STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenwood County
D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES CARRIER,

APPELLANT

APPELLATE CASE NO. 2012-212777

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

In October of 2009, the Greenwood County Grand Jury indicted Appellant for lewd act, indictment #2009-GS-24-1146. On May 16, 2012, Appellant appeared before the Honorable J. Cordell Maddox and moved for a speedy trial. Attorney E. Charles Grose Jr. represented Appellant. Attorney Elizabeth P. White was present for the State. In a written order Judge Maddox ordered that the trial be called in June. (R. p. **). In subsequent indictment on June 8, 2012, the Greenwood County Grand Jury again indicted Appellant for lewd act, indictment 2012-GS- 24- 1166.

On June 18, 2012, the State called the case to trial on the 2012 indictment before the Honorable D. Garrison Hill. Attorney E. Charles Grose Jr. again represented Appellant. Attorneys Elizabeth P. White and Andrew M. Hodges prosecuted the case. After the judge heard numerous motions in the case, both the State and the Defense agreed to continue the case to the July 16, 2012 term of court.

On July 17, 2012, the case was again called for trial. Attorney E. Charles Grose Jr. again represented Appellant at trial. Attorneys Andrew M. Hodges and Matt Swilley prosecuted the case. The jury returned a verdict of guilty and Judge Hill sentenced Appellant to 15 years. On July 30, 2012, Appellant filed a motion for new trial or in the alternative to reconsider the sentence. (R. p. **). On August 9, 2012, Judge Hill, in a written order, denied the motion. (R. p. **). A timely notice of intent to appeal was served on August 16, 2012. The appeal was filed in the original jurisdiction of the South Carolina Supreme Court based on a constitutional challenge to S.C. Code §23-3-540. This appeal follows.

STATEMENT OF FACTS

On March 31, 2009, the mother of the minor contacted the Greenwood County Sheriff's Office. Deputy Robert A. Grogan responded. The minor alleged that Appellant had sexually abused her six to seven years earlier at the home of her neighbor, Mariah Freel. Six to seven years earlier would have placed the incident date(s) in 2002 or 2003. The minor was sixteen when she talked to Grogan and would have been nine or ten at the time of the alleged incident(s). (Pre-trial hearing Tr. June18-19, 2012, pp.82-89).

Grogan filed an incident report and turned the investigation over to Investigator Chris Hadden[1]. Hadden arranged for Jessica Bell to interview the minor at The Child's Place, which is the statutorily mandated child advocacy center[2] and a division of the Sexual Trauma Center. The interview took place on April 14, 2009. The minor's allegation to Bell about the time and place of the incident was consistent with what she had told Grogan. The interviewers and counselors at the Sexual Trauma Center are part of an interdisciplinary team, including law enforcement and solicitors, organized to prosecute child sexual abuse cases. (Pre-trial hearing Tr. June 18-19, 2012, pp. 90-119).

In May of 2009, Hadden obtained an arrest warrant charging Appellant with committing a lewd act on a minor. Based on the minor's allegations, the warrant alleged the incident took place on or about January 1, 2003. Hadden arrested Appellant on June 23, 2009. (Arrest Warrant, R. p. **).

On October 2, 2009, the Greenwood County Grand Jury indicted Appellant for lewd act, indictment number 2009-GS-24-1146 [2009 indictment]. Consistent with the

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[1] Hadden's name is spelled "Haden" in subsequent transcripts and on the indictments.

[2] See S.C. Code §63-11-310.

arrest warrant, this indictment alleged the incident occurred on or about January 1, 2003. (2009 Indictment R. p. **)

On May 16, 2012, Appellant moved before the Honorable Cordell Maddox for a speedy trial. (May 16, 2012, Tr. pp. 1-7). Judge Maddox ordered the charges found in the 2009 indictment to be called to trial before a jury on June 18, 2012. (Speedy trial Order, R. p. **).

On June 5, 2012, in an e-mail to trial counsel, Assistant Solicitor Elizabeth P. White wrote:

> I am having Mr. Carrier re-indicted for Lewd Act because there is an error in the original indictment. It should read "between the 1st day of January 1999 and the 31st day of December 2003."

(Defense Exhibit #4, R. p. **). At the time, White offered no other explanation for the expanded time frame. On June 8, 2012, the Greenwood County Grand Jury again indicted Appellant for lewd act, indictment number 2012-GS-24-1166 [2012 indictment]. (2012 indictment. R. p. **). The 2012 indictment expands the time frame from on or about January 1, 2003, alleged in the 2009 indictment, to between the 1st of January 1999, and the 31st day of December 2003. (2012 indictment, R. p. **).

