511, 516, 662 S.E.2d 615, 618 (2008) (holding that registration as a sex offender is not a punishment, but rather is a regulatory requirement imposed to promote public safety); In the Interest of Justin B., a Juvenile under the Age of Seventeen, 419 S.C. 575, 799 S.E.2d 675 (2017) *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017) (reaffirming the constitutionality of SORA, even as related to online publication of juvenile Registry information, and reaffirming unequivocally that SORA is not punishment).

It is absurd and incomprehensible to believe that these decisions were issued and decided without the Supreme Court's knowledge and appreciation that SLED publishes SORA Registry information on the internet. Tellingly, the very decisions themselves belie this contention. *Id.* In 2003, the Supreme Court specifically acknowledged this fact in *Hendrix v. Taylor* noting,

> when the South Carolina Law Enforcement Division ("SLED") registers a sex criminal due to his conviction of a sexual offense in another state, the agency must correctly state the offense the criminal committed in that jurisdiction. **Accordingly, under the "Offense" heading on the registry**, SLED should provide (1) the state where the offense was committed; (2) the citation of that state's statute that was violated; (3) the name of the crime committed; and (4) the date of conviction. **For example, in this case, Appellant's offense would appear under the "Offense" heading as follows**....

Hendrix v. Taylor, 353 S.C. 542, 551–52, 579 S.E.2d 320, 325 (2003) (emphasis added). It is axiomatic that the "Offense" heading referenced therein is the heading on the publically accessible Registry website and cannot be argued otherwise. *See* Temple Affidavit. (R. p. 246).

Moreover, in 2017, the South Carolina Supreme Court again acknowledged this premise in the context of juvenile registration on the publically accessible online registry in the case of *In the Interest of Justin B.* noting,

> Justin B.'s age and the resulting **public registration** does not change our constitutional analysis. The Supreme Court held that an adult does not have a constitutionally protected liberty interest in his reputation. *See* Paul v. Davis, 424 U.S. 693, 712, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405, 420 (1976) (stating an "interest in reputation ... is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law"). A delinquent juvenile's reputation may be in greater need of protection than the reputation of an adult convicted of a felony sex crime, but the juvenile's interest in that reputation is still neither liberty nor property. The responsibility of balancing the need to protect a juvenile's reputation against the need to "to promote the state's fundamental right to provide for the ... safety of its citizens," § 23-3-400, falls to the Legislature, not the courts, S.C. Const. art. I, § 8.

In Interest of Justin B., 419 S.C. 575, 586, 799 S.E.2d 675, 681, *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017) (emphasis added). As such, it is factual and legal error to argue that the internet changes any of the existing precedent in this State, which remains absolutely binding. Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993); (recognizing decisions of the Supreme Court bind as precedent); S.C. Const. Art. V, § 9; *see also* W. E. B. DuBois Clubs of Am. v. Clark, 389 U.S. 309, 312, 88 S. Ct. 450, 452, 19 L. Ed. 2d 546 (1967) (acknowledging that courts do not decide constitutional questions in a vacuum).

Furthermore, additional binding authority regarding the constitutionality of online publication is found in the landmark United States Supreme Court's decision in *Smith v. Doe*, which was also rendered after SLED, and other states, published Registry information online. In that decision, the U.S. Supreme Court specifically considered internet publication of sex offender information, and still unequivocally ruled that online public

registration is non-punitive. *See* Smith v. Doe, 538 U.S. 84, 99, 123 S. Ct. 1140, 1150-51 (2003) (this decision was acknowledged by the South Carolina Supreme Court in In re Justin B., 405 S.C. 391, 747 S.E.2d 774 (2013) and in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013)). The U.S. Supreme Court noted specifically:

> The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. **The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.**
>
> The State's Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record. An individual seeking the information must take the initial step of going to the Department of Public Safety's Web site, proceed to the sex offender registry, and then look up the desired information. The process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality. The Internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry.

Smith v. Doe, 538 U.S. 84, 99, 123 S. Ct. 1140, 1150-51 (2003). South Carolina's SORA registry operates virtually identically to the website analyzed by the U.S. Supreme Court in *Smith v. Doe*. *See* Temple Affidavit (R. pp. 245-47). Moreover, the Appellants in this case do not utilize social media to disseminate Registry information. *See Id.*

Accordingly, the trial court's determination that SLED's online publication is a new argument that somehow changes the analysis in this case and authorizes courts to disregard binding precedent is legal error. *See Id.* As such, the plethora of binding precedent, discussed more fully below, remains the binding precedent that must be followed in this case. Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App.

1993) (recognizing the decisions of the Supreme Court bind as precedent); S.C. Const. Art. V, § 9. Therefore, the trial court's decision must be reversed.

II. The trial court erred in disregarding South Carolina's clear and unambiguous statutes and binding jurisprudence in finding that Respondent is entitled to equitable relief in this matter.

