ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenwood County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY NATION,

APPELLANT

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On July 16, 2003, Appellant Anthony Wade Nation pleaded guilty in Greenwood County to committing a lewd act on a minor under the age of sixteen. The Honorable William P. Keesley sentenced to fifteen years in prison suspended on the service of twelve years followed by five probation. The state dismissed one count of second degree criminal sexual conduct on a minor. R. p. *. The lewd act conviction automatically required Nation to register as a sex offender.

Nation's probation began on July 31, 2009. Tr. 4, l. 9. On May 6, 2011, the South Carolina Department of Probation, Parole, and Pardon Services (SCDPPPS) alleged Nation violated his probation for failing to report to his probation agent in March and April of 2011. R. p. *.

On September 14, 2012, the Honorable Frank R. Addy, Jr. convened a probation revocation hearing in Abbeville County. Tr. 1-63. Because any revocation would subject Nation to lifetime Global Position Satellite Position (GPS) monitoring, Nation filed a written objection to the constitutionality of S.C. Code Ann. §23-3-540. R. p. *. At the conclusion of the hearing, Judge Addy found Nation to be in willful violation of his probation for failing to report to his probation agent and ordered lifetime GPS monitoring. Tr. 18, ll. 12-14, 62, ll. 19-24. R. p. *.

This appeal follows.

STATEMENT OF FACTS

The State originally charged Nation with second degree criminal sexual conduct with a minor and committing a lewd act on a minor under the age of sixteen. Both charges arose out of the same conduct and alleged consensual sex "with somebody who was not old enough to give consent." Prior to pleading guilty, Nation was aware of the existing collateral consequences of convictions of these two charges. Both required registering as a sex offender. Criminal sexual conduct carried a potential penalty of twenty (20) years imprisonment with minimum service of eighty-five percent (85%) of the sentence, whereas lewd act carried a potential sentence of fifteen (15) years imprisonment that did not require service of at least eighty-five percent (85%). Criminal sexual conduct was also a strike under South Carolina's two strikes law. The State allowed Nation to pick which charge he wanted to plead guilty to, but the trial court judge would determine the sentence. On July 16, 2003, Nation elected to plead guilty to lewd act, and Judge Keesley sentenced him to fifteen (15) years imprisonment, suspended on the service of twelve (12) years followed by * years probation. Tr. 4, ll. 15-17; 24, ll. 6-12; 26, ll. 5-25; 27, l. 4 – 28, l. 6.; Defense Ex. 2 and 3, R. p. *.

After the guilty plea and while Nation was incarcerated in the Department of Corrections, the General Assembly amended the sex offender registration requirement to require GPS monitoring in certain circumstances. GPS monitoring would not apply to Nation unless he violated his probation. See History of South Carolina's Sex Offender Registry, infra.

Nation's probation started July 31, 2009. On May 6, 2011, SCDPPS Agent Jeff Sorrow alleged Nation violated his probation by not reporting to him in April and May.[1] Tr. 4, l. 23 – 5, ll. 6; R. p. *.

A probation violation hearing was held in Abbeville County on September 14, 2011. Nation filed a motion and memorandum in support of the motion which argued that the mandatory lifetime term of GPS monitoring, as set out in SC Code Ann. 23-3-540, was unconstitutional. R. p. *. Judge Addy received a copy of this pleading "about a month" before the hearing and had "reviewed it." Tr. 19, ll. 16-22.

During the hearing, Nation presented evidence that his decision whether to plead guilty to lewd act might have been different had he "know that lifetime GPS monitoring was a potential collateral consequence." It would have "changed the conversations that Mr. Nation" had with his lawyer prior to deciding to plead guilty. "A lot of times these collateral consequences come into play in the negotiations and the negotiations are different," Nation's trial lawyer told the judge. Nation "could have ended up being convicted of ABHAN and not gotten some of the consequences, but still have gotten sex offender registry and still could have gotten prison time, so it could have changed the whole equation." Tr. 27, l. 1 – 30, l. 19.

Agent Sorrow testified SCDPPPS has a test to assess the likelihood of a sex offender re-offending "referred to as the Static 99." He explained to the judge:

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[1] During the violation of probation hearing on September 14, 2011, Agent Sorrow erroneously noted at the hearing that Nation had incurred a prior violation on October 4, 2010. Nation did have a prior probation violation *alleged* against him, but the trial court did not violate Nation's probation and "continued [him] under supervision." Tr. 4, ll. 20-22; 5, l. 7 – 6. l. 7.

> It's just a series of questions that are based on a number system. Depending on what your answer, you get a score from zero to whatever and when we add up those numbers when the test is over, it will give you the level of supervision that we will supervise the sex offender.

Agent Sorrow testified that Nation scored *a zero* on the Static 99, "which is the lowest level sex offenders that [SCDPPPS] would have." Tr. 52, l. 25 – 54, l. 11; Defense Ex. 1, R. p. *.

Agent Sorrow testified about his training and experience "dealing with GPS monitoring." When GPS monitoring is required, SCDPPPS "put[s] the ankle monitor on them. It's a device that is attached to the ankle with a strap." It is made out of plastic and "would fit in the palm of your hand. The strap is made two inches wide." The Department establishes "an inclusion zone, exclusion zones. That is [SCDPPPS's] terms for where they're supposed to be or where they can go." The agent can monitor this information in "real time." The agent can see where a person is located, the direction a person is traveling, and even how fast the person is driving. If the monitor's "battery is getting low" or if a person enters into an exclusion zone, then the agent "would be alerted to that by our command center in Columbia that monitors these devices 24-hours-a-day." Tr. 48, ll. 12 – 50, l. 23; 52, ll. 6-10.

Agent Sorrow testified "three hours [daily] is the standard charg[ing]" time for the monitor's battery. Charging the battery means "somebody has to sit next to a wall, *plugged into a wall.*" (emphasis added). When the battery "gets weaker," then "you have to charge them more often." SCDPPS provides a "charging schedule" the agents "often encourage people that we supervise . . . to charge that thing . . . if they are watching television or something, just plug it in [to] kind of give it a boost."

Additionally, "[i]f that device gets weak, then [the agents] often call them, tell them to plug in, charge it up." Tr. 50, l. 24 – 52, l. 3.

SCDPPPS's GPS monitoring fee is $20.00 per week. The fee is imposed for the rest of the person's life. While the person is on probation, there is an additional $20.00 per week supervision fee, bringing the weekly fee to $40.00. Tr. 52, ll. 15-24.

Judge Addy found Nation to be "in willful violation of his probation for having missed two of his appointments with his probation officer." Judge Addy revoked five (5) months of Nations sentence with credit for the time he served in the county jail awaiting the hearing. Judge Addy found "that the GPS monitoring is mandatory, that . . . this Court has no discretion." The judge continued:

> I'm forced to conclude that the statute requires me without any discretion to require that he be subject to the GPS monitoring for the rest of his natural life. If I had discretion, I perhaps would be inclined to use it under these circumstances according to the facts as they were presented to me, but I must conclude that I have no discretion, zero, none as to whether or not I should impose GPS monitoring, therefore, I do order it imposed.

Judge Addy "reviewed [Nation's] memo and [took] into account all the arguments." He overruled the "arguments of defense counsel" and declined to "deviate from the explicit black letter law of the statute." Tr. 18, ll. 12-21; 62, l. 17 – 63, l. 20; R. p. *.

History of South Carolina's Sex Offender Registry

Prior to discussing the issues on appeal, it is important to review the history of the South Carolina Sex Offender registry.

When South Carolina first enacted a sex offender registry in 1994, the legislative intent was "to promote the State's fundamental right to provide for public health, welfare and safety of its citizens." 1994 Act 497, Part II §112A (S.C. Code §23-3-400). The registry was "not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws." Id. "[T]he General Assembly . . . intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes. Hence, the language indicates the General Assembly's intention to create a non-punitive act." State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Sex Offender registration in South Carolina is lifetime. 1994 Act 497, Part II §112A (S.C. Code §23-3-460). See also Hendrix v. Taylor, 353 S.C. 542, 579 S.E.2d 320 (2003) (since sex offender registration is non-punitive, no liberty interest is implicated regardless of the length of time registration is required).

