STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case No. 2011-187406

THE STATE,

Respondent,

vs.

ANDREW JAMES HARRELSON, JR.,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The plea judge did not violate Appellant's constitutional right to be free from cruel and unusual punishment by requiring Appellant to submit to electronic monitoring after Appellant pled guilty to committing a lewd act upon a minor child because the statutory electronic monitoring requirement of S.C. Code Ann. § 23-3-540 was a non-punitive civil remedy as opposed to a punishment, which meant that the constitutional prohibition against cruel and unusual punishment did not apply.

II.

The plea judge did not violate Appellant's constitutional right to procedural due process by ordering Appellant to submit to mandatory electronic monitoring without conducting a hearing in regard to Appellant's likelihood to reoffend after Appellant pled guilty to committing a lewd act upon a minor child because Appellant's likelihood to reoffend was not a relevant factor towards a determination of whether Appellant was required to submit to electronic monitoring pursuant to the requirements of S.C. Code Ann. § 23-3-540.

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STATEMENT OF THE CASE

In October of 2007, Appellant Andrew James Harrelson, Jr. was arrested following an investigation into allegations that he sexually assaulted an eight-year-old girl. In November of 2007, the McCormick County grand jury indicted Appellant for first-degree criminal sexual conduct with a minor. On February 24, 2009, Appellant appeared before the Honorable William P. Keesley, circuit court judge, in the McCormick County court of general sessions to enter a guilty plea to the lesser offense of committing a lewd act upon a minor child. During the plea hearing, defense counsel indicated he did not agree with Appellant's decision to plead guilty, and Judge Keesley suspended the proceedings. Thereafter, on February 27, 2009, Appellant appeared before Judge Keesley in the McCormick County court of general sessions to again plead guilty to committing a lewd act upon a minor child. At the conclusion of the plea hearing, Judge Keesley accepted Appellant's guilty plea, sentenced him to an indeterminate sentence not to exceed six years pursuant to the Youthful Offender Act, ordered him to register as a sex offender, and ordered him to comply with the mandatory electronic monitoring requirement of S.C. Code Ann. § 23-3-540 upon his release from incarceration. Appellant then timely filed and perfected an appeal.

Subsequently, on appeal, the Supreme Court vacated Appellant's guilty plea and remanded Appellant's case for further proceedings. State v. Harrelson, Op. No. 2010-MO-030 (S.C. Ct. App. filed Nov. 7, 2011). After the Supreme Court issued its decision, the State filed a petition for rehearing, and the petition was denied.

Thereafter, on February 22, 2011, Appellant appeared before the Honorable R. Knox McMahon, circuit court judge, in the Saluda County court of general sessions to again enter a guilty plea to a lesser charge of committing a lewd act upon a minor child

after waiving his right to have the plea heard in the McCormick County court of general sessions. At the conclusion of the plea hearing, Judge McMahon accepted Appellant's guilty plea, sentenced him to an indeterminate sentence not to exceed six years pursuant to the Youthful Offender Act, suspended the sentence to five years of probation, ordered him to register as a sex offender, and ordered him to comply with the mandatory electronic monitoring requirement of S.C. Code Ann. § 23-3-540. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

On August 11, 2007, Appellant Andrew James Harrelson, Jr., who was sixteen years old, went on a church trip to a lake along with an eight-year-old girl ("Victim"). (2009 Tr. pp. 34-35; p. 37; 2011 Tr. pp. 17-18). During the trip, Victim went into the lake at the same time as Appellant, and Appellant digitally penetrated her vagina underneath her bathing suit. (2009 Tr. pp. 35-37; 2011 Tr. pp. 17-18). Victim then attempted to swim away from Appellant, but he pulled her back towards himself and inappropriately touched her again. (2009 Tr. pp. 35-37; 2011 Tr. p. 18). Subsequently, after the trip, Victim revealed the abuse to her sister, and she was taken to a hospital where physical signs of the sexual abuse were discovered. (2009 Tr. p. 35; p. 37; 2011 Tr. p. 18). Appellant was then interviewed by law enforcement officers and admitted to inappropriately touching Victim on the trip. (2011 Tr. p. 18). As a result, Appellant was arrested and indicted for first-degree criminal sexual conduct with a minor. (2009 Tr. p. 4; Indictment).

