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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Honorable Heath P. Taylor, Circuit Court Judge

DENNIS MICHAEL GALLIPEAU,

APPELLANT,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-000890

INITIAL BRIEF OF APPELLANT

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II. Does a statutory scheme that impacts a significant liberty interest violate equal protection when it prices indigent litigants out of the ability to seek judicial review mandated by due process that would be available to other people impacted by the statute who had the ability to pay their own way?

III. Can this Court provide some guidance to the lower courts and registrants seeking relief under SORA to facilitate efficient and meaningful judicial review of decisions under S.C. Code Ann. § 23-3-462?

[1] 433 S.C. 457, 860 S.E.2d 344 (2021).

STATEMENT OF THE CASE

Appellant was required to register as a convicted sex-offender due to a conviction in Federal Court for possession of material "that contains an image of child pornography that has been mailed, shipped or transported using any means or facility of interstate or foreign commerce." 18 U.S.C.A. § 2252(a)(5)(A). R. * Petition for removal. Appellant petitioned SLED asserting that he was in compliance with the statutory requirements for a registrant to be removed from SORA under the provisions of S.C. Code Ann. § 23-3-462 (A)(1) (2025). R. * Petition for removal.

SLED refused to process the petition based upon appellant's failure to pay the processing fee established by SLED under the provisions of S.C. Code Ann. § 23-3-462 (A)(7) (2025) which allows a "filing fee, as set by SLED but not to exceed two hundred fifty dollars" to be charged for each petitioner. Due to appellant's indigency status, he was unable to pay the fee.[2] R. * Motion in G.S. Court. Due to refusal by SLED to process the petition for removal, appellant filed a motion with the Richland County Court of General Sessions seeking judicial review under S.C. Code Ann. § 23-3-463 (2025), asserting his indigency status and requesting judicial review of his petition for removal from SORA registration requirements. R. * Motion in G.S. Court. The Honorable Heath P. Taylor, without a hearing, issued an order denying the motion on the sole basis that the SLED fee had not been paid. Order.

This appeal follows.

[2] Appellant has been deemed indigent by the South Carolina Commission on Indigent Defense.

STANDARDS OF REVIEW

As to the first issue presented.

> When an act is challenged under the due process clause, this "Court only requires the act to be reasonably designed to accomplish its purposes, unless some fundamental right or suspect class is implicated." State v. Hornsby, 326 S.C. 121, 125–26, 484 S.E.2d 869, 872 (1997). Legislation restricting or impairing a fundamental right "is subject to 'strict scrutiny' in determining its constitutionality." Hamilton v. Board of Trustees, 282 S.C. 519, 523, 319 S.E.2d 717, 720 (Ct.App.1984). Legislation that does not infringe on fundamental rights is subject only to a rational basis test. 19 S.C. Juris. Constitutional Law § 74 (1993). Under either type of analysis, the one who attacks the law bears the burden of showing it is unconstitutional.

In re Treatment & Care of Luckabaugh, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002).

As to the second issue presented.

> "Equal protection 'requires that all persons be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed.'" Doe v. State, 421 S.C. 490, 504, 808 S.E.2d 807, 814 (2017) (*quoting* GTE Sprint Commc'ns Corp. v. Pub. Serv. Comm'n of S.C., 288 S.C. 174, 181, 341 S.E.2d 126, 129 (1986)). To succeed, an equal protection claim must have a showing that similarly situated persons receive disparate treatment. Grant v. S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995). Once a classification is identified, "[c]ourts generally analyze equal protection challenges under one of three standards: (1) rational basis; (2) intermediate scrutiny; or, (3) strict scrutiny." Denene, Inc. v. City of Charleston, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004).

Planned Parenthood S. Atl. v. State, 438 S.C. 188, 240–41, 882 S.E.2d 770, 798 (2023).

ARGUMENT

I. The state improperly denied an indigent litigant judicial review of a petition for removal from the sex offender registry solely based upon the indigent's inability to pay a fee that violated fundamental aspects of due process and this Court's holding in Powell v. Keel.[3]

The due process clause of the United States Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV. The same protection is afforded under South Carolina's Constitution. S.C. Const. art. I, § 3.

