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ATTORNEY GENERAL

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JUN 12 2013
SC Court of Appeals

June 12, 2013

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State v. Andrew James Harrelson, Jr. – Appellate Case No. 2011-187406

Dear Ms. Kitchings:

On August 9, 2012, this Court granted the State's motion to hold the above-referenced criminal appeal in abeyance pending the Supreme Court's resolution of the related case of State v. Dykes and advised the State to provide a status update in the case every thirty days. This letter is to notify the Court that the Supreme Court issued an opinion following rehearing in State v. Dykes on May 22, 2013. However, the Supreme Court's decision in State v. Dykes is not yet final because counsel for the petitioner filed a petition for rehearing on June 6, 2013, which has not yet been ruled upon and is currently pending in the Supreme Court. A copy of the Supreme Court's opinion and a copy of the petition for rehearing have been attached to this letter. Thanks, and if you should have any questions or concerns, please contact me at (803) 734-3727

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar No. 76901

MRF/
Enclosures

cc: LaNelle Cantey DuRant, Esquire
Victim Services

ATTACHMENT "A"

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Jennifer Rayanne Dykes, Appellant.

Appellate Case No. 2010-160047

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

Opinion No. 27124
Heard September 18, 2012 – Filed May 22, 2013

AFFIRMED AS MODIFIED

Deputy Chief Appellate Defender Wanda H. Carter, of
Columbia, and Christopher D. Scalzo, of Greenville, for
Appellant.

Tommy Evans, Jr. and John B. Aplin, both of Columbia,
for Respondent.

E. Charles Grose, Jr. of the Grose Law Firm, of
Greenwood, Chief Appellate Defender Robert M. Dudek,
of Columbia, and Assistant Public Defender Shane E.
Goranson, of Greenwood, for Amicus Curiae, Anthony
Nation.

JUSTICE KITTREDGE: Jennifer Dykes appeals the circuit court's order
requiring that she be subject to satellite monitoring for the rest of her life pursuant

to sections 23-3-540(C) and (H) of the South Carolina Code of Laws (Supp. 2011). We affirm as modified.

Section 23-3-540 represents a codification of what is commonly referred to as Jessica's Law. Many states have some version of this law, which was enacted in memory of Jessica Lunsford, a nine-year-old girl who was raped and murdered by a convicted sex offender in Florida. Across the country, these laws heightened criminal sentences and post-release monitoring of child sex offenders. The specific issue presented in this case concerns the mandate for lifetime global positioning satellite monitoring with no judicial review. The complete absence of judicial review under South Carolina's legislative scheme is more stringent than the statutory scheme of other jurisdictions. A common approach among other states is either to require a predicate finding of probability to re-offend or to provide a judicial review process, which allows for, upon a proper showing, a court order releasing the offender from the satellite monitoring requirements. *See generally*, N.C. Gen. Stat. Ann. § 14-208.43 (West 2010) (providing a termination procedure one year after the imposition of the satellite based monitoring or a risk assessment for certain offenders). While we hold that the statute's initial mandatory imposition of satellite monitoring is constitutional, the lifetime requirement without judicial review is unconstitutional.

I.

Dykes, when twenty-six years old, was indicted for lewd act on a minor in violation of Section 16-15-140 of the South Carolina Code (2006) as a result of her sexual relationship with a fourteen-year-old female. Dykes pled guilty to lewd act on a minor and was sentenced to fifteen years' imprisonment, suspended upon the service of three years and five years' probation.¹

Upon her release, Dykes was notified verbally and in writing that pursuant to section 23-3-540(C) she would be placed on satellite monitoring if she were to violate the terms of her probation. Shortly thereafter, Dykes violated her probation in multiple respects.² Dykes did not contest any of these violations, though she did offer testimony in mitigation.

¹ Because her offense predated the satellite monitoring statute, she was not subject to monitoring at the time of her plea.

