THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2019-001063

Dennis J. Powell, Jr., ... Respondent,

v.

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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* SOUTH CAROLINA OFFICE OF APPELLATE DEFENSE

Pursuant to Rules 213 and 240 of the South Carolina Appellate Court Rules, the South Carolina Office of Appellate Defense respectfully requests permission of this Court to file an *amicus curiae* brief on the issues before the Court in this appeal.

The South Carolina Office of Appellate Defense ("Appellate Defense") is a division within the Commission of Indigent Defense that provides appellate representation to indigent defendants convicted of criminal offenses in General Sessions Court before the Court of Appeals and the Supreme Court. Appellate Defense also represents individuals convicted of sex offenses who are subsequently civilly committed, following a jury trial, as sexually violent predators (SVP) after they have completed the service of their prison sentence. Criminal defendants convicted of sexual offenses within this state are also subject to lifetime registration on the South Carolina Sex Offender Registry managed by the State Law Enforcement Division.

The Office of Appellate Defense, therefore, has substantial experience with the issues presented in this appeal regarding the Sex Offender Registry, and has unique insight and experience which it respectfully submits would assist this Court in reaching the correct resolution of these issues.

It is the Office of Appellate Defense's position that lifetime inclusion on the Registry for all sex offenders, with the trial judge having no discretion in almost all cases and without providing a meaningful opportunity to petition for removal from the Registry, violates the due process rights of persons convicted of sex offenses within this state.

The Office of Appellate Defense has an identifiable interest in this matter satisfying Rule 213 of the South Carolina Appellate Court rules, as it seeks to improve the outcomes for clients—past, present, and future—who are convicted of a sex offense and subject to lifetime inclusion on the Registry. Therefore, it respectfully requests this Court grant leave to file an *amicus curiae* brief. A copy of the South Carolina Office of Appellate Defense's proposed brief is conditionally filed as Exhibit A to this motion.

Signature on Following Page

Respectfully submitted,

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Exhibit A

(Conditionally Filed Brief of Amicus Curiae)

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SOUTH CAROLINA OFFICE OF APPELLATE DEFENSE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Constitutions

Other Authorities

INTEREST OF AMICUS CURIAE

The South Carolina Office of Appellate Defense is a division within the Commission of Indigent Defense that provides appellate representation to indigent defendants convicted of criminal offenses in General Sessions Court before the Court of Appeals and the Supreme Court. Appellate Defense also represents individuals convicted of sex offenses who are subsequently civilly committed, following a jury trial, as sexually violent predators (SVP) after they have completed the service of their prison sentence. Criminal defendants convicted of sexual offenses within this state are also subject to lifetime registration on the South Carolina Sex Offender Registry (the "Registry") managed by the State Law Enforcement Division ("SLED"). It is the Office of Appellate Defense's position that lifetime inclusion on the Registry for all sex offenders, with the trial judge having *no discretion* in almost all cases and without providing a meaningful opportunity to petition for removal from the Registry, violates the due process rights of persons convicted of sex offenses within this state. The Office of Appellate Defense's interest in this case is to improve the outcomes for clients—past, present, and future—who are convicted of a sex offense and subject to lifetime inclusion on the Registry.

STATEMENT OF THE CASE

This case arises out of Dennis J. Powell, Jr.'s 2009 guilty plea to solicitation of a minor, which resulted in a sentence of probation for one-year and subjects him to lifetime inclusion on the Registry pursuant to the South Carolina Sex Offender Registry Act ("SC SORA"). While this specific case may arise out of the punitive effects of SC SORA experienced by one man, the issue of whether SC SORA violates the due process rights of registrants or constitutes punishment affects many other citizens—certainly other registrants, but also their families, employers, and

members of the community who falsely believe that the Registry is keeping them safe from the most dangerous sexual predators. Extensive research shows that indiscriminate registration is largely ineffective at protecting the community from the most dangerous sexual predators, in part, because extensive resources are spread thin due to the indiscriminate lifetime registration of all offenders convicted of all sex offenses, including those who are low-risk offenders and unlikely to recidivate.

ARGUMENT

I. The lifetime inclusion on the Registry required by SC SORA without providing registrants an opportunity to petition for removal violates their right to due process.

