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SLED GUIDANCE ON THE UPDATES TO THE SOUTH CAROLINA SEX OFFENDER REGISTRY ACT

ADULT TIER II OFFENDERS – South Carolina Adjudication or Conviction

On May 23, 2022, Governor Henry D. McMaster signed former House Bill 4075 into law. This Act affords all sex offenders in South Carolina a mechanism to seek removal from South Carolina's lifetime sex offender registry in response to the South Carolina Supreme Court's decision in *Powell v. Keel*. This bill creates state tiers for offenders and provides reasonable avenues for removal based on the offender's applicable state tier.

Moving forward, Adult Tier II Offenders in South Carolina are offenders convicted of the following offenses:

- (a) criminal sexual conduct in the second degree (Section 16-3-653);
- (b) engaging a child for sexual performance (Section 16-3-810);
- (c) producing, directing, or promoting sexual performance by a child (Section 16-3-820);
- (d) trafficking in persons (Section 16-3-2020) except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense;
- (e) criminal sexual conduct with minors, second degree (Section 16-3-655(B)). If evidence is presented at the criminal proceeding, or in any court of competent jurisdiction, and the court makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct, as contained in Section 16-3-655(B)(2), provided the offender is eighteen years of age or less, or consensual sexual conduct between persons under sixteen years of age, the convicted person is not an offender and is not required to register pursuant to the provisions of this article;
- (f) criminal sexual conduct with minors, third degree (Section 16-3-655(C)). If evidence is presented at the criminal proceeding, or in any court of competent jurisdiction, and the court makes a specific finding on the record that the conviction obtained for this offense resulted from consensual sexual conduct, as contained in Section 16-3-655(B)(2), provided the offender is eighteen years of age or less, or consensual sexual conduct between persons under sixteen years of age, the convicted person is not an offender and is not required to register pursuant to the provisions of this article;
- (g) criminal solicitation of a minor if the purpose or intent of the solicitation or attempted solicitation was to:
 - (i) persuade, induce, entice, or coerce the person solicited to engage or participate in sexual activity as defined in Section 16-15-375(5);
 - (ii) perform a sexual activity in the presence of the person solicited (Section 16-15-342); or
- (h) violations of Article 3, Chapter 15, Title 16 involving a minor.

SLED GUIDANCE – ADULT TIER II OFFENDERS – South Carolina Adjudication or Conviction

Duration and Frequency of Registration - Adult Tier II Offenders are still required to register with the same frequency as before the passage of this bill, and this frequency is still dictated by the offender's applicable federal SORNA tier – not the new state tiers. Specifically, Adult Tier II Offenders in South Carolina are required to “register biannually for life” for all persons who are not classified as Tier III offenders pursuant to the federal SORNA or “every ninety days” for life for all persons “classified as Tier III pursuant to Title I of the federal Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. 109-248), the Sex Offender Registration and Notification Act (SORNA).” *See* S.C. Code Ann. § 23-3-460(A), (B). However, this lifetime registration requirement is now subject to the removal provisions set forth below.

Removal Process and Requirements - For Adult Tier II Offenders:

The offender may file a request for termination of the requirement of registration with SLED, in a form and process established by SLED **AFTER HAVING BEEN REGISTERED FOR AT LEAST TWENTY-FIVE YEARS** if the offender was required to register based on an adjudication of delinquency or the offender was required to register as a Tier II offender. SLED's application form and process are attached and can be accessed on SLED's website – www.sled.sc.gov. Currently, SLED is only able to accept paper applications, which must be mailed to Application for Sex Offender Registry Removal, SLED SOR Unit, Post Office Box 21398, Columbia, SC 29221. The applicant must send the following:

1. Completed **SLED APPLICATION**. (Available on SLED's website www.sled.sc.gov).
2. **2 sets of fingerprints** from the applicant for SLED to conduct a fingerprint-based state and a federal criminal history check on the applicant.

