

## FOR-LIFE SEX OFFENDER STATUS RULED UNCONSTITUTIONAL



*Supreme Court says offenders on state's list have right to periodic review*

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Lifelong registration on the state's sex offender registry is unconstitutional in the absence of judicial review to assess an individual's risk of reoffending, a unanimous South Carolina Supreme Court has ruled.

The June 9 decision affirms a Richland County Circuit Court finding that while there is a legitimate governmental interest in requiring offenders to register under the state's Sex Offender Registry Act (SORA), lifetime registration without due process is arbitrary and unrelated to the legislature's purpose of protecting the public from high-risk offenders.

"The lifetime inclusion of individuals who have a low risk of re-offending renders the registry over-inclusive and dilutes its utility by creating an ever-growing list of registrants that is less effective at protecting the public and meeting the needs of law enforcement," Chief Justice Donald Beatty wrote for the court.

### Life on the list

In February 2008, Dennis Powell was arrested after exchanging sexually explicit chat room messages with an undercover police officer that he believed to be a 12-year-old girl. Powell planned to meet the girl at a skating rink but was pulled over by police when he drove past the location. Powell in 2009 pleaded guilty to soliciting a minor and was sentenced to two years in prison, suspended to one year of probation, and ordered to register for life as a sex offender.

Since then, Powell has completed probation, undergone outpatient psychiatric treatment and therapy, and has not reoffended. He was assessed by a professional counselor and a psychologist, both of whom found that he is unlikely to reoffend.

One of Powell's attorneys, Jon Ozmint of Columbia, said that his client is a low-level offender who has accepted responsibil-

ity and lived an exemplary life since the offense.

"He simply did not deserve to be branded and shamed by the state for the rest of his life," Ozmint said.

In 2016, Powell petitioned the circuit court, claiming that lifetime registry is excessive and violates the U.S. and state constitutions, depriving him of due process and equal protection.

The circuit court agreed. The state's appeal was transferred from the state Court of Appeals to the state Supreme Court.

SORA was passed in 1994 and requires those convicted of an offense listed in the statute to register as a sex offender. It also gives judges discretion to require registration—often lifelong—for those convicted of crimes that aren't listed in the statute if solicitors can show good cause. Offenders must register with their local sheriff's department every two years or face criminal prosecution. The South Carolina Law Enforcement Division (SLED) oversees the sex offender registry.

While SORA mandates registration, it doesn't provide an opportunity for registrants to show that they should be removed from the registry on the grounds that they're unlikely to reoffend. Getting an offender's name removed from the registry is thus extremely rare, typically reserved for those who've had their convictions overturned or vacated on appeal.

Beatty cited researcher and Florida State University law professor Wayne Logan in noting that South Carolina has the most stringent legislative schemes in the country. Most states, Beatty noted, provide for individualized assessment hearings.

Ozmint said that many other state's statutes, forbidding lifetime registration without judicial review, are modeled after the equivalent federal statute.

"I think that many in our General Assembly and in the executive branch saw this coming and will be prepared to quickly revise the statute," Ozmint said.

### Case-by-case basis

Solicitors pointed to the state Supreme

Court's 2003 decision in *Hendrix v. Taylor*, holding that because being placed on the sex offender registry isn't punitive and is rationally related to the legislature's intent, it can't constitute a deprivation of a constitutionally protected liberty interest.

Powell, meanwhile, argued that the state Supreme Court's 2013 ruling in *State v. Dykes* determined that while the initial imposition of satellite monitoring is appropriate, lifetime monitoring without judicial review violates the liberty interest to be free from "permanent, unwarranted governmental interference."

Applying a rational basis review, the court agreed with Powell that lifetime imposition of both satellite monitoring and sex offender registry without judicial review violates the Fourteenth Amendment right of due process.

The Supreme Court further found that the circuit court's hearing had satisfied due process, and because the circuit court determined that Powell is unlikely to reoffend and should be removed from the registry, Beatty ordered his immediate removal.

Just hours after the ruling, Powell no longer appeared on the registry.

The high court noted the General Assembly's dual purposes of ensuring public health and the safety of its citizens, and its assertion that the registry gives law enforcement agencies the tools needed to investigate criminal offenses. But while lawmakers cited statistics showing that sex offenders are often high-risk, Beatty wrote that no current statistics suggest that all offenders are high-risk, and that little evidence shows that SORA accomplishes its purported goals.

The Supreme Court determined that the development of a judicial review process is best left to the General Assembly, and gave the legislature 12 months to "correct the deficiency in the statute regarding judicial review."

SLED spokesperson Tommy Crosby said that the agency is reviewing the decision and deciding whether to petition the Supreme Court for rehearing.

"We would note, however, that the court was clear that this decision does not go into effect for 12 months," Crosby said, "so that the General Assembly can address this matter."

Amber Hendricks of Nelson Mullins in Columbia, who was one of the co-authors of an amicus brief filed on behalf of the South Carolina Office of Appellant Defense, said she was "slightly surprised" by the ruling, but was always hopeful.

"I like to advocate for people to receive second chances if they deserve them," Hendrick said. "I think that it is a win for the people who may now get a second chance to fully rejoin society in a way that they never thought they would be able to."

Adam Whitsett and Paul Ahearn of SLED and Attorney General Alan Wilson and Assistant Attorney General Harley Kirkland represented Keel.

Elise Crosby of Georgetown also represented Powell. Blake Williams and Daniel Westbrook, also of Nelson Mullins in Columbia, also represented the Office of Appellate Defense.

The 13-page decision is *Powell v. Keel* (Lawyers Weekly No. 010-029-21). The full text of the opinion is available online at [sclawyersweekly.com](http://sclawyersweekly.com).