The Due Process Clause of the Fourteenth Amendment and the Constitution of South Carolina both guarantee that the state government shall not "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV; S.C. Const. art. I, § 3. The purpose of the clause is "to secure the individual from the arbitrary exercise of the powers of government." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). In general, the Due Process Clause promotes fairness by ensuring the government follows appropriate procedures when its agents take actions to deprive people of their life, liberty, or property. *Id.* In addition to procedure, the Due Process Clause can also apply to the substance of legislation such that certain government actions may be barred regardless of the fairness of the procedures implemented to ensure that governmental power is not "used for purposes of oppression." *Id.*

In the past, courts in this state have declined to find that the SC SORA, and in particular, its lifetime registration requirement, violates the Due Process Clause. *In re Ronnie A.*, 355 S.C. 407, 585 S.E.2d 311 (2003); *Hendrix v. Taylor*, 353 S.C. 542, 579 S.E.2d 320 (2003).

Specifically, the Supreme Court found that it did not violate the Due Process Clause because sex offender registration was not punitive given the legislature's stated intention to protect the public from those who might reoffend. *In re Ronnie A.*, 355 S.C. at 409, 585 S.E.2d at 312; *Hendrix*, 353 S.C. at 552, 579 S.E.2d at 325. In the 17 years since these cases were decided, a significant body of research studying the efficacy of laws such as SC SORA developed. The overwhelming conclusion is that sex offender registration laws are so burdensome that they should be considered punitive in large part due to reporting requirements, residency restrictions, and internet monitoring. Moreover, researchers have found that sex offender registration laws are costly and ineffective in achieving the purported goals of assisting law enforcement, deterring future sex offenses, and reducing the recidivism of sex offenders.

In the past 17 years since *In re Ronnie A.* and *Hendrix* were decided, while courts in this state have been called upon to decide challenges to the SC SORA, South Carolina courts have not revisited whether the SC SORA's lifetime registration requirement implicates a constitutionally protected liberty interest and violates the Due Process Clause. Given that the legal and societal landscape has changed over the years, this Court should revisit the issue. Examining the aggregate cumulative effects of the SC SORA will reveal that the burdens placed upon registrants for life as a result of the law's registration requirement constitute punishment. Most importantly, this Court should evaluate whether, in light of the extensive burdens imposed on registrants by SC SORA, the lifetime registration requirement deprives registrants of a constitutionally protected liberty interest in violation of the Due Process Clause. Because the SC SORA fails to accomplish its stated purposes of assisting law enforcement and reducing recidivism, the deprivation of the liberties of registrants under the statutory scheme does not pass constitutional muster. Registrants are placed on the Registry for a wide-variety of sex offenses

and no individualized assessment is conducted to determine their risk before they are placed on the Registry, and once included, registrants are not provided an opportunity to reduce their registration period based on their individual circumstances and rehabilitation.

a. **The extensive obligations and requirements imposed on registrants by the SC SORA constitute punishment**.

Historically, the SC SORA and registration schemes similar to it have been held to be non-punitive. *See Smith v. Doe*, 538 U.S. 84 (2003) (holding that Alaska's registration scheme was non-punitive); *State v. Walls*, 348 S.C. 26, 558 S.E.2d 524 (2002) (holding that the SC SORA was "not so punitive in purpose or effect as to constitute a criminal penalty"). In *Smith v. Doe*, the Supreme Court of the United States ("SCOTUS") set forth a framework for courts to evaluate registration schemes in order to determine whether they constitute punishment. First, courts should apply traditional principles of statutory construction to determine whether the legislature intended to impose punishment. *Smith*, 538 U.S. at 91. If courts find that the legislature's "intention was to enact a regulatory scheme that is civil and nonpunitive" then courts are required to determine whether the statutory scheme is so punitive in either purpose or effect that it negates the legislature's intent. *Id.* To evaluate the effects of the scheme, the *Smith* court identified five factors that were most important to the analysis, and those include whether the regulatory scheme: (1) "has been regarded in our history and traditions as a punishment;" (2) "imposes an affirmative disability or restraint;" (3) "promotes the traditional aims of punishment;" (4) "has a rational connection to a nonpunitive purpose;" or (5) "is excessive with respect to this purpose." *Id.* at 97.