A. Appellant has a liberty interest impacted by the statutory scheme.

The registration requirements of the provisions of S.C. Code Ann. § 23-3-400 (1998) (hereinafter SORA) implicate a liberty interest and due process. *See* State v. Dykes, 403 S.C. 499, 506, 744 S.E.2d 505, 509 (2013) (noting "the requirement of satellite monitoring places significant restraints on offenders that amount to a liberty interest."). "When a fundamental right is not implicated, we require the law to be 'reasonably designed to accomplish its purposes.'" Powell v. Keel, 433 S.C. 457, 465, 860 S.E.2d 344, 348 (2021) (*quoting* State v. Hornsby, 326 S.C. 121, 125–26, 484 S.E.2d 869, 872 (1997)). A lifetime registration requirement "without any opportunity for judicial review to assess the risk of re-offending is arbitrary and cannot be deemed rationally related to the General Assembly's stated purpose of protecting the public from those with a high risk of re-offending." Powell, 433 S.C. at 472, 860 S.E.2d at 351–52. In recognition of this due process requirement, our Legislature has not only created a mechanism by which a registrant may move to terminate registration requirements but has acknowledged the importance of the liberty

[3] 433 S.C. 457, 860 S.E.2d 344 (2021).

interest at stake by also acknowledging the right to the assistance of counsel and if the person is indigent, court appointed counsel to assist the registrant in the process. S.C. Code Ann. § 23-3-463 (D) (2025).

Having created the right to judicial review to conform with this Court's declaration in Powell and added the additional right to appointed counsel for indigents during termination of registration actions, the Legislature has acknowledged the importance of the liberty interest at stake and amended the registration statute to attempt to comport with the basic requirements of due process required by Powell. However, in creating the mechanism to comply with due process as outlined in Powell, the Legislature has added a "filing fee" to be set "by SLED but not to exceed two hundred fifty dollars" for any registrant that requests "termination of registration requirements." S.C. Code Ann. § 23-3-462(A)(6) (2025). The question presented by the present appeal is whether the state may charge a fee to indigent applicants that creates a barrier to access to judicial review and be in compliance with fundamental aspects of due process and this Court's holding in Powell.

B. SLED's fee structure, without any mechanism for waiver for indigent applicants, violates appellant's due process rights and the rights of similarly situated indigents in South Carolina.

In response to Powell, the Legislature enacted provisions allowing for registrants who meet certain statutory conditions to request termination of continuing registration requirements initially through SLED. *See* S.C. Code Ann. § 23-3-462 (2025) (allowing "an offender may apply to the South Carolina Law Enforcement Division [SLED] for the termination of the requirements of registration pursuant to this article."). The legislation allows SLED to establish the required forms and "process" by which it enacts review of these requests. S.C. Code Ann. § 23-3-462 (A)(1) and

(A)(2) (2025). Before seeking judicial review, a registrant must first proceed under the "process" adopted by SLED. *See* S.C. Code Ann. § 23-3-463 (A)(1) noting an "offender may file a motion with the general sessions court to request an order to be removed from the requirements of the sex offender registry act if: (1) He is a Tier I or Tier II offender or if the offender was required to register based on an adjudication of delinquency *whose application for removal under Section 23-3-462 has been denied by SLED.*" (emphasis added).

Simply put, "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Boddie v. Connecticut, 401 U.S. 371, 377 (1971). Thus, states may not close the courthouse to indigents seeking a divorce using filing fees and associated government imposed costs under Boddie. Likewise, states may not deprive indigents of blood tests in paternity actions seeking to enforce child support obligations. *See* Little v. Streater, 452 U.S. 1, 16–17 (1981) (holding statute denying blood tests because of "lack of financial resources violated the due process guarantee of the Fourteenth Amendment."); *see also* Griffin v. Illinois, 351 U.S. 12 (1956) (holding that the state must provide trial records for indigent prisoners on appeal); Burns v. Ohio, 360 U.S. 252 (1959) (holding that it violated due process and equal protection when a state required an indigent prisoner to pay a filing fee before filing an appeal).

When there are alternatives to a judicial resolution, due process does not prohibit fees similar to that charged by SLED in the instant case. "In contrast with divorce, bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors. The utter exclusiveness of court access and court remedy, as has been noted, was a potent factor in *Boddie*. United States v. Kras, 409 U.S. 434, 445 (1973). Thus, a due process challenge to a fee

barring access to the courts involves establishing an impact on an individual right and lack of alternative remedies.

