STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

ANDREW JAMES HARRELSON, JR.,

Appellant.

MOTION TO HOLD APPEAL IN ABEYANCE PENDING RESOLUTION OF ISSUE BY SUPREME COURT

Respondent ("the State"), through its undersigned counsel, would respectfully show unto the Court as follows:

I.

In August of 2007, Appellant Andrew James Harrelson, Jr. was arrested following an investigation into an allegation he sexually assaulted a minor victim. In November of 2007, Appellant was indicted by the McCormick County grand jury for one count of first-degree criminal sexual conduct with a minor. On February 24, 2009, Appellant appeared before the Honorable William P. Keesley, circuit court judge, in the McCormick County court of general sessions to enter a guilty plea to the lesser charge of committing a lewd act upon a minor child. However, Appellant's defense counsel did not agree with Appellant's decision to plead guilty and asserted the lifetime electronic monitoring requirement mandated by S.C. Code Ann. § 23-3-

540 was unconstitutional. As a result of defense counsel's objection, the guilty plea hearing was recessed. Thereafter, on February 27, 2009, Appellant again appeared before Judge Keesley to enter a guilty plea to committing a lewd act upon a minor child. At the conclusion of the hearing, Judge Keesley accepted Appellant's guilty plea and sentenced Appellant to an indeterminate sentence not to exceed six years pursuant to the Youthful Offender Act. Additionally, Judge Keesley ordered Appellant to register as a sex offender and submit to mandatory electronic monitoring as required by statute. Following the imposition of the sentence, defense counsel renewed his objection to the electronic monitoring requirement, and the objection was overruled.

II.

Following the plea hearing, Appellant timely filed and perfected an appeal. On October 6, 2010, the Supreme Court heard oral arguments in Appellant's case. Thereafter, on November 8, 2010, the Supreme Court issued an opinion reversing Appellant's conviction and finding his guilty plea was an improper conditional plea. State v. Harrelson, Op. No. 2010-MO-030 (S.C. Sup. Ct. filed Nov. 8, 2010).

III.

On February 22, 2011, Appellant appeared before the Honorable R. Knox McMahon, circuit court judge, in the Saluda County court of general sessions to again enter a guilty plea to the lesser charge of committing a lewd act upon a minor child. In order to enter his guilty plea, Appellant waived his right to have his plea heard in McCormick County. During the plea hearing, Appellant admitted his guilt and Judge McMahon accepted Appellant's guilty plea. Judge McMahon then sentenced Appellant to an indeterminate sentence not to exceed six years pursuant to the Youthful Offender Act and suspended the sentence upon completion of a five-

year term of probation. Additionally, Judge McMahon again ordered Appellant to be subject to the statutory electronic monitoring requirement. Defense counsel objected to the imposition of the electronic monitoring requirement, and the objection was overruled. Thereafter, Appellant timely filed a notice of appeal.

IV.

On November 21, 2011, Appellant filed an Initial Brief of Respondent and Designation of Matter. In his brief, Appellant contended the mandatory electronic monitoring requirement was unconstitutional by violating the constitutional prohibition against cruel and unusual punishment and by violating his due process rights.

V.

On May 9, 2012, while Appellant's case was pending on appeal, the South Carolina Supreme Court issued an opinion in the case of State v. Dykes, Op. No. 27124 (S.C. Sup. Ct. filed May 9, 2012).[1] In Dykes, Dykes pled guilty to committing a lewd act upon a minor child prior to the effective date of the satellite monitoring statute. However, the statute went into effect after Dykes was convicted. Subsequently, following Dykes' release from incarceration, Dykes was placed on probation and violated a term of her probation. During the ensuing probation revocation hearing, Dykes challenged the constitutionality of the mandatory lifetime electronic monitoring requirement, but the circuit court judge denied Dykes' challenge and ordered Dykes to submit to lifetime electronic monitoring as required by statute. Dykes then appealed the circuit court judge's ruling, challenging the constitutionality of the electronic monitoring requirement and asserting it violated her substantive due process rights. On appeal, the Supreme Court reversed and remanded for further proceedings. In reaching that decision, Justice Kittredge, writing for the three-judge majority of the Supreme Court issuing the

[1] A copy of the Supreme Court's decision in State v. Dykes is attached to this motion as Exhibit "A."

controlling opinion in Dykes' case, found the mandatory, non-reviewable provisions of S.C. Code Ann. § 23-3-540(C) to be unconstitutional in violation of Dykes' due process rights and instructed: "Applying the rational basis test to Appellant's due process challenge, I would find the mandated lifetime satellite monitoring and absence of any judicial review related to an assessment of an individual's likelihood of re-offending renders the challenged provision arbitrary. Further, in light of the legislature's predication of the statutory scheme on the substantial purpose of protecting the public from sex offenders who may re-offend, I would find the lack of risk assessment within section 23-3-540(C) not rationally related to such purpose, and thus unconstitutional."

VI.

Following the Supreme Court's decision in Dykes, the State timely filed a petition for rehearing in that case.[2] On July 12, 2012, the Supreme Court granted the State's petition for rehearing and scheduled oral argument in Dykes for September 18, 2012, at 9:30 a.m.[3]

VII.

In Appellant's case, the sole issue raised to this Court to resolve is whether the lifetime electronic monitoring requirement mandated by S.C. Code Ann. § 23-3-540 was unconstitutional. As that question is currently being addressed by the Supreme Court in Dykes, the Supreme Court's decision in Dykes will likely be controlling in Appellant's case as Appellant's due process challenge to the electronic monitoring statute is similar to the challenge raised by Dykes. See, e.g., Davis v. United States, ___ U.S. ___, 131 S. Ct. 2419, 2431 (2011)

[2] A copy of the State's petition for rehearing in State v. Dykes is attached to this motion as Exhibit "B."

[3] A copy of the Supreme Court's order granting the State's petition for rehearing in State v. Dykes is attached to this motion as Exhibit "C."

("When this Court announced its decision in Gant, Davis's conviction had not yet become final on direct review. Gant therefore applies retroactively to this case.").

VIII.

Because the Supreme Court's decision in Dykes is highly relevant to Appellant's case and will likely play a large and perhaps decisive role in the ultimate outcome of Appellant's appeal, the State believes it is critical and necessary for the final decision in Dykes to be issued before the State can fully and properly respond to Appellant's constitutional challenge to the electronic monitoring statute. Accordingly, the State asks this Court to hold Appellant's appeal and the time for filing the Initial Brief of Respondent and Designation of Matter in abeyance pending the Supreme Court's resolution of Dykes and to permit the State thirty days to file the Initial Brief of Respondent and Designation of Matter in this case after the Supreme Court issues its final decision in Dykes following rehearing. The State also asks this Court to hold the filing deadlines in abeyance pending resolution of this motion. Should this Court grant the State's motion, the State will immediately notify this Court in writing when the Supreme Court issues its final decision in Dykes.