State v. Walls predated *Smith v. Doe* and did not apply the factors outlined in that case. Instead, the Supreme Court applied traditional principles of statutory construction and

determined from the plain language of the statute as stated in S.C. Code Ann. § 23-3-400 that "it is clear the General Assembly did not intend to punish sex offenders[.]" *Walls*, 348 S.C. at 31, 558 S.E.2d at 526. Although the Supreme Court determined that the SC SORA was a civil statutory scheme, it is not clear what information the Supreme Court considered in its analysis of the effects of registration under SC SORA to reach its conclusion that the effects of the statutory scheme are non-punitive.

Despite the lack of an explicit analysis of the effects of registration under SC SORA in *State v. Walls*, the Supreme Court has repeatedly affirmed that sex offender registration is non-punitive without analyzing the effects of SC SORA or addressing the increased burdens imposed on registrants due to subsequent amendments to the law. *See In re Justin B.*, 419 S.C. 575, 581, 799 S.E.2d 675, 678 (2017) (collecting cases and noting that "we followed our holding in *Walls* that the sex offender registry is non-punitive"). At the time *State v. Walls* was decided, in-person registration was only required on an annual basis and registrants only had to report in person at other times if they moved counties within South Carolina. *Compare* S.C. Code Ann. § 23-3-460 (Supp. 2000) *with* § 23-3-460 (2018) (requiring bi-annual in-person registration, additional in-person registration upon relocation to a new county in South Carolina, and in-person registration in following the acquisition of property, enrollment in school, and starting a new job in the relevant county). Likewise, registrants had ten days to complete in-person registration upon moving to a new county, which recent amendments shortened to three days. *Compare* S.C. Code Ann. § 23-3-460 (Supp. 2000) *with* § 23-3-460 (2018). There were no limitations on where sex offenders could live, but the recent amendments imposed such restrictions. *See* S.C. Code Ann. § 23-3-465 (2018) (campus student housing at universities supported in part by the state); S.C. Code Ann. § 23-3-535(B) (2018) (one thousand feet of a

school, daycare center, children's recreational facility, park, or public playground). There were also no requirements that registrants provide SLED with information regarding their internet accounts with internet access providers or information about their internet identifiers, which recent amendments added. *See* S.C. Code Ann. § 23-3-555(B) (requiring registrants to provide SLED with written notice of any changes to such information within three business days of the change).

As such, since the Supreme Court decided *State v. Walls*, the SC SORA has changed significantly. The burdens and restrictions imposed on registrants constitute punishment especially given the in-person reporting requirements, which are comparable to the in-person monitoring of persons subject to punishments such as parole and probation.

i. SC SORA's in-person reporting requirements are comparable to parole and probation and clearly serve a punitive purpose.

The SC SORA imposes in-person reporting requirements on registrants that are similar to parole and probation requirements, which include requirements that parolees report in-person to their agent within a day of their release and requires them to submit to in-person visits by the parole or probation agent. *See* S.C. Code Ann. § 24-21-430 (outlining potential conditions for probation); South Carolina Department of Probation, Parole and Pardon Services, Division of Paroles and Pardons, *Policy and Procedure Manual*, at 33 (April 2015), *available at* https://www.dppps.sc.gov/content/download/68278/1576111/file/Parole+Board+Manual-+April+2015.pdf (outlining the standard conditions for probation). Courts readily acknowledge that parole and probation constitute punishment for a crime. *State v. Ellis*, 397 S.C. 576, 579, 726 S.E.2d 5, 7 (2012) ("Probation, a suspension of the period of incarceration, is clearly part of a criminal defendant's term of imprisonment, as is actual incarceration, parole, and the

suspended portion of a sentence."); *see e.g., Samson v. California*, 547 U.S. 843, 848 (2006) (noting that probation is "one point on a continuum of possible *punishments*" (emphasis added)).

Similar to the standard parole conditions, registrants who are released from confinement must report to the sheriff of the county in which they intend to reside within one business day of their release. S.C. Code Ann. § 23-3-440(1). Beyond the initial in-person meeting, the SC SORA requires that every registrant appear in person to register bi-annually. S.C. Code Ann. § 23-3-460(A). Additionally, the SC SORA also requires registrants to appear in person when they make certain life changes. For example, each registrant must appear within three days, in person, and register with the sheriff's department in any county where the registrant has purchased real property, enrolled in school, or obtained employment. *Id.* § 23-3-460(C). If a registrant changes their permanent or temporary address to a different county in South Carolina, the registrant must appear in person to register with the county sheriff in the new county within three business days. *Id.* § 23-3-460(D). The failure to register pursuant to these directives can result in additional criminal charges for the failure to register. S.C. Code Ann. § 23-3-470(A). A conviction for failure register can result in imprisonment for up to a year or a fine of up to $1,000.00, with increasing penalties for subsequent offenses. *Id.* § 23-3-470(B).

