

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM GREENWOOD COUNTY
The Honorable Frank Addy, Circuit Court Judge

S.C. Supreme Court

THE STATE,RESPONDENT

v.

ANTHONY NATION,APPELLANT

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

- 1. DID IT VIOLATE APPELLANT'S RIGHT TO PROTECTION FROM EX POST FACTO PUNISHMENT UNDER THE UNITED STATES CONSTITUTION AND THE SOUTH CAROLINA CONSTITUTION FOR S.C. CODE §23-3-540(C) TO MANDATE THE LOWER COURT IMPOSE GPS MONITORING ON APPELLANT BASED SOLELY ON A VIOLATION OF THE PROBATIONARY PORTION OF APPELLANT'S ORIGINAL SENTENCE AND THE ORIGINAL SENTENCE AND THE ORIGINAL OFFENSE FOR WHICH HE WAS CONVICTED?**
- 2. DOES THE IMPOSITION OF GPS MONITORING VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY WHERE THE CONDITIONS OF MONITORING WERE IMPOSED AT A PROBATION VIOLATION HEARING?**
- 3. DOES THE IMPOSITION OF GPS MONITORING VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT AND EXCESSIVE FINES?**
- 4. DID IT VIOLATE APPELLANT'S RIGHT TO PROCEDURAL DUE PROCESS FOR THE LOWER COURT, PURSUANT TO S.C. CODE §23-3-540(C), TO IMPOSE GPS MONITORING ON APPELLANT WITHOUT HOLDING A HEARING ON THE MERITS OF WHETHER LIFETIME GPS MONITORING SHOULD BE IMPOSED ON APPELLANT?**
- 5. DID IT VIOLATE APPELLANT'S SUBSTANTIVE DUE PROCESS RIGHTS FOR S.C. CODE §23-3-540(C) TO MANDATE THE LOWER COURT IMPOSE GPS MONITORING ON APPELLANT WITHOUT CONSIDERING ANY EVIDENCE OF ITS NECESSITY?**
- 6. DID IT VIOLATE APPELLANT'S SUBSTANTIVE DUE PROCESS RIGHTS FOR S.C. CODE §23-3-540(C) FOR BEING OVERLY BROAD TO MANDATE THE LOWER COURT IMPOSE GPS MONITORING ON APPELLANT WITHOUT CONSIDERING ANY EVIDENCE OF ITS NECESSITY?**
- 7. DOES THE IMPOSITION OF GPS MONITORING VIOLATE APPELLANT'S STATE CONSTITUTIONAL RIGHT TO PRIVACY?**
- 8. DOES S.C. CODE §23-3-540(C) VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY ARBITRARILY AND UNREASONABLY CLASSIFYING SIMILARLY SITUATED PEOPLE CONVICTED OF SEX OFFENSE IN ORDER TO IMPOSE GPS MONITORING ON THEM?**

RESPONDENT'S STATEMENT OF THE CASE

The Respondent has no objection to the statement of the case presented by Appellant.

ARGUMENT

1. THE IMPOSITION OF GPS MONITORING IS A NON-PUNITIVE, CIVIL REGULATORY SCHEME AND THEREFORE DOES NOT VIOLATE THE EX POST FACTO PROHIBITIONS IN THE U.S. AND SOUTH CAROLINA CONSTITUTIONS.

The Sex Offender Accountability and Protection of Minors Act, also known in South Carolina as “Jessie’s Law” was enacted in 2006, in part as a result of the abduction, rape, and murder of Jessica Lunsford. Jessica, a nine year old girl, was abducted from her home in Homosassa, Florida, and held captive over the weekend where she was sexually assaulted and murdered by John Couey, a forty-seven year old registered sex offender. Mr. Couey later confessed to the crimes and was convicted of the offenses of first degree murder, kidnapping, and sexual battery. He was sentenced to death for the offense of murder.¹ After considering the circumstances surrounding the Lunsford case, both the Florida legislature and subsequently the South Carolina legislature determined that further monitoring methods other than the sex offender registry were necessary for the protection of children. Therefore, the Sex Offender Accountability and Protection of Minors Act (Jessie’s Law) was enacted with an effective date of July 1, 2006. Pursuant to this Act, any person convicted of the offenses of criminal sexual conduct in the first degree with a minor (CSC 1st / minor) or committing or attempting a lewd act on a child under sixteen, (Lewd Act), with an offense date on or after July 1, 2006, was required to be monitored with an active electronic monitoring (GPS) device for the duration of the time

¹ Before the sentence could be carried out John Couey died of natural causes on September 30, 2009.

that individual was required to register as a sex offender. S.C. Code Ann. § 23-3-540(A).

Appellant committed a lewd act on his victim prior to the effective date of Jessie's Law. He argues that because his crime was committed prior to the effective date, the mandatory imposition of GPS as a result of his probation violation violates ex post facto. The State disagrees.