Initially, the Sex Offender Registry applied only to "convictions," and not juvenile adjudications. 1994 Act 497, Part II §112A (S.C. Code §23-3-430). See State v. Ellis, 345 S.C. 175, 179, 547 S.E.2d 490, 492 (2001) (a juvenile adjudication is not the same as a conviction). When the General Assembly began requiring juveniles adjudicated of certain offenses to register as sex offenders, the juvenile's information remained confidential. 1996 Act 444 §16 (S.C. Code §23-3-430, 490). It was not until 1998 that the General Assembly authorized release of juvenile sex offender information under certain circumstances. 1998 Act 384 §1 (S.C. Code §23-3-490). Our Supreme Court has held requiring a juvenile to register as a sex offender does not violate due process, at least in situations where the juvenile's "registry information will not be made available to the

public because of appellant's age at the time of his adjudication." In re Ronnie A., 355 S.C. 407, 410, 585 S.E.2d 311, 312 (2003).

Since our Court's decisions in Walls, Hendrix, and Ronnie A. in 2002 and 2003, South Carolina's Sex Offender Registry has become increasingly punitive. In 2005, the General Assembly began requiring lifetime Global Positioning Satellite (GPS) monitoring for an offender convicted or adjudicated delinquent of certain offenses, including lewd act and CSC with a minor, 1st degree, 2005 Act 141 §8 (S.C. Code §23-3-540).

Also in 2005, the General Assembly began restricting residency by prohibiting sex offenders "from living in campus student housing at a public institution of higher learning supported in whole or in part by the State." 2005 Act 94 §2 (S.C. Code §23-3-465). In 2008, the General Assembly prohibited sex offenders convicted of certain offenses from residing "within one thousand feet of a school, daycare center, children's recreational facility, park, or public playground." 2008 Act 333 §1 (S.C. Code §23-3-535).

Likewise, the actual registration requirement has become harsher. Initially, a sex offender was required to register annually in the offender's county of residence. 1994 Act 497, Part II §112A (S.C. Code §23-3-460). Both of these requirements have been expanded. Offenders are now required to register biannually and, in some cases, quarterly. In addition to the county of residence, offenders must register in any county where the offender works, attends school, or owns property. S.C. Code §23-3-460. At no point has the legislature reaffirmed the

civil intent of the Registry when amending it. Indeed, they have acted to the contrary. See infra.

ARGUMENT

1.

The imposition of lifetime GPS monitoring violates the *ex post facto* clauses of the United States and South Carolina Constitutions where appellant Nation pleaded guilty and was sentenced before lifetime GPS monitoring, 2005 Act 141 amending S.C. Code §23-3-540 became law.

The *ex post facto* clause prohibits "every law that aggravates a crime, or makes it greater than it was when committed" and "every law that changes the punishment, and inflicts a greater punishment, that the law annexed to the crime, when committed." Rogers v. Tennessee, 532 U.S. 451, 456 (2001) (citing Calder v. Bull , 3 U.S. 386, 389 (1798)). In Calder Justice Chase described another *ex post facto* problem: "Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the commission of the offence in order to convict the offender," violates the Clause. Calder , 3 U.S. at 390.

The Court in Calder reviewed the rationale for the prohibition of *ex post facto* laws and cited notorious cases of the legislature exacting revenge upon a person or class of people. "With very few exceptions the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such and similar acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any *ex post facto* law." Id. at 389.

Ex post facto laws are prohibited from passage by the federal government in Article I, § 9 of the Constitution of the United States. Article I, § 10 furthermore declares that "...*no state* shall pass any ex post facto law." *U.S. Const.*, Art I, § 10. South

Carolina's constitution also prohibits passage of ex post facto clauses. *S.C. Const.*, Art I, § 4. The Court in Calder goes on to note that the purpose of the prohibition on *ex post facto* laws is to provide "...an additional bulwark in favour of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation." Calder, 3 U.S. at 390.

In analyzing *ex post facto* claims the Court must determine whether the intent of the legislature is to impose retroactive punishment, or if the statute in question is so punitive in effect as to negate the state's attempt to deem it a civil regulation. Smith v. Doe, 538 U.S. 84, 92 (2003). The "clearest proof" of punitive effect is required when the General Assembly's express or implied intention is to enact a law that is civil in nature. State v. Walls, 348 S.C. 26, 31 (2002) (internal citations omitted).

When the General Assembly initially enacted the Sex Offender Registry it was "not intended to violate the guaranteed constitutional rights of those who have violated our nation's laws." 1994 Act 497, Part II sec 112A (S.C. Code 23-3-400). Our Supreme Court, accordingly, held the Sex Offender Registry to be a non-punitive statute that was civil in nature. Walls, Hendrix, and Ronnie A., supra. As discussed previously, the General Assembly did not repeat this non-punitive declaration when adding the additional penalties and punishments to the Sex Offender Registry which Nation now challenges.

The intent of the legislature is clear (and the punitive effects are even clearer): lifetime GPS monitoring is a punitive measure. The punitive nature of GPS monitoring is plain in the statute. GPS monitoring may *only* be imposed upon conviction for certain crimes or for violations of probation, supervision is handled by SCDPPPS with many of

the same rules and requirements of probation, and it is imposed in certain cases, including Nation's case, regardless of any individualized determination. GPS monitoring results in a restraint upon liberties, invades privacy, and may cause personal safety and health concerns. See, infra. Furthermore, and perhaps most tellingly, it does not matter how successful the rehabilitation or how low the probability of reoffending[2] the GPS monitoring is for life, without exception. Because the General Assembly intended these provisions to be punitive, it is only necessary to prove that the act is being applied retroactively to Nation and disadvantages him. See Walls, supra.

Both the Supreme Court of the United States and the Supreme Court of South Carolina have held that the penalty for the violation of probation or community supervision relates back to the original offense for purposes of punishment. Johnson v. United States, 529 U.S. 694, 699 (2000) ("Penalties for violations of the terms of supervised release...are attributed to the original conviction rather than to the violation."); State v. McGrier, 378 S.C. 320, 331, 663 S.E.2d 15 (2008) (community supervision violation is not a second conviction, it is an addition to original sentence). If penalties were not attributed to the original conviction, then a person would be entitled to counsel and a trial by jury in which the state would have to prove guilt beyond a reasonable doubt. Johnson, 529 U.S. at 700. See McGrier, 378 S.C. at 331, 663 S.E.2d at 21: ("[U]nder the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.").

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[2] Indeed, Agent Sorrow testified that Appellant Nation scored a zero on the Static 99, "which is the lowest level sex offenders that [SCDPPPS] would have." Tr. 52, l. 25 –

In this case, Nation is being punished via a law enacted after he pleaded guilty. Nation is subjected to the punishment of GPS monitoring. Because there is punitive intent and retroactive punishment no further ex post facto analysis is necessary. Smith v. Doe, 538 U.S. 84, 92-93 (2003) ("a conclusion that the legislature intended to punish would satisfy an *ex post facto* challenge without further inquiry into its effects..."). However, Nation provides such an analysis for the Court. An analysis of the statute's effects further reveals its punitive nature.

Punitive in Effect.

In order to determine whether the Act is punitive in effect the Court should look to the factors listed in Kennedy v. Menoza , 372 U.S. 144 (1963). These factors are:

> Whether the sanction involves an 1) affirmative disability or retraint, 2) whether it has historically been regarded as punishment, whether it comes into play only a finding of scienter, 3) whether its operation will promote the traditional aims of punishment- retribution and deterrence, 4) whether the behavior to which it applies is already a crime, 5) whether an alternative purpose to which it may rationally be connected is assignable for it, and 6) whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of the statute, these factors must be considered in relation to the statute on its face.

Id. At 168-169 (footnotes omitted). Each of these factors will be addressed below.

