

 ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Greenville County  
Charles B. Simmons, Jr., Special Circuit Court Judge

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S.C. Sup. Ct. Opinion No. 27124  
Heard September 18, 2012 – Filed May 22, 2013

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

JENNIFER RAYANNE DYKES,

APPELLANT.

Appellate Case No. 2010-160047

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**PETITION FOR REHEARING**

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Appellant, Jennifer Rayanne Dykes, by and through her undersigned counsel, respectfully petitions the Court for rehearing pursuant to Rule 221(a) of the South Carolina Appellate Court Rules. Appellant seeks rehearing of the Court's conclusion that S.C. Code Section 23-3-540(C) is constitutional in its mandate that Appellant, notwithstanding her low risk of re-offending, be fitted and tracked with an electronic GPS monitor so long as Appellant is provided judicial review in ten years pursuant to S.C. Code Section 23-3-540(H).

Appellant seeks rehearing on the grounds that the Court may have (1) misapprehended her substantive due process argument by concluding Appellant sought substantive due process relief on a generalized notion of the fundamental right of sex offenders to be "let alone" when

Appellant sought relief on the specific fundamental rights of all persons to their personal privacy interests and bodily integrity; and (2) the Court may have overlooked Appellant's other grounds for relief as outlined in her brief—namely, violation of procedural due process, violation of *ex post facto* punishment, violation of equal protection, and violation of the Fourth Amendment right to be protected from unreasonable searches and seizures.

The following is submitted in support of this petition.

**I. The Court may have misapprehended that Appellant sought substantive due process relief on a generalized notion of the fundamental right to be “let alone” rather than the specific fundamental rights of all persons to their (1) personal privacy interests and (2) bodily integrity.**

The controlling opinion framed the issue presented to the Court as whether Appellant, as a sex offender, had a fundamental right to be let alone. State v. Dykes, Opinion No. 27124, p. 4. Based on this framing of the issue and the controlling opinion's analysis, Appellant avers that the Court may have misapprehended Appellant's substantive due process argument as being based on a broad legal proposition (the right to be “let alone”) rather than the specific infringements of fundamental rights discussed in Appellant's Final Brief at pp. 19 – 23, 24 – 26. Moreover, the Court may have misapprehended that Appellant averred that these rights were fundamental to sex offenders rather than to all persons.

A substantive due process analysis begins with a determination of the nature of the right affected by the government action at issue. See Treatment and Care of Luckabaugh, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (S.C. 2002). Appellant argued mandatory GPS monitoring infringes two specific fundamental rights, writing at the very beginning of part 1 of her argument:

Lifetime GPS monitoring under § 23-3-540(C) infringes fundamental liberty rights. It requires an electronic device to be permanently attached to the body, S.C. Code §§ 23-3-540(H) and (P), and, therefore, infringes the fundamental right to control the integrity of one's own body. Lifetime GPS monitoring tracks the physical location of a person minute-by-minute. ... It therefore infringes the fundamental right to be free from unwanted interference into one's personal privacy.

See Final Brief of Appellant, p. 18 (emphasis added). The fundamental rights infringed by § 23-3-540(C) were identified very specifically by Appellant as (1) bodily integrity, see Final Brief of Appellant, pp. 18, 19 – 23, and (2) personal privacy, see Final Brief of Appellant, pp. 18, 24 – 26. The right to be let alone was necessary for a proper, historical, and legal analysis. But it was these specific examples of that liberty right that Appellant averred were fundamental to all persons.

The Court may have misapprehended that Appellant sought to identify a single, broad fundamental right in her use of the phrase “right to be let alone.” Appellant, however, specifically named bodily integrity and personal privacy as the fundamental rights infringed and discussed the fundamental right to “be let alone” as being part of the broad category that historically the Supreme Court of the United States, as well as this Court and other courts throughout the United States, have used as the origin of the very specific rights of bodily integrity and personal privacy. See Final Brief of Appellant, pp. 19 – 23.