The bi-annual (possibly more often depending on life events), in-person registration requirement is very similar to the standard supervision requirements for persons on parole and probation, who are also subject to in-person meetings with their agent. Given the similarities, some courts have determined that these in-person reporting requirements constitute punishment in the same way that parole and probation do. *See Millard v. Rankin*, 265 F. Supp. 3d 1211, 1227-28 (D. Colo. 2017) (analyzing the Colorado SORA and finding that some aspects of the law resemble "the supervisory aspects of parole and probation"); *Does #1-5 v. Snyder*, 834 F.3d

696, 703 (6th Cir. 2016) (analyzing the Michigan SORA and determining that it "also resembles the punishment of parole/probation") *Starkey v. Okla. Dep't of Corrections*, 305 P.3d 1004, 1022-23 (Okla. 2013) (same under Oklahoma SORA's requirements).

In *Does #1-5*, in determining that compliance with the Michigan SORA resembled punishment like parole and probation, the Sixth Circuit noted that "much like parolees, [registrants] must report in person, rather than by phone or mail." *Does #1-5*, 834 F.3d at 703. The court also noted that the failure to register in person could be punished by imprisonment like a revocation of parole. And although the court acknowledged that the level of supervision for registrants is less than the typical probation or parole supervision, "the basic mechanism and effects have a great deal in common." *Id.* In *Millard*, the District of Colorado agreed with the reasoning of the Sixth Circuit in *Does #1-5* in analyzing Colorado's SORA. *Millard*, 265 F.Supp.3d at 1228. The court in *Millard* further noted that the Colorado SORA's requirement that registrants provide law enforcement with their email addresses and internet identities is "one more restrictive and intrusive provision that resembles the supervisory aspects of parole and probation." *Id.* The court determined that given the Colorado SORA's resemblance to historical forms of punishment, the similarities weighed in favor of finding that the effects of the statutory scheme are punitive. *Id.* at 1229.

The SC SORA similarly imposes frequent in-person reporting requirements on registrants which can be enforced by further imprisonment for failure to comply just like a parole or probation violation. Additionally, as in *Millard*, persons who register pursuant to the SC SORA must also provide information regarding their internet accounts when they register. S.C. Code Ann. § 23-3-555(B). Given the level of supervision of sex offenders, which can be burdensome and intrusive, the requirements imposed on sex offenders are punitive in the same way as parole

and probation. And while the supervision required by SC SORA does not typically rise to the level to which parolees or probationers are subject, punishment under criminal statutes in South Carolina does not always involve severe physical restraint. *See e.g.*, S.C. Code Ann. § 16-11-700(C) (providing that a person convicted of dumping litter can be sentenced to fine or imprisonment *and* eight hours of community service) (emphasis added)); S.C. Code Ann. § 22-3-800 (providing that magistrates can order community service in lieu of other punishments for certain crimes). Thus, if community service can be considered a punishment, then so is frequent in-person registration and internet monitoring for life by law enforcement certainly.

b. The burdens imposed by SC SORA are not rationally related to the stated goals of providing for community safety and curtailing recidivism of registrants.

"The substantive due process guarantee ensures that legislation which deprives a person of a life, liberty, or property right have, at a minimum, a rational basis, and not be arbitrary or overly vague." *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 139-40, 568 S.E.2d 338, 346 (2002). As such, absent the presence of a fundamental right, in reviewing legislation subject to a substantive due process challenge, courts evaluate whether the law was reasonably designed to accomplish its purposes. *State v. Hornsby*, 326 S.C. 121, 125-26, 484 S.E.2d 869, 872 (1997). In other words, the legislation must have a rational basis or bear "a reasonable relationship to any legitimate interest of government." *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 478, 527 S.E.2d 763, 765 (2000).