The State submits the ex post facto clauses of the South Carolina and United States Constitutions are inapplicable to the facts of this case both because GPS placement is not punishment, and because the law has not been applied retroactively to Appellant. The prohibition against ex post facto laws is set forth in Art. I, § 4 of the South Carolina Constitution and Art. I, § 10 of the United States Constitution. When addressing the issue, the South Carolina Supreme Court has looked to federal authority in order to determine whether a law is indeed violative of the ex post facto clauses of both state and federal constitutions. See State v. Huiett, 302 S.C. 169, 394 S.E.2d 486 (1990); State v. Wilson, 315 S.C. 289, 433 S.E.2d 864 (1993). Therefore, review of both federal and state case law is appropriate. In order for a law to be prohibited by the ex post facto clause, two elements must be present: (1) The law must be retrospective so as to apply to events occurring before its enactment; and (2) the law must disadvantage the offender affected by it. Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446 (1987); Huiett, supra. However, before this two part analysis can even begin, the statute in question must be found to be punitive in nature such that it inflicts punishment merely by requiring the conduct called for in the law. State v. Walls, 348 S.C. 26, 558 S.E.2d 524 (2002). Without such a finding, the ex post facto clause is inapplicable. Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140, (2003). Kansas v. Hendricks, 521 U.S. 346, 370-71, 117 S.Ct. 2072, 2086 (1997); Flemming v.

Nestor, 363 U.S. 603, 80 S.Ct. 1367 (1960); Jones v. Murray, 962 F.2d 302, 309 (4th Cir. 1992).

Huiett, *supra*. Therefore, if this Court determines Jessie's Law is civil rather than punitive, no *ex post facto* violation can exist. United States v. Sczubelek, 255 F.Supp.2d 315 (D. Del. 2003); North Dakota v. Norman, 660 N.W.2d 549 (2003); Kellogg v. Travis, 298 A.D.2d 323, 750 N.Y.S.2d 12 (2002).

The South Carolina Supreme Court most recently addressed this issue in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013), rejecting the appellants *ex post facto* challenge to Jessica's Law. In Dykes, the appellant pled guilty to lewd act on a minor prior to the enacting of Jessica's Law. While on probation, the appellant violated several terms of her probation and was subsequently ordered to be placed on satellite monitoring. The Court ruled the *ex post facto* clauses did not apply. *Id.* at fn. 9, citing Smith v. Doe, 538 U.S. 84 (2003).

Since the late 1800's, the United States Supreme Court has focused on the legislative intent underlying the enactment of a statute in determining whether a statute was penal or civil. Doe v. Pataki, 120 F.3d 1263 (2nd Cir. 1997)(citing Hawker v. New York, 170 U.S. 189, 18 S.Ct. 573 (1989). The Supreme Court articulated a two-step analysis in United States v. Ward, 448 U.S. 242, 100 S.Ct. 2636 (1980):

First, we have set out to determine whether congress, in establishing the penalizing mechanism, indicated whether expressly or impliedly a preference for one label or the other. Second, where congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. In regard to the latter inquiry, we have noted that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."

Id. At 248 (quoting Flemming, *supra*)(emphasis added). In addition, courts have sometimes

looked to the factors enumerated in Kennedy v. Mendoza-Martinez² to help make the determination of whether the statute in question was so punitive in effect as to overcome the legislative intent. See, e.g., Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997).

Initially, the Department submits that where, as here, the statute in question is so clearly intended to serve a legitimate, non-penal legislative purpose, the ex post facto inquiry need not extend to consideration of the Kennedy factors. First, as explained above, the non-penal purpose of Jessie's Law is demonstrated by the legislature's decision to include it in Article 7 of Chapter 3, Title 23, as an enhancement to the "Sex Offender Registry," which has already been determined to be non-punitive in nature. Second, the title of the Act reveals legislative intent. It is called the Sex Offender Accountability and Protection of Minors Act - aimed at protecting minors and making sex offenders accountable, not at punishing them further for their crimes. Third, the preamble to the Act explains its purpose was: "To amend Section 23-3-540, relating to the electronic monitoring of sex offenders, so as to establish the persons who shall or may be electronically monitored and to establish the procedures for monitoring these persons." In other words, the Legislature passed Jessie's Law to monitor particular sex offenders, not to punish them. Fourth, the device itself is defined as one that: "... actively monitors and records a person's location at least once every minute twenty-four hours a day and that timely records and

² 372 U.S. 144, 83 S.Ct. 554 (1963). The factors are: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has been historically regarded as punishment; (3) whether it comes to play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment - retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. This analysis requires weighing of all of the above factors. Only a clear finding of congressional intent to punish under the factors will evidence a punitive effect. Id.

reports the person's presence near or within a prohibited area or a person's departure from a specific geographic location." S.C. Code § 23-3-540(P) (Supp. 2010). This definition supports the legislative intent described by the location, title, and preamble to Jessie's Law. Finally, the primary effect of the law is to aid law enforcement efforts to investigate new crimes, which is clearly a non-punitive function of GPS monitoring. Based on these reasons, the State submits Jessie's Law's obvious purpose is not punitive; therefore, there is no ex post facto violation. Smith v. Doe, supra; Doe v. Bredesen, 507 F.3d 998 (6th Cir. 2007).