Beginning with her citation to Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 – 252, 11 S.Ct. 1000, 35 L.Ed. 734 (1891) as a primary source for the term “right to be let alone” and the further discussion of this right as a general legal proposition out of which, historically, the specific right to the protection of bodily integrity is a “natural extension,” Appellant explicitly argued that it was the right to bodily integrity that is fundamental and, so, is deeply rooted in our Nation's history and tradition. See Final Brief of Appellant, p. 19 – 21.

Further, Appellant’s discussion of how GPS monitoring infringed the fundamental right to be free from unwanted invasions into personal privacy included reference to the right to be let alone. That reference, however, was in the context of how the “comprehensive” nature of the right to be let alone was a bedrock concept out of which our rights to personal privacy grew and part of (but not the sole reason) that collection of rights is so firmly rooted in our Nation’s history and tradition they are deemed fundamental. See Final Brief of Appellant, pp. 24 – 26.

Appellant’s use of the right to be let alone in her argument is much the same as the use of the term “liberty” itself in any substantive due process analysis. The broad category of liberty is, of necessity, referenced in any discussion of a specific liberty interest with respect to substantive due process—for it is the operative word in the Due Process Clause. Reference to how specific examples of the rights of free people are included in, or derived from, the term “liberty” in the Due Process Clause does not render the discussion one of a general right rather than specific rights. See Luckabaugh, 351 S.C. at 14 (discussing how “[a] person's interest in freedom from bodily restraint is ‘at the core of the liberty protected by the Due Process Clause from arbitrary governmental actions.’) (quoting Foucha v. Louisiana, 504 U.S. 71, 80, 112 S.Ct. 1780, 1785, 118 L.Ed.2d 437, 448 (1992)) (emphasis added). For to do so would prevent litigants and courts alike from placing specific rights into their proper context. Because Appellant knows well that the Court understands this need for discussing general rights alongside of specific rights, Appellant avers that the Court may have misapprehended from Appellant’s brief an argument in generality rather than the one of specificity Appellant intended.

Appellant’s concluding phrase of the first paragraph of her argument on the fundamental nature of the privacy interests infringed by GPS monitoring states:

[the right to be let alone] includes the right to be free from unwanted interference into the privacy of one’s life.

Final Brief of Appellant, p. 24. After citing specific examples from case law on personal privacy rights that have been deemed fundamental, see Final Brief of Appellant, pp. 24 – 26, Appellant framed the conclusion as:

The right to be let alone encompasses all of the fundamental rights described above. Together they stand for the proposition that the Constitution offers some level of protection from government action that intrudes on the personal privacies of every-day life, such as marrying and raising a family, as much as it protects against gross intrusions like stomach pumping and forced medical procedures. But particularly it encompasses the right to the privacy of one's every-day life: to the comings and goings of a person free from the state's watchful eye.

Final Brief of Appellant, p. 26. Appellant very specifically identified the right to personal privacy—not the general right to be let alone—as being the fundamental right being infringed by GPS monitoring under § 23-3-540(C).

This approach is consistent with the Supreme Court's approach in Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997), of avoiding broadly stated rights and relying, instead, on an analysis focused on specific examples of rights that are fundamental in our concept of ordered liberty in that they are firmly rooted in our history and tradition.

Additionally, the Court may have misapprehended that Appellant sought to identify sex offenders as having fundamental rights separate from all persons. Such a proposition would be inconsistent with case law. Substantive due process analysis does not divide fundamental rights by categories of people. Rights either are or are not fundamental for all persons given the nature of the liberty at issue and our Nation's history and traditions. For example, the fundamental right to be free from physical restraint by a government agent is not premised on the person's status as a convict or a suspect. The fundamental nature of the right is premised on the history and tradition that physical restraint has always been the most basic of intrusions into liberty. See

State v. Brannon, 379 S.C. 487, 498, 666 S.E.2d 272, 277 (2008) and Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 1874, 20 L.Ed.2d 889 (1968) as two examples out of many.