In the case of SC SORA, the protected liberty interests at stake are the registrants' right to privacy and the freedom from a lifetime of government interference in their lives. *See, e.g. Hendrix*, 353 S.C. at 549 n.12, 547 S.E.2d at 324 n.12 (recognizing that the South Carolina constitution recognizes a right to privacy, but finding that in the context of sex offender registries

the right is not fundamental); *State v. Dykes*, 403 S.C. 499, 506, 744 S.E.2d 505, 509 (2013) (recognizing a protected liberty interest in being from "permanent, unwarranted governmental interference"). The interest of the government in the lifetime registration requirement is presumably to promote the purpose of the SC SORA, stated as follows in the Act:

> The intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens. Notwithstanding this legitimate state purpose, these provisions are not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws.
>
> The sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, 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.

S.C. Code Ann. § 23-3-400. While the stated purpose *may* support the principles of the SC SORA and the existence of the Registry in general, this stated purpose does not provide reasonable support for the lifetime registration requirement that subjects registrants to unwarranted and permanent government interference.

Studies increasingly show that the burdens imposed by statutory schemes such as the SC SORA fail to protect the public because they have no significant effect on the recidivism rates of registrants. Moreover, the lifetime registration requirement ensures that the number of persons included in the Registry continuously grows, which diminishes the utility of the tool for law enforcement purposes or to protect the public. This diminishing utility and complete failure of the SC SORA to have any effect on the recidivism cannot be viewed as a rational or reasonable basis to support legislation that subjects registrants to a lifetime of punishment even after serving

their sentence of incarceration or probation. "With continually increasing burdens, the inability of registrants to argue for waiver, residency restrictions that bar the offender from many parts of the country, and a lack of serious and sustained judicial oversight, registration schemes serve primarily to enable the government to oppress the sex offender." Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L.J. 1071, 1125 (2012). Thus, the use of the SC SORA and its lifetime registration requirement to oppress registrants is a clear violation of the Due Process Clause.

i. The Registry no longer effectively serves the needs of law enforcement.

The SC SORA requires persons convicted of a wide-range of offenses to register with SLED and be included on the Registry, providing that: "*any person*, regardless of age, residing in the State of South Carolina who. . . has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere" to a sex offense, which ranges from convictions for peeping to criminal sexual conduct, must register. S.C. Code Ann. § 23-3-430 (emphasis added). The SC SORA requires that *all* persons convicted of qualifying offenses must register bi-annually for life. S.C. Code Ann. § 23-3-460(A). A registrant can only be removed from the Registry if one of the following occurs: (1) the conviction was reversed, overturned, or vacated on appeal and a final judgment to that effect has been entered; or (2) the registrant was acquitted following a new trial granted pursuant to a post-conviction motion. S.C. Code Ann. § 23-3-430(E), (G). A registrant cannot even be removed from the Registry if pardoned unless the pardon specifically states that it is based on a finding that the registrant is not guilty. *Id.* § 23-3-430(F)(2).

Appellate courts rarely overturn criminal convictions. Studies of federal and state appellate court trends show that the likelihood of a reversal for a criminal conviction on appeal ranges from between 6% and 12%. *See* Barry C. Edwards, *Why Appeals Courts Rarely Reverse*

Lower Courts: An Experimental Study to Explore Affirmation Bias, 68 Emory L.J. 1035, 1037-39 (2019) (outlining reversal rates for U.S. Courts of Appeals between July 2017-June 2018); Nicole L. Waters et. al., U.S. Dep't of Justice, Office of Justice Programs, *Criminal Appeals in State Court* NCJ248874 at 4-5 (Sept. 2015), https://www.bjs.gov/content/pub/pdf/casc.pdf (outlining 2010 statistics for dispositions of criminal appeals in state intermediate appellate courts and courts of last resort). Similarly, less than 10% of post-conviction petitions are successful. *See* Nany J. King, Judicial Review: *Appeals and Postconviction Proceedings, in Examining Wrongful Convictions: Stepping Back, Moving Forward* 217, 220-21 (Allison D. Redlisch et al. eds., 2014) (noting that half of all post-conviction petitions are based on claims of ineffective assistance of counsel and the success rates for such claims are between 1% and 5%). With respect to pardons in South Carolina, between 2007 and 2017 only about 10% of pardons requested for sex offenses were granted. Jamie Self, *He Robbed People at Gunpoint. But South Carolina Forgives Him and Most Convicts Who Ask*, The State (Oct. 18, 2018), https://www.greenvilleonline.com/story/news/2018/10/18/south-carolina-grants-pardon-most-convicts-who-ask/1681160002/. Thus, it is statistically unlikely that a registrant who is subject to bi-annual registration for life under SC SORA will *ever* be relieved of the obligation to register and removed from the Registry.