The assistant solicitor sent another e-mail on June 13, 2012 stating:

> I found out that the victim has been seeing a counselor at Sexual Trauma. I intend to have the counselor testify. She won't/can't release her records without a Court order, so I propose having her come over some time [sic] this week so Judge Hughston can order her to produce her file. Thoughts?

(Defense Exhibit #4, R. p. **).

On June 14, 2012, the Honorable Thomas L. Hughston, Jr. signed an order requiring disclosure of the counselor records. (Judge Hughston order, R. p. **). The records revealed that the assistant solicitor and the counselor, Susan Bentley, of the Sexual Trauma Center, had been preparing for trial for over a year. On July 18, 2011, Bentley "agreed to go to court" with the child and called the assistant solicitor. (Defendant's Exhibit #15, R. p. **). The records also revealed allegations by the minor that she had been sexually abused by one of her mother's boyfriends. (Defendant's Exhibit #13, R. p. *).

The State called Appellant's case to trial on June 16, 2012, and sought to proceed on the 2012 indictment. Appellant moved to be tried on the 2009 indictment. (Tr. June 18-19, 2012, Tr. pp. 48-58; 196 – 217). Appellant submitted a written motion to try defendant on the original indictment. (Defendant's Exhibit #1, R. p.**). The trial judge ultimately continued Appellant's case so Appellant could investigate the minor's allegations that she was sexually abused by one of her mother's boyfriends, Kenneth Shamburg. (Tr. p. 218, lines 8-22).

On July 17, 2012, Appellant moved to quash the 2012 indictment as defective based on the fact that the State failed to establish the identity of the witness who testified before the Grand Jury. Appellant again moved to be tried on the 2009 indictment. (July 17, 2012, Tr. pp. 5-12). The trial judge denied the motion and allowed the State to proceed on the 2012 indictment. (July 17, 2012 Tr. p. 11, line 22 – p. 12, lines 1-13).

The jury found Appellant guilty on July 18, 2012. The Court immediately convened a sentencing hearing and sentenced Carrier to fifteen years imprisonment and ordered electronic monitoring, GPS, as prescribed by statute. (July 17, 2012, Tr. p. 182,

lines 1-6). Appellant informed the Court he would take the ten days allowed by Rule 29, SCRCrimP to make his new trial motions. In a written motion filed July 30, 2012, Appellant moved for a new trial or in the alternative moved for reconsideration of the sentence. (Motion for New Trial, R. p. **). Appellant specifically renewed the objection to the defective indictment. (Motion for New Trial pp. 4-8; R. pp. **). Appellant argued that the lifetime GPS monitoring requirement found in S.C. Code §23-3-540 was unconstitutional. (Motion for New Trial pp. 22-30; R. pp. **). The Appellant also renewed the motion for a mistrial made during trial when the State asked a witness if the minor approached the witness "pertaining to the incidents with Mr. Carrier" in violation of the restriction to time and place exception to the hearsay rule found in Rule 801(d)(1)(D), S.C.R.E. (Motion for New Trial pp. 12-13; R. pp. **). In a written order signed August 9, 2012, Judge Hill denied the motion. (Order Denying Motion for New Trial; R. p. **).

ARGUMENT

1. The trial judge erred in refusing to quash a subsequent defective indictment for lewd act, true-billed by the Greenwood County Grand Jury on June 8, 2012, when the State failed to establish the identity of the witness testifying before the Grand Jury in 2012.

Prior to trial on July 17, 2012, and prior to swearing the jury[3], Appellant moved to quash the 2012 lewd act indictment as defective and instead proceed on the 2009 lewd act indictment. (July 17, 2012, Tr. p. 5- 11). Appellant argued that the 2012 indictment was defective because the witness listed on the 2012 indictment, Chris Haden, formerly of the Greenwood County Sheriff's Department, was no longer with the Sheriff's Department, was not in the State of South Carolina on June 8, 2012, when the indictment was presented to the Grand Jury and could not have been the witness who testified before the Grand Jury. (July 17, 2012, Tr. p. 6, lines 2-12; p. 10, lines 18-25). The State did not argue that Haden testified before the Grand Jury on June 8, 2012. Instead, the State first responded asking, "Is there case law that says that the person who testified in front of the Grand Jury has to be listed on the indictment? I wasn't in the Grand Jury either but obviously probable cause was presented to the Grand Jury because they issued an indictment." (July 17, 2012, Tr. p. 6, lines 13-17). The State then again argued, "Your Honor, the indictment has been true billed, it was sent to the Grand Jury. Somebody had to present testimony that convinced the Grand Jury that there was probable cause in this case. I don't see where, I just don't see where it is deficient." (July 17, 2012, Tr. p. 11 lines 1-5).