The equitable relief granted by the trial court is not available as a matter of law. The binding precedent of this state clearly and unequivocally mandates otherwise. Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993); (recognizing decisions of the Supreme Court bind as precedent); S.C. Const. Art. V, § 9. The South Carolina Supreme Court held unequivocally that a "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). The South Carolina Legislature mandated lifetime SORA registration in South Carolina in clear, unequivocal, and unambiguous statutory language. *See* S.C. Code Ann. § 23-3-460 (mandating registration for all offenders "for life".). In fact, the words "for life" in S.C. Code Ann. § 23-3-460 could not be more clear and unequivocal. Similarly, the Legislature has specifically enumerated avenues of relief that simply do not include equitable relief. *See* S.C. Code Ann. § 23-3-430(E),(F), and (G). Because the Legislature did not include such a provision in the statute, the canon of statutory construction *expressio unius est exclusion alterius*, which holds that to express or include one thing implies the exclusion of another, is determinative. *See* Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000);

Black's Law Dictionary 602 (7th ed. 1999). South Carolina courts have noted that this "maxim should be used to accomplish legislative intent [*i.e.* lifetime registration in South Carolina], not defeat it." S.C. Dep't of Consumer Affairs v. Rent-A-Ctr., Inc., 345 S.C. 251, 256, 547 S.E.2d 881, 884 (Ct. App. 2001). As such, no court can exercise equitable authority to change this statute.

Further, the binding authority in this State also provides that "[c]ourts may not ignore statutes, precedent, or other binding authority while providing an equitable remedy. Johnson v. Lloyd, 399 S.C. 470, 476, 732 S.E.2d 198, 201 (Ct. App.2012) *reversed on other grounds by* Johnson v. Lloyd, 407 S.C. 610, 611, 757 S.E.2d 705, 706 (2014). In *Johnson*, the Court of Appeals considered whether a circuit court could provide an equitable remedy that removed appellant from the sex offender registry, despite the fact that the sex offender registry provides methods for removal that the appellant did not qualify to utilize. The answer was clear and unequivocal:

> The General Assembly enacted an unambiguously worded statute that sets for the legal remedies available to an individual on the registry. Because the sex offender statute provides an adequate remedy for Johnson, it was error for the circuit court to fashion an equitable remedy in this case.

Id., 399 S.C. 470, 476-77, 732 S.E.2d 198, 201. Although the Supreme Court subsequently overruled the Court of Appeals decision, the basis was not a flaw in the Court of Appeals' rationale or ruling on the merits: "[b]ecause the State failed to argue that Petitioner [Johnson] 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**." Johnson v. Lloyd, 407 S.C. 610, 612, 757 S.E.2d 705, 706 (2014) (emphasis added). Accordingly, the Court of Appeals decision in *Johnson* remains binding precedent on the issue of equitable authority.

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, 255 (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). 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 v. South Carolina Law Enforcement Division, 395 S.C. 509, 719 S.E.2d 258, 259 (2011).

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

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, "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).

In this case, relying on overturned law, the trial court improperly found equitable jurisdiction and granted equitable relief. *See* Key Corporate Capital, Inc. v. County of Beaufort, 360 S.C. 513, 602 S.E.2d 104 (Ct. App. 2004) *reversed by* Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.C.2d 675 (2007). There simply is no equitable jurisdiction in this matter. To that end, the binding authority in this State also provides that "[c]ourts may not ignore statutes, precedent, or other binding authority while providing an equitable remedy. Johnson v. Lloyd, 399 S.C. 470, 476, 732 S.E.2d 198, 201 (Ct. App.2012) *reversed on other grounds by* Johnson v. Lloyd, 407 S.C. 610, 611, 757 S.E.2d 705, 706 (2014). Accordingly, the trial court's decision to the contrary should be reversed.

[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.

III. The trial court erred in disregarding South Carolina's clear and unambiguous statutes and binding jurisprudence in finding that SORA violates Respondent's right to equal protection under the law.

FUNDAMENTAL CONSTITUTIONAL INTERPRETATION

As a threshold matter of interpretation, South Carolina law mandates that "all statutes are presumed constitutional and, if possible, will be construed to render them valid." Curtis v. State, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001); Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999); Davis v. County of Greenville, 322 S.C. 73, 470 S.E.2d 94 (1996). Further, a "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999) (citing Westvaco Corp. v. South Carolina Dep't of Revenue, 321 S.C. 59, 467 S.E.2d 739 (1995)). "A legislative enactment will be declared unconstitutional only when its invalidity appears so clearly as to leave no room for reasonable doubt that it violates a provision of the constitution." Joytime Distributors and Amusement Co., Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). As such, all of the statutes in question must be presumed as constitutional in this action because there is and can be no showing of any legitimately cognizable repugnance to the constitution, much less one that is beyond a reasonable doubt. However, the trial court appears to have disregarded these foundational tenets.

Further, the binding precedent in this state, which is set forth below, conclusively resolves this entire action as a matter of law contrary to the trial court's ruling. The most compelling recitation of this precedent was provided by the South Carolina Supreme Court in *In Interest of Justin B.* from 2017 in which the court noted

As the family court indicated, we have already addressed many of the issues Justin B. raises in his challenge to the imposition of sex offender registration and electronic monitoring requirements. In *State v. Walls,* 348 S.C. 26, 558 S.E.2d 524 (2002), we considered whether the sex offender registry violated the *ex post facto* clauses of the state and federal constitutions. 348 S.C. at 29, 558 S.E.2d at 525. We stated, "For the *ex post facto* clause to be applicable, the statute or the provision in question must be criminal or penal in purpose and nature." 348 S.C. at 30, 558 S.E.2d at 526. **We then held the sex offender registry did not violate the *ex post facto* clause because "it is clear the General Assembly did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes."** 348 S.C. at 31, 558 S.E.2d at 526.