² Five citations and arrest warrants were issued to her for various probation violations: a citation pertaining to her relationship with a convicted felon whom

The State recommended a two-year partial revocation of Dykes' probation and mandatory lifetime satellite monitoring. S.C. Code Ann. section 23-3-540(A) mandates that when an individual has been convicted of engaging in or attempting criminal sexual conduct with a minor in the first degree (CSC-First) or lewd act on a minor, the court must order that person placed on satellite monitoring. Likewise, if a person has been convicted of such offenses before the effective date of the statute and violates a term of her probation, parole, or supervision program, she must also be placed on satellite monitoring. *See* S.C. Code Ann. § 23-3-540(C). The individual must remain on monitoring for as long as she is to remain on the sex offender registry, which is for life. S.C. Code Ann. § 23-3-540(H); *see also* S.C. Code Ann. § 23-3-460 (requiring biannual registration for life).³ Significantly, the lifetime monitoring requirement for one convicted of CSC-First or lewd act on a minor is not subject to any judicial review process. *See* S.C. Code Ann. § 23-3-540(H) (prohibiting judicial review of the lifetime monitoring for CSC-First and lewd act on a minor).

In contrast, if a person is convicted of committing or attempting any offense which requires registration as a sex offender *other than* CSC-First or lewd act on a minor, the court has discretion with respect to whether the individual should be placed on satellite monitoring. *See* S.C. Code Ann. § 23-3-540(B), (D), (G)(1).⁴ In addition,

Dykes met while incarcerated and with whom she was then residing; an arrest warrant for Dykes' continued relationship with that individual; a citation for drinking an alcoholic beverage; a citation for being terminated from sex offender counseling after she cancelled or rescheduled too many appointments; and an arrest warrant for failing to maintain an approved residence and changing her address without the knowledge or consent of her probation agent.

³ Once activated, the monitor can pinpoint the individual's location to within fifteen meters.

⁴ The offenses include: criminal sexual conduct with a minor in the second degree; engaging a child for sexual performance; producing, directing, or promoting sexual performance by a child; assaults with intent to commit criminal sexual conduct involving a minor; violation of the laws concerning obscenity, material harmful to minors, child exploitation, and child prostitution; kidnapping of a person under the age of eighteen unless the defendant is a parent; and trafficking in persons under the age of eighteen if the offense includes a completed or attempted criminal sexual offense. S.C. Code Ann. § 23-3-540(G)(1).

after ten years, an individual who has committed the above-stated crimes may petition the court to have the monitoring removed upon a showing that she has complied with the monitoring requirements and there is no longer a need to continue monitoring her. If the court denies her petition, she may petition again every five years.⁵ S.C. Code Ann. § 23-3-540(H).

II.

At her probation revocation hearing, Dykes objected to the constitutionality of mandatory lifetime monitoring. In support of her arguments, Dykes presented expert testimony that she poses a low risk of reoffending and that one's risk of reoffending cannot be determined solely by the offense committed. The State offered no evidence, relying instead on the mandatory, nondiscretionary requirement of the statute.

The circuit court found Dykes to be in willful violation of her probation and that she had notice of the potential for satellite monitoring. The court denied Dykes' constitutional challenges and found it was statutorily mandated to impose satellite monitoring without making any findings as to Dykes' likelihood of reoffending. The court also revoked Dykes' probation for two years, but it ordered that her probation be terminated upon release. This appeal followed.

III.

The Fourteenth Amendment provides that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. Dykes contends that the imposition of mandatory, lifetime satellite monitoring without consideration of her likelihood of re-offending violates her due process rights.

A.

Dykes asserts she has a fundamental right to be "let alone." We disagree. The United States Supreme Court has cautioned restraint in the recognition of rights

⁵ As long as the individual is being monitored, she must comply with all the terms set by the State, report damage to the device, pay for the costs of the monitoring (unless she can show financial hardship), and not remove or tamper with the device; failure to follow these rules may result in criminal penalties. S.C. Code Ann. §§ 23-3-540(I) to (L).

deemed to be fundamental in a constitutional sense. *See Washington v. Glucksberg*, 521 U.S. 702 (1997) (noting the Supreme Court's reluctance to expand the concept of substantive due process). Indeed, courts must "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [members of the judiciary]." *Id.* at 720. The Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Id.* at 720-21 (internal citations omitted). We reject the suggestion that a convicted child sex offender has a fundamental right to be "let alone" that is "deeply rooted in this Nation's history and tradition."

Our rejection of Dykes' fundamental right argument flows in part from the premise that satellite monitoring is predominantly civil. *See Smith v. Doe*, 538 U.S. 84 (2003) (noting that whether a statute is criminal or civil primarily is a question of statutory construction). Where, as here, the legislature deems a statutory scheme civil, "only the clearest proof" will transform a civil regulatory scheme into that which imposes a criminal penalty. *Id.* at 92 (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997)) (internal quotations omitted).