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[3] "Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards." S.C. Code §17-19-90. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); Bayly v. State, 397 S.C. 290, 300, (fn. 6), 724 S.E.2d 182, 187 (fn. 6) (2012) ("Gentry merely concerned the appropriate time to raise a challenge to the sufficiency of an indictment.").

During the hearing Appellant and the trial judge specifically discussed State v. Capps, 276 S.C. 59, 275 S.E.2d 872 (1981). (July 17, 2012, Tr. p. 8, line 14 – p. 9, lines 1-7). The judge, however, denied the motion stating:

> Mr. Grose, I share with you your concerns about the current status of the Grand Jury practice in our State. However, I don't know any authority that would require me to quash the indictment based on the identity of the witness. The indictment itself sets forth the allegations for listing of a witness on the form, on the back of the indictment. If that is accurate, without any further showing would not be sufficient to render the indictment defective. Of course, this all could be avoided if we did have recordings made of the Grand jury proceedings. Certainly the State Grand Jury, I believe does that and I know the Federal Courts do it. And there have been many assaults on the Grand jury system in circuit court other than Justice Lewis' dissent, there has been no holding for amendment to the code that would allow me to grant your motion which I think is a serious motion and well thought out. And I respectfully deny it.

July 17, 2012, Tr. p. 11, line 20 – p. 10 lines 1-13). The trial judge erred. The defective indictment constitutes an error of law requiring reversal.

"No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed." S.C. Const. Art. I, §11. *See also* S.C. Code §17-19-10. Pursuant to Rule 3(c), SCRCrimP, the Solicitor's Office is responsible for preparing indictments for presentment to the Grand Jury. During the motion to quash the indictment as defective the State offered no evidence of the ordinary Grand Jury process or of the identity of the witness actually testifying before the Grand Jury.

In State v. Capps, 276 S.C. 59, 62, 275 S.E.2d 872, 873 (1981) the South Carolina Supreme Court wrote, "The practice of using a solicitor or other officer of the State, as the sole witness before the grand jury, to provide only a summary of the evidence could be abused and we strongly suggest it be abandoned unless no alternative is available." While the majority discouraged the practice of using the solicitor or other officer of the

State as the sole witness before the Grand Jury, the majority found no error in the trial judge's refusal to quash the indictment under those circumstances. In his dissent, however, Chief Justice Lewis wrote:

> Therefore, I would hold that as a general rule an attorney performing a prosecutorial function may not additionally appear before the grand jury as a witness. While compelling reasons may dictate a rare exception be allowed to this general rule, I note no such showing in this case. The normal effort required in calling witnesses is insufficient. Since such evidence was the sole testimony in this case, it follows that the indictment should have been quashed. See U. S. v. Treadway, 445 F.Supp. 959.

Capps, 276 S.C. at 67, 275 S.E.2d at 875-876.

In State v. Anderson, 312 S.C. 185, 187, 439 S.E.2d 835, 836 (1993), the South Carolina Supreme Court revisited the State's continued practice of using the solicitor as the sole witness before the Grand Jury and held, "Because of the uncertainty and confusion that is taking place at all levels of the judiciary regarding this issue, we take this opportunity to explicitly prohibit the practice of prosecutors appearing as the sole witness before the grand jury." In order to comply with the requirement of Anderson and assure that the solicitor is not the sole witness before the Grand Jury, the State must candidly disclose the identity of the witnesses testifying before the Grand Jury.

In State v. Thompson, 305 S.C. 496, 501-502, 409 S.E.2d 420, 424 (Ct. App. 1991) (internal citations omitted) (emphasis original), the South Carolina Court of Appeals wrote:

> Proceedings before the grand jury are presumed to be regular unless there is clear evidence to the contrary. Speculation about "potential" abuse of grand jury proceedings cannot substitute for evidence of *actual* abuse as grounds for quashing an otherwise lawful indictment. In saying this, we yield to no one in our zeal to insure that the grand jury continues to perform its historic function as a

> shield between the accused and abuse of the prosecutorial power of the State. The courts of South Carolina stand guard to see that the grand jury is not reduced to a "mere plaything of prosecutors."