As this Court has noted, placement on the sex offender registry for a lifetime implicates a significant liberty interest requiring due process protection. *See* State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013); Powell v. Keel, 433 S.C. 457, 860 S.E.2d 344 (2021). This places the present case squarely within the Boddie framework as opposed to Kras, which focused purely on the economic interest in the discharge of debts.

The Kras exception upholding court fees can be viewed as based on the importance of the right being implicated by the fee barriers or the presence of alternative avenues of relief. One can argue a sliding scale exists regarding access fees that create a barrier to the courts for indigents. Actions involving purely economic interests would not require waivers of fees for indigents under due process. *See* Murray v. Dosal, 150 F.3d 814, 818 (8th Cir. 1998) (holding that the Prison Litigation Reform Act of 1995 "provides no prisoner shall be prohibited from bringing an action 'for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee,' we agree that the provisions pass constitutional muster."). On the opposite end of the scale would be fees that prohibit access to courts in actions involving fundamental rights which, under Boddie, fee barriers to indigents would be unconstitutional under due process.

Registration under SORA and the ability to petition for removal from its registration requirements does not fit neatly into either category. Clearly, under this Court's holding in Powell, a significant liberty interest is impacted by the registration requirements for SORA.[4] Perhaps, if

[4] Powell did not classify the registrant's impacted liberty interest as fundamental. As such, Powell examined the validity of lifetime registration without judicial review under the less stringent rational basis analysis. Even under that lesser standard of review, the significant liberty interest at stake was sufficient to deny a rational basis for the stated purpose of SORA to protect the public

there was another avenue available to a registrant to seek redress of the impacted liberty interest, a fee barrier could be upheld on the ground that fees of the nature charged by SLED bear a rational basis to the costs incurred by the government in administering the matter in question.[5] However, when the impacted liberty interest acknowledged by Powell is combined with the sole remedy available to registrants as being relief under the statutory scheme, the scale involved in the present matter is firmly on the side of Boddie impacting due process when applied to indigents registrants. "While these cases [*Kras* and *Ortwein*] emphasize that due process does not guarantee unlimited initial court access for plaintiffs in all circumstances, they also reveal that *Boddie* did not turn exclusively on the nature of the interest the plaintiff sought to vindicate. In *Kras* and *Ortwein* the Court alluded to the availability to plaintiffs of relief outside the judicial system." Lecates v. Just. of Peace Ct. No. 4 of State of Del., 637 F.2d 898, 908 (3d Cir. 1980).

Under SORA, the only avenue for a registrant's removal from the registration requirement is contained in S.C. Code Ann. § 23-3-463. Prior to seeking judicial review of such a request, a registrant must first pay the fee established by SLED as authorized by S.C. Code Ann. § 23-3-462(A)(6) (2025). No other avenue exists for appellant (or similarly situated registrants) to seek removal as opposed to the alternative available to debtors outlined in Kras. Here, appellant has a matter of significant liberty. *Compare* Powell v. Keel, 433 S.C. 457, 860 S.E.2d 344 (2021) *to* Hendrix v. Taylor, 353 S.C. 542, 579 S.E.2d 320 (2003). The fee creates an impermissible barrier

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from the likelihood of re-offenders, when there was no mechanism in place to distinguish between those likely to reoffend and those who were not.

[5] Appellant does not concede that the fee set by SLED as authorized by S.C. Code Ann. § 23-3-462(A)(6) (2025) is rationally related to the actual costs of administering the process by which a registrant may seek removal from SORA. There is no record supporting such an assertion before this Court.

under due process in seeking the sole remedy available to indigent registrants who seek access to judicial review to litigate that significant liberty interest.

SLED's fee for processing the initial application is published as $250.00.[6] In effect, the government has imposed a financial barrier to access to judicial review akin to that rejected by the Supreme Court in Boddie. An indigent registrant, like appellant, who is unable to pay the fee established by SLED would be unable to seek removal from registration and be deprived of judicial review of the denial mandated by this Court in Powell. By contrast, non-indigent registrants will have access to the ability to be removed from the registration requirements by paying the SLED fee and, if denied, seek judicial review of the denial.

> Any time criminal procedures discriminate against defendants by reason of their indigent status, such procedures violate the guarantee of equal protection. Where the indigent defendant is subjected to a process which is required of an indigent defendant and not of a non-indigent defendant, then the process becomes invidiously discriminatory and violative of equal protection.