In *Hendrix v. Taylor*, 353 S.C. 542, 579 S.E.2d 320 (2003), we considered whether requiring a convicted Colorado sex offender to register in South Carolina violated the equal protection and due process clauses of the state and federal constitutions. 353 S.C. at 547, 579 S.E.2d at 322. As to the equal protection challenge, we found classifying an out-of-state sex offender as a sex offender in South Carolina "did not affect a fundamental right," and therefore we applied the "rational relationship" test. 353 S.C. at 550, 579 S.E.2d at 324. Under that test, a statutory classification will be constitutional if the "classification bears a reasonable relation to the legislative purpose," "the members of the class are treated alike under similar circumstances and conditions," and "the classification rests on some reasonable basis." *Id.* (quoting *Curtis v. State*, 345 S.C. 557, 574, 549 S.E.2d 591, 600 (2001)). We held requiring an out of state offender to register in South Carolina was "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." *Id.* As to the due process challenge, we followed our holding in *Walls* that the sex offender registry is non-punitive and did not implicate a liberty interest, and therefore held there was no due process violation. 353 S.C. at 552, 579 S.E.2d at 325 (citing *Walls,* 348 S.C. at 31, 558 S.E.2d at 526).

Later that year, we decided *In re Ronnie A.*, 355 S.C. 407, 585 S.E.2d 311 (2003), in which an eleven-year-old challenged the mandatory lifetime registration requirement after he was found to have committed criminal sexual conduct with a minor. **We followed *Hendrix*, and held "sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated." 355 S.C. at 409, 585 S.E.2d at 312 (citing Hendrix, 353 S.C. at 552, 579 S.E.2d at 325).**

We reiterated our holding in *Walls* that the legislative purpose for the sex offender registry "is to protect the public from those offenders who may re-

offend." *Id.* (citing Walls, 348 S.C. at 31, 558 S.E.2d at 526). We then concluded, **"The registration of offenders, including juveniles who have proved themselves capable of certain sex offenses, is rationally related to achieving this legitimate objective. Appellant has offered no valid basis upon which to distinguish juvenile sex offenders for purposes of due process."** 355 S.C. at 409-10, 585 S.E.2d at 312.

Finally, we considered an Eighth Amendment challenge to the section 23-3-540 requirement that juveniles submit to electronic monitoring for life in *In re Justin B.*, 405 S.C. 391, 747 S.E.2d 774 (2013). We held "the General Assembly intended section 23-3-540 as a civil scheme for the protection of the public." 405 S.C. at 405, 747 S.E.2d at 781. We concluded, "Section 23-3-540's electronic monitoring scheme bears a clear and rational connection to a non-punitive purpose," and stated "the continuous monitoring of these offenders supports the General Assembly's valid purpose of aiding law enforcement in the protection of the community." 405 S.C. at 407, 747 S.E.2d at 782-83. We held, however, "sex offenders ... are entitled to 'avail themselves of the section 23-3-540(H) judicial review process.' " 405 S.C. at 408, 747 S.E.2d at 783 (quoting *State v. Dykes*, 403 S.C. 499, 510, 744 S.E.2d 505, 511 (2013))....

Justin B.'s age and the resulting public registration does not change our constitutional analysis. The Supreme Court held that an adult does not have a constitutionally protected liberty interest in his reputation. *See* Paul v. Davis, 424 U.S. 693, 712, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405, 420 (1976) (stating an "interest in reputation ... is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law"). A delinquent juvenile's reputation may be in greater need of protection than the reputation of an adult convicted of a felony sex crime, but the juvenile's interest in that reputation is still neither liberty nor property. The responsibility of balancing the need to protect a juvenile's reputation against the need to "to promote the state's fundamental right to provide for the ... safety of its citizens," § 23-3-400, falls to the Legislature, not the courts, S.C. Const. art. I, § 8.

V. Conclusion

The requirement that adults and juveniles who commit criminal sexual conduct must register as a sex offender and wear an electronic monitor is not a punitive measure, and the requirement bears a rational relationship to the Legislature's purpose in the Sex Offender Registry Act to protect our citizens—including children—from repeat sex offenders. The requirement, therefore, is not unconstitutional. If the requirement that juvenile sex offenders must register and must wear an electronic monitor is in need of change, that decision is to be made by the Legislature—not the courts. The decision of the family court to

follow the mandatory, statutory requirement to impose lifetime sex offender registration and electronic monitoring on Justin B. is AFFIRMED.

In Interest of Justin B., 419 S.C. 575, 580–82, 586-87, 799 S.E.2d 675, 677–78, 681, *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017) (internal citations omitted) (emphasis added). This decision is binding precedent that ends any constitutional argument in this matter as a matter of law. *See* Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993); (decisions of the Supreme Court bind as precedent); S.C. Const. Art. V, § 9. Accordingly, reversal is warranted.

SPECIFIC EQUAL PROTECTION ANALYSIS

"The initial inquiry in [this as with] any equal protection analysis is whether the plaintiff made 'a showing that similarly situated persons received disparate treatment.'" State v. Walker, 422 S.C. 89, 92, 810 S.E.2d 38, 40 (2018). **The undisputed facts of this case are clear, unequivocal, and incontrovertible; the Respondent is in fact treated the SAME as all other similarly situation South Carolina registrants.** *See* RCSO Affidavit; Temple Affidavit. (R. pp. 243-47). The Respondent does not even endeavor to claim otherwise and cannot. Nevertheless, the trial court found that because other states treat their sex offenders differently than South Carolina that the Respondent **SHOULD** be treated differently than all other similarly situated South Carolina registrants. This is a perversion of equal protection and cannot form the decision in this matter.