In any event, the State submits that even under an analysis of the Kennedy factors, the Petitioner has not shown the "clearest proof" that the statutory scheme is so punitive either in purpose or effect as to negate that clear intention of the legislature. First, GPS monitoring does not involve an affirmative disability or restraint. As explained above, GPS monitoring is not a sanction. It is not incarceration, or even home detention. There is virtually no restriction on Appellant's liberty to move throughout the State. As long as he keeps it charged and operational, he is free to live, work, or travel. Appellant is not being denied movement at any time of the day. He is free to go where he wants, when he wants, and the State submits use of the device subjects him to no more shame than already exists from his having to be on the sex offender registry.³

Second, GPS placement has not historically been regarded as a punishment. It is not akin to historical punishments like humiliation or shaming. Indeed, the device is neither designed nor intended to draw specific attention to the individual wearer, or to invite public condemnation. As technology has advanced, the tracking device has become smaller and less obtrusive. It is more

³ The sex offender registry lists the name, address, and offense committed, and is accessible to the public. By comparison, the public has no access to information about GPS

like requiring an individual to provide a photograph, fingerprint, or DNA sample - a method of identification or tracking - than punishment. In addition, a GPS monitor is sometimes used before the punishment stage of a criminal prosecution has even occurred, to track a person as a condition of bond.

Third, the GPS placement does not only come into play upon a finding of scienter. If it is being imposed due to a conviction for a crime, then scienter is required. However, for a probation violation, scienter is not necessary. In South Carolina, the court can find a probationer in violation of the terms and conditions of probation without finding the violation was willful. State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 96 (Ct. App. 1999). Whatever the case, this factor is not particularly germane. By tying GPS placement to the finding of a violation of supervision, the Legislature appears to have simply created a prospective trigger, so as to avoid ex post facto problems altogether.

Fourth, use of a GPS device does not primarily promote the traditional aims of punishment-retribution and deterrence. While it does serve as a specific and general deterrent, this does not take away from the legitimate, non-punitive purposes of protecting children and aiding in law enforcement. As noted in Smith v. Doe, “[a]ny number of governmental programs might deter crime without imposing punishment.” 538 U.S. at 102. The device is used to help identify a person who re-offends or to provide a credible alibi if Appellant is wrongfully accused.

Fifth, requiring Appellant to be placed on GPS monitoring due to a probation violation does not necessarily depend on behavior which is already a crime. A probation violation is sometimes based on the commission of a new crime, but often the violation involves behavior

placement or tracking information.

that is not in and of itself criminal. Whatever the case, this factor is not particularly germane. By tying GPS placement to the finding of a violation of supervision, the Legislature appears to have simply created a prospective trigger, so as to avoid ex post facto problems altogether.

Sixth, use of a GPS monitor has a rational relationship to an alternative stated purpose, which is to protect children and solve crimes. A GPS monitor is not used solely for home detention. It is also used to monitor a person outside the home, allowing Appellant to move freely. It can be used either to place him at a crime scene, or confirm an alibi.

Seventh, GPS monitoring certainly does not appear excessive in relation to the alternative purpose assigned. The burdens placed on Appellant by having to wear the device are far outweighed by the purpose - to protect children. Furthermore, the statute's most extreme effect -- that of mandatory lifetime monitoring -- has been remedied in State v. Dykes. Lifetime monitoring may have been excessive, but pursuant to Dykes, the Appellant will be able to submit to the Court for a review of his propensity to reoffend, and have the device removed if it is found he presents a low risk of reoffending. Because ongoing research has not provided a "cure" for individuals with an inclination toward sexual contact with children, the national consensus recommends pursuing a "containment approach" to sexual deviance. Appellant was convicted of committing a lewd act on a child. While under supervision, he failed to diligently report as instructed, which caused him to go into absconded status. Furthermore, during this period of time, the Appellant's whereabouts were unknown. The State submits it is obligated to use all legal means available to protect children, particularly when those means are not excessive in comparison to the protection afforded.

The State also submits that even if this Court determines GPS placement is effectively a

punishment that disadvantages Appellant, the ex post facto still does not apply because Jessie's Law is not retrospective. Here, the law that required the probation revocation court to impose lifetime GPS monitoring on Appellant due to his probation violations was enacted pursuant to 2005 Act No. 141, with an effective date of July 1, 2006. S.C. Code Ann. § 23-3-540 (Supp. 2010). The probation arrest warrant charging Appellant with violating the conditions of his probation was issued after the effective date of the Act. Indeed, Appellant committed the probation violations for which the court found him in violation after the law was changed; thus, he was on notice of the current version of the statute and the possibility of facing lifetime GPS monitoring. The State submits that since the event triggering Appellant's GPS placement occurred after Jessie's Law was enacted, the law is not retrospective, there can be no ex post facto violation, and the ex post facto clauses are entirely inapplicable.