Notwithstanding the absence of a fundamental right, we do find that lifetime imposition of satellite monitoring implicates a protected liberty interest to be free from permanent, unwarranted governmental interference. We agree with other jurisdictions that have held the requirement of satellite monitoring places significant restraints on offenders that amount to a liberty interest. *See Commonwealth v. Cory*, 911 N.E.2d 187, 196 (Mass. 2009) (finding satellite monitoring burdens an offender's liberty interest in two ways, by "its permanent, physical attachment to the offender, and by its continuous surveillance of the offender's activities"); *United States v. Smedley*, 611 F.Supp.2d 971, 975 (E.D. Mo. 2009) (holding that imposing home detention with electronic monitoring as condition of release impinged on liberty interest); *United States v. Merritt*, 612 F.Supp.2d 1074, 1079 (D. Neb. 2009) (stating that "[a] curfew with electronic monitoring restricts the defendant's ability to move about at will and implicates a liberty interest protected under the Due Process Clause"); *State v. Stines*, 683 S.E.2d 411 (N.C. Ct. App. 2009) (holding that requiring enrollment in satellite-based monitoring program deprives an offender of a significant liberty interest). Therefore, having served her sentence, Dykes' mandatory enrollment in the satellite monitoring program invokes minimal due process protection.

Thus, courts must "ensure[] that legislation which deprives a person of a life, liberty, or property right have, at a minimum, a rational basis, and not be

arbitrary" *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 139-40, 568 S.E.2d 338, 346 (2002); *see also Nebbia v. N.Y.*, 291 U.S. 502, 525 (1934) ("[T]he guarant[ee] of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious"); *Hamilton v. Bd. of Trs. of Oconee Cnty. Sch. Dist.*, 282 S.C. 519, 319 S.E.2d 717 (Ct. App. 1984) (holding that, to comport with due process, the legislation must have a rational basis for the deprivation and may not be "so inadequate that the judiciary will characterize it as arbitrary").

B.

The General Assembly has expressly outlined the purpose of the state's sex offender registration and electronic monitoring provisions:

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 [by] . . . provid[ing] law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of reoffending. 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 (2007). This Court has examined this language and held "it is clear the General Assembly did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes." *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Thus, a likelihood of re-offending lies at the core of South Carolina's civil statutory scheme.

In light of the General Assembly's stated purpose of protecting the public from sex offenders and aiding law enforcement, we find that the initial mandatory imposition of satellite monitoring for certain child-sex crimes satisfies the rational relationship test. Accordingly, we find constitutional the baseline requirement of section 23-3-540(C) that individuals convicted of CSC-First or lewd act on a minor mandatorily submit to electronic monitoring upon their release from incarceration or violation of their probation or parole.

Although we find the initial mandatory imposition of satellite monitoring under section 23-3-540(C) constitutional, we believe the final sentence of section 23-3-

540(H) is unconstitutional, for it precludes judicial review for persons convicted of CSC-First or lewd act on a minor.⁶ The complete absence of any opportunity for judicial review to assess a risk of re-offending, which is beyond the norm of Jessica's law, 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. *See Luckabaugh*, 351 S.C. at 139-40, 568 S.E.2d at 346 (finding due process ensures that a statute which deprives a person of a liberty interest has "at a minimum, a rational basis, and may not be arbitrary"); *see also Lyng v. Int'l Union*, 485 U.S. 360, 375 (1988) (Marshall, J., dissenting) (noting that although allegedly arbitrary legislation invokes the least intrusive rational basis test, that standard of review "is not a toothless one") (quoting *Mathews v. De Castro*, 429 U.S. 181, 185 (1976)); *Addington v. Texas*, 441 U.S. 418, 427 (1979) (noting that although Texas has legitimate interest to protect the community from those that are mentally ill, Texas "has no interest in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others").⁷ Thus, we hold it is unconstitutional to impose lifetime satellite monitoring with no opportunity for judicial review, as is the case with CSC-First or lewd act pursuant to section 23-3-540(H).

The finding of unconstitutionality with respect to the non-reviewable lifetime monitoring requirement in section 23-3-540(H) does not require that we invalidate

⁶ "A person may not petition the court if the person is required to register pursuant to this article for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or committing or attempting a lewd act upon a child under sixteen, pursuant to Section 16-15-140."

