STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Grace Gilchrist Knie, Circuit Court Judge

Civil Action No. 2017-CP-32-00712

Eric Ragsdale .....Appellant,

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

REPLY BRIEF OF APPELLANT

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ARGUMENT

Having received and reviewed the Initial Brief of Respondents, and arguments raised therein, Appellant, John Doe ("Doe"), hereby submits this Reply Brief of Appellant pursuant to Rule 208(a)(3) of the South Carolina Rules of Appellate Procedure, responding to those issues raised by Respondents and not previously addressed by Appellant.[1] Doe submits this Brief as a supplement to the Opening Brief of Appellant, and hereby specifically adopts and reargues those arguments presented therein. For these reasons presented herein, as well as those previously presented, the circuit court erred in granting summary judgment to Defendants and concluding the lifetime registration requirement for unenumerated offenders is Constitutional.

Respondents' Initial Brief recites the numerous cases from our Courts interpreting various aspects of the Sex Offender Registration Act ("SORA"), including a quote from an extensive passage from *In Interests of Justin B.*, 419 S.C. 575, 580-82, 799 S.E.2d 675, 677-78, 681 *cert denied sub nom JDB v. South Carolina*, 138 S.Ct. 483, 199 L.Ed.2d 360 (2017). Doe does not dispute these holdings, nor does Doe dispute the fact that he is not eligible for removal from the Registry as constructed. Rather, Doe posits that a more thorough analysis regarding punishment, as defined by *Kentucky v. Mendoza-Martinez*, 372 U.S. 144 (1963), and an examination of studies regarding the impact of Registration yields a different conclusion. A challenge not yet made or decided by our Courts.

While a nominal review of the *Mendoza-Martinez* factors ultimately led to this Court to conclude that the lifetime electronic monitoring for juvenile offenders was not "punishment," the

[1] Doe rests on the arguments presented in his Initial Brief of Appellant as sufficient where no Reply is included herein.

Court noted the ability of the registrant to petition for judicial review in its analysis. *In re Justin B.*, 405 S.C. 391, 747 S.E.2d 774 (2013); s*ee also State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013). Doe lacks such an ability.

As noted in the Initial Brief of Appellant, the Sixth Circuit Court of Appeals conducted a detailed *Mendoza-Martinez* analysis in evaluating Michigan's sex offender registry, before ultimately determining that the registration was a punishment. *See Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016)(cert denied, 138 S.Ct. 55, Oct. 2, 2017). Both our case of *Justin B* and the Sixth Circuit's *Does* case rely upon United States Supreme Court precedent in their analysis of "punishment," but yield a different result. This difference in the result is traced to a single factor – the presence of studies demonstrating the Registration does not achieve the stated goals of the Act.

This is not the first instance where this Court has been asked to utilize the Sixth Circuit to support a position related to Registration. The Sixth Circuit was cited as authority by the *Justin B* Court in evaluating the *Mendoza-Martinez* factors as it relates to Registration. *See Justin B.*, 405 S.C. 391, 396-408; 747 S.E.2d. 774, 777-783 (citing *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007)). The *Bredesen* Court upheld the Tennessee Act, but in so doing noted that the accuracy and relevance of the statistics cited in the Tennessee Act were not contested. *See Bredesen*, 507 F.3d at 1006. After being presented with a challenge which does contest the accuracy and relevance of statistics in a challenge to the Michigan Act, the Sixth Circuit reached a different result. *See Does #1-5, supra.* Similar to the Sixth Circuit prior to *Does*, this Court has not had occasion to review data to determine whether such data supports the earlier conclusion that SORA is not punishment, or if, like the Sixth Circuit, a different result is yielded.

The South Carolina, Tennessee and Michigan statutes all have the stated purpose of "promot[ion of] . . . the public health, welfare, and safety of its citizens" and "provid[ing] law enforcement with the tools needed in investigating criminal offenses." *See* S.C. Code Ann. § 23-3-400. To support this proclamation, this section goes on to recite "[s]tatistics show that sex offenders often pose a high risk of re-offending." *Id.* Prior to *Does*, "statistics" had not been challenged in the Sixth Circuit. Prior to the instant challenge, statistics had not been challenged in South Carolina. Upon review of the challenged data, the Sixth Circuit concluded the Registry was unconstitutional. This Court now has that same opportunity.

Of note, despite this challenge, Respondent has failed to present any empirical support for the proposition that registration supported the enunciated purposes of SORA. No mention is made in the Initial Brief of Respondent as to the studies provided before the Circuit Court, the lack of any studies by Respondent, or the contents of the studies provided. Respondent presents nothing to support the blanket proclamation that implementation of SORA has made the public safer, deterred any sexual offenses, or contributed to the arrest of any sex offender. While earlier cases may have concluded that SORA is not a punishment, the presentation of these studies and the dearth of any studies to support SORA cannot render the same conclusion. It is not surprising that Respondent failed to respond to this argument – they have no data to support SORA.

As Registration is a "punishment," the Eighth Amendment to the United States Constitution prohibits punishment which is grossly disproportionate with the severity of a crime. *See State v. McKnight,* 352 S.C. 635, 652, 576 S.E.2d 168, 177 (2003); U.S. Const. amend. XIII. Absent statistical support demonstrating Registration prevents anything other than isolation, a lifetime of registration is disproportionate and cruel and unusual and cannot withstand

Constitutional muster.

CONCLUSION

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

Respectfully submitted,

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December 1, 2019

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CERTIFICATE OF SERVICE AND CERTIFICATE OF COMPLIANCE

I, the undersigned employee of Milling Law Firm, attorneys for John Doe, do hereby certify that, I have served all parties in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses and that the referenced documents comply with Rule 211(b).

Pleading: Final Brief of Appellant
Reply Brief of Appellant

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Dec. 2, 2019