Indeed, the State submits Jessie's Law cannot be considered a violation of ex post facto because the placement of GPS is not punishment, but procedural. The law as written does not subject Appellant to GPS monitoring unless he violates probation, which must be determined by a Circuit Court Judge. The law, as applied to those under supervision, creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of "punishment" for covered crimes and such conjectural effects are insufficient under any threshold the court might establish under the ex post facto clause. Roller v. Gunn, 107 F.3d 227 (1997). The prohibition against ex post facto laws is intended to prevent an additional punishment added to a sentence after conviction, due to the lack of notice. The ex post facto clauses safeguard common interests, in particular the interests in fundamental fairness (through notice and fair warning), and the prevention of the arbitrary and vindictive use of the laws.

Rodgers v. Tennessee, 532 U.S. 451, 121 S.Ct. 1693 (2001). Here, Appellant was on statutory notice of the possibility of GPS placement. But even beyond that general notice, he received specific written and verbal notice that any violation of probation would automatically result in lifetime GPS administration. The notice requirement is critical to an ex post facto analysis, which is why individuals convicted prior to the establishment of the statute only become subject to lifetime GPS upon finding of a violation of probation. Appellant was notified of this effect, as well as his requirements to report on a monthly basis. Though the Appellant seeks to minimize his violations, the State submits that failure to report to his probation officer is a very serious violation, made worse by failing to maintain a stable residence or notifying his agent of a change in address. Tr. 5, ll. 2-6. He chose to violate the conditions after being duly notified; therefore, ex post facto should not apply.

2. THE IMPOSITION OF GPS MONITORING IS A NON-PUNITIVE, CIVIL REGULATORY SCHEME AND THEREFORE DOES NOT VIOLATE CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY.

The South Carolina Supreme Court ruled in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013), that the initial mandatory imposition of satellite monitoring in §23-3-540(C) is constitutional. Although the last sentence of §23-3-540(E) was struck down because of its lifetime absence of judicial review, the remainder of the statute was upheld. Furthermore, the Court rejected the ex post facto challenge because the sex offender registration and monitoring requirements are civil in nature. Id. at fn. 9, *citing* Smith v. Doe, 538 U.S. 84(2003).

The United States and South Carolina constitutions both protect against double jeopardy, both a second prosecution for the same offense or multiple punishments for the same offense. However, Jessie's Law and the imposition of the satellite monitoring is not punishment, so it cannot be double jeopardy.

It is settled that it is not punishment to require registered sex offenders who committed lewd act upon a minor or CSC 1st with a minor and violate a term of probation, parole, or community supervision to be subject to an active electronic monitoring device for the purposes of the protection of children and the aid of law enforcement in investigations. The Supreme Court examined the registry and monitoring statute in State v. Walls, 348 S.C. 26, 558 S.E.2d 524 (2002), and noted, "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." Id. at 31, 526.

Furthermore, when an offender appears before the court on a probation violation, a judge may impose additional terms and conditions as a consequence of that violation. Section 24-21-430 states that, “[t]he court may impose by order duly entered and *may at any time modify the conditions* of probation and may include among them any of the following or any other condition not prohibited in this section.” (emphasis added). Among the standard conditions of probation, the court may require the probationer “submit to intensive surveillance which may include surveillance by electronic means.”

The court is well within its powers when it modifies and imposes additional conditions of probation. This is not a violation of a person’s constitutional protections against double jeopardy.

3. THE IMPOSITION OF GPS MONITORING DOES NOT VIOLATE THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT OR EXCESSIVE FINES, AS IT IS NOT PUNISHMENT.

The Appellant again contends that GPS monitoring is a form of punishment. However, the State maintains that GPS monitoring for the express purpose of protecting children and aiding law enforcement in investigating sex crimes has been determined to be civil in nature. Walls and Dykes, supra.

Even if the Court finds that a cruel and unusual punishment analysis is appropriate when considering the regulatory scheme in §23-3-540(C), then it must determine if the duration of the sentence is not grossly disproportionate with the severity of the crime. State v. McKnight, 352 S.C. 635, 652, 576 S.E.2d 168, 177 (2003).

Much of Appellant's outrage against the mandatory GPS monitoring is its lifetime nature, something that was remedied in State v. Dykes. Now, after ten years and every five years thereafter, a person under GPS monitoring pursuant to §23-3-540(C) may petition the court for a hearing on the offender's likelihood of reoffending. Consequently, while the statute still contemplates the possibility of remaining on the GPS monitoring for life, the Appellant is entitled to the judicial review as outlined in in §23-3-540(H).