The 2012 indictment is irregular on its face. It is undisputed that Investigator Haden was not in South Carolina and did not testify during the presentment of the 2012 indictment. At trial, the State contended it did not have to present any evidence whatsoever about the procedures surrounding the Grand Jury presentment or the identity of the testifying witness.[4] This position is contrary the settled practice of taking testimony during an evidentiary hearing. *E.g.* State v. Grim, 341 S.C. 63, 67, 533 S.E.2d 329, 330-31 (2000) ("The court may conduct an evidentiary hearing to determine whether the indictment was true billed; or resubmit the indictment for grand jury consideration; or effect a waiver of presentment of the indictment to the grand jury and, again, entertain the defendant's plea; or simply allow withdrawal of the plea and proceed anew."); Pringle v. State, 287 S.C. 409, 411, 339 S.E.2d 127, 128 (1986) ("Here, there was testimony by the foreman of the grand jury that indicted petitioner that the regular procedure was to have the clerk publish the indictment in open court after the grand jury returned a true bill."); State v. Bultron, 318 S.C. 323, 329, 457 S.E.2d 616, 619-20 (Ct. App. 1995) ("During the hearing on [the] motion to quash the subject indictment, the State presented testimony from a Greenville County investigator whose employment duties include serving as

[4] The State could not claim surprise by this motion. Although the June 2012 motion to be tried on the 2009 indictment centered on the State's Brady violations and untimely disclosure of the changed timeframe of the allegations, defense counsel called attention to the impossibility that Haden was the testifying witness. (June18-19 2012 Tr. pp. 53-54). The prosecution, therefore, had a month to prepare for this motion.

'docket coordinator' for the grand jury and assisting the grand jury in every meeting. The investigator testified the grand jury's regular procedure was to deliberate on the indictments presented to them and then publish their findings in open court."). The State, accordingly, could have called as a witness the foreperson of the Grand Jury or the person who actually testified before the Grand Jury.

Because Investigator Haden did not testify before the Grand Jury, the 2012 indictment is irregular on its face, revealing "*actual* abuse" of the Grand Jury process. Thompson, 305 S.C. at 502, 409 S.E.2d at 424 (emphasis original). The State's complete failure to present any evidence of what actually transpired during the Grand Jury presentment is fatal. See Anderson v. State, 338 S.C. 629, 633, 527 S.E.2d 398, 400 (Ct. App. 2000) ("[T]he document bears no indications of whether the grand jury 'true billed' or 'no billed' it. Nor do we have any additional evidence before us . . . as to what action the grand jury took."). The trial judge erred in refusing to quash the defective 2012 indictment. The error requires reversal.

2. The trial judge erred in refusing to find the requirement of lifetime GPS monitoring unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

At sentencing the State noted that S.C. Code §23-3-540 requires mandatory lifetime GPS monitoring. (July 17, 2012, Tr. p. 175, lines 5-18). Appellant objected to imposing this condition. (July 17, 2012, Tr. pp. 178-179). The trial judge ordered lifetime monitoring. In a written motion filed July 30, 2012, Appellant moved for a new trial or in the alternative moved for reconsideration of the sentence. (Motion for New Trial, R. p. **). Appellant specifically argued that the lifetime GPS monitoring

requirement found in S.C. Code §23-3-540 was unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.. (Motion for New Trial pp. 22-30; R. pp. **). In a written order signed August 9, 2012, the trial judge denied the motion. (Order Denying Motion for New Trial; R. p. **). The trial judge erred.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. U.S. Const., S.C. Const. Am. VIII Art. I, §15. The Eighth Amendment to the United States Constitution is applicable to the states by reason of the Fourteenth Amendment. Robinson v. U.S., 370 U.S. 660, 8 L.Ed.2d 758, 82 S.Ct. 1417 (1962). While the prohibitions of the Eighth Amendment are aimed at inhuman and barbarous penalties such as torture, the duration of punishment also falls within the purview of the amendment when the duration of imprisonment is so disproportionate to the offense that it shocks the moral sense of the community. See Am. Jur. 2d, Criminal Law, §§ 612, 614.

For example, in the seminal case on this issue, imprisonment of 12 to 20 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 equally important a principle as "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-yr

sentence for 12-year-old who killed his grandparents with shotgun, then lied about it, after finding other courts had given similar sentences).

In Stockton v. Leeke, 269 S.C. 459, 462, 237 S.E.2d 896, 897 (1977) the South Carolina Supreme Court found that a ten year minimum sentence for safe cracking did not violate the prohibition of cruel and unusual punishment. The Court wrote, "Where, as here, we are considering the constitutionality of a punishment in the abstract, we are guided by two principles. First, the historical principle that the cruel and unusual punishment clause is designed to prevent inhuman and barbarous treatment. Second, that the sentence must not be grossly out of proportion with the severity of the crime. State v. Gamble, 249 S.C. 605, 155 S.E.2d 916 (1967), cert. den. 390 U.S. 927, 88 S.Ct. 862, 19 L.Ed.2d 988; Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)." Id. 269 S.C. at 462, 237 S.E.2d at 897.

"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 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).