The United States Supreme Court has long recognized that "[e]very state is entitled to enforce in its own courts its own statutes lawfully enacted...." Williams v. State of North Carolina, 317 U.S. 287, 295, 63 S.Ct. 2017, 212 (1942). In Sun Oil Co. v. Wortman, the United States Supreme Court acknowledged that a state cannot be compelled by the

Full Faith and Credit Clause to substitute the statute of another state when "dealing with a subject matter concerning which it is competent to legislate." 486 U.S. 717, 722 (1988) (quoting Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 501 (1939)). In addition, in Alaska Packers Association v. Industrial Accident Commission, the United State Supreme Court recognized "that there are some limitations upon the extent to which a state will be required by the full faith and credit clause to enforce even the judgment of another state, in contravention of its own statutes or policy." 294 U.S. 532, 546-47 (1935). Moreover, the Court went on to state that the sovereignty of states to enforce their own laws is even more pressing because "a rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." *Id.* at 547. As such, the trial court's decision to disregard and violate South Carolina sovereignty by comparing Respondent's treatment to that of other offenders in other states fails as a matter of law.

In addition, the binding precedent of this State indicates that the Respondent is not part of a suspect class, nor does his placement on the sex offender registry affect a fundamental right. *See* Hendrix v. Taylor, 353 S.C. 542, 549-50, 579 S.E.2d 320, 324 (2003) (citing Cutshall v. Sundquist, 193 F.3d 466, 483 (6th Cir. 1999)). Therefore, the "rational relationship" test should be applied to determine whether the sex offender registry laws violate the Respondent's right to equal protection. *See* Hendrix v. Taylor, 353 S.C. 542, 550, 579 S.E.2d 320, 324 (2003). Under this test, the Respondent's classification as a sex offender in South Carolina is justified and does not violate equal protection if "(1) the classification bears a reasonable relation to the legislative purpose sought to be effected;

(2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis." *Id.* (quoting Curtis v. State, 345 S.C. 557, 574, 549 S.E.2d 591, 599, 600 (2001).

The South Carolina Supreme Court previously ruled in mandatory binding precedent that the SORA Registry "complies with the first prong of the test, as the legislative purpose is clearly defined" in the text of the law. Hendrix v. Taylor, 353 S.C. 542, 550, 579 S.E.2d 320, 324 (2003) (citing S.C. Code Ann. § 23-3-400). Classifying an individual as a sex offender 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." *Id.*; *see also* In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003). Registration as a sex offender is not a punishment, but rather a regulatory requirement imposed to promote public safety. Williams v. State, 378 S.C. 511, 516, 662 S.E.2d 615, 618 (2008); *see also* State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). As such, the Respondent unequivocally fails on the first prong.

In addition, all members of the Respondent's class, *i.e.* those persons convicted of Criminal Solicitation of a Minor, are treated identically. *See* Temple Affidavit. (R. p. 246). And, all members of the class "are subject to uniform administrative and legal procedures." Hendrix v. Taylor, 353 S.C. 542, 550, 551, 579 S.E.2d 320, 324 (2003) s*ee also* Temple Affidavit. (R. p. 246). It is indisputable that the Respondent is in fact treated identically to all similarly situated South Carolina registrants. As such, the Respondent unequivocally fails on the second prong.

As to the third and final component of the test, the South Carolina Supreme Court has determined in binding precedent that classification of the Respondent 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 v. Taylor, 353 S.C. 542, 551, 579 S.E.2d 320, 324 (2003). Further, the Registry accomplishes this goal. *See* S.C. Code Ann. § 23-3-400; Temple Affidavit; Victims' Advocate Affidavit. (R. pp. 246, 411-12).

In sum, the South Carolina Legislature has determined explicitly that the Registry is the appropriate mechanism by which to provide for the public health, welfare, and safety of South Carolina citizens; that the Registry provides law enforcement with tools needed to investigate; and that sex offenders as a class pose a risk of re-offending. *See* S.C. Code Ann. § 23-3-400 *et seq.* And, according to the United States Supreme Court, the Legislature has the authority to do this:

> Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness **as a class**.

Smith v. Doe, 538 U.S. 84, 103, 123 S.Ct. 1140, 1153 (2003) (emphasis added) (rejecting an argument that the Alaska registry law was excessive because it applies to all convicted sex offenders without regard to their future dangerousness). Accordingly, similar to Alaska, the South Carolina Legislature has enacted a Registry that protects all South Carolinians and aids law enforcement. As such, the Respondent clearly fails the third prong.

Further, the trial court's attempt to redefine existing law to include a distinction between "low-risk sex offenders" and "diagnosed sexual predators" must fail as a matter of law. *See* S.C. Code Ann. § 23-3-400 (stating the purpose of the Registry as applicable to all offenders, which has been recited countless times by South Carolina appellate courts). The binding precedent on point and the South Carolina Constitution prohibits the

Respondent or any court from re-writing the existing statutes to include categories of offenders that simply do not exist in the law. *See* Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675 (2007) (indicating that it is beyond a Court's power to change a statute or second guess the wisdom or folly of the Legislature); S.C. Const. art. I, § 8 (mandating separation of powers between the Legislature and the Courts). Put simply, it is a matter of legislative prerogative to have one single class of offenders who are treated the same, and regardless of any contrary opinion as to what the Legislature "should" do. Rather, the law mandates adherence to the clear and unequivocal Legislative prerogative. *Id.* As such, the Respondent's equal protection claim fails as a matter of law and the trial court's contrary decision must be reversed in its entirety.