WHEREFORE, Respondent prays that the Court hold the time for filing the Initial Brief of Respondent and Designation of Matter in abeyance pending a rehearing by the Supreme Court in State v. Dykes and the issuance of the Supreme Court's final decision in that case; extend the deadline for the service and filing of the Initial Brief of Respondent and Designation of Matter in this case for thirty days from the date the Supreme Court issues the final decision in State v. Dykes; hold the filing deadlines in abeyance pending resolution of this motion; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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July 25, 2012

I DO NOT OPPOSE:

By: _____
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Counsel for Appellant

ATTACHMENT "A"

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jennifer Rayanne Dykes, Appellant.

Appeal from Greenville County
Charles B. Simmons, Jr., Special Circuit Court Judge

Opinion No. 27124
Heard September 22, 2011 - Filed May 9, 2012

REVERSED AND REMANDED

Christopher D. Scalzo, Greenville County Public Defender's Office, of Greenville, and Deputy Chief Appellate Defender Wanda H. Carter, of South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Assistant Deputy Director J. Benjamin Aplin, and Legal Counsel Tommy Evans, Jr., of South Carolina Department of Probation, Parole, and Pardon Services, both of Columbia, for Respondent.

JUSTICE HEARN:[1] Jennifer Rayanne Dykes appeals the circuit court's order that she be subject to satellite monitoring for the rest of her natural life pursuant to Section 23-3-540(C) of the South Carolina Code (Supp. 2010). She lodges five constitutional challenges to this statute: it violates her substantive due process rights, her right to procedural due process, the Ex Post Facto clause, the Equal Protection Clause, and her right to be free from unreasonable searches and seizures. We hold the mandatory imposition of lifetime satellite monitoring violates Dykes' substantive due process rights and reverse and remand for further proceedings.

FACTUAL/PROCEDURAL BACKGROUND

Dykes was indicted for lewd act on a child under the age of sixteen in violation of Section 16-15-140 of the South Carolina Code (2003) as a result of her relationship with a fourteen-year-old girl while Dykes was twenty-six years old. The two met when Dykes was working at a local discount store and developed an eight month relationship. Dykes ultimately pled

guilty to lewd act and was sentenced to fifteen years' imprisonment, suspended upon the service of three years and five years' probation. Because her offense predated the satellite monitoring statute, she was not subject to monitoring at the time of her plea.

Prior to her release from prison, Dykes was evaluated pursuant to the Sexually Violent Predator Act and found not to meet the definition of a sexually violent predator. Accordingly, no civil commitment proceedings were initiated, and she was released on probation. At the time of her release, she was notified verbally and in writing that pursuant to section 23-3-540(C) she would be placed on satellite monitoring if she were to violate the terms of her probation.

Soon after Dykes' release, five citations and arrest warrants were issued to her for various probation violations: a citation pertaining to her relationship with a convicted felon whom Dykes met while incarcerated and with whom she was then residing; an arrest warrant for Dykes' continued relationship with that individual; a citation for drinking an alcoholic beverage; a citation for being terminated from sex offender counseling after she cancelled or rescheduled too many appointments; and an arrest warrant for failing to maintain an approved residence and changing her address without the knowledge or consent of her probation agent. Dykes did not contest any of these violations, but she did offer a context to each one in mitigation.

The State recommended a two-year partial revocation of Dykes' probation and mandatory life-time satellite monitoring. When an individual has been convicted of engaging in or attempting criminal sexual conduct with a minor in the first degree (CSC-First)[2] or lewd act, the court must order that person placed on satellite monitoring. S.C. Code Ann. § 23-3-540(A). Likewise, if a person has been convicted of those offenses before the effective date of the statute and violates a term of his probation, parole, or supervision program, he too must be placed on satellite monitoring. *See id.* § 23-3-540(C). Once activated, the monitor can pinpoint the individual's location to within fifteen meters. The individual must remain on monitoring for as long as he is to remain on the sex offender registry, *id.* § 23-3-540(H), which is for life, *id.* § 23-3-460. There is no statutory mechanism to petition the court for relief from this lifetime monitoring.

In contrast, if a person is convicted of committing or attempting any of the following offenses, or was previously convicted of one and violates a term of his probation, parole, or supervision, the court has discretion[3] with respect to whether the individual should be placed on satellite monitoring: criminal sexual conduct with a minor in the second degree; engaging a child for sexual performance; producing, directing, or promoting sexual performance by a child; assaults with intent to commit criminal sexual conduct involving a minor; violation of the laws concerning obscenity, material harmful to minors, child exploitation, and child prostitution; kidnapping of a person under the age of eighteen unless the defendant is a parent; and trafficking in persons under the age of eighteen if the offense includes a completed or attempted criminal sexual offense. *Id.* § 23-3-540(B), (D), (G)(1).

After ten years, an individual who has committed the above-stated crimes may petition the court to have the monitoring removed upon a showing by clear and convincing evidence that he has complied with the monitoring requirements and there is no longer a need to continue monitoring him. *Id.* § 23-3-540(H). If the court denies his petition, he may petition

again every five years. *Id.* As long as the individual is being monitored, he must comply with all the terms set by the State, report damage to the device, pay for the costs of the monitoring (unless he can show severe hardship), and not remove or tamper with the device; failure to follow these rules may result in criminal penalties. *Id.* §§ 23-3-540(I) to (L).

Furthermore, the satellite monitoring program places restrictions on the subject's movements as well. In response to a question from the bench during oral argument concerning Dykes' ability to travel outside the State of South Carolina while wearing the device, counsel for the Department of Probation, Parole, and Pardon Services-who appeared on behalf of the State-represented that out-of-state travel was not restricted. However, following oral argument, counsel corrected this error in a letter to this Court stating that the department's policy for monitoring "restricts travel outside the State of South Carolina unless there is approval by the supervising agent. This plan will not allow for overnight travel except in the case of an emergency, and must be approved by the Regional Director." Thus, a person subject to satellite monitoring may not leave the State without prior approval and may only be gone overnight in the case of an emergency. For Dykes, this restriction on her right to travel freely in this country would, pursuant to the policy, extend throughout her life, without any possibility of petitioning the court for relief.

At her probation revocation hearing, Dykes objected to the constitutionality of mandatory lifetime monitoring. In support of her arguments, Dykes presented expert testimony that she personally poses a low risk of reoffending and that one's risk of reoffending cannot be determined solely by the offense committed. Thus, the core of Dykes' constitutional challenge is that the State cannot monitor someone who poses a low risk of reoffending. Dykes' expert, however, did acknowledge that there is at least some risk that everyone will reoffend.