The net effect of the SC SORA's inclusion of a wide variety of sexual offenses—ranging from more minor violations like peeping to serious crimes that involve physical assault—and the lifetime registration requirement with virtually no opportunity for removal is that the Registry only continues to grow. The larger registries become, the less effective they are at meeting the needs of law enforcement. Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. Rev. L. & Soc. Change 727, 752 (2013). Law

enforcement resources are spread thin instead of being concentrated where they are needed most, which is on the offenders who pose the highest risk to the community. *Id.* at 753.

In February 2001, South Carolina had 4,924 registrants on the Registry.[1] As of December 2019, it had 17,651 registrants.[2] This growth demonstrates that, on average, 700 new registrants are added to the Registry each year. To put the size of the Registry in perspective, if the Registry were a South Carolina municipality, it would rank 24 of 272 South Carolina municipalities and would be slightly smaller than Lexington, but bigger than Conway, West Columbia, Orangeburg, and North Myrtle Beach.[3] If the purpose of the Registry is to provide law enforcement with the tools to investigate sex offenses and to protect the public by providing them with information, the sheer size of the registry makes it ineffective at both.

Importantly, it is impossible for both law enforcement and the public to determine which registrants pose the greatest risk to their safety. For law enforcement, the large size of the Registry and lack of any risk assessment information on registrants prevents law enforcement from focusing resources—which may already be minimal—where they are needed most, which is to monitor some of the highest risk offenders. Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. Rev. L. & Soc. Change 727, 753 (2013). For the public, this makes it impossible to truly know the registrants

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[1] U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Summary of State Sex Offender Registries* (2001), *available at* https://www.bjs.gov/content/pub/ascii/sssor01st.txt.

[2] Klaas Kids Foundation, *Megan's Law for South Carolina* (last updated Dec. 11, 2019), *available at* https://klaaskids.org/megans-law/south-carolina/.

[3] Municipal Association of South Carolina, *South Carolina Municipalities by Population*, *available at* https://www.masc.sc/pages/municipalities/directory/By-Population.aspx (last accessed Apr. 19, 2020).

that are most likely to be a threat. Research shows that the public generally perceives that all sex offenders are the same and are highly likely to recidivate while also being most afraid of sexual assault from a stranger. Mary Katherine Huffman, *Moral Panic and the Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management*, 4 Va. J. Crim. L. 241, 253-56 (2016). Such beliefs lead the public to greatly fear persons on the Registry. *Id.* Thus, for members of the public who look to the Registry, its size is unwieldy and diminishes their ability to determine who presents the most danger. *See* Elizabeth J. Letourneau, et al., *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence Against Women*, at 49 (2010) ("[B]road notification might dilute the public's ability to determine who truly presents the greatest threat to a community, because all offenders listed on the registry appear to be equally dangerous.").

Neither the police nor the public benefit from a Registry that is so ineffective at providing them with the information needed to know where to place their law enforcement resources or public concern.

ii. Registration of sex offenders has little to no effect on recidivism of sex offenders.

The SC SORA is based in part on the idea that "[s]tatistics show that sex offenders often pose a high risk of re-offending." S.C. Code Ann. § 23-3-400. However, over a decade of research shows that the "belief that sex offenders present a particularly high risk of recidivism is more myth than fact." Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. Rev. L. & Soc. Change 727, 756 (2013). In fact, the majority of studies "show that sex offenders are less likely to reoffend than other types

of offenders." Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & Econ 207, 211 (Feb. 2011) (collecting studies). In a study by the Department of Justice that conducted a nine-year follow-up of sex offenders released from state prisons across 30 states in 2005, the results showed that sex offenders were less likely to be arrested following release from incarceration than prisoners serving time for property offenses, drug offenses, and public-order offenses. Mariel Alper, et al., U.S. Department of Justice, Office of Justice Programs Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-14)*, NCJ251773 (May 2019) (noting that 67% of sex offenders were arrested following release in comparison to 88% for property crime offenders, 84% for drug offenders, and 82% for public-order offenders). Moreover, if they did reoffend, sex offenders were more likely to be arrested for other crimes, such as drug, property, public-order, or general assault, as opposed to sex offenses. *Id.* at 5. In fact, the data shows that *only 7.7%* of released sex offenders were arrested for a similar crime within nine years of their release. *Id.* By comparison, 44.2% of persons incarcerated for assault, 16.8% of persons incarcerated for robbery, 63.5% of persons incarcerated for property crimes, 60.4% of persons who were incarcerated for drug offenses, and 70.1% of persons incarcerated for public-order offenses were arrested for a similar crime within nine years of their release. *Id.* at 4.