IV. The trial court erred in disregarding South Carolina's clear and unambiguous statutes and binding jurisprudence in finding that SORA violates Respondent's right to due process.

"The substantive due process guarantee ensures that legislation which deprives a person of a life, liberty, or property right [has], at a minimum, a rational basis, and not be arbitrary or overly vague." In re Treatment and Care of Luckabaugh, 351 S.C. 122, 139-40, 568 S.E.2d 338, 346 (2002). As discussed above, the binding precedent in this state has conclusively rejected this claim. The most compelling recitation of the argument on this specific precedent was provided by the South Carolina Supreme Court in *In Interest of Justin B.* from 2017 in which the court noted

> **As to the due process challenge [in *Hendrix*], we followed our holding in *Walls* that the sex offender registry is non-punitive and did not implicate a liberty interest, and therefore held there was no due process violation. 353 S.C. at 552, 579 S.E.2d at 325 (citing *Walls,* 348 S.C. at 31, 558 S.E.2d at 526).**
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> Later that year, we decided *In re Ronnie A.*, 355 S.C. 407, 585 S.E.2d 311 (2003), in which an eleven-year-old challenged the mandatory lifetime

registration requirement after he was found to have committed criminal sexual conduct with a minor. **We followed *Hendrix*, and held "sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated." 355 S.C. at 409, 585 S.E.2d at 312 (citing Hendrix, 353 S.C. at 552, 579 S.E.2d at 325).**

We reiterated our holding in *Walls* that the legislative purpose for the sex offender registry "is to protect the public from those offenders who may re-offend." *Id.* (citing *Walls,* 348 S.C. at 31, 558 S.E.2d at 526). We then concluded, **"The registration of offenders, including juveniles who have proved themselves capable of certain sex offenses, is rationally related to achieving this legitimate objective. Appellant has offered no valid basis upon which to distinguish juvenile sex offenders for purposes of due process."** 355 S.C. at 409-10, 585 S.E.2d at 312.

Justin B.'s age and the resulting public registration does not change our constitutional analysis. The Supreme Court held that an adult does not have a constitutionally protected liberty interest in his reputation. *See* Paul v. Davis, 424 U.S. 693, 712, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405, 420 (1976) (**stating an "interest in reputation ... is neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law**"). A delinquent juvenile's reputation may be in greater need of protection than the reputation of an adult convicted of a felony sex crime, but **the juvenile's interest in that reputation is still neither liberty nor property**. The responsibility of balancing the need to protect a juvenile's reputation against the need to "to promote the state's fundamental right to provide for the ... safety of its citizens," § 23-3-400, falls to the Legislature, not the courts, S.C. Const. art. I, § 8.

V. Conclusion

The requirement that adults and juveniles who commit criminal sexual conduct must register as a sex offender and wear an electronic monitor is not a punitive measure, and the requirement bears a rational relationship to the Legislature's purpose in the Sex Offender Registry Act to protect our citizens—including children—from repeat sex offenders. **The requirement, therefore, is not unconstitutional.** If the requirement that juvenile sex offenders must register and must wear an electronic monitor is in need of change, that decision is to be made by the Legislature—not the courts. The decision of the family court to follow the mandatory, statutory requirement to impose lifetime sex offender registration and electronic monitoring on Justin B. is **AFFIRMED**.

In Interest of Justin B., 419 S.C. 575, 580–82, 586-87, 799 S.E.2d 675, 677–78, 681, *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017) (emphasis added). This case is binding precedent.

Notably, this decision was also issued after the *Dykes* decision relied on by the trial court. Accordingly, had *Dykes* espoused a new due process test, as erroneously found by the trial court, it would have been discussed and applied in *Justin B.* However, *Dykes* did not announce a new substantive due process test, and it is error to hold otherwise. The South Carolina Supreme Court has specifically acknowledged this in *State v. Nation* noting,

> A majority of this Court rejected Dykes's arguments, holding that mandatory GPS monitoring **did not violate Dykes's right to substantive due process**. *Id.* at 503, 744 S.E.2d at 507; *see also id.* at 510 n. 9, 744 S.E.2d at 511 n. 9 **(rejecting Dykes's remaining arguments). Specifically, we disagreed with Dykes's assertion that, as a convicted sex offender, she had a *fundamental* right to be "let alone."** *Id.* at 505–06, 744 S.E.2d at 508–09 ("The United States Supreme Court has cautioned restraint in the recognition of rights deemed to be fundamental in a constitutional sense." (citing *Washington v. Glucksberg,* 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997))). However, notwithstanding the absence of a fundamental right, we found that lifetime GPS monitoring "implicates a protected liberty interest to be free from permanent, unwarranted governmental interference." *Id.* at 506, 744 S.E.2d at 509. In light of the General Assembly's intent to protect the public from sex offenders and aid law enforcement, we held that an initial, mandatory imposition of GPS monitoring for certain sex crimes involving children was rationally related to the law's stated purpose. *Id.* at 507–08, 744 S.E.2d at 509–10.
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> Despite generally upholding the constitutionality of Jessie's Law, we found the final sentence of subsection (H) unconstitutional as arbitrary and not rationally related to the statute's purpose. *Id.* at 508, 744 S.E.2d at 510 (citing S.C. Code Ann. § 23–3–540(H)).