54, l. 11; Defense Ex. 1, R. p. *.

1. Affirmative Disability or Restraint.

Lifetime GPS monitoring involves an affirmative disability or restraint. The GPS monitor must be charged daily. Agent Sorrow testified that batteries must be charged for three hours per day but that as the batteries age they must be charged for longer periods of time. Sorrow also testified that when the battery charge is low he would call the person wearing the monitor and tell them to charge it up. Tr. 50, ll. 1-25; 52 ll. 1-5. Nation can expect to live approximately thirty (30) more years and if the battery must be charged a minimum of three hours per day that is approximately forty-five (45) days per year in which the person being monitored is tethered to a wall outlet.[3] Furthermore, Agent Sorrow testified the aging of the batteries requires more than the three hours of recharging normally scheduled. Tr. 51, ln 7-13. R. *. This call could come in the middle of the day while Nation is working to help his family and working to pay for the monitor. This disruption is an additional, affirmative restraint on Nation's liberty for the rest of his life.

The GPS device transmits once per minute every hour of every day. Carrying around the eyes of the government disables a person from feeling free to move about as he or she wishes and surely represents an affirmative burden on liberty. Not only will Nation have to be serially chained to a wall at the direction of his probation agent for the rest of his life but he will never have that last retreat into the privacy of his home. He

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[3] Information from Center for Disease Control (CDC): http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_09.pdf (last viewed February 12, 2012). Forty-five (45) days per year for thirty (30) is 3.69 years of being restrained to the wall by a power cord.

will always be watched. Nation will be receiving phone calls from the government telling him what to do for the rest of his life.

In addition to the forced submission to the GPS device, Nation had to report to Agent Sorrow to have the GPS ankle monitor attached to his body. He must report periodically and be subjected to forced touching while the device is inspected and maintained. Additionally, Nation will never be free from having that device cinched around his leg. He will always have to carry it because the requirement of GPS monitoring extends beyond the sentence originally imposed by the court to include the remainder of Nation's life. Duncan v. State, 391 S.C. 350, 353, 705 S.E.2d 489, 491 (Ct. App. 2011) ("the trial court did not have the discretion to terminate Duncan's electronic monitoring because electronic monitoring is required "for the duration of the time the person...remain[s] on the [sex offender registry].").

2. Traditional Aims of Punishment

Lifetime GPS monitoring is much like traditional forms of punishment. GPS monitoring

bears striking resemblance to branding and the historical ball and chain. Branding, which is a form of mutilation, is no longer allowed as punishment. See State v. Brown, 284 S.C. 407, 411, 326 S.E.2d 410, 412 (1985) ("Castration, a form of mutilation is prohibited by [S.C. Const.] Article I, sec 15."). However, "it should be noted that a statute need not fit within the historical category of punishment to be considered effectively equivalent to the historical punishment. If the punishment had to fit the historical category then the [legislature] could fashion new punishments in "new and heretofore unforeseen ways" and the *ex post facto* clause would not be able to respond to

modern attempts at punishment. Consol. Edison of New York v. Pataki, 292 F.3d 338 (2nd Cir 2002) (citing Nixon v. Administrator of General Services, 433 U.S. 425, 475, 97 S.Ct. 2777, 2806). But in this case lifetime GPS resembles not one but two types of historical punishments: branding and the ball-and-chain.

Nathaniel Hawthorne's 1850 novel The Scarlet Letter describes how people who were found guilty of adultery were forced to wear a scarlet letter A on their clothing. The effect was to shame the adulterer and invite prejudice and scorn. See The Scarlet Letter, Nathaniel Hawthorne, 1850; Husband v. Wife, 301 S.C. 531, 532, fn.1, 392 S.E.2d 811, fn.1 (Ct. App. 1990). In this case the GPS monitoring device will invite similar scorn and shame upon Nation. In Husband v. Wife, the Court of Appeals recognized the inherent prejudice in being branded with such a scarlet letter. Husband, 301 S.C. at 532 ("We nevertheless address the issue of adultery, assuming without deciding that prejudice is inherent in being branded with "The Scarlet Letter."). Furthermore, Emperor Constantine had Roman subjects who had been condemned to the arena or to the mines branded on the hands and lower legs.[4]

Historically, the ball and chain was forced upon some prisoners who had a history of escape. An iron anklet was fastened to the prisoner's leg, attached to the anklet was a length of iron chain attached to a 25 to 30 pound iron ball.[5] A strong man could pick up the ball and run with it-leading to the conclusion that in addition slowing an escape attempt it was a punishment to mark the potential offender and to inflict, at best,

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[4] The Theodosian Code and Novels and the Sirmondian Constitutions: A Translation with Commentary, Glossary, and Bibliography, by Clyde Pharr with Theresa Sherrer Davidson, The Lawbook Exchange, Union, New Jersey 2001, p. 55.

inconvenience and, at worst, pain and suffering. With a ball and chain, the pain and suffering might at least end upon completion of the sentence.

The conditions imposed upon Nation are a major departure from the earlier forms of the Sex Offender Registries. In Smith v. Doe, supra, the Supreme Court observed that some sex offenders might have been denied employment or housing because of the publicly available information. However, the offenders were free "to move where they wish and to live and work as other citizens" and there was no intent "to humiliate the offender." "Although public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." Smith v. Doe, 538 U.S. at 99-101. Here, Nation will never again be free from the requirements imposed by GPS monitoring for life similar to the ball and chain and branding, including wearing the scarlet letter, being connected to the wall to recharge the batteries, and being forced to report for maintenance of the device even after his probation ends.

The ball-and-chain and brand also present the risk of serious bodily injury or death. It is well known that people who have been placed on the sex offense registry have been ridiculed, harassed, and attacked by people who found out about the offender's presence via the internet or email alerts. It probably will not be long before the ankle bracelet gives vigilantes information that they will use against Nation. Nation's name, address, and picture will be published on South Carolina's sex offender registry website.

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[5] Folsom Prison (Images of America: California), by Jim Brown, Arcadia Publishing, 2008, p. 22.

Furthermore, it can no longer be argued that the negative attention stemming from being a convicted sex offender comes from the fact that there is a conviction. Finding out whether an individual is a sex offender is no longer akin to taking a trip to an archive. A person can simply sign up and receive alerts about not only one person but EVERY person. Tr. 35, ll. 14-19; Appendix to Memorandum, R. p. *.

3. Finding of Scienter as a result of conviction

Lifetime GPS monitoring can only come after a finding of scienter as a result of the conviction, in this case for lewd act. A person must knowingly commit some criminal act. Lifetime GPS monitoring is imposed as part of the sentence. Although the state might attempt to portray the lifetime GPS as a new penalty for the probation violation, the sentence for violation of probation relates back to the original conviction. McGrier, supra. While it is true that temporary GPS monitoring is sometimes used as a part of a person's bond conditions it is only a temporary condition. In terms of analyzing whether the state intended GPS as punishment, the requirement of scienter suggests that GPS is not available for acts done with negligence, *i.e.* it is for punishment of criminal wrongdoing.

4) Traditional aims of punishment.

Lifetime GPS monitoring promotes the traditional aims of punishment. Significantly, the GPS monitoring has been a traditional option in sentencing. S.C. Code Ann. § 24-21-430 establishes the standard conditions of probation. These include allowing the probation agent to collect fines and fees from the person on probation and require the probationer to "submit to intensive surveillance which may include surveillance by electronic means." Just as if he were on probation for the rest of his life,

Nation will be forced to pay fees associated with the monitoring, report periodically, follow the instructions of the monitoring agent or go to prison. Nation would not be challenging these forms of punishment but for the fact that he will be subject to these penalties for the rest of his life, rather than the duration of the probationary part of his sentence.