Thereafter, on February 24, 2009, Appellant appeared before the Honorable William P. Keesley, circuit court judge, in the McCormick County court of general sessions to plead guilty to the lesser offense of committing a lewd act upon a minor child. (2009 Tr. p. 16). During the plea colloquy, defense counsel acknowledged there was a factual basis for Appellant's plea and indicated that he had explained the offense, the potential sentence for the offense, and Appellant's constitutional rights to Appellant prior to the plea. (2009 Tr. p. 16). However, defense counsel indicated he did not agree with Appellant's decision to plead guilty based on the fact that Appellant would be required to be electronically monitored for the remainder of his life as a result of the plea. (2009 Tr. pp. 16-18). Regarding the electronic monitoring requirement, defense counsel argued

S.C. Code Ann. § 23-3-540 was vague and "is unconstitutional both as to the State and Federal Constitutions as cruel and unusual punishment and is a violation of his due process to have an opportunity to have the monitoring removed at some point in his life expectancy of over 50 years." (2009 Tr. pp. 18-19). In response to defense counsel's contentions, Judge Keesley suspended the plea proceedings. (2009 Tr. p. 21).

Three days later, Appellant again appeared before Judge Keesley in the McCormick County court of general sessions to plead guilty to committing a lewd act upon a minor child. (2009 Tr. p. 21; p. 24). During the hearing, the plea judge explained to Appellant that he would be required to submit to lifetime electronic monitoring as a result of the plea and discussed Appellant's constitutional rights with him. (2009 Tr. pp. 25-34). In response, Appellant indicated that he understand he would be required to submit to lifetime electronic monitoring, understood his rights, and still wished to plead guilty. (2009 Tr. pp. 24-26; p. 34). The solicitor then recounted the facts of the incident involving Victim, and Appellant admitted that those facts were true. (2009 Tr. pp. 34-37). Thereafter, Appellant again confirmed that he was pleading guilty to committing a lewd act upon a minor child, that he understood he would be required to register as a sex offender and submit to electronic monitoring, and that he still wished to plead guilty. (2009 Tr. pp. 38-42). Judge Keesley then accepted Appellant's guilty plea, sentenced Appellant to an indeterminate term of imprisonment not to exceed six years pursuant to the Youthful Offender Act, and ordered Appellant to register as a sex offender and submit to lifetime electronic monitoring upon his release from incarceration. (2009 Tr. p. 45; pp. 48-50). Following the pronouncement of the sentence, defense counsel objected to the statutory electronic monitoring requirement as vague and a violation of the

prohibition against cruel and unusual punishment and Appellant's due process rights, and Judge Keesley overruled defense counsel's objections. (2009 Tr. pp. 50-52).

Subsequently, Appellant appealed his sentence, arguing the electronic monitoring provision of S.C. Code Ann. § 23-3-540 was an unconstitutional violation of the prohibition against cruel and unusual punishment and disproportionate sentencing. (State v. Harrelson, Op. No. 2010-MO-030 (S.C. Ct. App. filed Nov. 7, 2011), p. 1). On appeal, the Supreme Court did not reach the merits of Appellant's appellate contentions. (Harrelson, Op. No. 2010-MO-030, pp. 2-3). However, because defense counsel objected to the constitutionality of the electronic monitoring provision prior to the plea judge's acceptance of the guilty plea, the Supreme Court determined Appellant's plea was an improper conditional guilty plea. (Harrelson, Op. No. 2010-MO-030, p. 2). As a result, the Supreme Court vacated Appellant's plea and remanded Appellant's case for further proceedings. (Harrelson, Op. No. 2010-MO-030, pp. 2-3).

Following the remand, Appellant appeared before the Honorable R. Knox McMahon, circuit court judge, in the Saluda County court of general sessions on February 22, 2011, to plead guilty to committing a lewd act upon a minor child after waiving his right to have the plea heard in the McCormick County court of general sessions. (2011 Tr. pp. 3-8; p. 13). During the hearing, Appellant admitted his guilt for committing a lewd act upon a minor child, indicated he understood he would be required to submit to lifetime electronic monitoring, and pled guilty to the crime. (2011 Tr. p. 11; pp. 13-14). The solicitor then recounted the facts of the incident to Judge McMahon, and Judge McMahon accepted Appellant's guilty plea. (2011 Tr. pp. 17-19). Thereafter, defense counsel objected to the electronic monitoring requirement of S.C. Code Ann. § 23-3-540, arguing the provision violated the constitutional prohibition against cruel and

unusual punishment and disproportionate sentencing. (2011 Tr. pp. 21-22). Judge McMahon then sentenced Appellant to an indeterminate sentence not to exceed six years pursuant to the Youthful Offender Act, suspended the sentence to five years of probation, ordered him to register as a sex offender, and ordered him to submit to mandatory electronic monitoring. (2011 Tr. p. 25). Following the imposition of the sentence, defense counsel renewed his objection to the electronic monitoring requirement, and Judge McMahon noted defense counsel's objection. (2011 Tr. p. 26).