Ex parte Lexington Cnty., 314 S.C. 220, 228, 442 S.E.2d 589, 594 (1994).

This Court should apply strict scrutiny and prohibit the use of a fee barrier that prevents indigent registrants under SORA from seeking judicial review of their "risk of re-offending" as dictated by this Court in Powell, 433 S.C. at 472, 860 S.E.2d at 352. "To survive strict scrutiny the Act must meet a compelling state interest and be narrowly tailored to effectuate that interest." In re Treatment & Care of Luckabaugh, 351 S.C. 122, 140–41, 568 S.E.2d 338, 347 (2002). Under strict scrutiny, there is no compelling government interest in forcing indigents to pay a filing fee to access the only mechanism by which their substantial liberty interest may be addressed.

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[6] https://scor.sled.sc.gov/SORRemoval.aspx#removal

Nor could this fee be upheld under the less rigorous rational basis standard of review. Such a fee, without provision for waiver as to indigent applicants, would not be rationally related to the stated purpose of the SORA and thus would not survive the rational basis test. *See* Powell, 433 S.C. at 466, 860 S.E.2d at 348 (holding "SORA's lifetime registration requirement without any opportunity for judicial review to assess the risk of re-offending is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending."). If a lack of judicial review does not survive rational basis, neither could a barrier to judicial review that only impacts indigent registrants. Neither would be rationally related to SORA's stated purpose.[7]

The current version of SORA and its "corresponding mandatory-minimum time periods for registration are rationally related to SORA's legislative purposes" and thus not offensive to due process. State v. McSwain, 445 S.C. 276, 286, 914 S.E.2d 124, 129 (2025). However, an impermissible barrier to judicial review of a denial of removal from SORA registration requirements for indigents who can establish that they meet the statutory allowance for removal would effectively prevent judicial review, a fundamental aspect of due process required by this Court in Powell. The lower court's refusal to reverse the decision of SLED not to waive the fee barrier and rule on the appellant's application to allow judicial review violated due process and requires reversal and a remand for a determination on the merits of appellant's application initially by SLED and, if required, by the Circuit Court.

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[7] Powell deemed the lifetime registration requirement facially unconstitutional in the absence of judicial review. Here, appellant is arguing the fee structure is unconstitutional as applied to indigent applicants. "In an 'as-applied' challenge, the party challenging the constitutionality of the statute claims that the 'application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional.'" Doe v. State, 421 S.C. 490, 503, 808 S.E.2d 807, 813 (2017).

II. A statutory scheme that impacts a significant liberty interest violates equal protection when it prices indigent litigants out of the ability to seek judicial review mandated by due process that would be available to other people impacted by the statute who had the ability to pay their own way.

The equal protection clause of the United States Constitution provides that "no state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const, amend. XIV, § 1. "[N]or shall any person be denied the equal protection of the laws." S.C. Const. art. I, § 3.

A. Strict scrutiny should apply to a fee structure that effective blocks a fundamental right (judicial review) based solely upon the ability to pay.

Statutory fee hurdles preventing access to courts hit at the heart of fundamental rights – access to judicial review. Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450 (1988) (noting numerous case each involving fees that "barred indigent litigants from using the judicial process in circumstances where they had no alternative to that process."); *see also* Smith v. Bennett, 365 U.S. 708 (1961) (holding that an indigent's inability to file a petition for writ of habeas due to fee barrier violated the Equal Protection Clause); Douglas v. California, 372 U.S. 353 (1963) (holding that a state must provide indigent prisoners with counsel for direct appeal to comply with the Equal Protection Clause); Williams v. Oklahoma City, 395 U.S. 458, 459 (1969)(stating that avenues of appellate review "must be kept free of unreasoned distinctions" that can impede open and equal access to courts, and holding that indigents are entitled to receive free transcripts of a petty offense trial under equal protection principles); Gardner v. California, 393 U.S. 367 (1969) (holding that

an indigent prisoner must receive habeas corpus proceeding transcripts under the Equal Protection Clause); Mayer v. Chicago, 404 U.S. 189 (1971) (holding that refusing to provide indigent defendants with non-felony trial transcripts violated equal protection).

"Courts have confronted, in diverse settings, the 'age-old problem' of '[p]roviding equal justice for poor and rich, weak and powerful alike.'" M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996) (*quoting* Griffin v. Illinois, 351 U.S. 12, 16 (1956)).