S.C. Code §23-3-540 (A), the challenged statute in the present case, provides:

> Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or criminal sexual conduct with a minor in the third degree, pursuant to Section 16-3-655(C), the court must order that the person, upon release from incarceration, confinement, commitment, institutionalization, or when placed under the supervision of the Department of Probation, Parole and Pardon Services shall be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

The 2012 amendment to the statute substituted criminal sexual conduct with a minor third degree for lewd act. At the time of sentencing of Appellant and pursuant to S.C. Code §23-3-540(H), the monitoring requirement was for life with no means to petition the Court for removal.

In State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) a majority of the South Carolina Supreme Court held that a statutory provision that mandates lifetime satellite monitoring of certain child sex offenders without judicial review related to an assessment of an individual's risk of reoffending violates the Due Process Clause. The Court wrote:

> Although we find the initial mandatory imposition of satellite monitoring under section 23–3–540(C) constitutional, we believe the final sentence of section 23– 3–540(H) is unconstitutional, for it precludes judicial review for persons convicted of CSC–First or lewd act on a minor. [FN6] The complete absence of any opportunity for judicial review to assess a risk of re-offending, which is beyond the norm of Jessica's law, is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending.

Dykes, 403 S.C. at 508, 744 S.E.2d at 510.

The challenge in Dykes was based on a violation of Due Process. As part of the Due Process analysis the majority wrote:

> Our rejection of Dykes' fundamental right argument flows in part from the premise that satellite monitoring is predominantly civil. See Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (noting that whether a statute is criminal or civil primarily is a question of statutory construction). Where, as here, the legislature deems a statutory scheme civil, "only the clearest proof" will transform a civil regulatory scheme into that which imposes a criminal penalty. Id. at 92, 123 S.Ct. 1140 (quoting Hudson v. United States, 522 U.S. 93, 100, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997)) (internal quotations omitted).

Dykes, 403 S.C. at 506, 744 S.E.2d at 509.

The challenge to the statute in the present case is based on a violation of the Eighth Amendment prohibition against cruel and unusual punishment. The South Carolina

Supreme Court addressed a similar challenge as applied to a juvenile in In re Justin B., 747 S.E.2d 774 (2013) where the Court found that while the Dykes opinion now required ten year judicial review of the monitoring requirement, the statute was civil in nature and not a violation of the Eighth Amendment. The Court wrote:

> Application of the Mendoza–Martinez factors demonstrates that in addition to the fact that the General Assembly intended section 23–3–540 as a civil scheme for the protection of the public, the statute is also not so punitive in effect as to negate the intention to deem it civil. See, e.g., Kansas v. Hendricks, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) ("[W]e will reject the legislature's manifest intent only where a party challenging the statute provides the'clearest proof' that the 'statutory scheme is so punitive in purpose or effect as to negate [the State's] intention' to deem it 'civil.' ") (citation omitted).

In re Justin B., 747 S.E.2d at 781-782.

The record in the present case provides the Court with additional information about the reality of electronic monitoring, as applied in South Carolina, which demonstrates that the statute, as applied, is so punitive in effect as to negate the State's intention to deem it civil, rendering the statute unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

Appellant filed an Appendix to the written motion for new trial or in the alternative for reconsideration of the sentence. (Appendix to Motion for new trial; R. p. **). Included in the Appendix was a transcript from a probation violation hearing in State v. Anthony Nation. (Appendix pp 1-14; R. pp **). Appellant relied on portions of that probation violation transcript in the motion for new trial.[5] (Motion for new trial p. 23, R. p.**).

[5] "A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records." Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984); Rule 201, SCRE.

The probation agent in the Nation case testified that the electronic monitoring device is plastic, would fit in the palm of your hand and is attached to the ankle with a two inch strap. (App. p. 8, lines 6-10; R. p. **). The batteries in the device require charging on average of three hours per day but longer as the batteries age. (App. p. 6, line 19 – p. 7, p. 8 lines 1-5, R. p. **). In order to charge the device, the individual being monitored must plug himself into an electrical outlet for at least three hours everyday. (App. p. 7, lines 1-5). The charging schedule is established by the Probation Department. (App. p. 7, lines 22-25). The State charges the offender $20.00 per week for the GPS monitoring. (App. pp. 8, 12-13). Twenty dollars a week is $1,040.00 every year. If Appellant lives for thirty years after completing his sentence, then he will owe South Carolina $31,200.00 for this electronic monitoring.

The realities of electronic monitoring, as discussed above, were not presented to this Court in In re Justin B., 747 S.E.2d 774 (2013). Appellant respectfully asks this Court to revisit the analysis used in In re Justin B in light of the punitive realities of electronic monitoring now before this Court.