ARGUMENT

I.

The plea judge did not violate Appellant's constitutional right to be free from cruel and unusual punishment by requiring Appellant to submit to electronic monitoring after Appellant pled guilty to committing a lewd act upon a minor child because the statutory electronic monitoring requirement of S.C. Code Ann. § 23-3-540 was a non-punitive civil remedy as opposed to a punishment, which meant that the constitutional prohibition against cruel and unusual punishment did not apply.

Appellant contends the plea judge erred in requiring him to submit to mandatory electronic monitoring after he pled guilty to committing a lewd act upon a minor child. In support of that contention, Appellant maintains that the electronic monitoring requirement of S.C. Code Ann. § 23-3-540 violates the constitutional prohibition against cruel and unusual punishment. To the contrary, the statutory electronic monitoring requirement does not violate the prohibition against cruel and unusual punishment because it is not punishment. Instead, the electronic monitoring requirement is a non-punitive civil remedy. As a result, the constitutional prohibition against cruel and unusual punishment was not applicable, and the plea judge committed no error in requiring Appellant to submit to electronic monitoring after Appellant pled guilty to committing a lewd act upon a minor child. Appellant's conviction and sentence should be affirmed.

Pursuant to the United States Constitution and the South Carolina Constitution, a criminal defendant cannot be subjected to cruel and unusual punishment. See U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); S.C. Const. art. I, § 15 ("Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflicted, nor shall witnesses be unreasonably detained.").

The constitutional prohibition against cruel and unusual punishment forbids extreme sentences that are grossly disproportionate to a particular crime. Harmelin v. Michigan, 501 U.S. 957, 1001 (1991).

In determining whether a particular statutory provision violates the prohibition against cruel and unusual punishment, a reviewing court must first determine whether the provision imposes a criminal penalty or a non-punitive civil remedy. See Trops v. Dulles, 356 U.S. 86, 98-99 (1958) (first determining whether a particular statutory provision was a penal law imposing a punishment before determining whether that statutory provision violated the prohibition against cruel and unusual punishment). In order to make that determination, the reviewing court must initially ascertain the legislature's intent behind the enactment of the statutory provision. Smith v. Doe, 538 U.S. 84, 92 (2003). If the legislative intent behind the provision was to create a non-punitive civil remedy as opposed to a criminal penalty, the reviewing court must next determine if the provision is so punitive in purpose or effect that the intended civil nature of the provision is negated and overcome. Id. The most relevant factors to be considered in making that determination are whether the provision: (1) imposes something that has been regarded in our history and traditions as a punishment; (2) imposes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) has a rational connection to a non-punitive purpose; or (5) is excessive with respect to its non-punitive purpose. Id. at 97; see also Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963) (identifying the following factors to consider when determining whether a sanction is penal or regulatory: (1) whether it involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims

of punishment; (5) whether the behavior to which it applies is already a crime; (6) whether it is rationally connected to a purpose other than punishment; and (7) whether it appears excessive in relation to the alternative purpose). Significantly, " 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty[.]" Hudson v. United States, 522 U.S. 93, 100 (1997) (citation omitted).