The circuit court found Dykes to be in willful violation of her probation and that she had notice of the potential for satellite monitoring. While the court clearly was troubled by the scope and breadth of section 23-3-540(C), it denied Dykes' constitutional challenges and found it was statutorily mandated to impose satellite monitoring without making any findings as to Dykes' likelihood of reoffending. The court also revoked Dykes' probation for two years, but it ordered that her probation be terminated upon release. This appeal followed.

LAW/ANALYSIS

Dykes argues that requiring she submit herself to lifetime satellite monitoring when she poses a low risk of reoffending violates her substantive due process rights under the Fourteenth Amendment to the United States Constitution. We agree.

"[A]ll statutes are presumed constitutional and, if possible, will be construed to render them valid." *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). Accordingly, we will not find a statute unconstitutional unless "its repugnance to the Constitution is clear and beyond a reasonable doubt." *Id.* at 570, 549 S.E.2d at 597. The party challenging the validity of a statute bears the burden of proving it is unconstitutional. *See Knotts v. S.C. Dep't of Natural Res.*, 348 S.C. 1, 6, 558 S.E.2d 511, 513 (2002).

The Constitution's provision that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law," U.S. Const. amend. XIV, § 1, guarantees more than

just fair process; it "cover[s] a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them,'" *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 840 (1998) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). The core of the Due Process Clause, therefore, is the protection against arbitrary governmental action. *Id.* at 845. Substantive due process in particular protects against the arbitrary infringement of "fundamental rights that are so 'implicit in the concept of ordered liberty' that 'neither liberty nor justice would exist if they were sacrificed.'" *Doe v. Moore*, 410 F.3d 1337, 1343 (11th Cir. 2005) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969)).

However, one does not have a general liberty interest simply in being free from arbitrary and capricious government action. *Hawkins v. Freeman*, 195 F.3d 732, 749 (4th Cir. 1999) (en banc). Rather, "the substantive component of the due process clause only protects from arbitrary government action that infringes a specific liberty interest." *Id.* If the interest infringed upon is a fundamental right, the statute must be "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993); *see also In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002). If the right is not a fundamental one, the statute is only subject to rational basis review. *Luckabaugh*, 351 S.C. at 140, 568 S.E.2d at 347. Dykes does not argue South Carolina's satellite monitoring scheme fails the lesser rational basis review, choosing instead to rely exclusively on strict scrutiny. Accordingly, we proceed only under this heightened review and must first determine whether the alleged right the statute infringes upon is fundamental.

Before analyzing the right argued by Dykes, we note that we must tread carefully in this arena. Over the years, the Supreme Court of the United States has expanded the liberty interest protected by the Due Process Clause beyond the specific freedoms contained in the Bill of Rights. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (noting that the Supreme Court has found the right to marry, have children, direct the education of one's children, marital privacy, use contraception, retain bodily integrity, and receive an abortion are all protected). The Supreme Court, however, "has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). Furthermore, when a court deems a right fundamental under the umbrella of substantive due process, it effectively removes the matter from discussion and legislative debate. *Glucksberg*, 521 U.S. at 720. We must therefore "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Id.* (internal citations and quotations omitted).

Hence, the Due Process Clause only "protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *See id.* at 720-21 (internal citations and quotations omitted). To guard against unwarranted expansions of protected liberty interests, we must give a "careful description" of the asserted right, using this country's history and traditions as "the crucial guideposts for responsible decisionmaking." *Id.* at 721 (internal citations and quotations omitted). The Supreme Court's

> substantive-due-process jurisprudence . . . has been a process whereby the outlines of the "liberty" specially protected by the Fourteenth Amendment-never fully clarified, to be sure, and perhaps not capable of being fully clarified-have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review.

Id. at 722. With that in mind, we turn to the right Dykes alleges has been infringed upon.

Dykes asserts that the State's continuous monitoring of her location violates her fundamental right "to be let alone." However, this broad statement is an "issue-begging generalization[] that cannot serve the inquiry" of delineating the precise contours of the asserted right. *See Hawkins*, 195 F.3d at 747. When viewed in light of the facts of this case and the authorities relied upon by Dykes, the narrow right on which she relies is the right of a convicted sex offender who has been released from prison and not serving a probationary term to be free from satellite monitoring for the rest of her life absent a demonstration that she is likely to reoffend.

Although Dykes has overstated the exact right on which she relies, traditional notions of liberty and the right to be let alone are instructive for they provide the context within which we must analyze Dykes' specific right. William Blackstone, in his landmark Commentaries on the Laws of England, noted that man is generally endowed with free will, but that freedom is not absolute and each of us relinquishes some of it to be part of an organized society:

> The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature: being a right inherent in us by birth, and one of the gifts of God to man at his creation, when He endued him with the faculty of freewill. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable, than that wild and savage liberty which is sacrificed to obtain it.

1 William Blackstone, Commentaries *121. Blackstone also found, however, that the government's right to restrict an individual's free will is not immutable:

> Political therefore, or civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public. Hence we may collect that the law, which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil liberty of mankind: but every wanton and causeless restraint on the will of the subject, whether

> practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny. Nay, that even laws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are laws destructive of liberty[.] . . . So that laws, when prudently framed, are by no means subversive but rather introductive of liberty; for (as Mr. Locke has well observed) where there is no law, there is no freedom. But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.

Id. at *121-22.

Thus, the concept of liberty as being unrestrained except as necessary to provide order in society is deeply rooted in the foundations of our common law system, and any further restriction would be tyranny. Indeed, Blackstone's commentary reflects our substantive due process milieu, where the core rights of freedom and liberty can only be limited when sufficiently necessary to advance the public good. Furthermore, various members of the Supreme Court have voiced their views that the government has a very limited ability to infringe on one's liberty. Louis Brandeis, before he became a Justice, wrote in a law review article,

> [T]here came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, - the right to be let alone; the right to liberty secures the exercise of extensive civil privileges . . . .

Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890). After he joined the Supreme Court, Justice Brandeis noted that the Founding Fathers

> recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized men.

Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled in part by Berger v. New York*, 388 U.S. 41 (1967) *and Katz v. United States*, 389 U.S. 347 (1967).

Not long thereafter, a majority of the Supreme Court stated,

> [T]he domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when it was recognized, as long ago as it was, that liberty is something more than exemption from physical restraint . . . .

Palko, 302 U.S. at 327.

Additionally, in an oft-quoted dissent in *Poe v. Ullman*, 367 U.S. 497 (1961), Justice Harlan wrote,

> [T]he full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.

Id. at 543 (Harlan, J., dissenting).[4] These words "eloquently" describe the Court's role in the substantive due process inquiry. *Moore v. City of East Cleveland*, 431 U.S. 494, 501 (1977).