> *Griffin* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant.

Mayer v. City of Chicago, 404 U.S. 189, 196–97 (1971).

The registration requirements under SORA are considered civil in nature and not punitive. State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) (finding the registration requirements was a non-punitive action that was civil in nature). However, registration "implicates a protected liberty interest to be free from permanent, unwarranted governmental interference." State v. Dykes, 403 S.C. 499, 506, 744 S.E.2d 505, 509 (2013). To be constitutional, SORA must allow "for judicial review to assess the risk of re-offending." Powell, 433 S.C. at 472, 860 S.E.2d at 352.

A fee barrier that would allow a significant disparity in such a required judicial review between indigent and non-indigent registrants violates equal protection.

> Due process and equal protection principles converge in the Court's analysis in these [court access] cases. *See Griffin v. Illinois*, *supra*, 351 U.S., at 17, 76 S. Ct., at 589-90. Most decisions in this area have rested on an equal protection framework, although Justice Harlan in particular has insisted that a due process approach more accurately captures the competing concerns. *See, e.g., Griffin v. Illinois*, 351 U.S., at 29-39, 76 S. Ct., at 595-600 (Harlan, J., dissenting);

> *Williams v. Illinois*, 399 U.S. 235, 259-266, 90 S.Ct. 2018, 2031-34, 26 L.Ed.2d 586 (1970) (Harlan, J., concurring). As we recognized in *Ross v. Moffitt*, 417 U.S., at 608-609, 94 S. Ct., at 2442-43, we generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.

Bearden v. Georgia, 461 U.S. 660, 665 (1983).

Indigency has not been deemed a suspect class for equal protection analysis. However, preventing access to a judicial remedy when no other available avenue exists to address a significant liberty interest based solely upon an ability to pay impacts a fundamental right: due process through judicial review. *See* M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996). SLED's fee is in essence a barrier to judicial review that disproportionately impacts indigent registrants under SORA. While that "classification" (indigent registrants under SORA) is not itself a suspect class, using fees as a barrier to the required ability to seek judicial review does impact a fundamental right and thus requires strict scrutiny. *See* Dykes, 403 S.C. at 506, 744 S.E.2d at 509 (SORA "implicates a protected liberty interest to be free from permanent, unwarranted governmental interference."); Powell, 433 S.C. at 472, 860 S.E.2d at 352 (holding that to be constitutional, SORA must allow "for judicial review to assess the risk of re-offending.").

"To survive strict scrutiny the Act must meet a compelling state interest and be narrowly tailored to effectuate that interest." In re Treatment & Care of Luckabaugh, 351 S.C. 122, 140–41, 568 S.E.2d 338, 347 (2002). Here, while access fees may serve a legitimate government purpose to cover the costs associated with an activity, such a fee that effectively prevents indigents from seeking the only remedy available to secure a significant liberty interest would not be narrowly tailored to address a compelling government interest.

B. Rational basis would not save the SLED access fee.

"If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." Denene, Inc. v. City of Charleston, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004).

> Under the rational basis test, the Court must determine: (1) whether the law treats similarly situated entities differently; (2) if so, whether the legislative body has a rational basis for the disparate treatment; and (3) whether the disparate treatment bears a rational relationship to a legitimate government purpose. Dunes W. Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 293–94, 737 S.E.2d 601, 608 (2013) (*citing* Ed Robinson Laundry & Dry Cleaning, Inc. v. S.C. Dep't of Rev., 356 S.C. 120, 124, 588 S.E.2d 97, 99 (2003)).

Joseph v. S.C. Dep't of Lab., Licensing & Regul., 417 S.C. 436, 451, 790 S.E.2d 763, 771 (2016). "Unless a statute provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 457–58 (1988).

On its face, the fee established by SLED treats all SORA registrants the same. However, as noted above, indigent registrants under SORA are disparately impacted by the fee barrier. There is no rational basis to treat an indigent registrant differently under the stated purpose of registration under SORA: to protect the public from the danger of re-offending. Since the law requires the ability to seek judicial review of a registrant's risk of re-offending, a fee barrier established by SLED that disparately impacts an indigent registrant's ability to seek such judicial review does not bear a rational relationship to a legitimate government purpose. As noted by this Court in Powell, the requirements under SORA for lifetime registration without judicial review cannot survive a rational basis review. Certainly, a fee structure that effectively prices an indigent registrant out of

such a judicial review would likewise not bear a rational relationship to the state's goal of protecting the public from the risk of re-offenders.