If, at the conclusion of the analysis, the reviewing court determines that the particular statutory provision does **not** impose a criminal penalty, that particular provision cannot have violated the prohibition against cruel and unusual punishment because it is not a punishment. See U.S. Const. amend. VIII (prohibiting "cruel and unusual **punishments**" (emphasis added)); S.C. Const. art. I, § 15 (prohibiting cruel, unusual, and corporal **punishment** from being inflicted); see also Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (holding the constitutional prohibition against cruel and unusual punishment did not apply to an order of deportation because deportation was not a punishment); Yeargin v. South Carolina Dep't of Highways & Pub. Transp., 313 S.C. 387, 390, 438 S.E.2d 234, 235-236 (1993) ("The suspension of the driver's license of a person convicted of a traffic offense is not part of the punishment for the offense. Therefore, the cruel and unusual punishment clause is inapplicable to a determination of the appropriateness of the suspension." (citations omitted)); see, e.g., Doe v. Poritz, 142 N.J. 1, 76, 662 A.2d 367, 405 (N.J. 1995) ("Because the challenged provisions do not constitute punishment, they do not violate any constitutional prohibition against punishment."); State v. Randall, 141 Ohio App. 3d 160, 164, 750 N.E.2d 615, 618 (Ohio Ct. App. 2001) ("[A]bsent any punishment, the protections against cruel and unusual punishment are not triggered."). However, if a particular

sentencing provision does constitute punishment, a reviewing court must continue the analysis and determine whether the provision constitutes cruel and unusual punishment. See Trops, 356 U.S. at 98-99 (first determining whether a particular statutory provision was a penal law imposing a punishment before determining whether that statutory provision violated the prohibition against cruel and unusual punishment).

What constitutes cruel and unusual punishment is an evolving standard and involves looking to how society presently views a particular punishment. State v. Wilson, 306 S.C. 498, 509-510, 413 S.E.2d 19, 26 (1992); see Trops, 356 U.S. at 101 ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."); see also Atkins v. Virginia, 536 U.S. 304, 311 (2002) (instructing that it is a precept of justice that punishment for a crime should be graduated and proportioned to the offense). The clearest and most reliable expression of society's contemporary values is derived from legislation enacted by the country's legislatures. State v. Pittman, 373 S.C. 527, 563, 647 S.E.2d 144, 162 (2007). However, a reviewing court's own judgment should also be employed by asking whether there is reason to disagree with the judgment reached by the citizenry and the legislature. Id. at 563, 647 S.E.2d at 163. In order to establish that evolving standards of decency preclude a particular punishment, the defendant bears the heavy burden of showing our culture and laws have emphatically and virtually universally rejected a particular sentencing practice. Id. at 565, 647 S.E.2d at 164. "It is not the burden of the state to establish a national consensus approving what their citizens have voted to do; rather, it is the heavy burden of the defendant to establish a national consensus against it." State v. Williams, 380 S.C. 336, 347, 669 S.E.2d 640, 646 (Ct. App. 2008).

Recently, in In re Justin B., Op. No. 27306 (S.C. Sup. Ct. filed Aug. 28, 2013) (Shearouse Adv. Sh. No. 38 at 80, 81), the South Carolina Supreme Court rejected the contention that the electronic monitoring requirement of Section 23-3-540 violated the constitutional prohibition against cruel and unusual punishment and determined the statutory requirement was a civil obligation instead of a criminal punishment. Id., (Shearouse Adv. Sh. No. 38 at 81-83). In reaching that conclusion, the Supreme Court noted that the legislature intended the statutory provision imposing the monitoring requirement to be civil in nature. Id., (Shearouse Adv. Sh. No. 38 at 92). The Supreme Court further found electronic monitoring was not historically regarded as punishment, did not impose an affirmative disability or restraint, did not promote the traditional aims of punishment to the exclusion of the statutory requirement's civil goals, was rationally related to the non-punitive purpose behind the statutory requirement, and was not excessive in relation to its non-punitive purpose. Id., (Shearouse Adv. Sh. No. 38 at 93-95). For those reasons, the Supreme Court determined the statutory electronic monitoring requirement was a civil remedy and, as a result, rejected the contention that it constituted cruel and unusual punishment. Id., (Shearouse Adv. Sh. No. 38 at 95, n. 3)

In the case sub judice, the plea judge did not violate the constitutional prohibition against cruel and unusual punishment by requiring Appellant to submit to mandatory electronic monitoring pursuant to Section 23-3-540 because the electronic monitoring requirement was not a punishment. Critically, the legislative intent behind the monitoring requirement was to protect the health, welfare, and safety of the citizens of South Carolina, which was a legitimate non-punitive civil goal. See S.C. Code Ann. § 23-3-400 (2007) ("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."); see also Williams v.