State v. Nation, 408 S.C. 474, 479–80, 759 S.E.2d 428, 431 (2014), *abrogated by* State v. Ross, 423 S.C. 504, 815 S.E.2d 754 (2018) (abrogating on other grounds) (emphasis added). As such, there is no *Dykes* test that can be used or relied on by the Court, and the

precedent set forth in *Justin B.* remains the binding authority in this State specifically rejecting a due process challenge to the Registry. In Interest of Justin B., 419 S.C. 575, 580–82, 586-87, 799 S.E.2d 675, 677–78, 681, *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017).

Accordingly, there is no viable due process claim based on the lack of individual judicial review of Plaintiff's registration requirement. In fact, the Supreme Court in *Dykes* specifically rejected this argument. *See* State v. Dykes, 403 S.C. 499, 510 n. 9, 744 S.E.2d 505, 511 n. 9 (rejecting Dykes' procedural due process claim under Rule 220, SCACR). The United States Supreme Court has also rejected this argument. *See* Connecticut v. Doe, 538 U.S. 1, 8 (2003) ("rejecting sex offender's due process argument requesting a hearing on his current level of dangerousness, and stating those 'who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in the hearing are relevant to the statutory scheme'").

Therefore, the espoused precedent in this state remains binding authority. *See* Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993); (decisions of the Supreme Court bind as precedent); S.C. Const. Art. V, § 9. **Specifically, "sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated.**" In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003) (emphasis added); Hendrix v. Taylor, 353 S.C. 542, 579 S.E.2d 320 (2003); In Interest of Justin B., 419 S.C. 575, 580–82, 586-87, 799 S.E.2d 675, 677–78, 681, *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017). As such, the Respondent's due process claim fails as a matter of law and the trial court's decision to the contrary should be reversed.

V. The trial court erred in disregarding South Carolina's clear and unambiguous statutes and binding jurisprudence in finding that SORA is punitive.

In addition, contrary to the trial court's decision, South Carolina, courts have uniformly and conclusively held that registration pursuant SORA is **not** punishment. *See* State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003) (finding 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."); In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003) (finding that "sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated."); In Interest of Justin B., 419 S.C. 575, 580–82, 586-87, 799 S.E.2d 675, 677–78, 681, *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017); Thompson v. State, 415 S.C. 560, 564 n. 3, 785 S.E.2d 189, 191 n. 3 (2016) ("As we have repeatedly stated, the sex offender registry is a civil requirement separate and apart from the criminal punishments associated with sexual offenses in this state."). This binding precedent does not change with online publication of Registry information on the internet, which, of course, occurred prior to such decisions. *See* Temple Affidavit; *supra.* (R. p. 245).

Moreover, the South Carolina Legislature also made it abundantly clear that the intent of SORA is "to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens" and to "provide law enforcement with the tools needed in investigating criminal offenses." S.C. Code Ann. § 23-3-400. In that regard, the South Carolina Supreme Court has held that registration as a sex offender is not a punishment, but rather is a regulatory requirement imposed to promote public safety. *See* Williams v. State, 378 S.C. 511, 516, 662 S.E.2d 615, 618 (2008). And the Registry accomplishes this

stated intent. *See* Victims' Advocate Affidavit; Temple Affidavit. (R. pp. 411-12, 246). As such, any claim asserting that SORA registration constitutes punishment of any kind, much less excessive punishment, fails as a matter of law and the trial court's decision to the contrary must be reversed.

VI. The trial court erred in disregarding South Carolina's binding jurisprudence in finding that SORA constitutes an unconstitutional *ex post facto* law.

In addition, the trial court's finding that Respondent's SORA registration constitutes acts as an *ex post facto* violation is legal error on an issue that was not properly raised at any time in this matter. Notably, this argument is absent from Respondent's Complaint or the Respondent's Motion for Summary Judgment. In addition, regardless of the deficiency of process on this issue, this Court's determination of this issue is in complete disregard of binding South Carolina precedent. *See* State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) ("We [the South Carolina Supreme Court] find the [Sex Offender Registration] Act is not so punitive in purpose or effect as to constitute a criminal penalty. Accordingly, the Act does not violate the *ex post facto* clauses of the state or federal constitutions."). *See* Daniels v. City of Goose Creek, 314 S.C. 494, 501, 431 S.E.2d 256, 260 (Ct. App. 1993); (decisions of the Supreme Court bind as precedent); S.C. Const. Art. V, § 9. It is noteworthy that the law in question regarding SLED's authority to electronically transmit SORA information was enacted in 1998, 10 years prior to the Respondent's guilty plea. *See* 1998 Act No. 384. Similarly, SLED began publishing SORA information on the internet in 1999, again 10 years prior to the Respondent's guilty plea. Accordingly, laws and decisions occurring 10 years prior to application to the Respondent simply cannot properly be held to be *ex post facto*. Accordingly, the trial court's decision must be reversed in its entirety.

VII. The trial court erred in disregarding and mischaracterizing the evidence in this matter.

Although aforementioned South Carolina law and jurisprudence indicates that there is no legally cognizable constitutional or equitable claim in this matter, the Appellants are informed and believe that rebutting the trial court's myriad of incorrect assertions is not required because none of these have any bearing whatsoever on the decision in this case. However, the Respondents believe it is nevertheless important to "set the proverbial record straight" regarding the trial court's factual inaccuracies and mischaracterizations.

