

**THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

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**APPEAL FROM CHARLESTON COUNTY  
Court of General Sessions**

**Thomas W. Cooper, Circuit Court Judge**

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**Case No. 2007-GS-10-6913  
Unpublished Opinion No. 2010-UP-077  
Submitted February 1, 2010 – Filed February 2, 2010**

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**THE STATE OF SOUTH CAROLINA, .....Respondent**

**vs.**

**ZEB ERON BINNARR, .....Petitioner**

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**BRIEF OF PETITIONER**

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## INTRODUCTION

This Court granted Certiorari to review the Court of Appeals' decision in *State v. Binnarr*, Unpublished Opinion No. 2010-UP-077, issued February 2, 2010. Petitioner asserts the Court of Appeals erred in affirming the circuit court's ruling that Petitioner was not entitled to notice of a change in the law that required twice-a-year sex offender registry registration, notwithstanding the misleading written instructions that the state gave Petitioner in February 2006. The Court's decision is contrary to precedent of both the South Carolina Supreme Court and United States Supreme Court.

### I. QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in holding that Petitioner was not entitled to notice of a change in the law that required twice-a-year sex registry registration, despite the fact that:

1. The indictment alleged that Petitioner had been given notice or “instructions” of the new registration requirement, even though such instructions were not given;
2. In February 2006, the state gave Petitioner written instructions that his next registration requirement would occur in February 2007;
3. Petitioner complied with the written notice and instructions given to him in February 2006, when he registered the following year.

## II. STATEMENT OF THE CASE

Petitioner appeared and registered, as required, for his February 2006 sex offender registration period, at which time the Charleston County Sheriff gave him written instructions concerning his next mandatory registration to occur during the February 2007 period. (App. 26, line 21 – App. 27, line 16)

The law requiring registration twice a year became effective July 1, 2006. There is no evidence in the record that Petitioner knew of the change or that he received any notice of the new biannual reporting requirement. (App 27, lines 17-23)

Petitioner reregistered, as required, within thirty days of his February 2007 registration date. (App. 28, line 7 – App. 29, line 11) Petitioner was, thereafter, indicted in May 2007, months after he voluntarily appeared for his annual re-registration.

### Indictment

The indictment in this case provides in pertinent part as follows:

That in Charleston County, South Carolina, on or about August 18, 2006, the Defendant, ZEB ERON BINNARR, did fail to register as a sex offender with the Charleston County Sheriff's Department after being instructed to do so, as required by Section 23-3-400, et. seq. of the Code of Laws of South Carolina, (1976, as amended); in violation of Section 23-3-470 of the Code of Laws of South Carolina, (1976, as amended). (Emphasis added) (App. 1)

Not only was Petitioner not instructed to register in August 2006, as the indictment states, the state instructed Petitioner to register in February 2007, which he did.

### III. Argument

**When, in February 2006, the state gave Petitioner written, hand delivered notice that his next registration would occur in February 2007, the doctrines of Due Process and Equal Protection required the state to notify Petitioner in a like or otherwise reliable manner when the law changed to require a different reporting date than the one the state gave him in person.**

South Carolina Code § 23-3-420 provides that the State Law Enforcement Division (SLED) shall promulgate regulations to implement the provisions of this article. The procedures followed by the Charleston County Sheriff's Department for Petitioner's annual re-registration in February 2006, including the notice to appear in February of 2007, were presumably performed pursuant to such regulations. See S.C. Code Regs. 73-220 (2009). The current procedural regulation still provides for "annual re-registration." S.C. Code Regs. 73-220 B (1) (2010).

In *State v. Edwards*, the South Carolina Supreme Court held that "A criminal conviction violates due process if, at the time of the conduct which forms the basis of the conviction, the defendant did not have fair notice that the conduct was criminal. 302 S.C. 492, 494, 397 S.E. 2d 88, 89, (1990) citing *Bowie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964).

Relying on *Edwards*, the Court of Appeals held that Petitioner had fair notice, based on the fact that the new registration requirements became effective one month before Petitioner was required to register under the new law. This case, however, is factually distinguishable from *Edwards*, as the state gave Petitioner actual written instructions to report next in February 2007. Moreover, the concept of fairness requires more than simply recognition that the new law predated the new reporting period by one month.

South Carolina Code § 23-3-440(2) provides for verbal and written notice for defendants sentenced to probation and for offenders who move into the state. Clearly, the notice requirement is central to Article 7, Sex Offender Registry statutes.

Fundamental fairness is the touchstone of due process. *Gagnon v. Scarpelli*, 411 U.S. 778 (1972). Due process requires that a law give “fair warning of the conduct it prohibits” so that “no man may be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” U.S. Const Amend V, XIV; *Bouie v. City of Columbia*, 378 U.S. 347, 84 S.Ct. 1697 (1964). It is fundamentally unfair (and a further encroachment of state police power) to expect ordinary citizens to reject the written instructions issued by state authorities and independently seek out and follow a wholly different set of rules. The defendant should not lose his liberty because the legislative and executive branches of state government have failed to coordinate their bureaucracies.

Fairness would have dictated that Petitioner be given a reasonable time to learn of the change in the law. When Petitioner appeared voluntarily for his February 2007 re-registration, the authorities could have advised him of the change, which they no doubt did. If it were important enough to see petitioner earlier than the anniversary of his written notice, the Sheriff’s Department could have phoned or otherwise contacted Petitioner.

Under the state’s theory of the case, the coincidence of Petitioner’s February birthday caused his “learning window” to be smaller than those whose birthdays occur in other months. For example, whether entitled to notice or not, someone with a June birthday would get either get actual written notice when they reregistered in June 2006 or he would have five additional

months to figure it out, significantly longer than Petitioner had. Considering the date in the indictment, August 18, 2006, Petitioner had approximately six and a half weeks to figure out the wording of the new statute on his own, while those with later birthdays had much more time to do so.

### Conclusion

Fundamental fairness lies at the heart of a respectable criminal justice system. The mere fact that the new registration law went into effect before August 18, 2006, should not be dispositive of the Due Process question where the state instructed Petitioner differently, in writing, with directions that he had no reason to question.

There is nothing in the record to suggest that the state intentionally misled Petitioner with the February 2006 notice. Nevertheless, the February 2006 notice, which Petitioner acknowledged in writing, was clearly misleading. Petitioner's compliance with these written instructions has had dire consequences, including a minimum mandatory sentence of ninety days in prison.<sup>1</sup>

Even if there is no official notice requirement, Due Process and fundamental fairness require proper and accurate notice under the circumstances of this case. Petitioner's conviction in this case is the result of the harsh operation and misinterpretation of the rules concerning "Notice." In order to ensure a just result, to promote fairness among the parties, and to maintain

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<sup>1</sup> South Carolina Code § 23-3-470 has been amended and no longer requires a minimum mandatory sentence for a first offense. Pursuant to § 23-3-470(B)(1), "A person convicted for a first offense is guilty of a misdemeanor and may be fined not more than five hundred dollars or imprisoned for not more than thirty days, or both."

the integrity of the legal system, the decision of the Court of Appeals should be reversed.

Respectfully submitted,



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July 22, 2011

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**PROOF OF SERVICE**

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I certify that I have served the **Brief of Petitioner** on Respondent by mailing a copy to William Blich, Assistant Attorney General, via First Class Mail, this 22<sup>nd</sup> day of July 2011, addressed as follows:

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