State, 378 S.C. 511, 515-516, 662 S.E.2d 615, 618 (Ct. App. 2008) ("The South Carolina Sex Offender Registry Act (the Act) was created to be a non-punitive act, and our Supreme Court has found that 'the Act is not so punitive in purpose or effect as to constitute a criminal penalty.' Thus, the consequence of registering as a sexual offender pursuant to the Act is regulatory in nature and is imposed to promote public safety." (citation omitted)); see, e.g., Smith, 538 U.S. at 103 ("Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is 'frightening and high.' " (citations omitted)); McKune v. Lile, 536 U.S. 24, 32-33 (2002) ("Sex offenders are a serious threat in this Nation. . . . When 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."). Furthermore, the statutory electronic monitoring requirement did not impose a sanction traditionally regarded as punishment, did not impose an affirmative disability or restraint, did not promote the traditional aims of punishment to the exclusion of its civil goal, was rationally related to its non-punitive purpose, and was not excessive in relation to its non-punitive purpose. Justin B., (Shearouse Adv. Sh. No. 38 at 93-95). Thus, just as the Supreme Court determined in Justin B., the statutory electronic monitoring requirement of Section 23-3-540 was **not** a punishment and, as a result, could not have violated the constitutional prohibition against cruel and unusual punishment, which only applies to punishments. See id., (Shearouse Adv. Sh. No. 38 at 95) ("[S]ection 23-3-540 is a civil remedy."); cf. Yeargin, 313 S.C. at 390, 438 S.E.2d at 235-236 (finding the cruel and unusual

punishment clause is inapplicable because the suspension of a driver's license was not a punishment).

Accordingly, for the forgoing reasons, the plea judge committed no error in requiring Appellant to submit to electronic monitoring following Appellant's guilty plea for committing a lewd act upon a minor child, and there is no basis upon which to conclude Section 23-3-540 violates the constitutional prohibition against cruel and unusual punishment. See State v. Harrison, 402 S.C. 288, 292-293, 741 S.E.2d 727, 729 (2013) ("[An appellate court] has a very limited scope of review in cases involving a constitutional challenge to a statute. All statutes are presumed constitutional and will, if possible, be construed so as to render them valid. A legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt." (citations omitted)). Appellant's conviction and sentence should be affirmed.[1]

[1] To the extent that Appellant contends on appeal that the electronic monitoring requirement violates the prohibition against cruel and unusual punishment based on the facts that he is required to pay the costs associated with the monitoring, that the electronic monitoring requirement is not mandatory for individuals convicted of sex offenses other than first-degree criminal sexual conduct with a minor and committing or attempting to commit a lewd act upon a minor child, and that electronic monitoring allegedly constitutes an unreasonable search and seizure, those arguments were not raised during the guilty plea hearing and, thus, are not properly preserved for appellate review. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Carmack, 388 S.C. 190, 200, 694 S.E.2d 224, 229 (Ct. App. 2010) ("Arguments raised for the first time on appeal are not preserved for our review."). However, even if those particular arguments had somehow been preserved for appellate review, the imposition of electronic monitoring did not violate the prohibition against cruel and unusual punishment because electronic monitoring is **not** a punishment. See Justin B., (Shearouse Adv. Sh. No. 38 at 81) (rejecting Justin B.'s claim that the mandatory electronic monitoring requirement constituted cruel and unusual punishment after finding electronic monitoring was not a punishment).

II.

The plea judge did not violate Appellant's constitutional right to procedural due process by ordering Appellant to submit to mandatory electronic monitoring without conducting a hearing in regard to Appellant's likelihood to reoffend after Appellant pled guilty to committing a lewd act upon a minor child because Appellant's likelihood to reoffend was not a relevant factor towards a determination of whether Appellant was required to submit to electronic monitoring pursuant to the requirements of S.C. Code Ann. § 23-3-540.

Appellant contends the plea judge erred in ordering him to submit to mandatory electronic monitoring after he pled guilty to committing a lewd act upon a minor child. In support of that contention, Appellant maintains that the mandatory imposition of electronic monitoring without an opportunity to be heard in regard to his likelihood to reoffend violated his right to procedural due process. Initially, Appellant's appellate due process argument is not properly preserved for appellate review because that particular argument was not raised to the plea judge during the guilty plea hearing. However, even if the issue had been properly preserved for appellate review, the plea judge's imposition of electronic monitoring without conducting a hearing on Appellant's likelihood to reoffend did not violate Appellant's procedural due process rights because Appellant's likelihood to reoffend was irrelevant towards a determination of whether Appellant was required to submit to mandatory electronic monitoring based on the mandates of Section 23-3-540, which requires offenders to submit to electronic monitoring based solely on their convictions for either first-degree criminal sexual conduct with a minor or committing or attempting to commit a lewd act upon a minor child. Accordingly, Appellant's conviction and sentence should be affirmed.