The fundamental nature of the rights infringed by GPS monitoring do not change for persons of any classification—that is why they are fundamental. A person’s classification, of course, is relevant to the overall substantive due process analysis. But not in the first inquiry, which is whether the nature of the impacted right is fundamental.

Appellant’s status as a sex offender is relevant in the second inquiry, which is the scrutiny to be applied. Is mandatory GPS monitoring of sex offenders narrowly tailored to achieve the purpose of the statute? The purpose of the statute is to “protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes.” State v. Dykes, Opinion No. 27124, p. 6. And it is the “likelihood of re-offending [that] lies at the core” of what the controlling opinion noted is a civil statutory scheme. State v. Dykes, Opinion No. 27124, p. 6. So, indeed Appellant’s status as a sex offender is an important factor in whether and to what degree any fundamental right (or, for that matter, simple liberty interest) may be infringed.

Appellant respectfully requests a rehearing to address the issues of whether the Court may have misapprehended the fundamental rights implicated by GPS monitoring—bodily integrity and personal privacy interests. Additionally, and with equal respect, Appellant requests a rehearing to address the issue of the proper place of sex offender status in the substantive due process analysis as being in the scrutiny inquiry and not in the fundamental rights inquiry.

**II. The Court may have overlooked that, in addition to Appellant's substantive due process rights being violated, Appellant also asserted separate constitutional claims of procedural due process, *ex post facto*, equal protection, and unreasonable search and seizure violations.**

The controlling opinion resolved one of the five constitutional violations alleged by Appellant. The Court, therefore, may have overlooked that the resolution of the substantive due process claim did not resolve the remaining alleged constitutional violations.

Appellant argued in part 2 of her Final Brief that section 23-3-540(C) violated her procedural due process rights; in part 3 that the statute violated her right to protection from *ex post facto* punishment; in part 4 that the statute violated her right to equal protection; and in part 5 that the statute violated her Fourth Amendment right to be free from unreasonable search and seizure.

**A. Section 23-3-540(C)'s violation of Appellant's right to procedural due process is not resolved by the resolution of her substantive due process claim.**

Appellant respectfully request rehearing because the Court may have overlooked that the substantive due process claim did not resolve whether Appellant's right to procedural due process was violated by section 23-3-540(C).

The controlling opinion leaves unresolved Appellant's right to a meaningful hearing as to the infringement of GPS monitoring into even minimal liberty interests. Procedural due process is aimed at preventing arbitrary action by the government against a person's liberty interests. Matthews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976). And in the context of GPS monitoring, procedural due process—separate from any substantive due process claims or analysis—has been held to be required for sex offenders. State v. Stines, 683 S.E.2d

411 (N.C. App. 2009) (finding GPS monitoring implicated a liberty interest and required procedural due process be afforded to sex offenders without conducting a substantive due process analysis).

The heart of the issue with regard to section 23-3-540(C)'s mandatory imposition on Appellant is that due process requires a meaningful hearing on whether GPS monitoring is specifically appropriate and/or necessary for Appellant given the evidence of her posing a low risk of re-offending. That the imposition of GPS monitoring was mandatory means that there was no hearing on the merits. Substantive due process may resolve that section 23-3-540(C) is not subject to strict scrutiny. That, however, does not resolve the issue of whether Appellant had a meaningful hearing consistent with procedural due process. This is particularly so because neither the conviction nor the revocation of probation addressed the level of risk Appellant posed for re-offending. That means the order imposing GPS monitoring has been divorced from the very premise the controlling opinion cited as being the "core" of the statutory scheme for section 23-3-540(C): "likelihood of re-offending." State v. Dykes, Opinion No. 27124, p. 6.

Appellant respectfully avers that the Court grant rehearing to address the procedural due process violations that were not resolved by the substantive due process ruling set forth in the controlling opinion.