1. Mischaracterization of Doctor Evaluations and Risk of Reoffending

The trial court found that the Respondent is of no risk of reoffending and that his recidivism rate is "zero percent". *See* Order p. 17. (R. p. 19). This finding is absolutely unsupported by the evidence in this matter and even the Respondent's own doctors contravene this finding. Dr. William Burke evaluated the Respondent in 2009. *See* Burke Evaluation. He provided in his evaluation that "Based upon the STATIC-99 score, this places Mr. Powell in the **Low Medium risk category** relative to other adult male sex offenders." This indicates unequivocally that the Respondent has a risk of reoffending, albeit a Low Medium risk. The STATIC-99 is an instrument designed to assist in the prediction of sexual and violent recidivism for sexual offenders that provides scores that are either in the Low, Medium-Low, Medium-High, or High Category. *Id.* There is not even a category for "no risk" of recidivism because that category does not exist. As such, Dr. Burke clearly concluded that the Respondent presents a risk of reoffending, and this cannot be argued otherwise. *Id.*

Respondent also sought out the services of Dr. Thomas V. Martin in 2009. *See* Martin 2009. (R. pp. 267-68). Dr. Martin opined in his evaluation: "It is also my opinion

that Mr. Powell is a low-risk to re-offend sexually while he continues in therapeutic treatment." *Id.* Furthermore, Dr. Martin provided an affidavit in this current action in which Dr. Martin stated, "[i]t is the opinion of this Examiner to a reasonable degree of medical and psychiatric certainty that Mr. Powell poses a very low risk to sexually reoffend." Martin 2017. (R. p. 270). As such, even Dr. Martin concluded on two separate occasions that the Respondent is at risk of reoffending, albeit a low one – not that he presents **"zero" risk**. As such, was factual and legal error for the trial court to articulate otherwise.

Most significant in the matter of reoffending is that the South Carolina General Assembly explicitly stated in S.C. Code Ann. § 23-3-400, which is the purpose section of SORA, that "[s]tatistics show that sex offenders often pose a high risk of re-offending." This is a statutory finding that is well within the province of the Legislature to make. *See* Smith v. Doe, 538 U.S. 84, 103, 123 S.Ct. 1140, 1153 (2003). As such, there is no conclusion that can be derived after an accurate reading of the evaluations of the Respondent's two different doctors provided that concludes the Respondent poses no risk of reoffending. Accordingly the trial court's finding to the contrary is factually incorrect.

2. Criminal Solicitation with a Minor is not a Victimless Crime

The growth of the internet in the last two decades has given rise to a new and dangerous avenue for sexual predators to prey on minors. The ability to solicit minors for sexual purposes is now possible with simply a few keystrokes. Accordingly, this crime is taken very seriously by the State of South Carolina. The South Carolina Attorney General's Office and other state and federal prosecutors dedicate considerable resources, often in unison with other state and federal law enforcement agencies, to arrest and

prosecute these dangerous predators. The crime of criminal solicitation specifically provides that a person is guilty if the person has the **intent** to perform a sexual act in the presence of a person under the age of eighteen, or a person **reasonably believed** to under the age of eighteen. *See* S.C. Code Ann. § 16-15-342. The Respondent admitted to such conduct under oath. *See* Sentencing Sheet; Plea Transcript. (R. pp. 184-192).

In order to protect vulnerable minors in our society from irreversible harm, this law exists because simply attempting this type of sexual conduct with someone believed to be under eighteen is a most serious offense. Often times, arrests for this offense occur after a "sting" operation, which is when law enforcement poses undercover online as minors in order to catch these sexual predators. To say this is a victimless crime because the solicited person is not actually a minor is directly contrary to the conduct the law seeks to prevent, and it goes against the government's mandate to protect society from these dangerous individuals. Lastly, SORA has the express purpose of aiding law enforcement and protecting the public. As such, SORA provides no distinction between whether an actual minor is solicited or an undercover police officer is solicited, because what matters is simply the intent of the perpetrator, which in this case was for a 22-year old that

> did knowingly though the Internet contact and communicate with a person located within the County of Lexington, State of South Carolina, whom he reasonably believed to be a twelve year-old girl, for the purpose of or with the intent of persuading, inducing, enticing, or coercing this person to engage or participate in a sexual activity as defined in Section 16-15-375(5).

See Indictment. (R. pp. 182-83). Put simply, Criminal Solicitation of a Minor is not a victimless crime and to say that it is constitutes an affront to all victims of sexual offenses because this completely disregards the ripple effect that crime has on the victims

themselves and community at large. *See* Victims' Advocate Affidavit. (R. p. 411) It was error for the trial court to hold otherwise.

