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Jun 24 2021

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.

PETITION FOR REHEARING

The Honorable Alan Wilson
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QUESTION PRESENTED

I. SHOULD THIS COURT REVISIT ITS DECISION TO DEPART FROM DECADES OF JURISPRUDENCE IN FINDING THAT SOUTH CAROLINA'S UNIFORM LIFETIME REGISTRATION REQUIREMENT FOR SEX OFFENDERS IS ARBITRARY?

Pursuant to Rules 221(1) and 240, SCACR, Appellants respectfully petition the Court to reconsider the Powell v. Keel, Op. No. 28033 (Shearouse Adv. Sh. No. 19). For the reasons set forth herein the Appellants submit that the Court should grant the petition for rehearing, withdraw its previous opinion, and issue a substituted opinion upholding the constitutionality of South Carolina's uniform lifetime registration requirement for sex offenders.

Appellants seek only to have this Court revisit its ruling and continue to follow its own longstanding precedent in this case. It is axiomatic that 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). The fact that this Court has rejected the very arguments brought forth in this case for decades demonstrates that SORA's uniform lifetime registration requirement can be construed in a manner to render it constitutionally valid. *See* State v. Walls, 348 S.C. 26, 558 S.E.2d 524 (2002); In re Ronnie A., 355 S.C. 407, 585 S.E.2d 311 (2003); Williams v. State, 378 S.C. 511, 662 S.E.2d 615 (2008) (holding that registration as a sex offender is not a punishment, but rather is a regulatory requirement imposed to promote public safety); State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013); In the Interest of Justin B., a Juvenile under the Age of Seventeen, 419 S.C. 575, 582, 799 S.E.2d 675, 678 (2017) *cert. denied sub nom.* J.D.B. v. South Carolina, 138 S. Ct. 483, 199 L. Ed. 2d 360 (2017) ("Beginning with *Walls*, and continuing through *Hendrix*, *Ronnie A.*, *Dykes*, and *Justin B.*, we upheld the constitutionality of the mandatory lifetime sex offender registry requirement for adults and juveniles.")

Further, this Court has long held that 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). And that 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." *Id.* Again, Appellant would assert that this same precedent set forth above, reaffirmed as recently as 2017, demonstrates that uniform treatment of sex offenders is not repugnant to the state or federal constitution beyond a reasonable doubt. *See supra.* Accordingly, the Appellant would respectfully request that this Court accord this decision with this Court's prior decisions.

U.S. Supreme Court Chief Justice John Robert's concurring opinion in the *June Medical Services v. Russo* decision from June of 2020 speaks to this issue. In his concurrence, Chief Justice Roberts quotes Alexander Hamilton in Federalist No. 78 that "[a]dherence to precedent is necessary to 'avoid an arbitrary discretion in the courts.'" June Med. Servs. L. L. C. v. Russo, 140 S. Ct. 2103, 2134, 207 L. Ed. 2d 566 (2020) *quoting* The Federalist No. 78, p. 529 (J. Cooke ed. 1961) (A. Hamilton). Ultimately, Chief Justice Roberts concludes that for "precedent to mean anything, the doctrine must give way only to a rationale that goes beyond whether the case was decided correctly." *Id*. This sentiment accords with the long-standing precedent of this Court that courts should not act as a "superlegislature to second guess the wisdom or folly of decisions of the General Assembly" and should not change the plain meaning of a statutes. *See* Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 59, 644 S.E.2d 675 (2007). To that end, Appellants request this Court revisit its decision to change the longstanding precedent in South Carolina that SORA's uniform treatment of sex offenders is arbitrary and, thus, unconstitutional.

To achieve this result, this Court was forced to essentially re-write the South Carolina Legislature's stated purpose of SORA in S.C. Code Ann. § 23-3-400. The South Carolina Legislature specifically provided that the SORA registry 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. 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." *Id*. Notably absent from this espoused purpose is any language that could be construed as legislative intent limiting this purpose or the need to protect the public from only individuals determined to have a high risk of re-offending. *Id*. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) *quoting* Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992).

Nevertheless, this Court, departing from decades of jurisprudence, found that lifetime registration without judicial review is no longer "rationally related to the legislature's stated purpose of protecting the public *from those with a high risk of re-offending*." (emphasis added). In so finding, this Court has resorted to a forced a construction that limits the statute's operations, which is contrary to this Court's precedent. *See* Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009) ("[Courts] will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation."). This forced construction and the departure from precedent results in the

South Carolina Legislature's longstanding policy of uniformly accepting zero risk of recidivism from sex offenders unconstitutionally arbitrary.