In finding that the South Carolina law requiring electronic monitoring of certain juveniles was a civil remedy this Court in In re Justin B relied on Smith v. Doe, 538 U.S. 84 (2003) and Doe v. Bredesen, 507 F.3d 998 (6th Cir. 2007). In Smith v. Doe, 538 U.S. 84 (2003), the United States Supreme Court, relying on the factors noted in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), found that the Alaska Sex Offender Registry Act requiring sex offenders, convicted prior to the Act's passage, to register with law enforcement was not an ex post facto violation because the Act was a civil remedy. The Smith v. Doe case does not address electronic monitoring. The Court noted, "The Alaska

statute, on its face, does not require these updates to be made in person." 538 U.S. at 101. The Court reserved for another day "[w]hether other constitutional objections can be raised to a mandatory reporting requirement, and how those questions might be resolved." Id. at 102.

Interestingly, the Alaska Supreme Court later found that the Act violates the protection against ex post facto laws afforded by the Alaska Constitution. Doe v. State, 189 P.3d 999 (Alaska, 2008). In Doe v. State, 189 P.3d 999, 1018 (Alaska 2008) the Alaska Supreme court wrote:

> Summing up the effects under the seven factors, we conclude that ASORA's effects are punitive, and convincingly outweigh the statute's non-punitive purposes and effects. We recognize that several of the factors seem closely related, and that discussion of one may overlap discussion of another. Nonetheless it is not the mere number of factors that leads us to our conclusion, but our assessment of those factors and their relative weight. Six of those factors lead us to disagree, respectfully but firmly, with the Supreme Court's analysis and its ultimate conclusion that ASORA is not penal.

Other states have reached the same conclusion. Doe v. Dep't of Pub. Safety & Corr. Servs., 430 Md. 535, 568, 62 A.3d 123, 143 (2013) ("The application of the statute has essentially the same effect upon Petitioner's life as placing him on probation and imposing the punishment of shaming for life, and is, thus, tantamount to imposing an additional sanction for Petitioner's crime."); State v. Letalien, 2009 ME 130, 985 A.2d 4 (2009) (held retroactive application of SORNA of 1999 violated ex post facto prohibitions by increasing registration duty of certain offenders from 15 years to their entire lifetimes and imposing a quarterly in-person verification requirement, without affording an opportunity for relief from those duties at discretion of sentencing court.)

In Doe v. Bredesen, 507 F.3d 998 (6th Cir. 2007), another case cited by this Court in Justin B to support the finding that the South Carolina law requiring electronic monitoring of certain juveniles was a civil remedy, the United States Court of Appeals for the Sixth Circuit found that the Tennessee law authorizing the Tennessee Board of Probation and Parole to enroll a convicted sex offender into an electronic monitoring program, **during the course of probation or parole**, did not constitute an ex post facto violation. Tenn. Code Ann. §40-39-303 provides:

> (a) Notwithstanding any other law, the board of parole may require, as a mandatory condition of release for any person convicted of a sexual offense as defined in § 40-39-301, that any person so released be enrolled in a satellite-based monitoring program for the full extent of the person's term of parole, consistent with the requirements of § 40-39-302.
>
> (b) The board of parole may require, as a mandatory condition of release for any person convicted of a serious offense as defined in this chapter or for other offenders as the board deems appropriate, that the person be enrolled in a satellite-based monitoring program for the full extent of the person's term of parole, consistent with the requirements of § 40-39-302.
>
> (c) Offender participation in a location tracking and crime correlation based monitoring and supervision program under this section shall be at the discretion of the department or as mandated by the board of parole and shall conform to the participant payment requirements stated in § 40-39-305 and be based upon the person's ability to pay.

Offender participation in the satellite monitoring program under Tennessee law is in the discretion of the department or board of parole and is only required during the term of parole. In contrast, pursuant to S.C. Code §23-3-540, the sentencing judge had no discretion and was required to order lifetime GPS monitoring for Appellant. The decision by this Court in State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013), allows

Appellant to petition for judicial review ten years after the commencement of electronic monitoring. The judicial review after ten years, however, does not cure the Eighth Amendment violation when considering the real effect of electronic monitoring.

The first step in the Eighth Amendment analysis is to determine the intent of the legislature in enacting the statute. If the intention was to enact a regulatory scheme that is civil and nonpunitive, the Court must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil. Kansas v. Hendricks, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).

