THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No 2011-199726

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ANTHONY NATION,

APPELLANT.

APPELLATE CASE NO. 2011-199726

PETITION FOR REHEARING

The Appellant, Anthony Nation, petitions this Court for rehearing. This petition is based on the following grounds:

1) This Court overlooked or misapprehended facts contained in the record that demonstrate the punitive nature of satellite monitoring;

2) This Court overlooked or misapprehended the evolution of our state's sex offender registry that demonstrates it has evolved from a civil requirement into a punitive measure; and

3) This Court has overlooked, misapprehended, or misapplied precedent from the Supreme Court of United States.

Each of these grounds is discussed below. Once these grounds are reconsidered, the necessity for reversing the trial court becomes apparent.

A. Grounds for Rehearing.

1) This Court overlooked or misapprehended facts contained in the record that demonstrate the punitive nature of satellite monitoring.

At the probation revocation hearing, Mr. Nation's probation agent testified about his training and experience "dealing with GPS monitoring." When GPS monitoring is required, his agency "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 [the Probation Department'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.

The probation agent testified "three hours 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." When the battery "gets weaker," then "you have to charge them more often." The State 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.

The department's satellite 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.

In prior cases challenging satellite monitoring, this Court has not been presented with records on appeal establishing these facts.

2) This Court overlooked or misapprehended the evolution of our state's sex offender registry that demonstrates it has evolved from a civil requirement into a punitive measure.

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 wasn't 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 this 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.

3) This Court has overlooked, misapprehended, or misapplied precedent from the Supreme Court of United States.

In *Smith v. Doe,* 538 U.S. 84 (2003), the Supreme Court of the United State considered an *ex post facto* challenge to Alaska's adult sex offender registry. The majority noted, "The Alaska statute, on its face, does not require these updates to be made in person." *Id.* at 101. That Court, therefore, 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. Alaska, however, subsequently recognized that its sex offender registration requirement "treats offenders not much differently than the state treats probationers and parolees subject to continued state supervision." *Doe v. State*, 189 P.3d 999, 1009 (Alaska 2008) (holding sex offender registry violates *ex post facto* clause of state constitution).

Other states have reached the same conclusion as Alaska. Oklahoma applied the "analytical framework used in *Smith v. Doe* and later in *Doe v. State*" and held retroactive application of punitive provisions of that state's sex offender registry violated the *ex post facto* prohibition. *Starkey v. Oklahoma Dep't of Corr.*, 2013 OK 43, 305 P.3d 1004, 1019 (2013). Maryland, likewise, held, "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." *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535, 568, 62 A.3d 123, 143 (2013).

The nationwide evolution of sex offender registration requirements is significant. Ohio recognized, "The statutory scheme has changed dramatically since this court described the registration process imposed on sex offenders as an inconvenience 'comparable to renewing a driver's license'" and held its statute violated the *ex post facto* clause of the Ohio Constitution. *State v. Williams*, 129 Ohio St. 3d 344, 348, 952 N.E.2d 1108, 1112 (2011).

Maine held retroactive application of SORNA[1] of 1999 violated *ex post facto* prohibitions by increasing the registration duty of certain offenders from 15 years to their entire lifetimes and imposing a quarterly an in-person verification requirement, without affording an opportunity for relief from those duties at discretion of sentencing court. *State v. Letalien*, 2009 ME 130, 985 A.2d 4 (2009).

The nature of the requirement under review is also important. In *State v. Myers*, 260 Kan. 669, 923 P.2d 1024 (1996), Kansas held registration requirements of its Sex Offender Registration Act remedial and thus constitutional, but retroactive application of the public disclosure provision of the act imposed punishment in violation of *ex post facto* clause.

Applying the seven factors listed in *Kennedy v. Mendoza–Martinez,* 372 U.S. 144 (1963), Indiana held retroactive application of sex offender registry "violates the prohibition on *ex post facto* laws contained in the Indiana Constitution because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed when his crime was committed." *Wallace v. State,* 905 N.E.2d 371, 384 (Ind., 2009). The Indiana statute is very similar to the South Carolina scheme. The Indiana

[1] Sex Offender Registration and Notification Act, 42 U.S.C.A. §16911, *et. seq.*

Supreme Court's consideration of the seven *Mendoza–Martinez* factors are discussed below, along with an analysis of how those factors apply to our state's law.