Furthermore, GPS monitoring promotes the traditional aims of punishment of retribution and deterrence. Retribution is the moral deserts for evil doings. Deterrence is divided into two forms, general and specific. General deterrence is the impact of the fear of punishment upon the public. Specific deterrence is the impact on the person being punished. Shaming and invitation of scorn are brought about by the sex offender registry and wearing the GPS monitor for life. These are generally designed to create a general deterrent effect. Although one may speculate that wearing a GPS monitor may be a specific deterrent, there is no research showing that to be the case. As stated throughout this brief, Nation is no threat to reoffend and the necessity for a specific deterrent is unproven at best. *See* Tr. 52, l. 25 – 54, l. 11; Defense Ex. 1, R. p. *.

The GPS monitor is not only a modern day brand but it is also a scarlet letter which will bring shame and scorn upon Mr. Nation. This humiliation is retribution. Nation knows that his every move will be watched by the state. Nation, who is not a threat to reoffend, is subjected to lifetime GPS monitoring is a heavy handed, obtuse, invasion of privacy. He is subjected to affirmative burdens upon his liberty, permanently affixed to his leg, and it is retribution.

5. Sanction applies to a crime.

The behavior to which the sanction applies is already a crime. Nation pleaded guilty to committing a lewd act, and the sentencing judge ordered that Nation be incarcerated for term of twelve years followed by three years of probation. SCDPPPS alleged, and Judge Addy found, that Nation violated this probation. The possible sentence for this violation of probation related back to the original crime for which the sentencing judge placed Nation in prison followed by probation. See Johnson and McGrier, supra. Lifetime GPS monitoring was not part of the penalty when Nation was sentenced. The General Assembly subsequently amended the sex offender registry to require the imposition of lifetime GPS monitoring for those convicted of the newly GPS eligible crimes and considered it a penalty. The General Assembly also made the trigger for monitoring a violation of probation. It did not opt to have a civil hearing for each prior offender. The legislature knew it was punishment but did not provide for a jury trial for someone in Nation's situation. The General Assembly, however, cannot impose a greater punishment in this manner. Johnson and McGrier, supra.

6. No rational purpose for the penalties other than punishment.

There is no rational purpose, other than punishment, that can be attributed to lifetime GPS monitoring. As previously discussed, lifetime GPS monitoring goes far beyond the original aims of the Sex Offender Registry. GPS monitoring is simply not necessary for law enforcement or the community to have information about where a sex offender lives. Registration adequately covers that. Rather, these provisions are intended to take away basic and fundamental rights of the person subjected to the conditions.

A close analysis of this case, moreover, underscores the irrational approach employed by the legislature. Recall that the State, based on the same underlying conduct, initially charged Nation with both second degree criminal sexual conduct and committing a minor and lewd act. At the time, second degree criminal sexual conduct with a minor was considered to have the more severe punishment. That is no longer the case. Second degree criminal sexual conduct with a minor does not require mandatory lifetime GPS monitoring. In fact, a judge must make a specific finding that GPS monitoring should apply. S.C. Code 23-3-540(G)(1)(b). Additionally, a person placed on GPS monitoring for that offense may petition for release from GPS monitoring after ten (10) years of compliance and every five years thereafter. S.C. Code § 23-3-540(H). Nation has no such option. Id. In 2003, on the advice of counsel, Nation chose to plead guilty to lewd act. Tr. 24, l. 6 – 32 ll. 14. Had Nation chosen to plead guilty to CSC 2nd with a minor then he would not be facing mandatory, lifetime GPS monitoring. Same conduct. Different outcome. No rational purpose.

7. The penalties are excessive in relation to purpose

Lifetime GPS monitoring is excessive in relation to the purpose for the punishment. Moreover, the punishment makes little sense when there has been absolutely no individualized determination as to whether the offender poses a danger to the community. Again, here, Nation scored a zero on this test as a danger. In a case similar to Nation's case, the Massachusetts Supreme Court found that the state had violated the prohibition against *ex post facto* laws. The underlying conviction was for a sexual assault against a child younger than fourteen. In a probation violation, a sex offender was made to wear a GPS monitor for the duration of his probation. The

Massachusetts Supreme Court found that the statute retroactively requiring sex offenders to wear GPS devices was excessive to the extent that it applies without exception . . . regardless of any individualized determination of their dangerousness or risk of reoffense." Comm v. Cory, 454 Mass 559, 572, 911 N.E. 2d 187, 197 (Mass. 2009).

Community safety is not a true alternative purpose for this penalty. Such an allegation ignores the history of the sex offender registry, which began as a non-public registration requirement designed to provide law enforcement with information and tools needed in investigating criminal offenses. No evidence has been provided which shows that the original sex offender registry's protocol was insufficient to the extent that it failed to protect a person. Nation, like most sex offenders, knew the victim. Therefore GPS monitoring would likely not be needed to prove or disprove involvement.

Wherever Nation goes he will carry with him SCDPPPS, SLED, and the shame of wearing a "scarlet letter" around his ankle. This weight is far heavier than the historical ball and chain. If Nation does not submit, then he faces indictment, prosecution, and imprisonment. *See* S.C. Code §§23-3-540 (I), (L), (M)(1). There is simply no other context, other than punishment, in which the State seeks to physically attach something to a person, without consent, and without consideration of individual circumstances, that may never be removed without facing severe criminal sanctions. It should also be noted that the dangerousness or likelihood of re-offending is irrelevant in a case where an offender must have lifetime GPS monitoring. The *only* consideration is the crime committed. Where likelihood to reoffend is ignored or irrelevant, the aim of the law is to visit past the past transgression and to assure increased punishment. An isolated set of circumstances is going to cause an ongoing humiliation and control over and interference

with Nation's life. The Court, in Kennedy-Mendoza, recognized that the analysis of these individual factors may point in different directions and, despite that, the intent or effect may be found to be punitive. In this case the factors all point in the same direction and the law is clearly punitive.

2.

The imposition of Lifetime GPS monitoring violates the Constitutional prohibition against Double Jeopardy where the additional penalties imposed at a probation violation hearing continued after appellant had completed the terms of his original sentence

Nation objected to the trial court increasing and expanding his punishment as a violation of double jeopardy. Tr. 19, l. 16 – 20, l. 3. Memorandum at 16; R. *. The Fifth Amendment prohibition against double jeopardy "protects against a second prosecution for the same offense after acquittal...a second prosecution for the same offense after conviction...[a]nd...multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717 (1969). The Fifth Amendment prohibition against double jeopardy is applicable to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 789 (1969).

The South Carolina Constitution extends the same protection. S.C. Const. Art I, § 12; State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997). As discussed in Section 1, *supra*, lifetime GPS monitoring is a penalty. ***This punishment did not exist at the time Nation committed the offense nor at the time when he pleaded guilty.*** The General Assembly created these penalties ***after*** Nation was sentenced.

Even after Nation completes the sentence imposed at his guilty plea this additional penalty will continue. This is a second punishment, an increase in his sentence, imposed after Nation was sentenced and without a jury. Therefore imposition of lifetime GPS monitoring violates the Fifth Amendment prohibition against double jeopardy.

Again, this sanction is criminal and not civil. It raises the specter of State v. Magazine, 302 S.C. 55, 393 S.E.2d 385 (1990) – while under a different double jeopardy "conduct analysis" -- nonetheless made clear that the defendant's conduct was *criminal contempt* and not civil because there was not anything he could do to purge himself of the criminal sanction.

3.

The imposition of Lifetime GPS monitoring violated the constitutional prohibition against cruel and unusual punishment and excessive fines where appellant faced blanket terms of mandatory lifelong punishment via GPS monitoring and the associated time spent charging the device and the fees generated to pay for the device or because it grossly disproportionate and greater punishment than is available for more serious crimes.

Nation objected to lifetime GPS, including associated fees, as cruel and unusual punishment. Tr. 19, l. 6 – 20, l. 3; Memorandum at 17-23; R. *. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., S.C. Const. Am. VIII;[6] S.C. Const. Art. I, §15. The cruel and unusual punishment clause requires that the duration of a sentence not be grossly disproportionate with the severity of the crime. State v. McKnight, 352 S.C. 635, 652, 576 S.E.2d 168, 177 (2003). The same clause also prevents inhuman and barbarous penalties. Stockton v. Leeke, 269 S.C. 459, 462 (1977).