After finding that the intent of the Alaska legislature in enacting the Sex Offender Registry Act was to create a "civil, non-punitive regime," the Court in Smith v. Doe, 538 U.S. 84, 97 (2003) wrote:

> In analyzing the effects of the Act we refer to the seven factors noted in Kennedy v. Mendoza–Martinez, 372 U.S. 144, 168–169, 83 S.Ct. 554, 9 L.Ed.2d 644(1963), as a useful framework. These factors, which migrated into our *ex post facto* case law from double jeopardy jurisprudence, have their earlier origins in cases under the Sixth and Eighth Amendments, as well as the Bill of Attainder and the *Ex Post Facto* Clauses. See id., at 168–169, and nn. 22–28, 83 S.Ct. 554. Because the Mendoza–Martinez factors are designed to apply in various constitutional contexts, we have said they are "neither exhaustive nor dispositive," United States v. Ward, 448 U.S., at 249, 100 S.Ct. 2636; *89* Firearms, 465 U.S., at 365, n. 7, 104 S.Ct. 1099, but are "useful guideposts,"Hudson, 522 U.S., at 99, 118 S.Ct. 488. The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.

The first Mendoza-Martinez factor is whether non-discretionary lifetime electronic monitoring is traditionally viewed as punishment. As noted by the dissent in Doe v. Bredesen, 507 F.3d 998, 1010 (6th Cir. 2007):

> The practice of requiring sex offenders to wear global monitoring systems for the purposes of continuous monitoring is fairly new. The recent origin of satellite-based monitoring "suggests that the statute was not meant as a punitive measure, or, at least, that it did not involve a traditional means of punishing."See Smith, 538 U.S. at 97, 123 S.Ct. 1140. However, a closer look at the satellite-based monitoring program, though new, shows that it bears a striking resemblance to historical forms of punishment.

In addressing whether the electronic monitoring was punitive, this Court in In re Justin B., 747 S.E.2d 774, 782 (2013) wrote:

> Appellant failed to provide the Court with any evidence that the electronic monitoring device is immediately recognizable to the public, or would cause him to be identified as a sex offender to the exclusion of other reasonable and legitimate uses for electronic devices. Moreover, the Supreme Court has held that the lifetime registration requirement for sex offenders is non-punitive. Id. at 105–06, 123 S.Ct. 1140. Electronic monitoring does not provide the same broad public dissemination of a sex offender's status. Thus, it does not logically follow that this Court can deem this prophylactic and non-invasive mechanism punitive.

In light of the evidence now before this Court in regard to the reality of electronic monitoring, the device can no longer be characterized as merely "prophylactic" and "non-invasive." As discussed by the dissent in Doe v. Bredesen, 507 F.3d 998, 1010 (6th Cir. 2007), the electronic monitoring requirement is far more intrusive than registration because with registration the information is disseminated only to those members of the public who choose to view the registry. The electronic monitoring device is on display at all times for the public including "co-workers, fellow worshipers at church, onlookers at the mall, diners at restaurants, patrons at gas stations, passengers on planes, trains, or buses, fans at sporting events, moviegoers at theaters, visitors at museums, sightseers, or any other person who may be at any conceivable location where Doe rightfully chooses to go within his probation limits" to view, whether they choose to or not. Doe v. Bredesen, 507 F.3d at 1011 (6th cir. 2007).

The requirement that the individual being monitored must charge the battery in the device by plugging himself into an electrical outlet for a minimum of three hours everyday meets the second Mendoza-Martinez factor of being an affirmative disability or restraint. Electronic monitoring promotes the traditional aims of punishment – retribution and deterrence, the third Mendoza-Martinez factor . The presence of a deterrent factor weighs in favor of a finding that the electronic monitoring requirement is punitive. Cutshall v. Sundquist, 193 F.3d 466, 476 (6th Cir. 1999).

As to the fourth Mendoza-Martinez factor of whether the non-discretionary mandatory lifetime requirement of electronic monitoring bears a rational connection to a non-punitive purpose, this Court in In re Justin B., 747 S.E.2d 774, 782 (2013) wrote, "The purpose of the registration and electronic monitoring scheme in the instant case is clear—to provide for the safety and welfare of the State's citizens, and eliminate information deficits which hinder law enforcement in their apprehension of those offenders. See S.C.Code Ann. § 23–3–400. These goals are a legitimate exercise of the State's police power, and Appellant fails to demonstrate that these objectives are mere pretext." While providing for the safety and welfare of the State's citizens is certainly a legitimate and non-punitive purpose, the rational connection to requiring the electronic monitoring for all who fall within the statute without a showing for the need to protect and without providing any discretion weighs heavily in favor of finding the monitoring punitive.