3. Respondent's Additional Claims of "Hardship"

The trial court's finding that Respondent is a victim of numerous "hardships", none of which are relevant to this action as legally cognizable direct punishment attributable to the Registry, is error. The 2008 South Carolina Court of Appeals case *Williams v. State* addressed the characterization of "consequences" related the sexual offender registry. "The imposition of a sentence may have a number of collateral consequences, however, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of the collateral consequences." Williams v. State, 378 S.C. 511, 514, 662 S.E.2d 615, 617 (2008) (citing Brown v. State, 306 S.C. 381, 382-83, 412 S.E.2d 399, 400 (1991)). The court determined that a defendant does not have to be advised of all of the collateral consequences of his plea in order for the plea to withstand constitutional scrutiny. "The distinction between 'direct' and 'collateral' consequences of a plea ... turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Williams v. State, 378 S.C. 511, 515 (2008) (internal citations omitted). A consequence that the defendant must be informed of is one which impacts the sentence imposed on the defendant, and as such, is a direct consequence. Williams v. State, 378 S.C. 511, 515 (2008). In *Williams*, the Court found that sex offender registration is a collateral consequence, not a direct consequence. *Id.* As such, the Respondent's claims of hardship are not even collateral consequences. Accordingly, any perceived hardship suffered by the Respondent, even if assumed as true, has no bearing whatsoever on this

action and simply does not rise to the level of legally cognizable punishment. *See* Williams v. State, 378 S.C. 511, 514, 662 S.E.2d 615, 617 (2008).

Therefore, even assuming all of the Respondent's "hardships" as true, this does not and cannot alter the binding precedent in this State which concludes unequivocally that online public registration is **not punishment**. *See* State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002); Hendrix v. Taylor, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003); In re Ronnie A., 355 S.C. 407, 409, 585 S.E.2d 311, 312 (2003) (finding that "sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated."); In Interest of Justin B., 419 S.C. 575, 580–82, 586-87, 799 S.E.2d 675, 677–78, 681, *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017).

Moreover, the Respondent is treated the same as all other similarly-situated South Carolina sex offenders and can claim no disparate treatment whatsoever. *See* RCSO Affidavit; Temple Affidavit. (R. pp. 243-47). Accordingly, the trial court's decision must be reversed.

VIII. The trial court erred in failing to find for the Appellants as a matter of law.

The South Carolina Legislature has mandated that SORA registration in South Carolina is for life. *See* S.C. Code Ann. § 23-3-460 (mandating registration "for life"). This lifetime mandate is set forth in clear, unequivocal, and unambiguous statutory language and represents the clear policy of South Carolina's lawmakers. As such, this specific statutory language is determinative and leaves no room for judicial interpretation or second-guessing. *See* Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6

(1993) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); In re Vincent J., 333 S.C. 233, 509 S.E.2d 261 (1998) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.") (internal citations omitted). Further, South Carolina jurisprudence on this issue is clear, "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. In re Vincent J., 333 S.C. 233, 509 S.E.2d 261, 262 (1998) (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)).

SORA, and more specifically S.C. Code Ann. § 23-3-430(E), (F), (G), provides the only lawful mechanisms and avenues by which an individual can be removed from the SORA registry. 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. S.C. Code Ann. § 23-3-430(F). And finally, pursuant to § 23-3-430(G) individuals exonerated subsequent to filing a petition for a writ of habeas corpus or a motion for a new trial are removed. S.C. Code Ann. § 23-3-430(G). However, it is uncontroverted that Respondent does not meet any of these statutory criteria and, in fact, he concedes that he does not. *See* Complaint. (R. pp. 54-60). Accordingly, there is no legal or constitutional

basis for the Respondent to be removed from the SORA registry and the Respondents were entitled to judgment as a matter of law. As was conclusively held in *Justin B.*,

> **If the requirement that juvenile sex offenders must register and must wear an electronic monitor is in need of change, that decision is to be made by the Legislature—not the courts.** The decision of the family court to follow the mandatory, statutory requirement to impose lifetime sex offender registration and electronic monitoring on Justin B. is **AFFIRMED**.

In Interest of Justin B., 419 S.C. 575, 580–82, 586-87, 799 S.E.2d 675, 677–78, 681, *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017). As such, the Respondent brought his arguments to the wrong forum as only the South Carolina Legislature can re-write the clear and unequivocal laws applicable to this case. Accordingly, the trial court's decision to the contrary must be reversed in its entirety.

CONCLUSION

In conclusion, based on the foregoing, the clear and unambiguous sovereign laws of the State of South Carolina applicable to this matter, and the binding jurisprudence applicable to this matter; Appellants respectfully request that this Court REVERSE the trial court's decision in its entirety and grant Appellants' judgment as a matter of law.

Respectfully Submitted,

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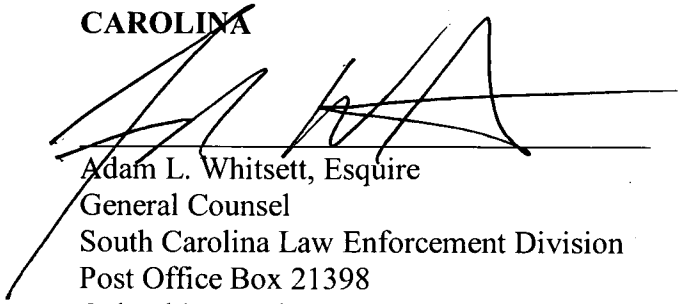

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COLUMBIA, SOUTH CAROLINA
DECEMBER 4, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No.: 2019-001063
Trial Court Case No. 2016-CP-40-06960

Dennis J. Powell, Jr. Respondent,

v.

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

RULE 211(b) CERTIFICATION

I hereby certify that the Final Brief of Appellants and the Final Reply Brief of Appellants comply with Rule 211(b), SCACR and the August 13, 2007 Supreme Court Order regarding personal identifiers.

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