⁷ This finding of arbitrariness is additionally supported by the South Carolina Constitution, which, unlike the United States Constitution, has an express privacy provision. *See* S.C. Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . ."). Our constitution's privacy provision informs the analysis of whether a state law is arbitrary and lends additional support to the conclusion that section 23-3-540(H)'s preclusion of judicial review for those offenders mandated to satellite monitoring under section 23-3-540(C) is unconstitutional. *Cf. State v. Weaver*, 374 S.C. 313, 649 S.E.2d 479 (2007) (holding that by articulating a specific prohibition against unreasonable invasions of privacy, the people of South Carolina have indicated a higher level of privacy protection than the federal Constitution).

the remainder of the statute. This is so because of the legislature's inclusion of a severability clause. *See* 2006 Act No. 346 § 8 (stating that if a court were to find any portion of the statute unconstitutional, that holding does not affect the rest of the statute and the General Assembly would have passed it without that ineffective part). The only provision invalidated by today's decision is the portion of section 23-3-540(H) that prohibits only those convicted of CSC-First and lewd act on a minor from petitioning for judicial relief from the satellite monitoring.⁸

⁸ We respond to the dissent in two respects. First, the dissent misapprehends our position by its suggestion that "[f]ormulating the right by couching it in terms of a specific class of persons fails to appreciate the extent of the right at stake" and that "the Constitution does not recognize separate rights for different classes of citizens and instead guarantees rights to all American citizens." Certainly, in the abstract, people generally have a right to be let alone. Respectfully, however, fundamental rights are not to be defined or examined in a vacuum, but rather must be viewed in the context of the situation presented. Even the dissent's analysis so acknowledges, as it refers to Dykes's status, stating "when viewed in light of the facts of this case" and quoting Justice Kennedy's opinion in *Lawrence v. Texas*, 539 U.S. 558, 562 (2003), in which he observed that "[l]iberty protects the person from *unwarranted* government intrusions" (emphasis added). The dissent's multiple invocations of the word "unwarranted" with regard to government intrusions necessarily implicate a context-specific analysis when examining the right asserted. *Compare District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding the Second Amendment confers to an individual the right to keep and bear arms) with 18 U.S.C. § 922(g)(1) (2012) (unlawful for a person with a prior felony conviction to possess a firearm). Indeed, the question before us is whether the state may constitutionally impose civil satellite monitoring for convicted child sex offenders. In the context of this case, as much as the dissent wishes otherwise, Dykes cannot avoid her unalterable status as a convicted child sex offender, and pursuant to *Glucksberg*, she holds no fundamental right to be let alone.

Secondly, the dissent attributes to the majority a position we have never taken. With our opinion today, we have not, as the dissent suggests, upheld mandatory *lifetime* monitoring with no judicial review for assessment of the risk of reoffending. In fact, although refusing to recognize a fundamental right, we have found the statutorily prescribed mandatory lifetime monitoring without a risk assessment is arbitrary and therefore unconstitutional. Going forward, pursuant to the savings clause and despite the dissent's suggestion to the contrary, Dykes and others similarly situated are entitled to periodic judicial reviews under section 23-3-540(H) to determine if satellite monitoring remains necessary.

Consequently, Dykes and others similarly situated must comply with the monitoring requirement mandated by section 23-3-540(C). However, persons convicted of CSC-First and lewd act on a minor are entitled to avail themselves of the section 23-3-540(H) judicial review process as outlined for the balance of the offenses enumerated in section 23-3-540(G). We affirm the circuit court as modified.

AFFIRMED AS MODIFIED.

TOAL, C.J., concurs. PLEICONES, J., concurring in result only. HEARN, J., dissenting in a separate opinion in which BEATTY, J., concurs.

JUSTICE HEARN: Respectfully, I dissent. Because I believe Dykes' status as a sex offender does not diminish her entitlement to certain fundamental rights, I would hold section 23-3-540(C) is unconstitutional because it is not narrowly tailored. I express no opinion on the constitutionality of section 23-3-540(H) because that subsection was never challenged and is thus not before us.⁹ Dykes' argument is, and always has been, that subsection (C) of 23-3-540—the provision requiring lifetime satellite monitoring for persons who violate a term of probation and were convicted of committing criminal sexual conduct with a minor in the first degree or committing or attempting a lewd act upon a child under sixteen—violates her substantive due process rights by imposing monitoring without any showing of her likelihood to reoffend. By invalidating a statutory provision not challenged, the majority ignores those settled principles of error preservation and appellate jurisprudence, and awards Dykes a consolation prize she has never requested and arguably has no standing to accept.