A. Issue Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised

in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); see State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) ("If a party fails to properly object, the party is procedurally barred from raising the issue on appeal."). The appellate court will not consider any issues that were not presented to or passed upon by the trial judge. State v. Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and **arguments**." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000) (emphasis added).

An issue must be raised in a sufficiently specific manner to call attention to the exact error to the trial court. Johnson, 363 S.C. at 58, 609 S.E.2d at 523; see State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge."). In raising a specific objection, "[a] party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). "Where an objection and the ground therefor is not stated in the record, there is no basis for appellate review." State v. Morris, 307 S.C. 480, 485, 415 S.E.2d 819, 823 (Ct. App. 1991).

Furthermore, in raising an objection, a defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to

the appellate court. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal."). Instead, an appellant is limited on appeal solely to the grounds raised to the trial judge. Patterson, 324 S.C. at 19, 482 S.E.2d at 767 (1997).

In Appellant's case, Appellant's procedural due process argument is not preserved for appellate review because it was not raised to Judge McMahon during Appellant's guilty plea hearing. Significantly, during Appellant's first guilty plea hearing before Judge Keesley, defense counsel challenged the constitutionality of the mandatory electronic monitoring requirement by arguing that the statutory requirement constituted cruel and unusual punishment and violated his due process rights by denying him an opportunity to have the electronic monitoring device removed at some point in the future. However, Appellant's first guilty plea was subsequently vacated. Thereafter, during Appellant's second guilty plea hearing, Appellant appeared before Judge McMahon, who did not preside over Appellant's first guilty plea hearing, and defense counsel did **not** challenge the constitutionality of the electronic monitoring requirement on the basis that it violated Appellant's substantive or procedural due process rights during that hearing. See State v. Baker, 390 S.C. 56, 65, 700 S.E.2d 440, 444 (Ct. App. 2010) ("Baker cannot now add a constitutional claim on appeal because he cannot raise one ground to the trial court and a different ground on appeal."). Because defense counsel did not raise any due process argument to Judge McMahon, Judge McMahon was not presented with an opportunity to consider or address such an argument. See In re Care and Treatment of

Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) ("The record contains no indication that Corley ever raised a due process argument in the circuit court. This argument is not preserved for review."); State v. Charron, 351 S.C. 319, 328, 569 S.E.2d 388, 393 (Ct. App. 2002) (finding that allegations of due process and equal protection violations were not preserved for appellate review where there was no indication that the issues were raised to the trial court). As a result, Appellant's appellate due process argument, which is even different from the due process argument he raised to Judge Keesley during his first guilty plea hearing, cannot now be raised for the first time on appeal. See Corley, 365 S.C. at 258, 616 S.E.2d at 444 ("Constitutional issues, like most others, must be raised to and ruled upon by the trial court to be preserved for appeal."). Appellant's conviction and sentence should be affirmed.

B. Constitutionality of the Statutory Electronic Monitoring Requirement

Pursuant to the United States Constitution and the South Carolina Constitution, no person shall be deprived of life, liberty, or property without due process of law. See U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"); U.S. Const. amend. XIV, § 1 ("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."); S.C. Const. art. I, § 3 ("The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."). The touchstone of due process is the

protection of an individual from arbitrary government action. County of Sacremento v. Lewis, 523 U.S. 833, 845 (1998).

Through the constitutional guarantee of due process, an individual is entitled to both substantive and procedural due process. Id. at 845-846; see Albright v. Oliver, 510 U.S. 266, 272 (1994) ("[T]he Due Process Clause of the Fourteenth Amendment confers both substantive and procedural rights."). On one hand, substantive due process protects against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective[.]" Lewis, 523 U.S. at 846; see Washington v. Gluckenberg, 521 U.S. 702, 720-721 (1997) (recognizing that substantive due process protects against the infringement of fundamental rights and liberties deeply rooted in the United States' history and tradition regardless of what process is provided unless the infringement is narrowly tailored to serve a compelling government interest); Reno v. Flores, 507 U.S. 292, 301-302 (1993) (recognizing that due process contains "a substantive component, which 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" (italics in original)). On the other hand, procedural due process protects against "a denial of fundamental procedural fairness[.]" Lewis, 523 U.S. at 845-846; see Carey v. Piphus, 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from mistaken or unjustified deprivation of life, liberty, or property.").