The Appellant also likens the GPS monitor to a "ball and chain" or to "branding." Brief of Appellant p. 16. This is extreme and should not be well-taken. The device is small, fits around the ankle comfortably and is easily hidden by clothing, a far cry from the public shaming or "scarlet letter" that Appellant makes it out to be. Far from such historical extremes, the GPS

monitor does not proscribe the Appellant's movement or daily activities. Any similarities between colonial punishments and the sex offender registry were examined and dismissed in Smith v. Doe, 538 U.S. at 98-99. The public information supplied through the sex offender registry did not amount to a public shaming, the U.S. Supreme Court held. The fact that an offender must wear a GPS monitoring device is not publicly available. The device merely tracks his whereabouts, so that should it ever become necessary, law enforcement can eliminate him as a suspect quickly or further its investigation.

The Appellant also maintains that the costs of the device are excessive. Though the Appellant's description of his current finances are lamentable, the State Legislature included in the text of in §23-3-540(K) a means for the Department of Probation, Parole and Pardon Services to exempt or defray the costs of the monitoring. This clause further supports the compelling state interest in the monitoring of sex offenders who have previously targeted children, as it favors monitoring over the payment of the associated fees.

4. THE IMPOSITION OF GPS MONITORING DOES NOT VIOLATE THE APPELLANT'S PROCEDURAL DUE PROCESS BY THE ORDER OF THE LOWER COURT IMPOSING GPS MONITORING PURSUANT TO §23-3-540(C) OF THE S.C. CODE OF LAWS.

Appellant argues that placing him on a Global Positional Satellite (GPS) monitoring device without the benefit of a hearing is in violation of procedural due process. He argues that there should have been a determination by the lower court regarding his future dangerousness, before being placed on lifetime GPS. The Respondent (the State) disagrees, and argues that GPS monitoring is not punitive, so due process does not apply. The application of GPS monitoring should be considered an extension of the sex offender registry. The purpose of the registry is explained in Section 23-3-400 of the South Carolina Code of Laws which states:

The sex offender registry will provide law enforcement with the tools needed in investigating a criminal offense. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

S.C. Code Ann. §23-3-400 (2007).

Appellant was convicted on July 16, 2003, of lewd act upon a minor. Because his conviction was based on acts that took place before the establishment of the Act, Appellant was not placed on GPS monitoring at the time of his plea, but did become subject to placement if it was determined by a Circuit Court Judge that he violated his conditions of probation on or after July 1, 2006. The State submits that mandatory GPS monitoring is merely an extension of the sex offender registry, because, GPS placement is required only as long as an offender is required to register as a sex offender. The South Carolina Code of Laws specifically states:

A person who 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 16 pursuant to Section 16-15-140 and who violates a term of probation, parole, community supervision, or a community supervision program must be ordered by the Court or agency with jurisdiction to be monitored by the DPPPS with an active electronic monitoring device.

S.C. Code Ann. §23-3-540(C)(Supp. 2010).

Appellant argues that the placement of a GPS monitoring device is in violation of due process due to the fact that the statute does not allow him to appear and argue his lack of a threat to minors. However, Appellant is only required to be placed on GPS because he is a registered sex offender; committed that sex offense against a minor; and, then failed to comply with the conditions of probation imposed by the sentencing court as a result of his conviction.

Furthermore, after ten years Appellant may petition the court for an order to be released from the electronic monitoring after a hearing to determine if he presents no further risk of re-offending.

Pursuant to South Carolina law, a person convicted of sex offenses is required to register as a sex offender for the remainder of his or her natural life.⁴ The establishment of lifetime GPS monitoring is in direct correlation with the sex offender registry; as long as Appellant has to register he will be monitored with GPS unless his petition for removal of monitoring is granted by the court.

It has been held by the South Carolina Supreme Court that the sex offender registry is not considered punitive; therefore, due process does not apply. Hendrix v. Taylor, 353 S.C. 542, 579

⁴ A person required to register under this article is required to register annually for life. S.C. Code Ann. § 23-3-460 (2010).

S.E.2d 320 (2003). Requiring registration as a sex offender is non-punitive, such that the length of time an individual is required to register is non-punitive, and thus the length of time on the registry was not a deprivation of a constitutionally protected liberty interest for purposes of a due process analysis. Id. It is the position of the State that since lifetime GPS monitoring is an extension of the sex offender registry, it also cannot be considered punitive, but a law enforcement device in order to pinpoint registered sex offenders who have committed crimes against minors.

The State's argument is related to the intent of the legislature regarding the connection of the sex offender registry, to the lifetime GPS requirement. This intent is shown by, first, the statute specifically stating that as long as a person has to register he must be placed on GPS, and Jessie's Law being placed in Article 7 of Title 23 of the South Carolina Code of Laws, which is specifically entitled "Sex Offender Registry." It is obvious that the legislature intended for the GPS requirement to be a linked to, and part of, the sex offender registry. Based on Hendrix, this suggests the legislature intended GPS not to be punitive, thereby not requiring due process prior to placement.