In *Glucksberg*, however, the Supreme Court admonished overreliance on these vague and free-flowing concepts of liberty in the due process analysis. Although the Supreme Court has, in the past, relied in particular on Justice Harlan's dissent in *Poe* in its fundamental rights analysis, at no point has the Court jettisoned its "established approach" of searching for concrete examples of the claimed right in the Court's jurisprudence. *Glucksberg*, 521 U.S. at 721-22 & n.17. In the context of this case, the Court's reaffirmance of the historical approach to fundamental rights presents us with an interesting quandary. While we must search for historical examples of the claimed right in order to find it one deeply rooted in our legal tradition and therefore fundamental, the ability to track an individual's precise location is a relatively recent technological innovation without a historical antecedent.

Nevertheless, we believe the mere fact that something is a new invention does not preclude the finding that it implicates a fundamental right. Constitutional principles cannot be "entirely unaffected by the advance of technology," *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001), and courts must be able to incorporate new innovations into our existing constitutional framework.[5] *Glucksberg* strongly reminded courts to avoid a generous application of the Due Process Clause to state actions and insisted on a historical focus as a check. Here, however, there is no history for us to examine, not because the claimed right is not deeply rooted in our traditions, but instead because satellite monitoring is a new invention the Founding Fathers could not have envisioned. In the absence of a history to rely on in similar circumstances, the Court has resorted to examining more traditional notions of liberty. *Cf. Griswold*, 381 U.S. at 482-86 (detailing general concepts of privacy under the Constitution and concluding that proscribing the use of contraception "is repulsive to the notions of privacy surrounding the marriage relationship"). At this point, a careful delineation of the exact nature of the claimed right serves to prevent the gratuitous expansion of fundamental rights. Thus, while we proceed without much history on which we can rest our analysis, narrowly defining the right Dykes argues has been infringed upon acts as the sort of check and guidepost the Court emphasized in *Glucksberg*.

As we previously stated, the right at issue in this case is the right of a convicted sex offender who is not under any probationary or similar restrictions to be free from continuous

satellite monitoring for life when she poses a low risk of reoffending. We begin first by examining the general impact of the satellite monitoring scheme. Recently, the Supreme Court had the opportunity to address a similar issue in *United States v. Jones*, No. 10-1259, 2012 WL 171117 (Jan. 23, 2012), albeit in a different context. At issue in *Jones* was whether the government's surreptitious placement of a GPS tracking device on Jones's car without a warrant was an unconstitutional search. 2012 WL 171117, at *2. The majority held that it was because the attachment of the monitor to the car was a physical trespass on personal property for the purpose of obtaining information. *Id.* at *3.

In his concurring opinion, Justice Alito tackled the thornier question of whether this satellite monitoring violated an individual's reasonable expectation of privacy. Justice Alito aptly observed that recent technological advancements have placed vast swaths of information into the public realm, a development which "will continue to shape the average person's expectations about the privacy of his or her daily movements."[6] *Id.* at *17 (Alito, J., concurring). With that in mind, he concluded monitoring one's movements on a public street for a relatively short period of time would not violate an individual's reasonable expectations of privacy. *Id.* (citing *United States v. Knotts*, 460 U.S. 276, 281-82 (1983)). When that monitoring becomes long-term, however, the nature of the invasion changes:

> But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would-and indeed, in the main, simply could not-secretly monitor and catalogue every single movement of an individual's car for a very long period.

Id. Applying this principle to the four-week monitoring at issue in *Jones*, Justice Alito concluded, "We need not identify with precision the point at which the tracking of th[e] vehicle became a search, for the line was surely crossed before the 4-week mark." *Id.*

Justice Sotomayor similarly noted we live in an age so inundated with technology that we may unwittingly "reveal a great deal of information about [our]selves to third parties in the course of carrying out mundane tasks." *Id.* at *10 (Sotomayor, J., concurring). In that vein, she agreed with Justice Alito's concerns about the intrusiveness of satellite monitoring: "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[7] *Id.* at *9. Thus, satellite monitoring invites the State into the subject's world twenty-four hours per day, seven days per week, and it provides the State with a precise view of her intimate habits, whether she is in public or not. If we are not careful about and cognizant of this fact, "the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse" and "may 'alter the relationship between citizen and government in a way that is inimical to democratic society.'" *Id.* (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

Although these cases were decided under the rubric of the Fourth Amendment, we nevertheless find them instructive here. As Justice Alito and Justice Sotomayor incisively observed, the very concept of what we as citizens view as private is called into question by technology which facilities unprecedented oversight of our lives. More importantly, at issue in this case is not just the tracking of individuals for a period of time while they are being

investigated for a specific crime-as with a Fourth Amendment search-but the statutorily mandated monitoring of certain individuals for as long as they live with no ability to have it removed. *See United States v. Pineda-Moreno*, 617 F.3d 1120, 1124 (9th Cir. 2010) (Kozinski, J., dissenting from the denial of rehearing en banc) ("By holding that this kind of surveillance doesn't impair an individual's reasonable expectation of privacy, the panel hands the government the power to track the movements of every one of us, every day of our lives."). We must not forget that "liberty is something more than exemption from physical restraint" and includes a "liberty of the mind." *Palko*, 302 U.S. at 327. As our history from Blackstone to *Jones* accordingly makes clear, the Constitution guarantees a certain freedom from government intrusion into the day-to-day order of our lives which lies at the heart of a free society. In our opinion, "neither liberty nor justice would exist" if the government could, without sufficient justification, monitor the precise location of an individual twenty-four hours a day until he dies.

We turn next, as we must, to whether Dykes' status as a convicted sex offender alters this result. Although the concurrence believes it does, we disagree for the reasons below. The State first argues that satellite monitoring is akin to sex offender registration and is, indeed, less intrusive than registration. Numerous courts, including this Court, have routinely held that convicted sex offenders do not have a fundamental liberty interest to be free from registration requirements. *E.g., Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 500 (6th Cir. 2007); *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004); *Ark. Dep't of Corr. v. Bailey*, 247 S.W.3d 851, 861 (Ark. 2007); *State v. Germane*, 971 A.2d 555, 584 (R.I. 2009); *Hendrix v. Taylor*, 353 S.C. 542, 552, 579 S.E.2d 320, 325 (2003); *McCabe v. Commonwealth*, 650 S.E.2d 508, 512 (Va. 2007). However, a requirement that a person register is qualitatively different than a requirement that a person submit to mandatory satellite monitoring of his location for the rest of his life. The State argues that the inverse is true and that it is the sex offender registry which is more invasive. In particular, the State points out that the registry provides the public with the offender's full name, address, and offense history. Furthermore, the registry contains a photograph of the individual in addition to a physical description, complete with a list of tattoos and scars. In contrast, information obtained through satellite monitoring of that individual is limited to only the person's location and is not available to the public.