In Connecticut Dep't of Pub. Safety v. Doe, 538 U.S. 1, 3-4 (2003), the State of Connecticut challenged the decision of the United States Second Circuit Court of Appeals enjoining the public disclosure of the information of individuals on Connecticut's sex offender registry. Despite the fact that Connecticut law required public disclosure of the

information of individuals convicted of certain offenses based solely on their convictions, the Second Circuit Court of Appeals determined that those individuals were entitled to a hearing to determine whether they were likely to be currently dangerous before their sex offender registry information could be publicly disclosed. Id. at 4. Siding with Connecticutt, the United States Supreme Court disagreed and reversed the judgment of the Second Circuit Court of Appeals. Id. In reversing, the Supreme Court concluded that individuals do not have a procedural due process right to a hearing to allow them to establish a fact that is immaterial to the process they are challenging. Id. at 7. Because the fact that Doe sought to prove – that he was not currently dangerous – was irrelevant to whether the Connecticut sex offender registry statute required disclosure of Doe's information, the Supreme Court concluded that the public disclosure of Doe's information without a hearing regarding Doe's level of dangerousness did not violate Doe's procedural due process rights. Id. at 7-8.

In the case at bar, Appellant pled guilty to committing a lewd act upon a minor child. Pursuant to requirements of Section 23-3-540, **all** individuals convicted of, adjudicated delinquent for, or who pled guilty or nolo contendere to first-degree criminal sexual conduct with a minor or committing or attempting a lewd act upon a minor child are required to be monitored by an active electronic monitoring device upon their release from confinement. See S.C. Code Ann. § 23-3-540(A) (Supp. 2007) ("Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person 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, the court must order that the person, upon release from incarceration, confinement, commitment, institutionalization, or when placed under the

supervision of the Department of Probation, Parole and Pardon Services shall be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device."). Critically, based on the statutory requirements of Section 23-3-540(A), a sentencing judge is **not** required to make any determination whatsoever regarding the convicted individual's level of dangerousness or likelihood to reoffend and, instead, is required to order the convicted individual to submit to electronic monitoring based **solely** on the individual's conviction for an offense specified by the statutory provision. Id. Accordingly, because Appellant's likelihood to reoffend was irrelevant as to whether he was statutorily required to submit to electronic monitoring following his guilty plea, Appellant's procedural due process rights were not violated by the lack of a hearing on that issue, and the plea judge committed no error in ordering Appellant to submit to mandatory electronic monitoring after Appellant pled guilty to committing a lewd act upon a minor child.[2] See Doe, 538 U.S. at 8 ("Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme.").

Notably, Appellant's appellate argument is focused solely on an alleged violation of his procedural due process rights, and, thus, that is the only issue that can appropriately be considered on appeal. See Taylor v. State, 258 S.C. 369, 375, 188 S.E.2d 850, 853 (1972) (holding a ground was waived because it was not argued in the appellate brief); State v. Broadnax, 401 S.C. 238, 242, n. 2, 736 S.E.2d 688, 690 (Ct. App. 2013) ("This

[2] In arguing on appeal that his procedural due process rights were violated by the requirement that he submit to electronic monitoring, Appellant concedes that he was required to submit to electronic monitoring "solely on the basis of the underlying criminal offense[.]" (App. Br. p. 14). Significantly, that concession is fatal to Appellant's appellate procedural due process claim. Cf. Doe, 538 U.S. at 7-8 ("Even if [Doe] could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of *all* sex offenders – currently dangerous or not – must be publicly disclosed. Unless [Doe] can show that that *substantive* rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise." (italics in original)).

issue was not raised on appeal; thus, it is not preserved."); see also Doe, 538 U.S. at 7-8 (declining to consider whether a particular statutory provision violated Doe's substantive due process rights where Doe's appellate argument focused solely on whether his procedural due process rights were violated). However, even if Appellant had challenged the electronic monitoring requirement as a violation of his substantive due process rights, the plea judge still committed no error in ordering Appellant to submit to mandatory electronic monitoring following his guilty plea.