First, the Indiana statute imposes "significant affirmative obligations and a severe stigma on every person to whom it applies." *Id.* at 379. The law imposes affirmative, post-sentence duties "under threat of prosecution." *Id.* Mr. Dean and Mr. Brown had discharged their juvenile dispositions before South Carolina ever imposed the registration requirement on them. For them, the registry is entirely a post-sentence obligation. Now, their failure to comply with the registry requirements can result—and it has for both—in criminal prosecution. They "must re-register for the rest of their lives," every ninety days. *Id.* at 379-80. The requirement "exposes registrants to profound humiliation and community-wide ostracism." *Id.* at 380.

Second, Indiana held its statue resembles sanctions that have been historically considered punishment. "Aside from the historical punishment of shaming, the fact that the Act's reporting provisions are comparable to supervised probation or parole standing alone supports a conclusion that the second *Mendoza–Martinez* factor favors treating the effects of the Act as punitive when applied in this case". *Id.* at 380-81. South Carolina's scheme, likewise, is lifetime probation, especially for the plaintiffs who must report, in person, quarterly, and pay and the annual fee.

Third, Indiana's statute "overwhelmingly applies to offenses that require a finding of scienter for there to be a conviction." *Id.* at 381. Likewise, our state's requirement applies only in the context of criminal convictions or juvenile adjudications for offenses that would be crimes if the child were an adult.

Fourth, when considering the traditional aims of punishment, the Indiana Supreme Court considered the statutory scheme's focus on rehabilitation. "Nonetheless it strains credulity to suppose that the Act's deterrent effect is not substantial, or that the Act does not promote community condemnation of the offender, both of which are included in the traditional aims of punishment." *Id.* at 382 (internal citations and quotations omitted). Thus, that Court concluded, the fourth *Mendoza–Martinez* factor slightly favors treating the effects of the Act as punitive when applied to Wallace." *Id.* at 382. These same considerations exist in South Carolina.

Fifth, in Indiana "it is the determination of guilt of a sex offense, not merely the fact of the conduct and potential for recidivism, that triggers the registration requirement." *Id.* Here, the adjudication for first-degree criminal sexual conduct with a minor triggered the registration requirement for Mr. Dean and Mr. Brown without any consideration of their likelihood of reoffending.[2]

Sixth, the Indiana Court recognized a non-punitive interest for the registration requirement, "as a measure to give the community notification necessary to protect its children from sex offenders." *Id.* at 383. Although considering this factor regulatory, that Court observed the "expansion [of the Act] supports the view that the effects of the Act are punitive." *Id.* As seen in Section III, *supra*, the expansion of South Carolina's sex offender registry points towards this same conclusion.

[2] Compare South Carolina's sex offender registry with our state's Sexually Violent Predator Act, S.C. Code Ann. § 44-48-10 *et. seq.*, which provides for a hearing for the Court to consider whether the person suffers from a condition that increases their likelihood to reoffend. The absence of these procedural safeguards militates in favor of finding the sex offender registry punitive.

Seventh, in considering whether the Act was excessive in relation to its articulated purpose, the Indiana Supreme Court observed, "In those jurisdictions that have rejected *ex post facto* challenges to sex offender registration statutes, courts have specifically noted that disclosure was limited to that necessary to public safety, and/or that an individualized finding of future dangerousness was made." *Id.* Indiana, like South Carolina, "makes information on all sex offenders available to the general public without restriction and without regard to whether the individual poses any particular future risk." *Id.* at 384. "Thus, the non-punitive purpose of the Act, although of unquestioned importance, does not serve to render as non-punitive a statute that is so broad and sweeping." *Id.* As seen in Section III, supra, South Carolina initially maintained a private registry. There is no provision for the plaintiffs' information to remain private.