II. This Court can provide some guidance to the lower courts and registrants seeking relief under SORA to facilitate efficient and meaningful judicial review of decisions under S.C. Code Ann. § 23-3-462.

Currently, there is limited procedural guidance for the Court of General Sessions [or Family Court for those originally adjudicated as minors] on handling the motions for judicial review filed under S.C. Code Ann. § 23-3-463. By its wording, the initial decision by SLED regarding a registrant's removal under S.C. Code Ann. § 23-3-462 appears ministerial in nature by simply requiring SLED to validate the statutorily defined requirements. For example, for a Tier 1 offender, SLED would be required to initially verify the registrant:

> (a) has been registered for at least fifteen years; or
> (b) has been discharged from incarceration without supervision for at least fifteen years for the charge requiring registration; or
> (c) has had at least fifteen years pass since the termination of active supervision of probation, parole, or any other alternative to incarceration for the charge requiring registration; or
> (d) is a Tier I offender who was required to register as an offender because of a conviction in another state or because of a federal conviction and who is eligible to be removed under the laws of the jurisdiction where the conviction occurred.

S.C. Code Ann. § 23-3-462 (2025). This threshold question of eligibility may in fact be ministerial in nature and not require resolution of disputed facts. SLED's ministerial role appears to be this Court's view:

> SLED *must approve the application* so long as the tier I or II offender (1) completed all of the sex offender treatment programs that were required; (2) was not convicted of failure to register in the

> previous ten years; (3) was not convicted of any additional sexual offenses after being placed on the registry; (4) paid a filing fee; and (5) waited either fifteen or twenty-five years, whichever is applicable to him or her.

State v. McSwain, 445 S.C. 276, 280, 914 S.E.2d 124, 126 (2025) (emphasis added).

Despite the imperative from this Court in McSwain, S.C. Code Ann. § 23-3-462(A)(1)(d) may well involve a resolution of disputed facts or law from other jurisdictions by SLED. It is not clear what the burden of proof for such factual inquiring would be (preponderance or clear and convincing) and if the registrant, as the requesting party, would shoulder that burden.

Moreover, after the initial eligibility screening depending on the Tier involved, SLED must also evaluate factual issues including that:

> (4) The requesting offender must have successfully completed all sex offender treatment programs that have been required.
>
> (5) The requesting offender must not have been convicted of failure to register within the previous ten years.
>
> (6) The offender must not have been convicted of any additional sexual offense or violent sexual offense after being placed on the registry.

S.C. Code Ann. § 23-3-462 (A)(4) – (6) (2025). Again, it is unclear what the burden of proof for such factual inquiries would be (preponderance or clear and convincing) and if the registrant, as the requesting party, would shoulder that burden. However, before the Court of General Sessions [or Family Court for those originally adjudicated as minors] the burden of proof would be "clear and convincing" on the issue of no longer a risk to reoffend.[8] See S.C. Code Ann. § 23-3-463(F) (2025).

[8] "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it

S.C. Code Ann. § 23-3-462 (E) indicates the judicial review mandated by Howell is of an appellate nature:

> An offender whose request for termination of registration requirements is denied by SLED is entitled to appeal the denial to the general sessions court pursuant to the requirements of Section 23-3-463 for the county in which the conviction occurred if the conviction occurred within the State, or if not, the county in which the offender resides.

If appellate in nature, one would assume the matter would be on the written record compiled by SLED and not involve a hearing *de novo* allowing for presentation of evidence. However, S.C. Code Ann. § 23-3-463 (2025) appears to provide for a *de novo* review requiring a formal evidentiary hearing on the registrant's risk of re-offending.

> (E) The court may direct that a qualified evaluator designated by the Office of Mental Health conduct an evaluation whether the offender poses a foreseeable risk to reoffend. For any such evaluation, the court must order the offender to comply with all testing and assessments deemed necessary by the evaluator. After the evaluation by the qualified evaluator designated by the Office of Mental Health, if the offender or the prosecutor seeks an independent evaluation by an independent qualified evaluator, then that evaluation must be completed within ninety days after receipt of the request by the Office of Mental Health evaluator. The court may grant an extension upon the request of the independent qualified evaluator and a showing of extraordinary circumstances. Any qualified evaluator who will be submitted as an expert at a hearing on the motion must submit a written report available to both parties.
>
> (F) The court must make a determination upon a finding by clear and convincing evidence that the offender is no longer a foreseeable risk to reoffend and that it is in the best interest of justice to grant the motion for removal from the requirement of registration.