For example, in the seminal case on this issue, imprisonment of twelve to twenty years for falsifying a public document was held to constitute cruel and unusual punishment. Weems v. United States, 217 U.S. 349, 54 L.Ed.2d 793, 30 S.Ct. 544 (1910). Similarly, a sentence of life imprisonment without possibility of parole for the crime of forcible rape has also been held unconstitutional as to juvenile defendants. Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968).

The "proportionality" bedrock of Eighth Amendment jurisprudence is an equally important a principle to "evolving standards of decency" when determining whether a sentence constitutes cruel and unusual punishment. State v. Pittman, 373 S.C. 527,647 S.E.2d 144 (2007) (upholding 30 year sentence for 12-year-old who killed his grandparents with shotgun, then lied about it, after finding other courts had given similar sentences).

"Although there are decisions to the effect that the provision against cruel and unusual punishment is applicable solely to the kind of punishment, and not to its amount or duration, according to the weight of authority, the punishment for a crime, while not cruel

[6] The Eighth Amendment to the United States Constitution is applicable to the states by reason of the Fourteenth Amendment. Robinson v. United States, 370 U.S. 660 (1962).

and unusual in kind, may be so severe as to fall within the meaning of this provision." State v. Kimbrough, 212 S.C. 348, 46 S.E.2d 273, 275 (1948).

Furthermore, the Eighth Amendment prohibition against cruel and unusual punishment should be read as placing a limit on the retributive aspects of punishment. Lifetime GPS is effectively a retributive punishment because it serves hardly any other purpose, and it is so retributive and disproportionate to this sentence that this amounts to cruel and unusual punishment. *See* "The Constitutional Right Against Cruel and Unusual Punishment" by Youngjae Lee, New York University Public Law and Legal Theory Working Papers, March 15, 2005.

The test to determine whether a law is cruel and unusual punishment is found in Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) and Harmelin v. Michigan, 501 U.S. 957 (1991). This test first involves a comparison of the gravity of the offense with the severity of the sentence. Harmelin, at 1005. When this comparison "leads to an inference of gross disproportionality," the court should then compare sentences imposed for the same crime in other jurisdictions to see if that comparison "validate[s] an initial judgment that [the] sentence is grossly disproportionate." Id.

In this case, the State seeks to punish Nation for the rest of his life as a result what would have been consensual sex but for the age difference between Nation and the victim. The only other crime that requires lifetime GPS monitoring is first degree criminal sexual conduct with a minor, a crime that requires a sexual battery on a person under eleven years of age and a crime that the legislature once attempted to have eligible for the death penalty.

In a fifty state survey, approximately ten states have provisions for mandatory lifetime monitoring for sex offenders. However, of those ten states only two have provided

for lifetime monitoring for a crime fitting Nation's conviction: South Carolina and Kansas. S.C. Code §23-3-540; Kansas §22-3717(u) (An inmate sentenced to imprisonment for the crime pursuant to K.S.A. 21-4643, and amendments thereto, for crimes committed on or after July 1, 2006, shall be placed on parole for life and shall not be discharged from supervision by the Kansas parole board. When the board orders the parole of an inmate pursuant to this subsection, the board shall order as a condition of parole that the inmate be electronically monitored for the duration of the inmate's natural life.).

The other states will not require lifetime GPS monitoring in Nation's case. Florida Code § 775.082(3)(a)(4) (lifetime probation or community control[7] for offenders convicted of offense against those 11 or younger); Georgia Code § 42-1-14 (e))Any *sexually dangerous predator* shall be required to wear an electronic monitoring system); Indiana Code § 11-13-3-4(J)(1)(j) (As a condition of parole, the parole board: (1) shall require a parolee who is a *sexually violent predator* under IC 35-38-1-7.5; to wear a monitoring device (as described in IC 35-38-2.5-3) that can transmit information twenty-four (24) hours each day regarding a person's precise location, subject to the amount appropriated to the department for a monitoring program as a condition of parole.); Louisiana Code §§ 14:78.01(d)(3) (lifetime monitoring for offender convicted of aggravated incest on victim younger than 13), 14:81.2(E)(2) (offender convicted of molestation on victim less than 13 years old), 14.81.1(E)(3) (offender convicted of pornography involving victim under 13 years old), 14:43.1(C)(3) (offender convicted of sexual battery on victim less than 13 years old is to be monitored for life); Michigan Code §750.520n (offender convicted of criminal sexual conduct on victim younger than 13 to be monitored for life); Missouri

§217.735 (mandatory lifetime monitoring for offender convicted of prior sex offense and convicted of sex offense against victim less than 14 years old); Montana Code §§ 45-5-503(4) (lifetime monitoring for offender convicted of sex without consent on victim less than 12 years old), 45-5-625 (lifetime monitoring for conviction of sexual abuse of child under 12 where offender is over 18 years old), 45-5-507 (offender to be monitored for life when convicted of incest where victim is 12 years old or younger and offender is over 18 years old), 46-18-222 (a safety valve that allows a judge to suspend mandatory minimums (arguably including lifetime monitoring)); North Carolina §14-27.4A(Offender convicted of sex offense on victim less than 13 years old), 14-208.40 (Offender designated sexually violent predator); Oregon §144.103 (lifetime monitoring for sex offenses involving a victim less than 12 years old (and other circumstances not at issue in this case)); Rhode Island §11-37-8.2.1 (lifetime monitoring for offender convicted of molesting child 12 years old or younger and for persons designated sexually violent predators); Wisconsin Code §301.48(2)(m) (offender can step down to passive tracking after completing sentence), 301.48(6)(providing for petition to be relieved of tracking), 301.48(6)(b)(2)(a person may not petition for relief from tracking if offender committed another crime while being tracked).

In this case, Nation is punished for the rest of his life for missing two appointments with his probation agent. There was not even an allegation of inappropriate conduct. Ordinarily, the most time Nation would be facing would be the suspended portion of his sentence. In this case, three years is all that remains of the original sentence. Instead, at 39 years old Nation is facing the rest of his life with lifetime GPS monitoring. Such a

[7] Florida Code 775.082(3)(a)(4) does not specify use of GPS monitoring.

punishment is grossly disproportionate to the reason the state argues it is imposing this punishment.

However, the inquiry is not completed by simply considering the gravity of the offense as compared with the punishment or comparing the penalties of other jurisdictions. The Eighth Amendment is also violated when the penalty imposed for a particular offense is *greater* than a sentence that could be imposed for a more serious crime. For example, in Oregon, a defendant sentenced to life imprisonment for assault with intent to rape successfully argued that the penalty constituted cruel and unusual punishment when the maximum punishment for statutory or forcible rape was 20 years imprisonment. Cannon v. Gladden, 203 Or. 629, 81 P.2d 233 (1955). Courts in additional states have also held penalties to violate the Eighth Amendment when they were greater than penalties for more serious crimes. See State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963) (holding a penalty of 20 to 30 years for possession of burglary tools was unconstitutional as it provided for a time of imprisonment three times as long as the penalty that could be imposed for the crime of housebreaking); Roberts v. Collins, 404 F.Supp. 119 (D.C. Md. 1975) (finding 20-year sentences for the lesser-included offense of simple assault unconstitutional when the maximum penalty for the more aggravated offense of assault with intent to murder was 15 years); People v. Schueren, 10 Cal.3d 553, 111 Cal. Rptr. 129, 516 P.2d 833 (1973) (finding a term of six months to life, which could exceed 14 years, for assault with a deadly weapon unconstitutional when the charge of assault with a deadly weapon with intent to commit murder carried a term of one to 14 years); Buchanan v. State, 68 S.W.3d 136 (Tex. App. 2001) ("a prohibition against grossly disproportionate punishment survives under the Eighth

Amendment apart from any consideration of whether the punishment assessed is within the range established by the legislature").