**B. Section 23-3-540(C)'s violation of Appellant's right to protection from *ex post facto* punishment is not resolved by the resolution of her substantive due process claim.**

Appellant respectfully request rehearing because the Court may have overlooked that the substantive due process claim did not resolve whether Appellant's protection against *ex post facto* punishment was violated by section 23-3-540(C).

It is undisputed that Appellant committed her offense prior to the effective date of section 23-3-540(C). See Final Brief of Appellant, p. 40. Appellant was not placed on GPS monitoring until after a finding of a violation of probation. Therefore, if GPS monitoring is a punishment, section 23-3-540(C) violates the *ex post facto* clause.

The determination of whether GPS monitoring is punishment under section 23-3-540(C) is not answered by the substantive due process analysis. An *ex post facto* analysis does not involve a fundamental rights analysis or even a rational basis analysis. The appropriate analysis is to apply the factors set forth by the Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 – 169, 83 S.Ct. 554, 567 – 568, 9 L.Ed.2d 644 (1963). Five of the seven factors from Mendoza-Martinez apply to GPS monitoring of Appellant.

First, permanent GPS monitoring is a sanction; it is an unwanted action by the state against Appellant in response to her violation of the state's probation rules. Moreover, the monitoring is a disability, as it involves physical impairment, shame and embarrassment, and paying fees.

Second, permanent GPS monitoring of Appellant was triggered by a probation violation—and nothing else. It was not triggered by evidence that Appellant posed at the time (or now poses) a risk for re-offending that warrants GPS monitoring.

Third, forcing Appellant to submit to GPS monitoring is aimed at deterring future conduct, which is a classic element of punishment.

Fourth, electronic monitoring is only used in the criminal justice context. It is used where a court orders a person confined to their home as a substitute for being confined in prison or jail. Active electronic monitoring is not used in the civil context.

Fifth, the sanction is excessive given the evidence that Appellant poses a low risk for re-offending. Lifetime GPS monitoring is not a minor inconvenience. It is highly intrusive in the length of time it is applied and the extent to which it is a physical invasion of liberty and privacy. Applying such a sanction to Appellant, who poses a low risk of re-offending is excessive.

Appellant respectfully avers that the Court grant rehearing to address the *ex post facto* violations that were not resolved by the substantive due process ruling set forth in the controlling opinion.

**C. Section 23-3-540(C)'s violation of Appellant's right to equal protection under the law is not resolved by the resolution of her substantive due process claim.**

Appellant respectfully request rehearing because the Court may have overlooked that the substantive due process claim did not resolve whether Appellant's right to equal protection under the law was violated by section 23-3-540(C).

The substantive due process analysis in the controlling opinion did not resolve the unequal application of GPS monitoring that section 23-3-540(C) imposes on similarly situated people. The statute does not classify sex offenders by the level of risk for re-offending they pose. Instead, it arbitrarily classifies sex offenders based on factors that do not fairly or rationally distinguish high risk offenders from low risk offenders. Moreover, it imposes lifetime GPS monitoring on sex offenders who pose risk levels that are different and often contradictory to each other.

The evidence in the record established that the level of risk could not be determined solely from the offense for which an offender was convicted. See Final Brief of Appellant, p. 46 (citing to R. 65, l. 5 – 67, l. 20). The record also established that an expert administered

psychological/psychiatric test need to be applied to make a proper risk assessment. See Final Brief of Appellant, p. 46 (citing Tr. 64, ll. 15 – 18).

Section 23-3-540(C) classifies sex offenders based on their underlying offense. The result is that § 23-3-540(C) requires trial courts use different procedures and impose different requirements on sex offenders who pose the same level of risk. That is a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This issue was not resolved by the substantive due process ruling. The fundamental rights analysis under substantive due process does not address the classification or the improper application of different procedures and requirements on similarly situated people.

