

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2019-001063

Dennis J. Powell, Jr.,

Respondent,

v.

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

Appellants.

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**MEMORANDUM IN SUPPORT OF RESPONDENT'S RULE 217 MOTION  
TO ARGUE AGAINST PRECEDENT**

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I. Introduction

This Court has previously issued opinions in challenges to certain aspects of the South Carolina Sex Offender Registry Act, §§23-3-400 *et. seq.*, S.C. Code, as amended (“the SORA.”) Such challenges have included--among others--matters unrelated to this case, such as how SLED converts out-of-state offenses, (*e.g. Hendrix v. Taylor*, 353 S.C. 542, 579 S.E.2d 320 (2003)), how juvenile registrants are treated (*e.g. In re Ronnie A.*, 355 S.C. 407, 585 S.E.2d 311 (2003); *In re Justin B.*, 419 S.C. 575, 799 S.E. 2d 675 (2017)), and challenges to ankle monitoring for sexually violent predators (*e.g. State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013); *In re Justin*

*B., id.*) Respondent's case does not include those issues.

The trial court found "Plaintiff does not argue against precedent in asserting that the entirely different and distinctly punitive and risk-increasing publication methods for these low-level criminal convictions is unconstitutional, when such publication is for life. Plaintiff's argument is that SLED has not followed the plain language of statute, and that the extra-statutory and risk-increasing publication methods used by the Defendants and others to publish information about him is unconstitutionally punitive to him. This has not been addressed by our appellate courts." (R. 26.) Respondent is, however, bringing a challenge to South Carolina's Sex Offender Registry Act and Appellants' enforcement of it. Out of an abundance of caution and because counsel is familiar with language from this Court in historical SORA-related cases, Respondent wishes to be permitted to argue for a different conclusion on some issues, as the law is applied to the facts in his case.

## II. Potentially Precedential Language

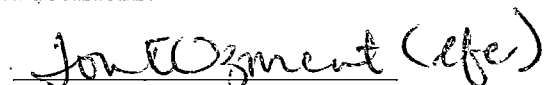
Eighteen years ago, this Court stated "The [SORA] language indicates the General Assembly's intention to create a non-punitive act. We find the Act is not so punitive in purpose or effect as to constitute a criminal penalty." *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). In 2003, this Court stated "the length of time one must be listed on the sex offender registry is non-punitive" (*Hendrix* at 550 (2003)), and "We recently held sex offender registration, regardless of the length of time, is non-punitive and therefore no liberty interest is implicated." (*Ronnie A.* at 409 (2003.))

Unlike in other cases, Respondent does not conflate registration with NCIC-style public

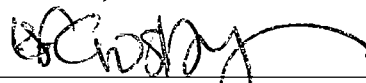
access by request nor with wholesale publication on the internet. Further, Respondent notes the nature and impact of registration and internet publication have changed in the intervening years. Lastly, Respondent does not expect to argue against U.S. Supreme Court precedent, in that his position is the trial court's analysis of his case under the *Smith v. Doe*<sup>1</sup> factors was correct.

### III. Conclusion

This court has never addressed the statutory authority for wholesale publication online. It has never addressed whether lifetime registration and internet publication (not NCIC-style public access by request) for all, even low-level offenders, without tiering of offenses, without a path off, and without limits on publication are constitutional. Therefore, it is not Respondent's expectation to argue against any precedent. However, he submits the facts of his case and the trial court's findings and conclusions may present this Court with an opportunity to revisit and potentially re-evaluate certain aspects of prior SORA decisions.

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<sup>1</sup> 538 U.S. 84 (2003)