Not only do sex offenders have a lower arrest rate than other prisoners following release, but they also have a lower five-year return to prison rate. *Id.* at 8 (noting that five-year return to prison rate for sex offenders is 35% in comparison to the 55% return rate for offenders overall). Moreover, the chances for recidivating decrease as time passes. *Id.* at 6. The rate of arrest was approximately 13% for sex offenders who were arrested for the first time following year two of release. *Id.* However, first time arrests in year nine were 4%. *Id.*

A study of South Carolina data found that of sex offenders released from prison, 8% were charged with new offenses and 5% were convicted of additional sex offenses. Elizabeth J. Letourneau, et al., *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence Against Women*, at 32 (2010). The greatest predictors of recidivism among sex offenders were prior convictions and crimes that did not involve a child victim. *Id.* at 33. Most importantly, registration status had *no effect* on recidivism and, overall, there was no evidence that the SC SORA reduced sex crime recidivism. *Id.* at 33, 48. Additionally, as with the national population, the study found that even the risk of recidivism for high-risk offenders decreased with age and time in the community. *Id.* at 54.

Thus, the data supports that sex offenders have a very low rate of general recidivism, and an even lower rate of recidivism than other criminal offenders. Even with respect to committing additional sexual offenses, the rate is significantly lower than the rate of other offenders committing the offenses for which they were previously incarcerated. As such, the underlying premise upon which the SC SORA is based—the idea that sex offenders have a high risk of recidivism—is demonstrably false. Further, there is no correlation between registration and recidivism, which demonstrates that inclusion on the Registry does not have an influence on the goal of protecting the public by reducing recidivism. The SC SORA's false premise as to its purpose undermines the conclusion that there is a rational basis for the SC SORA's lifetime registration requirement and that it is not arbitrary.

II. Providing a meaningful opportunity for review of sex offender status will remedy the due process issues and provide an opportunity for relief from the punitive effects inherent in the SC SORA.

The primary issue with the SC SORA is not that it created a Registry or that it requires sex offenders to register but that it requires lifetime registration of all offenders *regardless of the*

severity of the crime or taking into account an individual registrant's risk to the community. As currently enforced, registrants can never be removed from the Registry unless their convictions are vacated or reversed, and as such, registrants will forever be subject to the punitive effects of the SC SORA. The majority of states and the federal government employ a tiered approach in which the period of registration is determined by the tier which, in general, corresponds with the severity of the offense.[4] For example, the federal government has created a three-tier system that provides for 15 years of registration for Tier 1 offenders, 25 years of registration for Tier 2 offenders, and lifetime registration for Tier 3 offenders. 34 U.S.C. § 20915(a). Even under the tiered scheme, Tier 1 and Tier 3 offenders can receive reductions to the registration requirement if they successfully complete their sentences, including parole and probation; maintain a clean record by not being convicted of another sex offense or any other crime punishable by more than one-year imprisonment; and successfully complete a sex offender rehabilitation program. *Id.* § 20915(b)(1). Upon satisfaction of those requirements and maintaining a clean record for ten years, a Tier 1 offender may be relieved of registration requirements. *Id.* § 20915(b)(2)-(3). A Tier 3 offender may be relieved of registration requirements if they maintain a clean record for at least 25 years. *Id.*

Less than 20 states have declined to adopt a tiered system similar to that of the federal government and instead impose lifetime registration requirements on persons convicted of sex offenses regardless of the severity of the offense. However, *South Carolina is the only state that*

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[4] *See* Collateral Consequences Resource Center, Restoration of Rights Project, Fifty State Comparison on Relief from Sex Offender Registration Requirements (last updated Nov. 14, 2019), https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations/.

does not provide registrants with an opportunity to petition for removal from the Registry.[5] For example, Hawaii allows registrants to petition the court for relief from registration requirements after the successful completion of the sentence, compliance with registration, and maintenance of a clean record for at least ten years for Tier 1 offenders, 25 years for Tier 2 offenders, and 40 years for Tier 3 offenders. Haw. Stat. § 846E-2. A court can grant termination of registration requirements on proof beyond preponderance of the evidence that the registrant has met the statutory requirements for eligibility to petition for termination; has substantially complied with registration requirements; is unlikely to commit a sex offense again; and that the continued registration of the registrant will not assist in protecting the public. *Id.* § 846E-2(f). If the court denies the petition, the registrant may petition for termination again after five years. *Id.* § 846E-2(g). As such, Hawaii provides registrants with an opportunity to petition the court for relief from registration requirements accounting for the individual registrant's rehabilitation and risk to the community.