As three justices frankly reiterated in a recent case: "If it were true courts have the authority to interpret statutes according to a sense of justice and right, then courts would have the power to rewrite statutes to suit their own personal preferences, regardless of legislative intent. *Courts do not have that power*." Buchanan v. S.C. Prop. & Cas. Ins. Guar. Ass'n, 424 S.C. 542, 553, 819 S.E.2d 124, 130 (2018) (Few, J. concurring) (emphasis added). As Appellant believes this is in error, Appellant requests that this decision be revisited.

In addition, this Court failed to reconcile or even acknowledge the most authoritative precedent on this issue, which is the 2017 *In the Interest of Justin B.* decision penned by Justice Few. This is the most recent decision on this issue in which this Court upheld the constitutionality of lifetime registration for juveniles in South Carolina without a judicial mechanism for review. In this decision, this Court held that

> 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). This decision simply cannot be reconciled with the Court's decision in this matter.

Nor can this Court's repeated rejection of identical procedural due process claims for decades. *See supra.* This specific claim was rejected in the 2013 *Dykes* case. *See* State v. Dykes, 403 S.C. 499, 510 n. 9, 744 S.E.2d 505, 511 n. 9 (2013) (rejecting Dykes' procedural due process claim under Rule 220, SCACR). It is noteworthy that this Court specifically rejected legislative "line drawing" amongst offenses in the *Dykes* case, yet the result in this case requires the South Carolina Legislature to engage in the very same type of "line drawing" that resulted in S.C. Code Ann. § 23-3-540(H) being held arbitrary and unconstitutional. *Id*. The irreconcilability with this Court's decision to all prior historical decisions on this same issue should not stand.

Moreover, the irreconcilability with historical precedent is exacerbated by the fact that the record before the Court in this matter clearly established that absolutely nothing changed with regard to South Carolina's uniform lifetime registration requirement between the time of the 2017 *In the Interest of Justin B.* decision and this decision. As nothing has changed that would alter or affect the historical precedent in this case, Appellants respectfully request that this Court revisit its decision in this matter, reaffirm the decades of jurisprudence and find that South Carolina's unform treatment of all sex offenders is not arbitrary nor unconstitutional.

This Court also appears to have misapprehended the nature and substance of the 2019 circuit court hearing in this matter, ultimately finding that this hearing is an acceptable process for removal from SORA. Put simply, there was no actual hearing on the merits in this case during which the circuit court weighed all of the evidence related to the Respondent's risk of re-offending. Rather, in 2019, the parties argued cross motions for summary judgment on the constitutionality of SORA. In this motions hearing, the Appellant relied on the decades of binding constitutional precedent from this Court. While Appellant concedes that there were certainly various affidavits attached to both Appellants' and Respondent's memorandums filed in support of the respective

cross motions for summary judgment, no evidentiary record was ever created in this matter. No testimony was taken, no documents were authenticated, and no actual evidence was submitted into the evidentiary record in this matter. As such, Appellants submit that a motions hearing on cross motions for summary judgment is not an acceptable avenue of removal from SORA and should not be considered as such in the future. Therefore, the Appellants request that this Court revisit its acknowledgment of such for future cases.

In addition to the procedural deficiencies regarding the 2019 circuit court hearing, the record demonstrates that not only did the circuit court not view the evidence in the light most favorable to the Appellants as the non-moving parties, but the circuit court also completely disregarded the actual affidavits and medical records in this matter. Specifically, the trial court inexplicably found that the Respondent was no risk of reoffending and that his recidivism rate is "zero percent". (R. p. 19). This finding is completely and totally contradicted by Respondent's own doctors and the evidence present in this case. One doctor evaluated the Respondent in 2009 and placed him "in the Low Medium risk category relative to other adult male sex offenders." Another doctor concluded on two separate occasions that the Respondent is in fact, a risk of reoffending, albeit a low one. Notably none of the documents submitted in this matter can support the "zero" risk finding made by the trial court. It was reversible error for the trial court to make findings contradicted by the record. Yet, not only was the trial court not reversed on appeal, but this Court has authorized this as an acceptable process moving forward. This aspect of the decision should be re-evaluated.

In conclusion, based on the foregoing, the clear and unambiguous sovereign laws of the State of South Carolina applicable to this matter, and the decades of historical binding jurisprudence applicable to this matter; Appellants respectfully request that this Court grant the

petition for rehearing, withdraw its previous opinion, and issue a substituted opinion upholding the constitutionality of South Carolina's uniform lifetime registration requirement for sex offenders.

Respectfully Submitted,

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