While all of this may be true, the State misapprehends the thrust of Dykes' argument. She does not contend public availability of the information implicates a fundamental right, but rather that citizens have a right to be free from state monitoring of their every movement. This sort of constant surveillance reveals the intimate details of her private life by compiling a complete picture of her movements in public and in private that tells the story of how she lives her life, information not available through the registry. It is this invasion of privacy and infringement of an individual's freedom from government interference with the liberty of the mind that implicates substantive due process. Additionally, Dykes is no longer on probation and therefore is not subject to the limited liberty interest courts recognize for those serving probationary terms. *See Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (noting that offenders on probation "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'" (alteration in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

It is true that convicted felons do not have the same constitutional liberties as those who have not been convicted of a felony. *See State v. Bowditch*, 700 S.E.2d 1, 12 (N.C. 2010);

cf. Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986) ("It is undisputed that a state may constitutionally disenfranchise convicted felons, and that the right of felons to vote is not fundamental."). The State accordingly argues, and the concurrence agrees, that Dykes does not enjoy the full liberty interest described above because she is a convicted sex offender.

However, this misses the nature of the right in question. The precise right Dykes claims is fundamental is the right of a convicted sex offender who is not under any probationary or similar restrictions and *who poses a low risk of reoffending* to be free from continuous satellite monitoring. In our opinion, if Dykes poses a low risk of reoffending, then her status as a convicted sex offender is no longer a compelling reason to impair her constitutional rights in this regard. As we discuss below, a sex offender's likelihood of reoffending is the impetus for imposing satellite monitoring; as the risk of reoffending diminishes, so too does the rationale for monitoring her. Therefore, while Dykes' status as a convicted felon may impair her rights to some degree, we do not believe the fact that she stands convicted of a sex crime, by itself, is sufficient to warrant lifetime continuous government tracking of her location. If Dykes does pose a low risk of reoffending, it accordingly is clear to us beyond a reasonable doubt that section 23-3-540(C) would infringe on her fundamental rights. *See State v. Stines*, 683 S.E.2d 411, 413 (N.C. Ct. App. 2009) (finding satellite monitoring implicates a liberty interest).

We are also deeply troubled by the policy restricting the interstate travel of the subject being monitored. "The right to travel is inherent in the concept of our country as a federal union; hence the right to travel is a fundamental constitutional right under the federal constitution." *Mitchell v. Steffen*, 504 N.W.2d 198, 200 (Minn. 1993); *see also Pelland v. Rhode Island*, 317 F. Supp. 2d 86, 90 (D.R.I. 2004) ("American citizens enjoy the constitutionally protected liberty to travel across state borders."). Where an individual is still under a probationary or similar term, a state may constitutionally restrict his right to travel. *See Pelland*, 317 F. Supp. 2d at 91; *see also United States v. Crandon*, 173 F.3d 122, 128 (3d Cir. 1999) (recognizing conditions of release may curtail certain fundamental rights). However, it is a different situation when a person is not on probation. Requirements that a sex offender notify officials when he leaves the state have been upheld as not sufficiently burdening interstate travel. *See, e.g., United States v. Shenandoah*, 595 F.3d 151, 162-63 (3d Cir. 2010); *State v. Wigglesworth*, 63 P.3d 1185, 1190 (Or. Ct. App. 2003). Far from being a mere notification requirement, the policy here is a flat prohibition against crossing state lines absent government approval. We can see few clearer burdens on interstate travel than having to seek prior permission from the State to leave South Carolina and permitting overnight stays only in emergency situations and with approval solely by the regional director.

Next, we must determine whether section 23-3-540(C) is narrowly tailored to serve a compelling state interest, thus surviving strict scrutiny.[8] One cannot "minimize the importance and fundamental nature of [an individual's liberty interest]. But, as our cases hold, this right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society." *United States v. Salerno*, 481 U.S. 739, 750-51 (1987). For as Blackstone so eloquently wrote, "[T]his species of legal obedience and conformity is infinitely more desirable[] than that wild and savage liberty which is sacrificed to obtain it." 1 William Blackstone, Commentaries *121. Dykes concedes that protecting the public from sex offenders who pose a high risk of reoffending is a

compelling state interest; she steadfastly maintains, however, that protecting the public from those who have a low risk of reoffending is not a compelling state interest. We agree.

It is beyond question that "[s]ex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32 (2002). In fact, "the victims of sexual assault are often juveniles," and "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.* at 33. Thus, the General Assembly noted "[s]tatistics show that sex offenders often pose a high risk of re-offending," S.C. Code Ann. § 23-3-400 (2007), prompting it to enact provisions "to protect the public from those sex offenders who may re-offend," *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). However, imposing measures which are justified, at least substantially in part, by the possibility that an individual may reoffend without any actual consideration of his likelihood to reoffend is incongruous and arbitrary. Monitoring sex offenders who pose a low risk of reoffending for the rest of their lives is not "sufficiently weighty" such that the subject's liberty interest in being free from government monitoring must be "subordinated to the greater needs of society." *See Salerno*, 481 U.S. at 750-51. The same is true with respect to the State's travel policy for it unquestionably infringes on Dykes' fundamental right to travel without any consideration of whether such a restriction is warranted.

We therefore hold that requiring Dykes, a convicted sex offender who is under no probationary or similar restrictions, to submit to satellite monitoring for the rest of her life *if she poses a low risk of reoffending* violates her substantive due process rights. To paraphrase Blackstone, section 23-3-540(C)'s application to Dykes has the potential to decrease her natural liberty without any attendant increase in overall civil liberty. However, because the circuit court made no findings as to Dykes' chance of reoffending, a remand is in order for that determination.

We emphasize that our holding today is a narrow one and the satellite monitoring provisions remain largely intact.[9] First, we do not suggest that satellite monitoring as a whole is unconstitutional. Rather, it is only the mandatory monitoring of those who pose a low risk of reoffending that violates due process. Furthermore, our holding only extends to those who are not under any term of probation, parole, or similar restrictions; we express no opinion as to whether mandatory monitoring those who are on probation, parole, or community supervision implicates substantive due process. Our holding also only applies to those who have no mechanism to have the monitoring removed because they have a conviction of CSC-First or lewd act. Given the manner in which Dykes framed this issue to us and the strictures of *Glucksberg*, we also do not reach today the issue of whether those individuals who are found to pose a high risk of reoffending have a due process right to discretionary imposition or periodic review of their lifetime monitoring.

Accordingly, the circuit court on remand will exercise discretion to determine Dykes' risk of reoffending. If it finds she has a low risk of re-offending but nevertheless imposes monitoring, Dykes will be able to petition for release from the monitoring after ten years, consistent with section 23-3-540(H).

