

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

The Honorable Frank R. Addy
Circuit Court Judge

Appellate Case No.: 2020-001486

Andrew Young, Petitioner,

v.

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

**RESPONDENT’S RESPONSE TO THE BRIEF OF *AMICI CURIAE*
SOUTH CAROLINA JUSTICE PROJECT AND ROOT & REBOUND**

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QUESTION PRESENTED

I. **DID THE COURT OF APPEALS ERR IN DENYING THE PETITIONER'S REQUEST FOR REMOVAL FROM THE SOUTH CAROLINA SEX OFFENDER REGISTRY ACT REGISTRY?**

STATEMENT OF THE CASE

The Petitioner pled guilty to the offense of Lewd Act on a Minor in 1995. (Appendix p. 35).¹ The Petitioner concedes that this conviction required him to register as a sex offender pursuant to the South Carolina Sex Offender Registry Act, § 23-3-400 *et seq.* (“SORA”) and that the Petitioner did in fact so register. Subsequently, because the Petitioner was sentenced pursuant to the Judge William R. Byars Youthful Offender Act (YOA), § 24-19-5 *et seq.*, he sought and received an expungement for this offense (Appendix pp. 35-6). Nevertheless, despite this expungement, the Petitioner does not meet any of the statutory criteria for removal set forth in the plain language of SORA. *See* S.C. Code Ann. § 23-3-430(E), (F), (G). (Appendix p. 36). Put simply, an expungement is not and has never been a ground for removal from SORA. *Id.* Rather, SORA removal is governed exclusively by the clear and unambiguous language of S.C. Code Ann. § 23-3-430(E), (F), and (G).

¹ The offense of Lewd Act was repealed and recodified as Criminal Sexual Conduct with a Minor in the third degree (S.C. Code Ann. § 16-3-655(C)) in 2012. *See* 2012 Act 255; State v. Ross, 423 S.C. 504, 815 S.E.2d 754 (2018).

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DENIED THE PETITIONER'S REQUEST FOR REMOVAL FROM SORA BECAUSE AN EXPUNGEMENT IS NOT AN AVENUE OF RELIEF FROM SORA.

The *Amici* are simply incorrect in their application of South Carolina law in this matter. Put simply, this case begins and ends with the determination of whether Petitioner meets any of the enumerated avenues for removal from SORA. The record in this matter is undisputed and confirms that the Petitioner does not. As such, the Court of Appeals correctly denied Petitioner's request for removal applying the clear and unambiguous South Carolina law.

STATUTORY AVENUES FOR REMOVAL FROM SORA

The plain language of SORA sets forth the only lawful avenues by which an individual's lifetime SORA registration requirement can be removed. *See* S.C. Code Ann. § 23-3-430(E), (F), (G); *see also* Johnson v. Lloyd, 399 S.C. 470, 476–77, 732 S.E.2d 198, 201 (Ct. App. 2012), *overruled on other grounds by* Johnson v. Lloyd, 407 S.C. 610, 757 S.E.2d 705 (2014) (“The General Assembly enacted an unambiguously worded statute that sets forth the legal remedies available to an individual on the [SORA] registry. Because the sex offender registry statute provides an adequate remedy..., it was error for the circuit court to fashion an equitable remedy in this case.”). As such, the plain language of SORA resolves this entire matter and there is no need for further interpretation or analysis. *See* Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003) (acknowledging that the cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent.).

The South Carolina Legislature did not intend for an expungement to relieve an individual's SORA registration requirement. If that were the intent, the Legislature would have specifically stated such in statute. However, because the Legislature did not, the canon of statutory construction *expressio unius est exclusion alterius* - 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).

Moreover, YOA expungements came into existence in 2003. See 2003 Act No. 1. Since that time, SORA has been amended seven (7) times, including one amendment to the statutory criteria for removal.² However, despite these numerous opportunities, not once has the Legislature ever included YOA expungements, or any expungement for that matter, in the list of statutory avenues for removal from lifetime SORA registration. See S.C Code Ann. § 23-3-430(E), (F), (G). As such, the legislative intent that a YOA expungement does not relieve an individual's SORA registration requirement is clear and unequivocal and conclusively resolves this matter. See Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003) (acknowledging that the cardinal rule of statutory construction is to ascertain the intent of the legislature and to accomplish that intent.).

² These amendments are: 2004 Act No. 208, § 14; 2005 Act No. 141, § 2; 2008 Act No. 335, § 16, eff June 16, 2008 (amending the criteria for removal set forth in S.C. Code Ann. § 23-3-430(F)); 2010 Act No. 212, § 3, eff June 7, 2010; 2010 Act No. 289, § 8, eff June 11, 2010; 2012 Act No. 255, § 5, eff June 18, 2012; 2015 Act No. 7 (S.196), § 6.D, eff April 2, 2015.