S.C. Code Ann. § 23-3-463 (2025).

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does not mean clear and unequivocal." State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008).

Absent an evidentiary hearing transcript for factual disputes before SLED or at least transfer of the written documents presented to SLED for use in the initial determination, the Court of General Sessions [or Family Court for those originally adjudicated as minors] would be deprived of a record to resolve disputed facts absent a full *de novo* review and may not have a sufficient order outlining the basis for SLED's determination.[9] The lack of a clear process as the matter transitions from SLED determination to the appropriate Court of General Sessions [or Family Court for those originally adjudicated as minors] is a void that must be filled in order to accommodate meaningful judicial review to comport with basic due process as dictated by this Court in Howell.

More importantly, a registrant may be denied removal by SLED solely based upon a finding that registrant has not "substantially complied" or based solely upon "an objection" filed by the original prosecuting agency." S.C. Code Ann. § 23-3-462 (D).[10] Does any objection by the prosecuting agency override all other factors so that it becomes in essence a veto or is it solely a matter to be considered by SLED in determining removal? Should such an objection be required to at least address registrant's danger to re-offend or may specific Circuit Court solicitors adopt universal objections to all such requests?

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[9] There is no requirement that SLED provide details on its final decision. S.C. Code Ann. § 23-3-462 (D)(1) only requires notice be provided of a denial of a registrant's request and S.C. Code Ann. § 23-3-462(E) allows, but does not require, the SLED official who denied the request for termination of registration to "submit an affidavit to the court detailing the reasons the request was denied." S.C. Code Ann. § 23-3-462. Even if a justification were submitted by SLED, during a *de novo* hearing would deference to the earlier agency determination be required?

[10] The use of the term "substantial" indicates a registrant may assert and argue less than complete compliance and still be eligible. On a showing of less than complete compliance, would SLED's rejection of substantial compliance bind the Court of General Sessions during a *de novo* review as it would have if appellate in nature? *See* S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 260–61, 725 S.E.2d 480, 483 (2012) ("Although our review of these questions is *de novo,* we will generally give deference to an agency's interpretation of its own regulation.").

The need for guidance from this Court does not end at the transition between SLED and the lower courts. Does an aggrieved party have the right to seek appellate review as a matter of right under S.C. Code Ann. § 14-3-330 (1991) or 14-8-200 (2007) or does the review before the Court of General Sessions [or Family Court for those originally adjudicated as minors] provide sufficient judicial review to comport with due process?

If appeal from an order from the Court of General Sessions [or Family Court for those originally adjudicated as minors] may be had under S.C. Code Ann. § 14-3-330 (1991) or 14-8-200 (2007), does the right to appointed counsel created by the Legislature under S.C. Code Ann. § 23-3-463 (D) extend to appointed counsel on direct appeal?[11] In such an appeal, what process is to be followed before our appellate courts and how are costs associated with such an appeal allocated for those found indigent?

This Court has in the past provided guidance to appellants and attorneys in similar settings involving termination of parental rights and sexually violent predators. For termination cases, this Court adopted specific provisions related to the payment of transcript costs and handling cases of questionable merit. *See* Ex parte Cauthen, 291 S.C. 465, 354 S.E.2d 381 (1987). Cauthen set specific steps to be followed during an appeal from an order terminating parental rights. Initially, "the appellant's attorney shall file a Motion to be Allowed to Proceed Without Costs along with the Notice of Intent to Appeal." Id., 291 S.C. at 467, 354 S.E.2d at 382. Absent a challenge to the indigency claim, indigent appellants proceed without costs, including the costs of transcripts,

[11] In the present appeal, the South Carolina Commission on Indigent Defense has appeared on behalf of appellant through the Office of Appellate Defense. Representation through the Office of Appellate Defense is governed by statute and if and how applications under S.C. Code Ann. § 23-3-462 fall within the statutory mandate for representation by that office as opposed to indigent representation from some other source, such as the provisions of Rule 608, SCACR, is not before the Court in the present appeal.

which must be paid for by the Department of Social Services.[12] Appointed counsel would then proceed either with a merits appeal or file a notice of lack of merit, triggering the ability for *pro se* filings on behalf of appellant and a review of the transcript by the appellate court for errors missed by appointed counsel.