In this case CSC with a Minor 2nd degree carries more potential prison time yet does not require lifetime monitoring. SC Code 16-3-653; SC Code 23-3-540(G)(1)(b).

The duration of lifetime electronic monitoring for Nation is so severe as to constitute a violation of the prohibition against cruel and unusual punishment under the Eighth Amendment of the United States Constitution and Article I, § 15 of the South Carolina Constitution. A lifetime of probation is a severe penalty. A lifetime of probation is longer than the legislature allows. S.C. Code Ann. 24-4-440. Given the isolated nature of the incident and the appellant's non-likelihood of reoffending a lifetime punishment is disproportionate to the severity of the crime.

Where the judge has no discretion to hear evidence about offender's individual circumstances, the mandatory lifetime electronic monitoring requirement, with no means to petition the court for release from the monitoring requirement, is unconstitutional as applied to Nation when there is no evidence to suggest that Nation is at a high risk to re-offend, in fact the opposite is true. When the legislature takes away a judge's discretion in such a highly subjective area with a highly burdensome punishment, an unbalanced and unstable justice system results. State v. Kimbrough, 212 S.C. 348, 357 (1948) (Trial judge's sound judgment on sentencing "vitally affects the stability of free institutions).

1) Lifetime GPS monitoring is a punishment that is disproportionate to the severity of the crime.

As established above, lifetime GPS monitoring is a punishment. See Section 1, supra. Lewd

act carries a maximum penalty of fifteen (15) years and a fine in the discretion of the court. S.C. Code § 16-15-140. The General Assembly has limited the maximum amount of time a person can serve on probation to five years in South Carolina. S.C. Code § 24-21-440. Lifetime GPS monitoring puts a person on probation for the rest of their lives without any way to have the necessity of monitoring reviewed or terminated. A punishment that lasts for the rest of the life of the offender, even if not cruel and unusual in kind, is cruel and unusual in duration.

Nation had consensual sex with a fifteen year old female. There has been no determination that Nation now poses a danger to anyone. Nation was screened for sexually violent predator program before being released from prison and it was determined that he did not qualify. S.C. Code § 44-48-30 et seq. As noted above, Nation scored the lowest score possibly on PPP's screening test. Tr. 52, l. 25 – 54, l. 11. Nation is being punished for the rest of his life for having consensual sex, twice, with one fifteen year old female, with whom he was acquainted.

2) Sixty Dollars Per Month In Addition to Other Fees and Fines for the Rest of Nation's life is Cruel and Unusual Punishment.

In a *good* month Nation earns $300.00. He also gets food stamps. Of that money he earns he owes $50.00 for basic supervision fees, and other monies for court costs and assessments. He also has to pay $150.00 a month to rent a trailer that did not even have a properly functioning door because he cannot live with his parents as a result of this conviction. Tr. 12 ll. 21-22. Many months of the year Nation will not earn the full $300.00. He may not even make any money in some months because he does yard work and construction, work that depends on favorable weather conditions and subject to the

whims of the economy. Having to pay at least 18% of his income for the rest of his life for GPS monitoring is Cruel and Unusual Punishment.

4.

Imposition of Lifetime GPS monitoring violates Nation's right to Procedural Due Process of Law where there was no individualized determination of Nation's likelihood to reoffend and no opportunity for a jury trial to determine whether there were facts proven beyond a reasonable doubt so as to allow greater punishment than the original sentence

Nation objected to the trial judge imposing lifetime GPS monitoring as a violation of procedural due process. Tr. 19, l. 16 – 20, l. 3. South Carolina denied Nation procedural due process by imposing additional post-sentence penalties. Procedural Due Process is required where government action deprives a citizen of liberty or property. There are four requirements for compliance with procedural due process "(1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007). Additionally,

> Procedural due process requirements are not technical; no particular form of procedure is necessary. [D]ue process is flexible and calls for such procedural protections as the particular situation demands. The requirements in a particular case depend on the importance of the interest involved and the circumstances under which the deprivation may occur.

Sloan v. S.C. Bd. of Physical Therapy Examr's 370 S.C. 452, 484, 636 S.E.2d 598, 615 (2006). (internal citations omitted). "Where important decisions turn on questions of fact, due process often requires an opportunity to confront and cross-examine adverse

witnesses." Moore v. Moore, 376 S.C. 467, 473, 657 S.E.2d 743, 746 (2008) (internal citations omitted).

When Nation pleaded guilty to the charge of lewd act he did not have notice that South Carolina would impose lifetime GPS monitoring. "[T]he imposition of a sentence which exceeds the defendant's original term of incarceration involves a situation where the defendant has not received notice that the terms of his original sentence would be modified and a greater punishment imposed." McGrier, 378 S.C. at 329, 663 S.E.2d at 20.

Had South Carolina provided notice of these punishments, Nation might have exercised his right to a jury trial. Tr. 27, l. 4 – 30, l. 19. It is difficult to work out a precise calculus of plea agreements but it is entirely possible that Nation could have pleaded guilty to a lesser offense and served the same amount of active time. Lifetime GPS monitoring may have been a very real concern for him. Fundamental fairness and the prohibition of *ex post facto* laws dictate that changing the rules on someone after the process has begun is obviously unfair and unjust.

Now, the probation violation judge has imposed these penalties without affording Nation his constitutional rights. He will not have a jury trial. South Carolina does not require SCDPPPS to follow the same discovery rules that ordinarily apply in a criminal prosecution, State v. Hill, 368 S.C. 649, 630 S.E.2d 274 (2006), or offer the person an opportunity to confront and cross-examine witnesses. State v. Pauling, 371 S.C. 435, 639 S.E.2d 680 (Ct. App. 2006).

Under a much different factual scenario, in Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1 (2003), the Supreme Court considered a procedural due process

challenge to a state sex offender registry. Connecticut required all sex offenders to register and made the registration information available to the public through the internet, regardless of whether the person was currently a danger. Connecticut's sex offender registry, in fact, informed the public that that state had "made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law." Id. 538 U.S. at 5. Retroactive inclusion on Connecticut's registry, however, did not include any GPS monitoring. In fact, in Smith v. Doe, decided the same date as Connecticut Dept. of Public Safety v. Doe, observed that branding, public shaming, humiliation, and banishment "involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community." Smith, 538 U.S. at 98.

Since GPS monitoring involves more than dissemination of information, South Carolina must provide Nation with a jury trial before the state can impose these conditions.

5.

Imposition of lifetime GPS monitoring violates Nation's right to substantive due process where the State acts in an arbitrary and capricious manner in applying lifetime GPS conditions to Nation without any individualized determination of its necessity

Nation objected to the trial judge imposing lifetime GPS monitoring as a violation of substantive due process. Tr. 19, l. 6 – 20, l. 3.; Memorandum at 26-28; R. *.

In order to comply with the requirements of substantive due process, Nation should have a full hearing to determine whether or not he should be subject to lifetime GPS monitoring. Imposing lifetime GPS monitoring implicates myriad fundamental rights and is unconstitutional under the Fourteenth Amendment of the United States Constitution where the Circuit Court Judge -- as Judge Addy noted on this record -- has no discretion to hear and weigh evidence on whether Nation should be deprived of his constitutional rights. S.C. Code § 23-3-540(C).

Substantive due process protects citizens against arbitrary or capricious actions by the government regardless of the procedures used to carry out that action. In Re Care and Treatment of Luckabaugh, 351 S.C. 122, 140 (2002). The Circuit Court judge has no discretion under the South Carolina Code to forgo lifetime GPS monitoring or even order a lesser period of monitoring upon a violation of probation. The judge cannot consider evidence that such drastic measures are unnecessary. Therefore, Nation's right to substantive due process is in issue. See Cleveland Board of Education v. Lafleur, 414 U.S. 632 (1974) (A state may not presume a teacher incapable of continuous service in the classroom merely because she is four or five months pregnant or has a child under age three). As a result of imposition of lifetime GPS monitoring, Nation will be denied rights enumerated below. This process amounts to a complete denial of substantive due process.