To that end, the clear intent of the South Carolina Legislature is that the enumerated avenues of removal set forth in SORA clearly are the only legal avenues to remove a lifetime registration requirement. To that end, pursuant to S.C. Code Ann. § 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). As discussed more fully below, an expungement does not equate to a reversal, overturn, or the vacation of a conviction. Rather, S.C. Code Ann. § 17-1-40 provides the mechanism for handling expunged records and authorizes the continued maintenance and use of such records. *See below.*

Pursuant to S.C. Code Ann. § 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 after 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(F). However, unfortunately for the Petitioner, none of these avenues apply to him. (Appendix p. 36). Simply put, an expungement is not an enumerated ground for removal of an individual’s lifetime registration requirement recognized in SORA. As such, the South Carolina Court of Appeals was correct to affirm the trial court and the *Amici’s* request that this Court rewrite clear and unambiguous South Carolina law must fail.

APPLICATION OF S.C. CODE ANN. § 22-5-920

In addition, any reliance on S.C. Code Ann. § 22-5-920, much less other expungement statutes, is misplaced. An expungement pursuant to § 22-5-920 does not operate as a reversal, overturn, or vacation of a conviction on appeal and does not affect an individual's overall SORA registration requirement. As correctly noted by the trial court in this matter, the Petitioner's expungement "does not change or rewrite history; it does not operate to vacate or undo a prior adjudication." (Appendix p. 7). Moreover, § 22-5-920 deals only with the publication of certain arrest and conviction records - not overall SORA registration.

It is axiomatic that actual SORA in-person registration and the publication of SORA conviction information are separate and distinct matters governed by separate and distinct statutes. To that end, S.C. Code Ann. § 23-3-450 mandates that offenders "register with the sheriff" and specify that registration entails providing "information as prescribed by SLED." This is SORA registration and is completely unaffected by S.C. Code Ann. § 22-5-920 and the statutes are not *in pari materia* such that they need to be harmonized.

Rather, S.C. Code Ann. § 23-3-490 separately speaks to the public accessibility of and the publication of SORA information. To that end, § 23-3-490 provides that "information collected for the offender registry is open to public inspection" and specifically authorizes the use of "computerized or electronic transmission of data or other electronic or similar means" *i.e.* the internet, to accomplish such publication. Accordingly, even assuming *arguendo* that § 22-5-920 could be read to limit the public's access to the SORA registry information related to the Petitioner, which it does not, there is simply no possible way to read § 22-5-920 to authorize the removal of the Petitioner's separate and

distinct lifetime SORA registration requirement. Rather, the only lawful avenues to remove this mandatory lifetime SORA registration requirement are set forth in SORA itself. *See* S.C Code Ann. § 23-3-430(E), (F), (G).

Moreover, the proper application of § 22-5-920, which speaks only to the publication of certain arrest and conviction records, requires only that Respondent seal from the public view the actual charge of conviction on the Petitioner's publicly accessible SORA website entry. Respondent has done such. Accordingly, Respondent is informed and believes that it is in full compliance with both § 22-5-920 and with SORA. However, there is simply no reading of § 22-5-920, a statute dealing only with the publication of arrest records, that can evidence a Legislative intent to remove an individual's overall SORA registration requirement. *See Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). Accordingly, the Court of Appeals decision should stand.

SORA REGISTRATION IN SOUTH CAROLINA IS NOT PUNISHMENT

Contrary to the assertions in the brief of the *Amici*, SORA registration is not punitive. The binding authority of this state clearly and unequivocally provides that registration pursuant to 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 the Interest of Justin B., a Juvenile under the Age of Seventeen*, 419 S.C. 575, 799 S.E.2d 675 (2017) (reaffirming the constitutionality of

SORA and reaffirming unequivocally that SORA is not punishment). The unauthenticated articles proffered by the *Amici*, which are not properly a part of the record in this matter, cannot change the binding precedent of this State. *Id.*

Rather, the clear Legislative 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 State v. Walls, this Court held:

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. Hence, the 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. Accordingly, the Act does not violate the *ex post facto* clauses of the state or federal constitutions.

348 S.C. 26, 30-31, 558 S.E.2d 524, 525-26 (2002).

The case of In the Interest of Justin B., a Juvenile under the Age of Seventeen, 419 S.C. 575, 799 S.E.2d 675 (2017), is also determinative. In denying every challenge to SORA brought before it, this Court, not only provided a comprehensive review of the history of SORA jurisprudence, but also stated the following:

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**.

Id. at 586–87, 681 (emphasis added).

Similarly, the Respondent would assert that should South Carolina’s SORA laws need amendment to include expungement as an available route for removal from the SORA registry, which Respondent certainly does not concede, that is a decision that can **only** be made by the South Carolina Legislature. *Id.*; S.C. Const. art. I, § 8; Santee Cooper Resort, Inc. v. S. Carolina Pub. Serv. Comm’n, 298 S.C. 179, 379 S.E.2d 119 (1989); Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007). However, in the absence of such legislative change, there is simply no lawful relief on which the Petitioner’s claim can be granted. Accordingly, this Court should reject the *Amici’s* request that this Court act as a “superlegislature” to rewrite clear and unambiguous South Carolina law. *Id.*

CONCLUSION

In conclusion, the South Carolina Court of Appeals decision, which is based on the clear and unambiguous law in South Carolina, should stand.

Respectfully Submitted,

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