****For SLED to proceed, the applicant “must not have been convicted of failure to register within the previous ten years” and “must not have been convicted of any additional sexual offense after being placed on the registry.” *See* S.C. Code Ann. § 23-3-462(A)(4), (5).**

3. A filing fee of **\$250.00**, which can only be paid via money order or cashier's check. (SLED does not accept personal checks).
4. Proof that the applicant “**successfully completed all sex offender treatment programs that were required.**” This proof must be official documentation acknowledging successful completion.

Upon receipt of all the above required documents and information, SLED will review the documentation provided by the offender, and will notify the original prosecuting agency for approval. If all the requirements of this section are verified, SLED shall, within one hundred twenty days of receipt of the request for termination, remove an offender's name from the registry and notify the offender that the offender is no longer required to comply with the registry requirements of this article. **If it is determined that the offender has been convicted of any prohibiting offenses during the applicable period, has not substantially complied with this section, or an objection has been filed by the original prosecuting agency, SLED shall not remove the offender's name from the sex offender registry and shall notify the offender that the offender has not been relieved of the provisions in this article.**

SLED GUIDANCE – ADULT TIER II OFFENDERS – South Carolina Adjudication or Conviction

Challenging SLED’s Determination – For Adult **Tier II** Offenders who are denied by SLED:

THERE IS NO APPEAL TO SLED. Rather, 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. Individuals placed on the registry as a juvenile should petition the family court that adjudicated them delinquent.

In accordance with S.C. Code Ann. § 23-3-463, the State of South Carolina must be named as the respondent to the action and shall be represented by the prosecution office that obtained the underlying conviction for which the offender is required to register, or, if the conviction occurred outside of the State, the Attorney General. All requirements of the Victim’s Rights Act, including reasonable notice, must be observed. SLED is not a party to such action and should not be named.

The appeal must be filed in the county in which the underlying conviction occurred if the conviction occurred within the State, or if the conviction occurred outside of the State, the county in which the offender resides. 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.

However, a person requesting a hearing under this section is entitled to the assistance of counsel, and if the person is indigent, the court must appoint counsel to assist the person.

In addition, the court may direct that a qualified evaluator designated by the South Carolina Department 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 department, 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 department 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.

Re-applying After Denial – For Adult **Tier II** Offenders:

If the offender is denied a termination request by SLED, the offender may petition again for termination with SLED **NO SOONER THAN FIVE YEARS AFTER THE PREVIOUS DENIAL**. If an offender is denied a termination request based on conviction of any additional sexual offenses or violent sexual offenses, the offender may not submit a petition to SLED for termination unless the subsequent conviction is overturned or a pardon granted.

However, if an appeal motion is filed and denied, the person may not file for removal from the registry pursuant to this section again until five years after the date of the final order.

SLED GUIDANCE – ADULT TIER II OFFENDERS – South Carolina Adjudication or Conviction

Other Avenues of Removal – For Adult Tier II Offenders:

While not a part of the updates in House Bill 4075, S.C. Code Ann. § 23-3-430(E), (F), and (G) also provide statutory mechanisms of removal for adult Tier II Offenders in South Carolina.

S.C. Code Ann. § 23-3-430(E) - SLED shall remove a person's name and any other information concerning that person from the sex offender registry immediately upon notification by the Attorney General that the person's adjudication, conviction, guilty plea, or plea of nolo contendere for an offense listed in subsection (C) was reversed, overturned, or vacated on appeal and a final judgment has been rendered.

S.C. Code Ann. § 23-3-430(F) - If an offender receives a pardon for the offense for which he was required to register, the offender must reregister as provided by Section 23-3-460 and may not be removed from the registry except:

- (1) as provided by the provisions of subsection (E); or
- (2) **if the pardon is based on a finding of not guilty specifically stated in the pardon.**

S.C. Code Ann. § 23-3-430(G) - If an offender files a petition for a writ of habeas corpus or a motion for a new trial pursuant to Rule 29(b), South Carolina Rules of Criminal Procedure, based on newly discovered evidence, the offender must reregister as provided by Section 23-3-460 and may not be removed from the registry except:

- (1) as provided by the provisions of subsection (E); or
- (2) (a) if the circuit court grants the offender's petition or motion and orders a new trial; and
(b) a verdict of acquittal is returned at the new trial or entered with the state's consent.