No person should be deprived of life, liberty or property without due process of law. U.S. Const. Amend XIV; S.C. Const. Art. I, §3. A violation of substantive due process arises whenever a person is deprived of life, liberty, or property in an arbitrary or capricious manner, regardless of whether or not the process is ostensibly fair.

Luckabaugh, 351 S.C. at 140. Substantive due process "allows a court to examine the constitutionality of the underlying statute as opposed to merely the process by which it is applied to each individual." Id.

States are permitted to infringe on basic liberty interests, but only "in certain narrow circumstances." Kansas v. Hendricks, 521 U.S. 346, 357 (1997)(upholding statute permitting civil commitment of sexually dangerous persons, but only where state provided a full-blown, individualized trial on the issue of future dangerousness).[8] The hallmark of a permissibly narrow infringement in instances where the person's liberty is severely damaged is an individualized assessment to ensure the State does not step beyond what is strictly necessary. See United States v. Loy, 237 F.3d 251, 269 (3d Cir. 2001) (a state may not restrict a sex offenders' parental rights without first determining in an individualized hearing that the parent's custody threatens the child's safety).

There are at least two levels of scrutiny applied to substantive due process analysis. See Luckabaugh, 351 S.C. at 140. To determine which level of scrutiny is applied the Court looks to the nature of the rights infringed by the statute. If the right is a fundamental right then strict scrutiny applies. Id. at 140-141. Strict scrutiny requires a statute to be narrowly tailored to achieve a compelling state interest. Id. If a fundamental right is not implicated then the rational basis test is applied. Id. Under the rational basis test, a statute must be "reasonably designed to accomplish its purpose." Id. (internal quote omitted).

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[8] The civil commitment statute in Hendricks was upheld because of the extreme vigilance Kansas had taken to ensure that it was justified in committing the person under the statute. Hendricks, 521 U.S. at 352-53, 357-58.

Heightened scrutiny should be applied because of the fundamental rights involved, including *the right to travel*, the right to be free from unreasonable searches and seizures, and the *right to privacy*. Additionally, Nation will be required to pay a fee for the imposed monitoring on pain of criminal sanctions. S.C. Code § 23-3-540(K) ("The payment of the cost must be a condition of supervision of the person and a delinquency of two months or more in making payments may operate as a violation of a term or condition of electronic monitoring"). This fee implicates the Eighth Amendment's prohibition against excessive fines. Currently the Code requires that sixty dollars be paid per month by the person being monitored for life. Id. Because failure to pay carries criminal sanctions heightened scrutiny should apply.

In Moore v. Moore, 376 S.C. 467, 657 S.E.2d 743 (2008), a Family Court issued an Order of Protection that was challenged, along with the underlying statute, as violating substantive due process. Moore, 376 S.C. at 469-470. This Court found that a reduction in financial resources and threat of "criminal prosecution or contempt proceedings" resulting from an Order of Protection issued by the Family court raised cognizable due process issues regarding the defendant's constitutionally protected right to property for several reasons. Among them is that a person convicted of criminal domestic violence or having an order of protection against them cannot carry or own a gun which deprives them of certain employment opportunities. Id. at 474. In this case Nation faces a similar predicament.

Because Nation's challenge involves fundamental rights and he makes his substantive due process challenge under the United States Constitution strict scrutiny applies. Luckabaugh, 351 S.C. at 140.

6.

The imposition of lifetime GPS monitoring violated appellant's right to substantive due process because it is overly broad where the State acted in an arbitrary and capricious manner in applying lifetime GPS conditions to appellant without any individualized determination of its necessity.

Nation objected to the trial judge imposing lifetime GPS monitoring as a violation of substantive due process. Tr. 19, l. 16 – 20, l. 3; Memorandum at 28-29; R. *. Adding Lifetime GPS Monitoring to the terms of Nation's supervision is overly broad because "it involves a greater deprivation of liberty than is necessary to protect the public and prevent recidivism." State v. Allen, 370 S.C. 88, 97-98 634 S.E.2d 653, 657 (2006) (citing U.S. v. Paul, 274 F.3d 155, 164-167 (5th Cir 2001)). As discussed in Section I, supra, the primary effects are punitive and any residual effects regarding community safety are substantially outweighed by the enormous cost in liberty to Nation, particularly where there has been no individualized determination concerning Nation's risk of recidivism.

Probation conditions have generally been upheld where they are "related to the crime for which the offender was convicted, [are] intended to prevent future criminal conduct, or bear[] a reasonable relationship to offender's rehabilitation." Allen, 370 S.C. at 99. First, the condition of GPS monitoring is only tangentially related to the crime. This is because Nation and his family had close ties to the victim. While the claim that a GPS monitor would protect a stranger from attack is dubious, though it might help identify a perpetrator, a GPS monitor certainly would not matter if the attack was to be made against someone familiar to the attacker. Second, though the GPS device is

intended to be both a general and specific deterrent such is unnecessary without a determination, given weight by exercise of discretion, of a likelihood to reoffend. Because Nation does not pose a likelihood to reoffend, there is no reasonable relationship between GPS monitoring for the rest of his life and deterrence.

In this case, these punishments are not simply running with probation for a period of five years or less, they are to extend out for the rest of Nation's life. Conditions of probation which extend past the period of probation in perpetuity have been held unenforceable. *Id.* at 99 (citing People v. Miller, 182 Mich. App. 711, 452 N.W.2d 890 (1990). Lifetime GPS monitoring imposed beyond the period of probation without any evidence on the effect of recidivism amounts to overbreadth and is unconstitutional.

7.

The imposition of lifetime GPS monitoring violated appellant's state Constitutional right to privacy because it is a highly intrusive government invasion into Nation's personal life.

Nation objected to the trial judge's imposing lifetime GPS monitoring as a violation of his right to privacy. Tr. 19, l. 16 – 20, l. 3; Memorandum at 29-31; R. *. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. State v. Forrester, 343 S.C. 637, 644, 541, S.E.2d 837 (2000). South Carolina's Constitution not only safeguards a person's right to be free from unreasonable search and seizure but it also places a higher level of protection of privacy. The South Carolina Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *and unreasonable invasions of privacy* shall not be violated." Id. at 644 (emphasis in original). The people in South

Carolina have "indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution..." Id. South Carolina and other states with a right to privacy provision "imbedded in the search and seizure provision of their constitutions have held such a provision creates a distinct privacy right that applies both within and outside the search and seizure context." Id. at 644. South Carolina's Constitution "favors an interpretation offering a higher level of privacy protection than the Fourth Amendment." Id. at 645.

The drafters of South Carolina's right to privacy provision "were principally concerned with the emergence of new electronic technologies that increased the government's ability to conduct searches." Id. at 647. The Court in Forrester, also noted that the drafters also intended for this provision to be interpreted and applied in more than just the electronic surveillance context. The drafters knew that the provision operated separately from the Fourth Amendment. Id.

If this Court forces Nation to comply with lifetime GPS monitoring, then he will be subjected to constant electronic surveillance when he is traveling and when he is at home. Law enforcement will be able to determine when Nation is at home and possibly more, depending on the accuracy of the device. They may be able to determine when Nation is watching television, in the kitchen making a meal, in bed asleep, or even in the bathroom. This degree of electronic intrusion into Nation's home is prohibited without a warrant.

This type of search is more intrusive and less reasonable than conduct prohibited by Kyllo v. United States, 533 U.S. 27 (2001). In Kyllo law enforcement was suspicious that Kyllo was growing marijuana in his home. Law enforcement used a thermal imager

to scan the house. The scan produced a "crude visual image of heat being radiated from the house...it did not show any people or activity within the walls of the structure." Id. at 30. The United States Supreme Court noted that "the device cannot penetrate walls or windows to reveal conversations or human activities" and "no intimate details of the home were observed." Id. If GPS monitoring is imposed on Nation the GPS monitor will penetrate the walls of his home once a minute, every hour of the day. SC Code 23-3-540(P). If the device is as precise as ordinary GPS the intrusion will allow observation intimate human activities.