CONCLUSION

For the foregoing reasons, we reverse the order of the circuit court and remand for

proceedings consistent with this opinion.[10]

BEATTY, J., concurs. KITTREDGE, J., concurring in a separate opinion in which TOAL, C.J. and PLEICONES, J., concur. JUSTICE KITTREDGE: I concur in result. I commend my learned colleague for her scholarly research, and I agree with the majority's general proposition that persons have a fundamental right "to be let alone." But I respectfully disagree that Appellant, as a convicted child sex offender, possesses a right that is fundamental in the constitutional sense. I do not view Appellant's purported right as fundamental. I would find Appellant possesses a liberty interest entitled to constitutional protection, for all persons most assuredly have a liberty interest to be free from *unreasonable* governmental interference. I would find that the challenged mandatory lifetime, non-reviewable satellite monitoring provision in section 23-3-540(C) is arbitrary and fails the minimal rational relationship test.[11]

I.

I begin with the premise that satellite monitoring is predominantly civil. See Smith v. Doe, 538 U.S. 84 (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 (quoting Hudson v. United States, 522 U.S. 93, 100 (1997)) (internal quotations omitted).

> The General Assembly expressly stated its intent:
>
> The intent of this article is to promote the state's fundamental right to provide for the public health, welfare, and safety of its citizens [by] . . . provid[ing] law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of reoffending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

S.C. Code Ann. § 23-3-400 (2007). This Court has examined this language and held "it is clear the General Assembly did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes." State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). Thus, a likelihood of re-offending lies at the core of South Carolina's statutory scheme.

II.

The United States Supreme Court has cautioned restraint in the recognition of rights deemed to be fundamental in a constitutional sense. Washington v. Glucksberg, 521 U.S. 702 (1997). Courts must "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [members of the judiciary]." Id. at 720. The Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" Id. at 720-21 (internal citations

omitted). I would not hold that a convicted child sex offender has a fundamental right to be "let alone" that is "deeply rooted in this Nation's history and tradition." Given the civil nature of satellite monitoring and the clear authority of the legislature to impose such a regulatory scheme, I respectfully reject the suggestion that a convicted child sex offender's limited liberty interest morphs into a fundamental right when the active sentence comes to an end.

Notwithstanding the absence of a fundamental right, I do believe lifetime imposition of satellite monitoring, with no consideration of likelihood of re-offending, implicates a liberty interest and invokes minimum due process protection.[12] See Commonwealth v. Cory, 911 N.E.2d 187 (Mass. 2009) (finding satellite monitoring burdens an offender's liberty interest in two ways, by "its permanent, physical attachment to the offender, and by its continuous surveillance of the offender's activities"). Thus, courts must "ensure[] that legislation which deprives a person of a life, liberty, or property right have, at a minimum, a rational basis, and not be arbitrary . . . ." In re Treatment and Care of Luckabaugh, 351 S.C. 122, 139-40, 568 S.E.2d 338, 346 (2002); see also Nebbia v. N.Y., 291 U.S. 502, 525 (1934) ("[T]he guarant[ee] of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious . . . ."); Hamilton v. Bd. of Trs. of Oconee County Sch. Dist., 282 S.C. 519, 319 S.E.2d 717 (Ct. App. 1984) (holding that, to comport with due process, the legislation must have a rational basis for the deprivation and may not be "so inadequate that the judiciary will characterize it as arbitrary").

Having served her sentence, I believe Appellant possesses a liberty interest that is violated by the mandatory, non-reviewable provisions of section 23-3-540(C). Applying the rational basis test to Appellant's due process challenge, I would find the mandated lifetime satellite monitoring and absence of any judicial review related to an assessment of an individual's likelihood of re-offending renders the challenged provision arbitrary. Further, in light of the legislature's predication of the statutory scheme on the substantial purpose of protecting the public from sex offenders who may re-offend, I would find the lack of risk assessment within section 23-3-540(C) not rationally related to such purpose, and thus unconstitutional. See Addington v. Texas, 441 U.S. 418 (1979) (finding an individual's liberty interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by clear and convincing proof); Kansas v. Hendricks, 521 U.S. 346 (1997) (upholding sexually violent predator commitment statute and emphasizing the role of the review to ensure commitment lasts only so long as it is necessary to protect the public); see also Lyng v. Int'l Union, 485 U.S. 360 (1988) (noting that although allegedly arbitrary legislation invokes the least intrusive rational basis test, that standard of review is "not a toothless one"); Luckabaugh, 351 S.C. at 139-40, 568 S.E.2d at 346 (finding due process ensures that a statute which deprives a person of a liberty interest has "at a minimum, a rational basis, and may not be arbitrary").

I believe the finding of arbitrariness is additionally supported by the South Carolina Constitution, which, unlike the United States Constitution, has an express privacy provision. See S.C. Const. art. I, § 10 ("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 . . . ."). While our constitution's privacy provision does not transform a purported privacy interest into a fundamental right for purposes of applying the strict scrutiny test, I believe it does inform the analysis of whether a state law is arbitrary and lends additional support to the conclusion that section 23-3-540(C) is unconstitutional. Cf. State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007) (holding that by

articulating a specific prohibition against unreasonable invasions of privacy, the people of South Carolina have indicated a higher level of privacy protection than the federal Constitution).

Therefore, I concur in result to reverse and remand.

TOAL, C.J., and PLEICONES, J., concur.

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[1] Because a majority of the Court has joined the separate concurring opinion of Justice Kittredge, his concurrence is now the controlling opinion in this case.

[2] Specifically, the individual must have engaged in a sexual battery with a victim who is less than eleven years old. S.C. Code Ann. § 23-3-540(A) (Supp. 2010) (cross-referencing *id.* § 16-3-655(A)(1) (Supp. 2010)).

[3] The statute does not provide any criteria to aid the court in determining whether to order monitoring for these individuals.

[4] The majority in *Poe* did not reach the substantive issue involved because it found the case to be nonjusticiable. *Poe*, 367 U.S. at 507-09.

[5] As Chief Justice Roberts stated in 2006, "the impact of technology across the law" is going to be the biggest challenge for the Court in the coming years. Chief Justice John G. Roberts, Jr., Address at the Charleston School of Law (Oct. 20, 2006) (video recording on file in the Charleston School of Law Sol Blatt, Jr., Law Library). Especially with respect to constitutional rights, the Court is going to be confronted with "the impact of technology on areas of the law that we thought had been pretty well settled and established and are going to have to be revisited and rethought in the light of the new science." *Id.*

[6] In *Jones*, the monitor placed on underside of Jones's car constantly tracked the car's movements over a four-week period without his knowledge. 2012 WL 171117, at *2. The majority's contention to the contrary, Justice Alito noted there is no eighteenth century analogue to this type of investigation, because that "would have required either a gigantic coach, a very tiny constable, or both-not to mention a constable with incredible fortitude and patience." *Id.* at *11 n.3 (Alito, J., concurring).

[7] Justice Alito's concurrence was joined by three other members of the Court, Justice Ginsburg, Justice Breyer, and Justice Kagan. After noting she shared the same concerns as Justice Alito, Justice Sotomayor wrote that "[r]esolution of these difficult questions . . . is unnecessary" at this time because the majority's trespass theory was dispositive of the case. *Jones*, 2012 WL 171117, at *10 (Sotomayor, J., concurring).