In light of the registration and other requirements already imposed upon Appellant and without a showing of a specific need for protection of the public by requiring electronic monitoring of the Appellant, the requirement is excessive in respect

to the stated goal of providing for the safety and welfare of the State's citizens. Additionally it is questionable how electronic monitoring serves the goal of public safety. As noted by the dissent in Doe v. Bredesen, 507 F.3d 998, 1012 (6th Cir. 2007):

> It equally eludes me as to how the satellite-based monitoring program prevents offenders, like Doe, from committing a new crime. Although the device is obvious, it cannot physically prevent an offender from re-offending. Granted, it may help aw enforcement officers track the offender (after the crime has already been committed), but it does not serve the intended purpose of public safety because neither the device, nor the monitoring, serve as actual preventative measures.

The fifth Mendoza-Martinez factor also weighs in favor of finding the requirement punitive.

The electronic monitoring requirement, as applied in South Carolina without discretion, is traditionally viewed as punishment, constitutes an affirmative disability or restraint by requiring the individual being to plug himself into an electrical outlet for at least three hours everyday and promotes the traditional aims of punishment of retribution and deterrence. The rational connection of the electronic monitoring requirement to the non-punitive purpose of public safety is tenuous because the requirement is mandatory and the judge has no discretion to determine if there is a need for electronic monitoring. The electronic monitoring requirement is excessive with respect to the non-punitive goal of public safety in light of the additional registration requirements. The non-discretionary lifetime electronic monitoring requirement is unconstitutional as a violation of the Eighth Amendment prohibition against cruel and unusual punishment.

3. The trial judge erred in refusing to grant a mistrial when the State asked a witness if the minor approached the witness "pertaining to the incidents with Mr. Carrier" in violation of the limitation to time and place exception to the hearsay rule found in Rule 801(d)(1)(D), S.C.R.E.?

During the direct examination by the State of Carolyn Travis, the minor's youth director, the State asked, "Did [minor] approach you pertaining to the incidents with Mr. Carrier?" (July 17, 2012, Tr. p. 131, lines 22-23). Appellant objected and moved for a mistrial. (July 17, 2012, Tr. p. 131, line 24 – p. 132, line 1). The judge denied the motion. The judge erred.

Rule 801(d)(1)(D) provides, "A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is consistent with the declarant's testimony in a criminal sexual conduct case where the declarant is the alleged victim and the statement is limited to time and place of the incident . . ." In State v. Jeffcoat, 350 S.C. 392, 396, 565 S.E.2d 321, 3232 (Ct.App. 2002) the South Carolina Court of Appeals wrote:

> The rule expressly allows other witnesses to testify the victim complained of the assault, but only as to "time and place"; it specifically circumscribes such testimony by "excluding details or particulars." State v. Schumpert, 312 S.C. 502, 506, 435 S.E.2d 859, 862 (1993). Among the details which must be excluded under the rule is the identity of the alleged perpetrator. See Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994).

The question, asked by the prosecutor was in direct violation of the rule because it included the identity of Appellant as the alleged perpetrator.

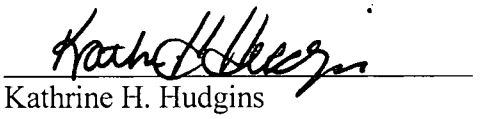
Appellant was prejudiced by the improper question. Credibility of the minor witness was a critical determination to be made by the jury. *E.g.* State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) (Pleicones, J., dissenting) ("As in many CSC cases, this

case turned primarily on the veracity of the victim. In the instant case, while physical evidence indicated that the victim had been abused, no physical evidence other than the testimony of the victim connected Petitioner to the crime."). In Sanchez v. State, 351 S.C. 270, 275, 569 S.E.2d 363, 365 (2002) the South Carolina Supreme Court wrote, "As to the prejudice prong of Strickland v. Washington, supra, Sanchez was prejudiced by counsel's deficient performance because improper corroboration testimony that is merely cumulative to the victim's testimony cannot be harmless. As stated in Jolly v. State, 314 S.C. at 21, 443 S.E.2d at 569, 'it is precisely this cumulative effect which enhances the devastating impact of improper corroboration.'" The improper question by the State constituted prejudicial corroboration testimony warranting a mistrial.

CONCLUSION

Based on the argument presented in issue one, Appellant's conviction should be reversed and the case remanded for trial on the 2009 indictment. Based on the argument presented in issue two, this Court should find the mandatory electronic monitoring requirement of S.C. Code §23-3-540 unconstitutional as a violation of the prohibition against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution. Based on the argument presented in issue three, Appellant's conviction and sentence should be reversed.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of November, 2013.

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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenwood County
D. Garrison Hill, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES CARRIER,

APPELLANT

APPELLATE CASE NO. 2012-212777

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 Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and also served upon Mr. James Carrier, # 351607 Allendale Correctional Institution PO Box 1151, Hwy. 47 Fairfax, SC 29827 this 4th day of November, 2013.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of November, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.