Such surveillance contravenes the Fourth Amendment of the United States Constitution which "at the very core...stands for the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Id.* at 31 (citing Silverman v. United States, 365 U.S. 505, 511 (1961)).

The State may contest that there is no search of the home in this case. Such a position would be untenable in light of recent United States Supreme Court precedent. Attaching a monitoring device to Nation means "[t]he Government physically occupie[s] [him] for the purpose of obtaining information." U.S. v. Jones, ___ U.S. ___, 132 S.Ct. 945, 949 (2012). "[U]se of that device to monitor [Nation's] movements, constitutes a 'search'" within the meaning of the Fourth Amendment. Id. The GPS monitor gives law enforcement a "crude visual image" but this crude visual image *is* providing information about the inside of Nation's home. The thermal imager search prohibited in Kyllo was cruder and less intrusive, than the GPS monitoring that the government wants to use to spy on Nation.

This type of search is not a reasonable search it is an ongoing search carried out, supposedly, in the course of investigating crimes. However, Nation is not a suspect in any crime (sex offense related or not) and even when there are no investigations ongoing Nation is subject to constant monitoring. Monitoring Nation's whereabouts twenty four hours a day for the rest of his life does not fall within any exception to the warrant requirement. There is no consent, no exigent circumstances, and no special needs.

The mandatory order imposing lifetime GPS monitoring on appellant pursuant to S.C. Code § 23-3-540(C) is aimed at protecting against future criminal conduct but not based on specific evidence of a present risk of criminal conduct and, therefore, violates appellant's right to protection against unreasonable, warrantless search and seizure under the Fourth Amendment to the United States Constitution and Article I, § 10 of the South Carolina Constitution.

Lifetime GPS monitoring of Nation pursuant to § 23-3-540(C) violates his Fourth Amendment right to be free from unreasonable searches and seizures. The State will seize Nation 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 Nation 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 Fourth Amendment does not

allow law enforcement to use search and seizure in this way. The United States 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.

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. It targets all crime that might happen in the future. 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 searching and seizing Nation 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.

In addition to the ongoing search, the State will repeatedly subject Nation to unwanted touching. The GPS monitor must be affixed to his leg. He will have to report periodically for the rest of his life for the device to be inspected and maintained.

8.

The imposition of lifetime GPS monitoring violated the Equal Protection Clauses of the United States and South Carolina Constitutions because it treats persons committed similar conduct differently, and in this case much more harshly for a lifetime.

Nation objected to the trial judge imposing GPS monitoring as a violation of equal protection. Tr. 19, l. 16 – 20, l. 3; Memorandum at 34-37; R. *. S.C. Code 23-3-540(C) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by arbitrarily and unreasonably classifying similarly situated people convicted of sex offenses in order to impose lifetime GPS monitoring upon them. The statute does not classify sex offenders by the level or risk for re-offending they pose. Rather, it classifies them based on the crime they are convicted of, essentially ignoring the possibility that on the same facts a person could be convicted for two or more different crimes. Nation's case is a good example of such a scenario where Nation was charged with second degree criminal sexual conduct with a minor and lewd act. Had Nation presently known that lifetime GPS monitoring for lewd act might apply to him years later he might have pled guilty to the criminal sexual conduct charge, which does not mandate lifetime GPS monitoring. He might have negotiated a plea to a lesser charge. Or, he may have decided to go to trial. See State v. Lawton, 382 S.C. 122, 128, 675 S.E.2d 454, 457 (Ct. App. 2009) (prejudice results when there is a reasonable probability an accused might have made different decision about how to exercise a fundamental right).

The equal protection clause of the United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of its laws."

U.S. Const. Am. XIV; See also S.C. Const. Art. I, §3. Where a fundamental right is at stake strict scrutiny should be used in analyzing whether a person is denied equal protection under the law. Hendrix v. Taylor, 353 S.C. 542, 549, 579 S.E.2d 320, 323 (2003). Equal protection under the law requires that the law be equally applied to people who are similarly situated. Town of Iva ex rel. Zoning Administr. v Holley, 374 S.C. 537, 649 S.E.2d 108 (Ct. App. 2007). A statute cannot classify people arbitrarily or unreasonably. Id. The statute must justify treating similarly situated people differently by its purpose; it "must rest this difference [in treatment] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Id at 540-541.

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 first degree criminal sexual conduct with a minor or lewd act and (2) those that commit any other sex offense. *See id.* For people, such as Nation, 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).

Strict scrutiny will be applied to a statute challenged under the Equal Protection Clause if a suspect class is implicated or a fundamental right is abridged. City of Beaufort v. Holcombe, 369 S.C. 643, 648, 632 S.E.2d 894, 898 (Ct. App. 2006). If no suspect class is implicated or a fundamental right is not abridged, then the rational basis test is applied. Id.

As discussed throughout this brief, lifetime GPS monitoring under 23-3-540(C) infringes on fundamental rights and therefore strict scrutiny applies. The classification by § 23-3-540(C) results in loss of fundamental liberty. The lifetime GPS monitoring statute, §23-3-540(C), fails to meet strict scrutiny because it is not narrowly tailored to achieve the statute's purpose of protecting the public from sex offenders who pose a high risk of re-offending. Instead, it allows for broad imposition of lifetime GPS monitoring on all offenders

Moreover, Section 23-3-540(C) does not even pass the rational basis test under an equal protection analysis. The rational basis test requires that a statute's classification "(1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis." City of Beaufort v. Holcombe, 369 S.C. at 648. The classification of sex offenders by § 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 for which the person was convicted of or adjudicated. S.C. Code §23-3-540(A) through (F).

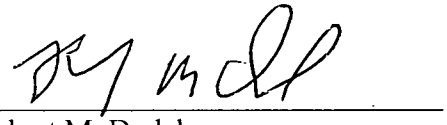
Let us take two people: person A and person B. A has been convicted of Lewd Act. B has been convicted of Criminal Sexual Conduct with a Minor in the 2nd degree. Both A and B pose a low risk of re-offending. The statutory scheme of §23-3-540(C) will subject A to the mandatory procedure; and A will have lifetime GPS monitoring automatically imposed regardless of the level of risk A poses for re-offending. On the other hand, B will be subjected to the discretionary procedure, allowing the trial court to use its discretion and not impose lifetime GPS monitoring on B because B poses a low

risk of re-offending. Thus, similarly situated people are treated differently. It isn't the wording of the statute that makes the people alike or different -- it's the underlying facts that matter. Section 23-3-540(C) classifies sex offenders based on their underlying offense. The result is that § 23-3-540(C) requires trial courts use different procedures and impose different requirements on sex offenders who pose the same level of risk. That is a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. By not creating a special evidence based finding of likelihood to reoffend or even allowing the judge to hear evidence on lifetime GPS Monitoring the Legislature has created an arbitrary scheme that violates Nation's right to equal protection. This scenario is exactly what happened to Nation. The state originally charged him with both second degree criminal sexual conduct with a minor and lewd act. He pleaded guilty to lewd act. Had he plead guilty to the other charge, this issue would never have arisen.

CONCLUSION

The Court should respectfully hold that imposition of lifetime GPS violates Nation's rights in the above discussed ways and it respectfully should be held unconstitutional.

Respectfully submitted,



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ATTORNEYS FOR APPELLANT.

This 27th day of April, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenwood County
Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTHONY NATION,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Entire probation revocation hearing transcript;
(2) Memorandum in opposition to revocation of probation and Motion to declare portions of the sex offender registry unconstitutional;
(3) Appendix in memorandum;
(4) Probation violation warrant;
(5) Defendant's Exhibits 1-3

I certify that this designation contains no matter which is irrelevant to this appeal.

April 27th, 2012

Robert M. Dudek
Chief Appellate Defender

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STATE OF SOUTH CAROLINA

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Appeal from Greenwood County

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THE STATE,

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at PO Box 50666, Columbia, SC 29250, this 27th day of April, 2012.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of April, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: May 16, 2021.