To the extent this Court disagrees, and determines that the placement of GPS is punitive, the Respondent submits the circumstances of this case demonstrate that Appellant was not denied procedural due process. He was granted an opportunity to appear before the Court regarding the violation of probation; he was represented by competent counsel; he was allowed to answer all of the allegations; he was allowed to present witnesses on his behalf; and he was allowed to cross-examine any witness against him. If the lower court determined that Appellant did not violate the terms and conditions of his probation, he would not have been placed on GPS monitoring.

Appellant argues that Jessie's Law should allow the lower court to have a separate hearing to determine if there is a likelihood of his re-offending, and that determination should allow the lower court to deny her placement on GPS monitoring, regardless of whether he violated probation. Appellant was allowed to appear before the Court to attempt to demonstrate he did not violate probation; therefore, he had an opportunity to defend against the allegation that ultimately caused her GPS placement. Appellant had notice that his violation of probation would result in GPS monitoring for as long as he is on the sex offender registry. Because there is no way to absolutely determine if a person will or not re-offend, the sex offender registry and the Sex Offender Accountability and Protection of Minors Act was created for the protection of the citizens of South Carolina, which is a legitimate state interest. Since there is no way to determine if a person is going to re-offend, the State submits these measures are necessary for the protection of minors.

In conclusion, the State submits that since lifetime GPS monitoring is a legitimate legislative extension of the sex offender registry, which was created for monitoring and not punitive purposes, procedural due process as posited by Appellant does not apply. If the court determines GPS monitoring is punishment, the State submits Appellant received due process by way of his hearing for the determination of the probation violation.

5. THE IMPOSITION OF GPS MONITORING DOES NOT VIOLATE THE APPELLANT'S SUBSTANTIVE DUE PROCESS AS IT IS CIVIL AND NOT ARBITRARY OR CAPRICIOUS.

Appellant argues that placing him on GPS monitoring device without the benefit of a hearing is in violation of substantive due process. He argues that the GPS monitoring infringes upon his fundamental rights and therefore the GPS monitoring should be held unconstitutional. The Respondent disagrees, and argues that the statutory scheme creating the GPS monitoring is predominantly civil in nature.

State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) examined this in detail. The Supreme Court rejected the argument that the imposition of satellite monitoring implicates a fundamental right. Id., citing Smith v. Doe, 538 U.S. 84 (2003). Instead, the Court found the GPS monitoring invokes a liberty interest to be free from permanent, unwarranted governmental interference.

When a liberty interest is at stake, “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....’” Id., quoting In re Treatment and Care of Luckabaugh, 351 S.C. 122, 139-40, 568 S.E.2d 338, 346 (2002); and citing Nebbia v. N.Y., 291 U.S. 502, 525 (1934); and Hamilton v. Bd. of Trs. of Oconee Cnty. Sch. Dist., 282 S.C. 519, 319 S.E.2d 717 (Ct. App. 1984).

The purpose of the registry is explained in Section 23-3-400 of the South Carolina Code of Laws which states:

The sex offender registry will provide law enforcement with the tools needed in investigating a criminal offense. Statistics show that sex

offenders often pose a high risk of re-offending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

S.C. Code Ann. §23-3-400 (2007).

Respondent submits that the stated purpose of §23-3-400 and its effect are rationally related to each other. The S.C. Supreme Court agreed and held as such in Dykes. "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." Id. at 510.

The Due Process clause of the United States Constitution specifically states that no one shall be deprived life, liberty, or property without the due process of law. U.S. Const. Amend. V. Appellant is simply not being deprived of a protected liberty interest through the application of a GPS monitor. The Courts have defined liberty as:

Liberty denotes not merely freedom from bodily restraint but also the right of the individual to contact, to engage in any of the common occupations of life, to acquire useful knowledge, to marry establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness of free men.

Mayer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923). The mandatory decision of the lower court to impose GPS monitoring does not deprive Appellant of any right to engage with others, to live in his home, to raise children, or to attend any worship he chooses. It is a monitor that allows the State to determine his whereabouts at all times in an effort to protect children, and to assist law enforcement with investigating new crimes.

Although freedom from physical restraint has always been at the core of liberty protected by due process clause from arbitrary governmental action, that liberty interest is not absolute. Of course the specific content and incidents of this right must be shaped by the context in which it is asserted. For what the constitution forbids is not all searches and seizures, but unreasonable searches and seizures. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). The slight touching of an ankle does not equate to a seizure, nor does it deny Appellant any of his Constitutional rights.

In conclusion, the State submits that since GPS monitoring is a legitimate legislative extension of the sex offender registry, which was created for monitoring and not punitive purposes, substantive due process as posited by Appellant does not apply.

6. THE IMPOSITION OF GPS MONITORING DOES NOT VIOLATE THE APPELLANT'S SUBSTANTIVE DUE PROCESS AS IT IS CIVIL AND NOT OVERLY BROAD, NOR IS IT ARBITRARY OR CAPRICIOUS.