Significantly, the South Carolina Supreme Court recently addressed the issue of whether the requirements of Section 23-3-540 constitute a violation of a criminal defendant's substantive due process rights in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013).[3] In that case, Dykes challenged the constitutionality of Section 23-3-540, arguing that the electronic monitoring requirement violated her fundamental right to be "let alone." Id. at 505, 744 S.E.2d at 508. After considering the issue, the Supreme Court disagreed that Dykes had such a fundamental right as a convicted sex offender but concluded "that lifetime imposition of satellite monitoring implicates a protected liberty interest to be free from permanent, unwarranted governmental interference." Id. at 506, 744 S.E.2d at 509. The Supreme Court further found that the initial mandatory imposition of electronic monitoring had a rational relationship to the legislative goals behind the enactment of Section 23-3-540 and, thus, did not violate Dykes' due process rights. Id. at 508, 744 S.E.2d at 510. However, the Supreme Court determined the portion of Section 23-3-540(H) that precluded subsequent review of the electronic monitoring requirement for individuals convicted of first-degree criminal sexual conduct

[3] The Supreme Court also considered and summarily rejected Dykes' contention that the requirements of Section 23-3-540 violated her procedural due process rights. Dykes, 403 S.C. at 510, n. 9, 744 S.E.2d at 511.

with a minor and committing or attempting to commit a lewd act upon a minor child was unconstitutional. Id. Based on that determination, the Supreme Court instructed that individuals convicted of those offenses would be "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)." Id. at 510, 744 S.E.2d at 511.

Accordingly, pursuant to the United States Supreme Court's decision in Doe and the South Carolina Supreme Court's decision in Dykes, neither Appellant's procedural due process rights nor Appellant's substantive due process rights were violated by the statutory requirement that Appellant submit to mandatory electronic monitoring following his guilty plea for committing a lewd act upon a minor child. Therefore, Appellant's conviction and sentence should be affirmed. However, pursuant to the South Carolina Supreme Court's decision in Dykes, Appellant will be able to petition to be released from electronic monitoring in accordance with the provisions of Section 23-3-540.[4] See id. ("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)."); see also S.C. Code Ann. § 23-3-540(H) (Supp. 2007) ("Ten years from the date the person begins to be electronically monitored, the person may petition the chief administrative judge of the general sessions court for the county in which the person was ordered to be electronically monitored for an order to be released from the electronic

[4] Notably, notwithstanding the fact that Appellant did not raise any due process arguments at the time of his second guilty plea, the relief afforded to Appellant by the Supreme Court's decision in Dykes fully addresses the due process argument that Appellant raised at the time of his first guilty plea, which was focused on his inability to seek the removal of the electronic monitoring device at some point in time in the future. (2009 Tr. p. 19).

monitoring requirements of this section. The person shall serve a copy of the petition upon the solicitor of the circuit and the Department of Probation, Parole and Pardon Services. The court must hold a hearing before ordering the person to be released from the electronic monitoring requirements of this section, unless the court denies the petition because the person is not eligible for release or based on other procedural grounds. The solicitor of the circuit, the Department of Probation, Parole and Pardon Services, and any victims, as defined in Article 15, Chapter 3, Title 16, must be notified of any hearing pursuant to this subsection and must be given an opportunity to testify or submit affidavits in response to the petition. If the court finds that there is clear and convincing evidence that the person has complied with the terms and conditions of the electronic monitoring and that there is no longer a need to electronically monitor the person, then the court may order the person to be released from the electronic monitoring requirements of this section. If the court denies the petition or refuses to grant the order, then the person may refile a new petition every five years from the date the court denies the petition or refuses to grant the order.").

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 9, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case No. 2011-187406

THE STATE,

Respondent,

vs.

ANDREW JAMES HARRELSON, JR.,

Appellant.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to the matter designated by Appellant, Respondent proposes the following to be included in the Record on Appeal:

(1) Entire February 2009 Guilty Plea Hearing Transcript;

(2) Entire February 2011 Guilty Plea Hearing Transcript;

(3) State v. Harrelson, Op. No. 2010-MO-030 (S.C. Ct. App. filed Nov. 7, 2011);

(4) Indictment; and

(5) Sentencing Sheet.

To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served. This 9th day of September, 2013.

Ellen R. DuBois

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