[8] We note Dykes posits her argument of unconstitutionality solely in terms of strict scrutiny. With great respect for the concurrence, we do not believe Dykes' repeated statements that the statute is arbitrary and capricious are sufficient to invoke the rational basis test. Rational basis review and strict scrutiny are merely the vehicles through which we determine whether a statute is arbitrary for due process purposes, and using the term "arbitrary" or "capricious" is not determinative of the level of review we apply. However, if we were to apply rational basis review, we would be inclined to find the statute constitutional.

Absent the implication of a fundamental right, "[t]he impairment of a lesser interest . . . demands no more than a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose." *See Reno*, 507 U.S. at 305. A law also "need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487-88 (1955). The State undoubtedly has an important interest in investigating sexual assaults against children, and Dykes has not challenge this interest. Furthermore, we believe requiring those who have committed similar crimes in the past to be monitored is at least rationally related to that interest and not wholly arbitrary, especially if their right to be free from monitoring is not fundamental.

[9] Consistent with the severability clause found in 2006 Act No. 346-the act passing section 23-3-540-the only portions of the statute affected by our decision are that the court "must" order satellite monitoring for those convicted of CSC-First and lewd act and that these persons have no means of petitioning for relief from the monitoring. *See* 2006 Act No. 346 § 8 (stating that if a court were to find any portion of the statute unconstitutional, that holding does not affect the rest of the statute and the General Assembly would have passed it without that ineffective part); *see also Dean v. Timmerman*, 234 S.C. 35, 43, 106 S.E.2d 665, 669 (1959) ("When the residue of an Act, sans that portion found to be unconstitutional, is capable of being executed in accordance with the Legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional Provision.").

[10] Because our conclusion here is dispositive of Dykes' appeal, we do not reach her remaining challenges to section 23-3-540(C). *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that a court need not reach remaining issues if one issue is dispositive of the appeal).

[11] Following the rape and murder of a nine year-old-girl by a convicted sex offender who lived across the street, Florida passed the Jessica Langford Act in 2005. This Act, referred to as "Jessica's Law," heightened criminal sentences and post-release monitoring of child sex offenders. Many states, including South Carolina, followed suit in adopting some version of Jessica's Law. However, South Carolina's requirement of mandatory lifetime monitoring without review is more severe than the statutory scheme of other jurisdictions. A common approach among other states that have adopted some form of "Jessica's Law" is to require either a predicate finding of probability to re-offend or provide a judicial review process, which allows for, upon a proper showing, a court order releasing the offender from the satellite monitoring requirements. See generally, N.C. Gen. Stat. Ann. § 14-208.43 (West 2010) (providing a termination procedure one year after the imposition of the satellite based monitoring or a risk assessment for certain offenders). In accordance with the severability clause in South Carolina's statutory scheme, I concur with the finding of the majority expressed in footnote 7 that the offenses of criminal sexual conduct in the first degree and committing or attempting a lewd act upon a child under sixteen must follow the process as outlined for the balance of child sex related offenses.

[12] In my opinion, although Appellant posited her main argument in terms of strict scrutiny, Appellant's presentation of a due process challenge sufficiently permits the Court to consider such claim under the lesser levels of scrutiny. Indeed, Appellant's final brief

contains many assertions that fit the rational relationship test, for example:

> Substantive due process protects citizens against arbitrary or capricious action by the government regardless of the procedures used to carry out that action. . . . In this case, appellant's substantive due process rights were violated because §23-3-540(C) mandated [the trial judge] arbitrarily and capriciously imposed lifetime GPS monitoring on her. The imposition was arbitrary and capricious . . . . The substantive component of this right prohibits the state from arbitrarily or capriciously depriving a person of life, liberty, or property regardless of whether or not the way in which the government carries out this deprivation is, itself, ostensibly fair.

The concept of "arbitrary and capricious" lies at the heart of the rational relationship test. Therefore, I would find that the Court may properly consider Appellant's due process challenge under the rational relationship test.

ATTACHMENT "B"

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Charles B. Simmons, Jr., Special Circuit Court Judge

S.C. Sup. Ct. Opinion No. 27124
Heard September 22, 2011 - Filed May 9, 2012

The State, Respondent,

v.

Jennifer Rayanne Dykes, Appellant.

PETITION FOR REHEARING

Respondent, the State of South Carolina, respectfully petitions the Court for rehearing pursuant to Rule 221(a), SCACR. The State hereby seeks rehearing on the grounds that the Court may have misapprehended or overlooked several crucial points in concluding that the mandatory lifetime, non-reviewable satellite monitoring provisions in section 23-3-540(C) of the South Carolina Code are arbitrary, not rationally related to the purpose of the statutory scheme, and therefore violate Appellant's substantive due process rights under the Fourteenth Amendment to the United States Constitution. Specifically, the State submits the Court may have misapprehended the scope of the due process argument raised by Appellant in this appeal, and as a result, may have addressed an issue neither raised to nor ruled upon by the lower court. The State further submits that to the extent this Court conducted a due process analysis within the scope of the argument raised by Appellant, it may have misapprehended or overlooked the

rational relationship that clearly exists between the mandatory lifetime satellite monitoring provisions in section 23-3-540(C) of the Code, and the stated purposes of the statutory scheme; a relationship that renders that statute neither arbitrary nor unconstitutional under the due process clause of the Fourteenth Amendment. In addition, the State submits the Court may have misapprehended and exceeded its judicial authority in attempting to add a risk-assessment procedure that was not enacted by the General Assembly and cannot be found in the statute. Finally, the State submits the Court may have overlooked the lack of adequate guidance for the bench and bar in regard to implementation of the proposed risk-assessment process, because it leaves several key issues unanswered.

Therefore, the State respectfully asks this Court to grant this Petition for Rehearing and issue an opinion affirming the decision of the lower court. Alternatively, the State asks this Court to grant this Petition for Rehearing and issue an amended opinion limited to: (1) striking the unconstitutional portions of the law (mandatory placement on satellite monitoring with no option to petition for removal), and (2) ordering appropriate consideration of all affected individuals under the portions of the law saved by the severability clause (discretionary placement on satellite monitoring with the option to petition for removal), without attempting to add an undefined risk-assessment procedure that cannot be found in the existing legislation. Finally, as a third alternative the State asks this Court to grant this Petition for Rehearing and issue an amended opinion providing additional guidance to the State, Appellant, the bench, and the bar regarding the full and accurate implementation of its current decision, by addressing the specific issues raised in Part III below.

I. The mandatory imposition of lifetime satellite monitoring pursuant to Section 23-3-540(C) of the South Carolina Code, without judicial review related to an assessment of an individual's likelihood of re-offending, is neither arbitrary nor unconstitutional because it is rationally related to the stated purpose of the statutory scheme.