Proceeding to the question presented, I agree with Dykes that subsection (C) of 23-3-540 unconstitutionally infringes on her right to substantive due process. The Fourteenth Amendment to the United States Constitution's command that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law," U.S. Const. amend. XIV, § 1, guarantees more than just fair process; it "cover[s] a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them,'" *County of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (quoting *Daniels v.*

⁹ I question whether Dykes would even have standing to challenge subsection (H). The constitutional minimum of standing requires the showing of "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," a causal connection between the injury and the challenged action, and evidence that the injury will be redressed by a favorable decision. *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dept. of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations and citations omitted)). Here, Dykes would fail the initial inquiry because she cannot demonstrate any particularized, imminent injury. Subsection (H) allows a person to petition the court for release from electronic monitoring "[t]en years from the date the person begins to be electronically monitored." Dykes was ordered to begin GPS monitoring on April 22, 2010 and would therefore not be eligible to avail herself of this provision until 2018. Any claim that she suffered an injury under subsection (H) would be speculative at this point.

Williams, 474 U.S. 327, 331 (1986)). The core of the Due Process Clause, therefore, is the protection against arbitrary governmental action. *Id.* at 845.

However, one does not have a right to be free from government action merely because a law is arbitrary or unreasonable. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting.). Rather, "the substantive component of the due process clause only protects from arbitrary government action that infringes a specific liberty interest." *Hawkins v. Freeman*, 195 F.3d 732, 749 (4th Cir. 1999) (en banc). Substantive due process in particular protects against the arbitrary infringement of "fundamental rights that are so 'implicit in the concept of ordered liberty' that 'neither liberty nor justice would exist if they were sacrificed.'" *Doe v. Moore*, 410 F.3d 1337, 1342–43 (11th Cir. 2005) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969)). If the interest infringed upon is a fundamental right, the statute must be "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993); *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002). If the right is not fundamental, the statute is only subject to rational basis review. *Luckabaugh*, 351 S.C. at 140, 568 S.E.2d at 347. Accordingly, the initial inquiry is whether the alleged right impacted by the statute is fundamental.

As a threshold matter, I acknowledge the Court must tread carefully in this arena. Over the years, the United States Supreme Court has acknowledged the "liberty" protected by the Due Process Clause extends beyond the specific freedoms contained in the Bill of Rights. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (noting that the Supreme Court has found the right to marry, have children, direct the education of one's children, marital privacy, use contraception, retain bodily integrity, and receive an abortion are all protected). The Supreme Court, however, "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Furthermore, when a court recognizes a right as fundamental under the umbrella of substantive due process, it effectively removes the matter from the democratic process. *Glucksberg*, 521 U.S. at 720. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Id.* (internal citations and quotations omitted). Hence, the Due Process Clause only "protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor

justice would exist if they were sacrificed." *See id.* at 720–21 (internal citations and quotations omitted).

In articulating the precise right that section 23-3-540(C) infringes, Dykes frames it as the right "to be let alone." However, in determining whether the right at stake is fundamental, we must first make "a 'careful description' of the asserted liberty right or interest [to] avoid[] overgeneralization in the historical inquiry." *Hawkins*, 195 F.3d at 747. I profoundly disagree with the majority's characterization of the right at issue as the right of "a convicted sex offender" to be "let alone." Formulating the right by couching it in terms of a specific class of persons fails to appreciate the extent of the right at stake and instead focuses on the the State's asserted justification for infringing upon that right. The Constitution does not recognize separate rights for different classes of citizens and instead guarantees rights to all American citizens. Furthermore, determining whether a law violates an individual's substantive due process rights is a two-pronged analysis that first requires a determination as to whether a fundamental right has been implicated, and if so, whether the State has a compelling interest to justify the infringement. Injecting the State's interest—here, Dykes' status as a convicted sex offender—into the articulation of the right at stake conflates the analysis and dooms from the outset any possibility of finding the alleged right fundamental. While a person's status as a sex offender may affect whether the State can infringe upon her fundamental rights in certain ways, that factor should be considered in the second part of the analysis. Therefore, when viewed in light of the facts of this case and the authorities relied upon by Dykes, I believe the narrow right on which she relies is the right to be free from the permanent, continuous tracking of her movements.