Finally, the Indiana Supreme Court summarized:

> [O]f the seven factors identified by *Mendoza–Martinez* as relevant to the inquiry of whether a statute has a punitive effect despite legislative intent that the statute be regulatory and non-punitive, only one factor in our view—advancing a non-punitive interest—points clearly in favor of treating the effects of the Act as non-punitive. The remaining factors, particularly the factor of excessiveness, point in the other direction.

Id. at 384.

This Court should reach the same conclusion about South Carolina's sex offender registration requirement. In fact, in his brief and during oral argument, Mr. Nation relied on *Commonwealth v. Cory*, 454 Mass. 559, 911 N.E.2d 187 (2009). The Massachusetts Supreme Court weighed the *Mendoza–Martinez* factors and concluded that state's satellite monitoring requirement placed a "substantial burden on liberty," making it

"punitive in effect." Retroactive application of the requirement, therefore, violated the *ex post facto* clause. *Id.* 454 Mass. at 572, 911 N.E.2d at 197.

B. Once these grounds are reconsidered, the necessity for reversing the trial court becomes apparent.

In denying Mr. Nation's appeal, this Court relied on its recent precedent in *In re Justin B.*, 405 S.C. 391, 747 S.E.2d 774, 775 (2013) and *State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013). Mr. Nation's record on appeal, however, presented facts not presented in *Justin B.* and *Dykes*. *See* Section A(1), *supra*. The opinion does not discuss any of these facts. Thus, despite this Court previously considering these same legal issues, this Court has not had the opportunity to apply the law to the facts presented in this case.

In discussing *Justin B.*, this Court observed:

> After examining the legislative intent behind Jessie's Law and applying the *Mendoza–Martinez* factors, we held that "electronic monitoring is *not a punishment,*" but a civil requirement. We also reaffirmed that all sex offenders subject to GPS monitoring in accordance with Jessie's Law may periodically petition for judicial review of the necessity of continued monitoring.

(citation omitted). A close reading of *Justin B.*, however, reveals that this Court merely reviewed the *Mendoza–Martinez* factors as discussed by the Supreme Court of United States in *Smith v. Doe*. As seen in Sections A, *supra*, the High Court observed it might reach a different conclusion if confronted with a statute that imposed more burdens on liberty. Mr. Nation did not challenge the sex offender registration requirement *as it existed on the day he plead guilty*. This Court, therefore, should apply the *Mendoza–Martinez* factors to the satellite-monitoring requirement.

Regarding majority of this Court's reliance on *Dykes*, the lack of an individualized determination prior to placing Mr. Nation on satellite monitoring militates in favor of finding the requirement punitive. *See Cory*, 454 Mass. at 572, 911 N.E.2d at 197. This Court should reconsider and follow the analysis set for the in *Cory*.

Once the Court finds the satellite-monitoring requirement punitive, the necessity of reversing—based on Mr. Nation's ex post facto, Double Jeopardy, Eighth Amendment, and Equal Protection arguments—becomes apparent. Additionally, once the Court considers the time required the charge the device, which amounts to a seizure, the necessity of reversing based on the Fourth Amendment argument becomes apparent.

Conclusion

This Court should rehear Mr. Nation's case and reverse the trial court judge.

IT IS SO MOVED.

Respectfully submitted,

By 

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July 17, 2014

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IN THE SUPREME COURT

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Frank R. Addy, Circuit Court Judge

THE STATE,

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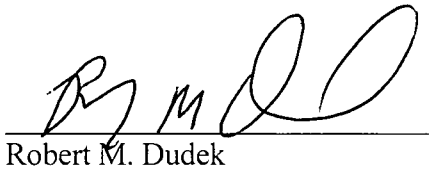
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mathew Buchanan, Esquire, at the South Carolina Department of Probation, Parole & Pardon Services, P.O. Box 50666, Columbia, SC 29250 and Mr. Anthony Nation, at 707 Poplar Street, Abbeville, SC 29620-2265, this 17th day of July, 2014.



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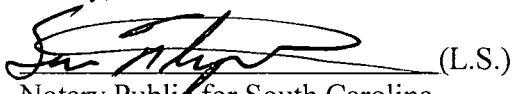
SWORN TO BEFORE ME this 17th day
of July, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.