Appellant respectfully avers that the Court grant rehearing to address the equal protection violations that were not resolved by the substantive due process ruling set forth in the controlling opinion.

**D. Section 23-3-540(C)'s violation of Appellant's right to be free from unreasonable search and seizure is not resolved by the resolution of her substantive due process claim.**

Appellant respectfully request rehearing because the Court may have overlooked that the substantive due process claim did not resolve whether Appellant's right to be free from unreasonable search and seizure was violated by section 23-3-540(C).

Appellant was seized by a government agent to have the monitor attached to her body. This is a Fourth Amendment seizure. See State v. Brannon, 379 S.C. 487, 498, 666 S.E.2d 272, 277 (2008) and Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 1874, 20 L.Ed.2d 889 (1968). She is continuously being monitored by the government. This, too, raises Fourth Amendment concerns. See United States v. Jones, \_\_\_ U.S. \_\_\_, 132 S. Ct. 945, 181 L.Ed.2d 911 (2012).

The question raised by the seizure and the continuous monitoring is the reasonableness of both given the totality of Appellant's circumstances. The substantive due process analysis did not resolve this question. A fundamental rights analysis does not address the fact that one of the clear intentions of continuous, minute-by-minute monitoring using GPS is to assist law enforcement in its investigation into future, uncommitted sex offenses or that the Fourth Amendment does not allow law enforcement to use search and seizure in this way. See City of Indianapolis v. Edmond, 531 U.S. 32, 37, 121 S.Ct. 447, 451, 148 L.Ed.2d 333 (2000) ("A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.").

Neither does the substantive due process analysis resolve that the program created by § 23-3-540(C) is aimed at general crime control and has no specific basis for investigating an imminent crime. It is aimed solely at future crime that may happen. Moreover, whether the government can provide probable cause that a crime has been committed or can even provide articulable facts that a crime is afoot was not addressed by the controlling opinion's substantive due process analysis.

Appellant respectfully avers that the Court grant rehearing to address the Fourth Amendment unreasonable search and seizure violations that were not resolved by the substantive due process ruling set forth in the controlling opinion.

### **CONCLUSION**

Appellant requests this Court grant her petition for rehearing and reconsideration of its holding constitutional on substantive due process grounds the mandatory imposition of GPS monitoring on Appellant regardless of her posing a low risk of re-offending with judicial review

ten years after imposition. Additionally, Appellant requests this Court grant her petition for rehearing to address the impact the holding has on the constitutional issues raised by Appellant but not resolved by the controlling opinion.

Respectfully submitted,

Christopher D. Scalzo  
Deputy Public Defender

Wanda H. Carter  
Deputy Chief Appellate Defender

ATTORNEYS FOR APPELLANT

By: 

This 6th day of June, 2013.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Greenville County  
Charles B. Simmons, Jr., Special Circuit Court Judge

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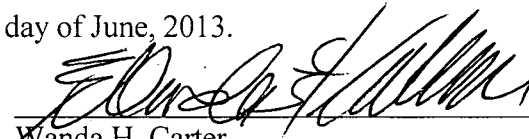
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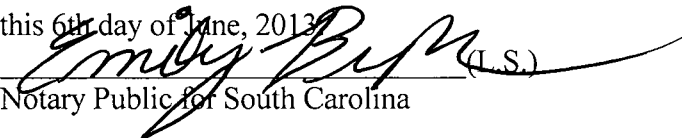
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The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above referenced case has been served upon Tommy Evans, Jr., at the South Carolina Department of Probation, Parole & Pardon Services, PO Box 50666, Columbia, SC 29250 and Jennifer Rayanne Dykes, at 318 Chukar Way, Greenville, SC 29617, this 6th day of June, 2013.

  
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Wanda H. Carter

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me  
this 6th day of June, 2013.

  
\_\_\_\_\_  
Notary Public for South Carolina (I.S.)

My Commission Expires: November 16, 2022.