Although Dykes has overstated the exact right on which she relies, traditional notions of liberty and the right to be let alone are instructive for they provide the context within which the Court must analyze Dykes' specific right. Sir William Blackstone, in his landmark *Commentaries on the Laws of England*, noted the government's right to restrict an individual's free will is not immutable and any greater restriction than necessary threatens liberty in general:

[W]e may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind: but every wanton and causeless restraint on the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny.

1 William Blackstone, *Commentaries* *121–22. Blackstone's commentary reflects our substantive due process milieu, where the core rights of freedom and liberty can only be limited when sufficiently necessary to advance the public good.

Furthermore, various members of the Supreme Court have voiced their views that the government has an acutely constrained power to infringe on one's liberty. Louis Brandeis, before he was appointed to the Supreme Court, wrote,

[T]here came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, — the right to be let alone; the right to liberty secures the exercise of extensive civil privileges

Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890). After joining the Supreme Court, Justice Brandeis noted the Founding Fathers

recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled in part by Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967). Additionally, in an oft-quoted dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), Justice Harlan wrote,

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.

Id. at 543 (Harlan, J., dissenting).¹⁰ As the Supreme Court later noted, these words "eloquently" describe our role in the substantive due process inquiry. *Moore*, 431 U.S. at 501.

In *Glucksberg*, however, the Supreme Court admonished overreliance on these expansive concepts of freedom in the due process analysis. Although the Supreme Court has, in the past, relied on Justice Harlan's dissent in *Poe* in its fundamental rights analysis, at no point has the Court jettisoned its "established approach" of searching for concrete examples of the claimed right in the Court's jurisprudence. *Glucksberg*, 521 U.S. at 721–22 & n.17. While satellite monitoring itself may not have an analogous precursor in the Court's jurisprudence, in the absence of a history to rely on in similar circumstances, the Court has resorted to examining more traditional notions of liberty. *Cf. Griswold*, 381 U.S. at 482–86 (detailing general concepts of privacy under the Constitution and concluding that proscribing the use of contraception "is repulsive to the notions of privacy surrounding the marriage relationship"). In my opinion, the right at stake—preventing a government's ubiquitous eye from following an individual's every movement throughout her life—rests easily within our established conception of liberty. As Justice Kennedy has noted,

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds.

Lawrence v. Texas, 539 U.S. 558, 562 (2003). A basic tenet of liberty is that there are places and aspects of our lives in which the State may not invade without clear justification.

Recognizing the growing threat of technological advances on individual liberty, Justice Douglas warned almost fifty years ago that "[t]he dangers posed by wiretapping and electronic surveillance strike at the very heart of the democratic philosophy." *Osborn v. United States*, 385 U.S. 323, 352 (1966) (Douglas, J., dissenting). Even then, the scope of the government's ability to enter an individual's private life was troubling, and it has only increased with the advent of GPS monitoring. I therefore believe an examination of the general impact of the satellite monitoring scheme is helpful in understanding how the articulated right is

¹⁰ The majority in *Poe* did not reach the substantive issue involved because it found the case to be nonjusticiable. *Poe*, 367 U.S. at 507–09.

here infringed and the extent to which Dykes' liberty is impacted. Recently, the Supreme Court had the opportunity to consider a similar issue in *United States v. Jones*, 132 S. Ct. 945 (2012), albeit in a different context. At issue in *Jones* was whether the government's surreptitious placement of a GPS tracking device on Jones's car without a warrant was an unreasonable search in violation of the Fourth Amendment to the United States Constitution. *Id.* at 947. The majority held it was because the attachment of the monitor to the car was a physical trespass on personal property for the purpose of obtaining information. *Id.* at 949.

In his concurring opinion, Justice Alito tackled the thornier question of whether this satellite monitoring violated an individual's reasonable expectation of privacy. Justice Alito observed that recent technological advancements have placed vast swaths of information in the public realm, a development which "will continue to shape the average person's expectations about the privacy of his or her daily movements."¹¹ *Id.* at 963 (Alito, J., concurring). With that in mind, he concluded monitoring one's movements on a public street for a relatively short period of time would not violate an individual's reasonable expectations of privacy. *Id.* at 964 (citing *United States v. Knotts*, 460 U.S. 276, 281–82 (1983)). When that monitoring becomes long-term, however, the nature of the invasion changes:

But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period.