Appellant argues that the GPS monitoring is overly broad and is a greater deprivation of liberty than necessary. The Respondent disagrees, and argues that the statutory scheme creating the GPS monitoring is suitably tailored for its stated purpose and is a civil matter rather than a punitive one.

Appellant argues that the “enormous cost in liberty” to him outweighs the State’s goals of protecting the public. Brief of Appellant p. 39. The State submits that Appellant is overstating the infringement to his liberty. The court again addressed this in State v. Dykes, discussed *supra*. “[W]e find that the initial mandatory imposition of satellite monitoring for certain child-sex crimes satisfies the rational relationship test.” Id. at 510.

7. THE IMPOSITION OF GPS MONITORING DOES NOT VIOLATE THE APPELLANT'S RIGHT TO PRIVACY OR FOURTH AMENDMENT RIGHTS.

Appellant argues that the GPS monitoring is a violation of his right to privacy in the South Carolina Constitution and also argues that the mandatory imposition of a GPS monitoring device violates his Fourth Amendment right to be free from unreasonable search and seizure. Appellant contends that the State does not have a particularized basis for believing he would commit or has already committed a crime, and as a result, subjecting him to GPS monitoring is an unconstitutional search and seizure being used for general crime control. The State disagrees.

Appellant contends that the GPS monitoring violates his right to privacy, although he fails to note that the South Carolina Constitution offers protections against *unreasonable* invasions of privacy. S.C. Const. art. 1 §10 (emphasis added).

Even if the Court finds that there is a minor intrusion of Appellant's privacy, that intrusion is overridden by the public interest of the government in the protection of minors. In weighing such an intrusion against public interest, the Court examined the government interests advanced to justify such routine intrusions "upon the constitutionally protected interests of private citizen, and concluded that under the circumstances the government interests outweighed those of a private citizen." Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 87 S.Ct. 1727 (1967).

The State submits the application of GPS monitoring is less intrusive than the sex offender registry. The sex offender registry lists the offender's name, address, offense, eye and hair color, height, weight, and includes a photograph. GPS monitoring records gathered and

maintained by probation agents with the Department of Probation, Parole and Pardon Services are privileged and not subject to public disclosure. Indeed, all information and data obtained in the discharge of his official duty by a probation agent is privileged information, is not receivable as evidence in a court, and may not be disclosed directly or indirectly to anyone other than the judge or others entitled under this chapter to receive reports unless ordered by the court or the director. S.C. Code Ann. §24-21-290 (2007). The original version of Jessie's Law made a specific exception to this non-disclosure statute.⁵ However, that language was subsequently removed, demonstrating the legislative intent that GPS tracking information not be public. According to the statute, such information is also not admissible in court. By its terms, §24-21-290 makes information gathered by a probation agent from his offender inadmissible as evidence in court. State v. Hook, 356 S.C. 421, 590 S.E.2d 25 (2004). Therefore, unless Appellant is being prosecuted for damaging or removing the unit, willfully failing to pay the fees, or some other violation of his GPS tracking conditions, any information gathered pursuant to the GPS monitoring program is privileged, and will not be released.

Furthermore, the Appellant overstates the amount of information collected by the GPS monitor. While the Appellant contends that the device will allow the government to know when he is watching television, eating, or sleeping. This is patently untrue, and the rest is merely speculation about future technological innovations that have no relation to the statute's stated purpose. The device merely tracks the Appellant's location. While it would report when he is home, it does not have some power of penetrating through the walls as Appellant likens to the

⁵ Notwithstanding the provisions of Section 24-21-290, information gathered by a probation agent pursuant to the provisions of Section 24-21-540 is admissible in a criminal

thermal imaging device that was at issue in Kyllo v. United States, 533 U.S. 27 (2001).

Furthermore, convicted sex offenders have a much reduced right to privacy.

The Fourth Amendment of the United States Constitution specifically states:

The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend IV.

Appellant is of the opinion that the day to day monitoring of his location amounts to an unreasonable search and seizure of his person, in violation of the Fourth Amendment. However, the State submits any alleged intrusion on the property or the privacy of Appellant by wearing this monitor is reasonable under any Fourth Amendment analysis. The Fourth Amendment governs all intrusions by public agents upon personal security. Terry v. Ohio, 392 U.S. at 16. Here, the GPS monitoring device does not prevent Appellant from doing anything he pleases. He is not restricted or restrained from going where he pleases when he pleases; therefore, there exists no seizure.

Appellant's argument relies in part on the case of City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000), in which the United States Supreme Court ruled that the state cannot use a program that "seizes" people when the primary purpose is crime control. In Edmond, traffic stops were being used to investigate drug trafficking, circumstances that do not apply to the case at bar. As noted above, in Appellant's case, there is no seizure. In Terry, "seizure" is defined as an individual being restrained from his freedom to walk away and a

prosecution. S.C. Code Ann. §23-3-540(m)(1)(2006).