Similarly, Idaho also imposes lifetime registration requirements. However, Idaho allows all registrants—except recidivists, persons who committed aggravated offenses, or violent sexual predators—to petition the court after completion of their sentence followed by ten years of compliance with registration requirements. Idaho Code §18-8310(1). A court may grant the registrant relief from registration requirements following a hearing if the court finds by clear and

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[5] Currently, Alabama, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Mississippi, Montana, New Jersey, Oregon, South Carolina, South Dakota, Tennessee, Virginia, and Wyoming all impose lifetime registration requirements. Collateral Consequences Resource Center, Restoration of Rights Project, Fifty State Comparison on Relief from Sex Offender Registration Requirements (last updated Nov. 14, 2019) https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations/.

convincing evidence that the registrant has shown, *inter alia*, that they: completed their sentence, are not a recidivist, completed a treatment program, and it is highly probable or reasonably certain they are not a risk to commit a violent crime. Idaho Code §§ 18-8310(1)(a)-(g), (4).

Hawaii and Idaho's provisions are examples of registration schemes that impose lifetime requirements but still provide a meaningful opportunity for the registrants to petition for removal from the registry accounting for the individual's rehabilitation and future risk to society. If the SC SORA operated similarly to the statutory schemes in either Idaho or Hawaii, a registrant like Respondent who successfully completed their sentence of probation, has complied with the registration requirements for ten years, and has maintained a clean record for the same period of time could petition a local circuit court for relief from registration requirements and would have the opportunity to present evidence of their compliance and low-risk to the community. The lack of any such meaningful opportunity for review under the SC SORA constitutes a deprivation of due process.

CONCLUSION

The SC SORA violates the due process rights of persons convicted of sex offenses within this state by subjecting them to a lifetime of registration and punishment, without any reasonable opportunity for removal outside the rare occasion where the registrant's conviction is reversed or vacated. The lifetime registration requirement, which constitutes punishment to the registrants, is not rationally related to the stated purpose of protecting the public from high-risk offenders or assisting law enforcement in investigating sex crimes because the statutory scheme is so over-inclusive that significant numbers of low-risk offenders will continue to crowd the Registry, spread thin the resources of law enforcement, and diminish the utility of the Registry

will be diminished. Accordingly, if this Court grants the application for leave in this case, Amicus Curiae South Carolina Office of Appellate Defense asks this Court to hold that the SC SORA's lifetime registration requirement without an opportunity for review to seek relief from the requirement is punitive and violates the Due Process clauses of the United States and South Carolina constitutions.

Respectfully submitted,

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May 6, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2019-001063

Dennis J. Powell, Jr., ... Respondent,

v.

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

PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Nelson Mullins Riley & Scarborough, LLP, attorneys for South Carolina Office of Appellate Defense, do hereby certify that on May 6, 2020 I have served all counsel in this action with a coy of the pleading(s) hereinbelow specified at the following address(es):

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May 6, 2020

Via Electronic Filing

The Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
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RE: Dennis J. Powell, Jr. v. Mark Keel, Chief, State Law Enforcement Division, and the State of South Carolina.
Appellate Case No. 2019-001063
NMR&S File No. 033999.02465

Dear Ms. Kitchings:

Enclosed for electronic filing is a Motion for Leave to File Brief of Amicus Curiae South Carolina Office of Appellate Defense, with the Brief conditionally filed as Exhibit A to the Motion, in the above referenced matter. The check for the filing fee for this Motion will be sent at a later time under separate cover.

By copy of this letter, we are serving a copy of the Motion for Leave to File Brief of Amicus Curiae South Carolina Office of Appellate Defense and Exhibit A upon all parties in this action.

Very truly yours,

Blake T. Williams

BW:kdm
Enclosure

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