Id. Applying this principle to the four-week monitoring at issue in *Jones*, Justice Alito concluded, "We need not identify with precision the point at which the tracking of th[e] vehicle became a search, for the line was surely crossed before the 4-week mark." *Id.*

¹¹ In *Jones*, the monitor placed on the underside of Jones's car constantly tracked the car's movements over a four-week period without his knowledge. 132 S. Ct. at 947. The majority's contention to the contrary, Justice Alito noted there is no eighteenth century analogue to this type of investigation, because that "would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience." *Id.* at 958 (Alito, J., concurring).

Justice Sotomayor similarly noted we live in an age so inundated with technology that we may unwittingly "reveal a great deal of information about [our]selves to third parties in the course of carrying out mundane tasks." *Id.* at 957 (Sotomayor, J., concurring). In that vein, she agreed with Justice Alito's concerns about the intrusiveness of satellite monitoring: "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."¹² *Id.* at 955. Thus, satellite monitoring invites the State into the subject's world twenty-four hours per day, seven days per week, and it provides the State with a precise view of her intimate habits, whether she is in public or not. If we are not careful about and cognizant of this fact, "the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse" and "may 'alter the relationship between citizen and government in a way that is inimical to democratic society.'" *Id.* at 956 (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

Although decided under the rubric of the Fourth Amendment, *Jones* is nevertheless instructive here. As Justice Alito and Justice Sotomayor incisively observed, the very concept of what we as citizens view as private is called into question by technology which facilitates unprecedented oversight of our lives. More importantly, at issue in this case is not just the tracking of individuals for a period of time while they are being investigated for a specific crime—as with a Fourth Amendment search—but the statutorily mandated monitoring of certain individuals for as long as they live with no ability to have it removed. See *Osborne*, 385 U.S. at 343 (Douglas, J., dissenting) ("These examples . . . demonstrate an alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of man's life at will."); *United States v. Pineda-Moreno*, 617 F.3d 1120, 1124 (9th Cir. 2010) (Kozinski, J., dissenting from the denial of rehearing en banc) ("By holding that this kind of surveillance doesn't impair an individual's reasonable expectation of privacy, the panel hands the

¹² Justice Alito's concurrence was joined by three other members of the Court, Justice Ginsburg, Justice Breyer, and Justice Kagan. After noting she shared the same concerns as Justice Alito, Justice Sotomayor wrote that "[r]esolution of these difficult questions . . . is unnecessary" at this time because the majority's trespass theory was dispositive of the case. *Jones*, 132 S. Ct. at 957 (Sotomayor, J., concurring).

government the power to track the movements of every one of us, every day of our lives.").

I therefore conclude that the right of an individual to be free from the government's permanent, continuous tracking of her movements is easily encompassed by the larger protection of liberty and personal privacy accorded by the Constitution. As our history of protestations on government intrusion from Blackstone to *Jones* illustrates, our Constitution was designed to guarantee a certain freedom from government interference in the day-to-day order of our lives which lies at the heart of a free society. Accordingly, I believe neither liberty nor justice would exist if the government could, without sufficient justification, constantly monitor the precise location of an individual twenty-four hours a day until she dies. In my opinion, safeguarding against this Orwellian nightmare¹³ falls squarely within the ambit of fundamental precepts embraced by the drafters of the Constitution. I would therefore hold that Dykes has a fundamental right to be free from the permanent, continuous tracking of her movements which the State may only infringe upon where it demonstrates the statute at issue is narrowly tailored to serve a compelling interest.

Before progressing to the second portion of the analysis, I question whether the majority's holding that the statute implicates "a protected liberty interest" is meaningfully different from my conclusion that it implicates a fundamental right or whether it is just an exercise in semantics. The issue is whether the interest/right is fundamental and in my opinion, a general liberty interest in being free from permanent, unwarranted government interference is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 721. Unpalatable though it may be to recognize that persons guilty of sex crimes against children have fundamental rights, the Constitution was not designed to protect only the rights of people we like. See *Communist Party of U.S. v.*

¹³ George Orwell's novel *1984* increasingly appears less of a dystopian fantasy and more a cautionary tale:

There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time.

George Orwell, *1984* 6 (1949).