In the context of the Sexually Violent Predator Act, this Court noted the right to seek relief due to ineffective assistance of trial counsel and adopting the *Strickland*[13] standard for such claims. Matter of Chapman, 419 S.C. 172, 796 S.E.2d 843 (2017) (noting the *Strickland* standard ensured an SVP's right to the effective assistance of counsel through a well-recognized body of existing law and practice). In the context of direct appeals and PCR appeals, this Court has adopted procedures allowing appointed counsel to provide notice of a perceived lack of merit and safeguards for oversight of counsel, including pro se filings and review by the Court of the record itself. *See* Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988); and Anders v. California, 386 U.S. 738 (1967).

Here, the Legislature has acknowledged the right to counsel during "a hearing under this section [motion before General Sessions] is entitled to the assistance of counsel, and if the person is indigent, the court must appoint counsel to assist the person." S.C. Code Ann. § 23-3-463 (D) (2025). Does the right created by S.C. Code Ann. § 23-3-463 (D) (2025) carry with it an inherent right to effective assistance of counsel as found in Matter of Chapman, 419 S.C. 172, 796 S.E.2d

[12] It can be argued that SLED, through the fee capture mechanism, would be in a similar position to pay for the costs associated with transcripts for indigent applicants.

[13] Strickland v. Washington, 466 U.S. 668 (1984).

843 (2017)?[14] Does the right extend to representation on appeals and, potentially, ineffective assistance of counsel claims?[15]

Aspects of S.C. Code Ann. § 23-3-463 and the proper procedures to be followed during an appeal of the denial of removal from SORA require guidance similar to that provided by this Court in the context of actions under the SVP Act and for termination of parental rights. As in both areas, the uncertainty surrounding the procedural aspects of the transition between SLED's determination under S.C. Code Ann. § 23-3-462 and the Court of General Sessions [or Family Court for those originally adjudicated as minors] determination under S.C. Code Ann. § 23-3-463 and subsequent review by the appellate court requires guidance for the sake of judicial economy and meaningful judicial review. *See* Cabiness v. Town of James Island, 393 S.C. 176, 188, 712 S.E.2d 416, 423 (2011) ("However, in the interest of judicial economy and the likely event of Town re-filing its Petition, we reach the remaining issues to provide guidance for future incorporation petitions and help alleviate the ambiguities that plagued Town's most recent petition."). This Court should take the opportunity afforded by the present appeal to address aspects of the process by which the due process mandates outlined in Powell may be effectively implemented.

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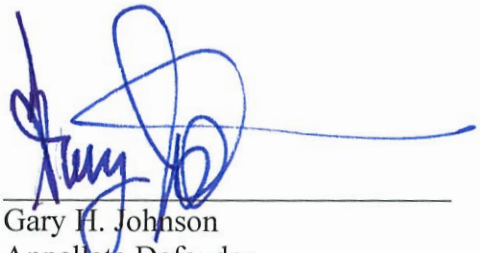
[14] "Lest the right ring hollow, we further hold this right to counsel is necessarily a right to effective counsel." Matter of Chapman, 419 S.C. at 180, 796 S.E.2d at 847.

[15] "We find this result would be not only inequitable, but also the functional equivalent of denying SVPs the right to effective assistance of counsel." Matter of Chapman, 419 S.C. at 183, 796 S.E.2d at 848.

CONCLUSION

Based upon the foregoing arguments, this Court should rule that any fee charges associated with implementing the due process mandate articulated by this Court in Powell must be waived for indigent registrants and remand this matter to the Court of General Sessions and order it proceed with a *de novo* review of appellant's request under S.C. Code Ann. § 23-3-463 or, in the alternative, a remand to SLED as the administering agency for a determination of appellant's initial request with direction that associated fees be waived. In addition, this Court should provide guidance to the bench and bar regarding the procedural aspects associated with the transition between SLED's initial determination and the *de novo* review by the lower courts and any subsequent appeal before our appellate courts.



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ATTORNEY FOR APPELLANT

This 26th day of January, 2026.