“search” is defined as the careful exploration of the outer surfaces of a person’s clothing in attempt to find a weapon. Terry, 392 U.S. at 16. Appellant’s mandatory GPS monitoring does not fit either definition. Neither his person nor his residence is searched by the device, and there is no restraint to his movement. In Edmond, checkpoints have been declared in violation of the Fourth Amendment due to it not being indistinguishable from the general interest in crime control. Edmond, at 531 U.S. at 32. However, if the stop is in the interest of a specific crime, and the use of the highway checkpoint is a legitimate means to stop this specific crime, the Supreme Court has found it not to be in violation of the 4th Amendment. U.S. v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116(1976), (suspicionless seizures at a fixed checkpoint designed to intercept illegal aliens); Michigan v. Dept. of State Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481, 110 L. Ed.2d 1990)(a sobriety checkpoint aimed at removing drunk drivers from the road). The use of a GPS monitor is specific to the monitoring of convicted sex offenders who specifically committed crimes against minors. This is far from a fishing expedition because it is a specific, targeted population based on a legitimate state interest that does not infringe on the privacy or rights of Appellant. The State submits it therefore cannot be considered a violation of the Fourth Amendment.

Based on all of these reasons, the State submits Appellant did not have any privacy rights unreasonably infringed by having the GPS monitor placed on him. There was no search of his premises, nor is the device capable of conducting a search. There was also no seizure because Appellant was not detained, and is allowed to move freely anywhere he wishes to go. Since Appellant will not be subjected to a search or seizure, there exists no violation of the Fourth Amendment.

8. THE IMPOSITION OF GPS MONITORING DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The United States Constitution states, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV.

Appellant argues that he is being denied equal protection of the laws because under “Jessie’s Law,” only individuals convicted of CSC 1st w/minor or Lewd Act are subject to mandatory GPS monitoring. The State disagrees and submits that since each person with an identical charge as Appellant is treated identically; there is no violation of equal protection. Equal protection requires all persons to be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed. GTE Sprint Commc’ns Corp. v. Pub. Sev. Comm’n of South Carolina, 288 S.C. 174, 341 S.E.2d 126 (1986).

The Supreme Court also rejected this argument in State v. Dykes. “Grant v. S.C. Coastal Council, 319 S.C. 348, 354, 461 S.E.2d 388, 391 (1995) (“The *sine qua non* of an equal protection claim is showing that *similarly situated* persons received disparate treatment.”) (emphasis added)); Curtis v. State, 345 S.C. 557, 575, 549 S.E.2d 591, 600 (2001) (noting if the case does not involve a suspect classification or a fundamental right, the question is whether the legislation is rationally related to a legitimate state purpose).” Id. at fn. 9.

Appellant argues that his treatment is not identical to other sex offenders; however, he does not have the fundamental right not to be placed on GPS monitoring, nor does he fall under a suspect class. The rational basis test is used to determine if equal protection is being violated.⁶ Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and, (3) the classification rests on some reasonable basis. Fraternal Order of Police v. South Carolina Dep't of Rev., 352 S.C. 420, 574 S.E.2d 717 (2002). Jessie's Law was enacted for the purpose of the monitoring sex offenders whose victims were children. The GPS monitor is used to be able to monitor these offenders in case another child has been subject to a sexual assault, and to pinpoint the whereabouts of these offenders either for prosecution or exoneration. All individuals convicted of CSC 1st w/minor and Lewd Act are treated alike. This law was not created for the monitoring of all sex offenders, only those whose victims were children. Children require more protection so the intent of the Legislature is to create laws specifically created for the protection of those children. As stated in Jessie's Law, the purpose of the statute is to provide law enforcement with the tools needed in investigating criminal offenses, particularly against children, and the use of GPS monitoring is certainly reasonable for the enhanced monitoring of child sex offenders. Jessie's Law and the placement of GPS monitoring on Appellant is appropriate pursuant the rational basis test; therefore, there is no violation of equal protection.

⁶ If the classification does not implicate a suspect class, the rational basis test is used. Denene, Inc. v. City of Charleston, 359 S.C. 85, 596 S.E.2d 917 (2004).


CONCLUSION

The lower Court committed no error in ordering lifetime GPS monitoring for Appellant. Therefore, the Respondent respectfully request this Honorable Court to affirm the decision of the lower court.

Respectfully submitted,

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Columbia, South Carolina
August 22, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

AUG 26 2013

APPEAL FROM GREENWOOD COUNTY
The Honorable Frank Addy, Circuit Court Judge

S.C. Supreme Court

THE STATE,RESPONDENT

v.

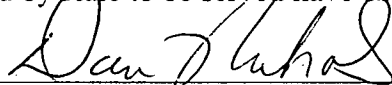
ANTHONY NATION,APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent and Designation of Matter* dated August 22, 2013, on Appellant this 22nd day of August, 2013, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorneys of record:

Robert Dudek, Chief Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, S.C. 29211-1589

I further certify that all parties required by Rule to be served have been served.



Dawn K. Nichols
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