Subversive Activities Control Bd., 367 U.S. 1, 190 (1961) (Douglas, J., dissenting) ("Our Constitution protects all minorities, no matter how despised they are."). Constant, unjustified government intrusions in the lives of an individual are the types of tyrannical acts the Founding Fathers sought to protect against when establishing our nation. I therefore believe even under the majority's iteration of the interest at stake, that interest is fundamental and the statute must be evaluated under a strict scrutiny analysis.¹⁴ *Flores*, 507 U.S. at 302 (1993) (holding that substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest"); *Luckabaugh*, 351 S.C. at 140, 568 S.E.2d at 347 (2002) (acknowledging that the constitutionality of a statute which implicated the defendant's "liberty interest from bodily restraint" should be analyzed under strict scrutiny).

Accordingly, I proceed to the consideration of whether section 23-3-540(C) is narrowly tailored to serve a compelling state interest—thus surviving strict scrutiny—and conclude it is not. One cannot "minimize the importance and fundamental nature of [an individual's liberty interest]. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society." *United States v. Salerno*, 481 U.S. 739, 750–51 (1987). Dykes concedes that protecting the public from sex offenders who pose a high risk of reoffending is a compelling state interest; nevertheless, she steadfastly maintains, and I agree, that protecting the public from those who have a low risk of reoffending is not.

It is beyond question that "[s]ex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32 (2002). In fact, "the victims of sexual assault are most often juveniles," and "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.* at 32–33. Thus, the General Assembly noted "[s]tatistics show that sex offenders often pose a high risk of re-offending," S.C. Code Ann. § 23-3-400 (2007), prompting it to enact provisions "to protect the

¹⁴ I note as well my disagreement with the majority's assertion that merely because it is civil in nature, rather than criminal, the statute does not implicate a fundamental right. Whether a statute is characterized as civil or criminal is immaterial to this analysis and certainly not dispositive. See *Luckabaugh*, 351 S.C. at 135–140, 568 S.E.2d at 344–347 (recognizing that although the Sexually Violent Predator Act is civil and non-punitive in nature, it nevertheless infringes the "fundamental right to liberty, free from bodily restraint").

public from those sex offenders who may re-offend," *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Accordingly, I recognize Dykes' status as a convicted sex offender is relevant to the analysis. However, any infringement which is substantially justified by the possibility that an individual may reoffend—without any actual consideration of her likelihood to reoffend—belies a conclusion that the statute is narrowly tailored. Monitoring sex offenders who pose a low risk of reoffending for the rest of their lives is not "sufficiently weighty" such that the subject's liberty interest in being free from government monitoring must be "subordinated to the greater needs of society." *Salerno*, 481 U.S. at 750–51.

I therefore find that requiring Dykes to submit to satellite monitoring for the rest of her life without an assessment of her risk of reoffending violates her substantive due process rights. To paraphrase Blackstone, section 23-3-540(C)'s application to Dykes has the potential to decrease her natural liberty without any attendant increase in overall civil liberty. Accordingly, I would hold that subsection (C) of 23-3-540 is unconstitutional and must be stricken from the statute.

BEATTY, J., concurs.

ATTACHMENT "B"

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

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

RECEIVED

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S.C. Supreme Court

THE STATE,

RESPONDENT,

v.

JENNIFER RAYANNE DYKES,

APPELLANT.

Appellate Case No. 2010-160047

PETITION FOR REHEARING

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

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

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

THE STATE,

RESPONDENT,

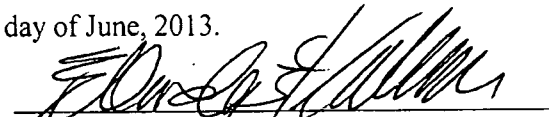
V.

JENNIFER RAYANNE DYKES,

APPELLANT

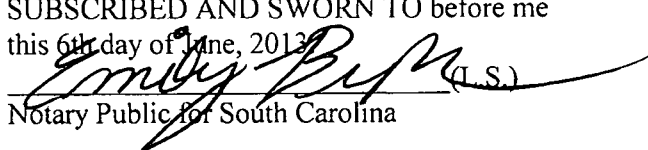
CERTIFICATE OF SERVICE

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.


Wanda H. Carter

ATTORNEY FOR APPELLANT.

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


Notary Public for South Carolina

My Commission Expires: November 16, 2022.

RECEIVED
JUN 12 2013
SC Court of Appeals