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STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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SEP 19 2013

SC Court of Appeals

Appeal from McCormick County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ANDREW JAMES HARRELSON,

APPELLANT

APPELLATE CASE NO. 2011-187406

INITIAL REPLY BRIEF OF APPELLANT

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## ARGUMENT IN REPLY

The plea judge violated Harrelson's right to be free from cruel and human punishment by requiring Harrelson to submit to lifetime global position monitoring (GPS) pursuant to S.C. Code § 23-3-540 following his guilty plea to lewd act on a minor. The state's argument that S.C. Code § 23-3-540 is a non-punitive civil remedy as opposed to cruel and unusual punishment and disproportionate sentencing violating both the Eighth Amendment and the South Carolina Constitution is misplaced.

The state, in his initial brief, argued that, based on the ruling by the South Carolina Supreme Court in the case of In re Justin B., Op. No. 27306 (filed August 28, 2013), that electronic monitoring as required by § 23-3-540 was a lawful civil obligation and thus was not punishment for Eighth Amendment purposes. Thus Harrelson's trial court did not violate Harrelson's constitutional rights by ordering electronic monitoring.

However, the Supreme Court did not address certain issues that affect this determination of a civil obligation. The Court relied on the factors from Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), for the determination that electronic monitoring is civil. § 23-3-540 (A) requires that the person be monitored by the Department of Probation, Parole and Pardon (DPPPS) with an electronic monitoring device. DPPS clearly is a criminal oriented agency. People monitored by DPPS are restrained in various ways with electronic monitoring constituting a form of restraint.

Section 23-3-540 (I) and (L) provide that the person who damages the electronic device or removes it is guilty of a felony, and can be imprisoned for five years, and face a fine.

The Court did not address that **S.C. Code § 23-3-540 (C) violates the Eighth Amendment's prohibition against cruel and unusual punishment because appellant is required to pay for the imposed monitoring and faces criminal sanctions if not able to comply.** Section 23-3-540 (K) provides that the person must be charged for the cost and operation of the active electronic monitoring. The Court did not address the issue of employment which is necessary in order for the person to maintain the device. Harrelson worked in his parents' MacDonald's restaurant. However, the likelihood of his being able to obtain other employment is remote considering that he is a convicted felon and is a registered sex offender since the age of sixteen.

The Court did not address that **S.C. Code § 23-3-540 constitutes cruel and unusual punishment because it requires mandatory GPS monitoring for someone who commits a lewd act on a minor or CSC with a minor first degree, but makes GPS discretionary for other sex offenses such as CSC with a minor second degree.**

Section 23-3-540 classifies sex offenders by the offense they have committed. S.C. Code §§ 23-3-540 (A) through (G). There are two classes: (1) those that commit CSC with a Minor 1<sup>st</sup> degree or Lewd Act and (2) those that commit any other sex offense. See id. For people, such as appellant, who fit into the first class, lifetime GPS monitoring is mandatory. S.C. Code § 23-3-540 (A), (C), and (E). Those people who fit into the second class are not ordered to submit to lifetime GPS monitoring unless a court, in its discretion, orders lifetime GPS monitoring. S.C. Code § 23-3-540(B), (D), and (F).

The classification of sex offenders by S.C. Code § 23-3-540 (C) is not reasonably related to protecting the public from those offenders who pose a high risk of re-offending. The statute bases its classification solely on the offense the person was convicted of or for which they were adjudicated delinquent. Section 23-3-540 (C) classifies sex offenders

based on their underlying offense. The result is that § 23-3-540(C) arbitrarily requires trial courts use different procedures and impose different requirements on sex offenders who pose the same level of risk.

**The mandatory order imposing lifetime GPS monitoring on appellant pursuant to S.C. Code § 23-3-540 (C) is cruel and unusual punishment because it violates appellant's right to protection against unreasonable, warrantless search and seizure under the Fourth Amendment to the United States Constitution and Article I, Section 10 of the South Carolina Constitution.**

The Court in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013), held that the imposition of lifetime satellite monitoring of a child sex offender implicated a due process liberty interest to be free from permanent, unwarranted governmental interference. The Court ruled that legislation that deprives a person of a life, liberty, or property right, thus implicating due process concerns must have, at a minimum, a rational basis, and not be arbitrary. The Court determined that "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."

Lifetime GPS monitoring of appellant pursuant to § 23-3-540 (C) violates appellant's Fourth Amendment right to be protected from unreasonable searches and seizures. The state will seize appellant in order to permanently attach the GPS device and then will retrieve his location every minute of the day for the rest of his life. Because the state does not have a particularized basis for believing that appellant will commit or has already committed a crime, the imposition of lifetime GPS monitoring is an unconstitutional use of search and seizure for general crime control.

The stated intention of § 23-3-540 (C) is to assist law enforcement with the investigation of sex offenses. S.C. Code § 23-3-400 One of the clear intentions of continuous, minute-by-minute monitoring using GPS is to assist law enforcement in its investigation into future, uncommitted sex offenses. The program created by § 23-3-540 (C) is aimed at general crime control. It has no specific basis for investigating a crime that is imminent; all crime is in the future—it might happen. The government cannot provide probable cause that a crime has been committed. It cannot even provide articulable facts that a crime is afoot.

Using permanent GPS monitoring amounts to seizing appellant for the purpose of investigating a future crime without probable cause or reasonable suspicion to believe that he has committed or would even commit the crime. It is like tapping a phone without probable cause or reasonable suspicion because the state “thinks” (but has no evidence) that a person might use the phone to commit a crime.

The U.S. Supreme Court has held that a state cannot use a program that seizes people when the primary purpose is general crime control. City of Indianapolis v. Edmond, 531 U.S. 32, 37, 121 S.Ct. 447, 451, 148 L.Ed.2d 333 (2000) (“A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing.”). In Edmond, the Court rejected a highway checkpoint used by the Indianapolis Police Department for the primary purpose of conducting drug interdiction. Id. at 453 – 454. The Court noted that it has “never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.” Id. at 454.

Although the South Carolina Supreme Court held that electronic monitoring is civil and not criminal, it is appellant’s contention that his case still has merit that electronic

monitoring is cruel and unusual punishment and a violation of the Eighth Amendment and Fourth Amendment.

## ARGUMENT IN REPLY

The mandatory imposition of permanent Global Positioning Satellite (GPS) monitoring pursuant to S.C. Code § 23-3-540 (C) without the opportunity for a meaningful hearing on the merits if imposing GPS monitoring on appellant violated his right to procedural due process.

The state argued that the issue is not preserved. However, a showing and assessment of Harrelson's future dangerousness and likelihood to reoffend needed to be a part of the procedural due process in determining the imposition of electronic monitoring.

Appellant recognizes that the Supreme Court addressed this issue in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013). However, the Court determined that person convicted of CSC with a minor first degree and committing a lewd act on a minor were granted a judicial review on the electronic monitoring in ten years.

In State v. Guidry, 105 Hawai'i 222, 96 P.3d 242 (2004), the Supreme Court of Hawaii held that lifetime registration requirement for sex offenders implicated a protected liberty interest, and that the failure to provide the offender with a hearing as to future dangerousness violated due process.

North Carolina has held GPS monitoring of sex offenders infringes liberty rights protected by the Due Process Clause. In State v. Stines, 683 S.E.2d 411 (N.C. App. 2009), the Court of Appeals of North Carolina addressed a procedural due process challenge to the application of North Carolina's Satellite-Based Monitoring program. Id. The program uses a GPS tracking system to monitor sex offenders after their release from state supervision. Id. at 412 – 414. The Stines court held that the GPS tracking system used by North Carolina "implicate[d] a protected liberty interest." Id. at 413.

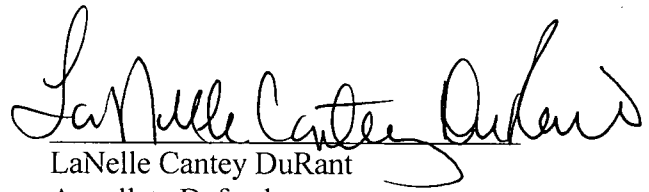
In finding that GPS tracking of sex offenders infringed the subject's liberty, the Stines court reasoned the device (1) was physically attached to the person and (2) provided continuous surveillance of the person. Id. at 414 (following the reasoning in Commonwealth v. Cory, 454 Mass. 559, 911 N.E.2d. 187 (2009)).

Appellant contends that his issue of a hearing for a judicial assessment at the time of conviction is the only way to avoid a due process violation. The Sexually Violent Predator Act has been determined to be civil. However, there is a multi-step process that must occur before a person is institutionalized, possibly for life. Because electronic monitoring takes away a person's liberty possibly for life, there needs to be at a minimum notice and a hearing before electronic monitoring is ordered.

CONCLUSION

Based on the above, Harrelson's case should be remanded for resentencing and the mandatory order imposing permanent Global Positioning Satellite (GPS) monitoring on appellant pursuant to S.C. Code § 23-3-540 (C) should be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant". The signature is written in a cursive style with a large, sweeping flourish at the end.

LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR APPELLANT.

This 19th day of September, 2013.

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Appeal from McCormick County  
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THE STATE,

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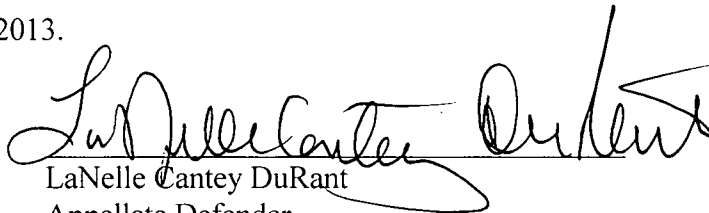
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ANDREW JAMES HARRELSON,

APPELLANT

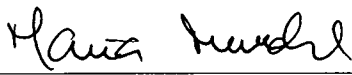
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CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Andrew Harrelson, at this 19th day of September, 2013.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me  
this 19th day of September, 2013.

 (L.S.)  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires: July 3, 2013.