Initially the State submits that in choosing to analyze Appellant's substantive due process challenge under the rational basis test, the controlling opinion may have misapprehended the scope of Appellant's argument in this matter. Because Appellant's due process argument rested solely on her claim that the statute impacts a fundamental right and fails strict scrutiny, the State submits the Court should not have considered her challenge under a rational basis test analysis. As noted in Justice Hearn's dissent,[1] "Dykes does not argue South Carolina's satellite monitoring scheme fails the lesser rational basis review, choosing instead to rely exclusively on strict scrutiny." The controlling opinion responds to this concern by way of reference to Appellant's final brief, noting her repeated use of the terms "arbitrary" and "capricious" when generally introducing her due process analysis. State v. Dykes, (Kittredge, J., concurring) (citing Final Brief of Appellant, p.17)). However, the controlling opinion takes Appellant's use of such terms out of context. When Appellant goes on to actually argue her position she states:

> The first step in a substantive due process analysis is to determine what level of scrutiny should be applied.
>
> . . . .
>
> Lifetime GPS monitoring under § 23-3-540(C) infringes fundamental liberty rights. It requires an electronic device to be

[1] The State refers to this opinion as a dissent because its conclusions do not agree with the controlling opinion's ultimate holding when applying the rational basis test. See State v. Dykes, footnote 8 ("If we were to apply rational basis review, we would be inclined to find the statute constitutional.").

> permanently attached to the body, S.C. Code §§ 23-3-540(H) and (P), and, therefore, infringes the fundamental right to control the integrity of one's own body. Lifetime GPS monitoring tracks the physical location of a person minute-by-minute. Stipulation of Facts at 1, R. 121. It therefore infringes the fundamental right to be free from unwanted interference into one's personal privacy. Because lifetime GPS monitoring under § 23-3-540(C) infringes on fundamental liberty and constitutionally protected property rights, the proper standard for review under substantive due process is strict scrutiny.

(Final Brief of Appellant, p.18). This argument follows precisely from the position Appellant presented to the lower court on April 22, 2010, wherein she argued the statute impinged on a "fundamental" liberty right or interest, and that it was unconstitutional because it was not "narrowly tailored" to achieve the State's goal. (R.p.18, lines 13-15; p.22, line 25-p.24, line 13; p.35, lines 16-19). She never argued to the lower court or to this Court that Section 23-3-540(C) would fail the rational basis test. The State submits that standing alone, the appellate argument is self-limited to a strict scrutiny analysis, and that even without the self-limitation, the argument is nevertheless constrained to a strict scrutiny analysis by the limited argument made to the court below. By failing to claim a due process violation under a rational basis review, Appellant failed to preserve such argument for appellate review. See State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 96 (Ct. App. 1999) (holding that a challenge to validity of probation revocation must be raised to and ruled upon by the revocation judge to be preserved for appellate review). Consequently, the State respectfully submits this Court should not have conducted a due process review using the rational basis test, and the lower court's decision should be affirmed.

To the extent the Court disagrees and continues to apply a rational basis analysis, the State submits the Court may have misapprehended or overlooked the proper application of that

analysis in the context of the sex offender registry as a whole. The State respectfully submits that the mandatory imposition of lifetime satellite monitoring pursuant to section 23-3-540(C) is neither arbitrary nor unconstitutional because it is rationally related to the stated purposes of the statutory scheme. Satellite monitoring as set forth in the Sex Offender Accountability and Protection of Minor Act of 2006 is part and parcel of the South Carolina Sex Offender Registry. In fact, the duration of satellite monitoring is tied specifically to the duration of the time the person is required to remain on the registry. S.C. Code Ann. § 23-3-540(H) (Supp. 2010). As part of the registry, satellite monitoring is also tied to its registry's stated government goals, for investigative, statistical, and public safety purposes. As noted by the controlling opinion, this Court has directly examined the statutory intent as stated by the General Assembly and held: "it is clear the General Assembly did not intent to punish sex offenders, but instead intended to protect the public from those sex offenders who may re-offend and to aid law enforcement in solving sex crimes." State v. Walls, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002) (emphasis added).

The State submits that by imposing satellite monitoring on a narrowly defined class of registered sex offenders who have been convicted of sex crimes against children, the General Assembly has simply enacted a legitimate extension of the registry itself, furthering the two primary purposes of the statute - to protect the public and to aid law enforcement. When an individual knows she is subject to satellite monitoring, she is far less likely to commit a new sex crime by virtue of the satellite monitor being able to place her at the scene of the crime. Thus, satellite monitoring has an unquestionable specific deterrent effect. Similarly, satellite monitoring can help law enforcement agencies solve crimes, either by placing the individual at a

crime scene, or as exculpatory evidence proving the person was elsewhere. If, as previously determined by this Court, lifetime registry does not constitute punishment so as to invoke constitutional protection, and does not otherwise violate the United States or South Carolina Constitutions, then the additional satellite monitoring requirements imposed by Section 23-3-540(C) should avoid such treatment as well, because they are simply legitimate legislative extensions of the registry.

The State notes that the Court's controlling opinion makes no finding whatsoever that satellite monitoring is any more restrictive or oppressive than the registry itself. Without such a distinction, there is no basis for finding that satellite monitoring violates due process, while the registry does not. The only thing the Court found as a problem with Section 23-3-540(C) was the lack of a specific risk assessment and a judicial finding of Appellant's likelihood to re-offend, a procedure which is also non-existent in the general provisions requiring that all convicted sex offenders register for life. Such registry provisions have repeatedly withstood constitutional challenge in South Carolina and the rest of the country. See e.g. In re Ronnie A, 355 S.C. 407, 585 S.E.2d 311 (2003) (finding no due process violation in requiring lifetime sex offender registration for juvenile sex offenders because registration is rationally related to achieving legitimate objective of protecting public from those offenders who may re-offend).

Sex offender registry laws have withstood constitutional challenge because they are rationally related to the stated goals of protecting the public and assisting law enforcement. In the controlling opinion this Court found that Appellant possesses a liberty interest entitled to constitutional protection, "for all persons most assuredly have a liberty interest to be free from unreasonable government interference." State v. Dykes, (Kittredge, J., concurring). However,

Appellant is a convicted child sex offender and does not stand in the same status as "all persons." Indeed, in regard to the goal of protecting the public, registry laws have been upheld because the likelihood to re-offend is inherent and universally recognized for the type of offenders required to submit to monitoring. See Smith v. Doe, 538 U.S. 84, 103 (2003) ("The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is 'frightening and high.' " (emphasis added and citations omitted)); McKune v. Lile, 536 U.S. 24, 32-33 (2002) ("Sex offenders are a serious threat in this Nation. . . . When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." (emphasis added)). Based on the United States Supreme Court's holdings, sex offenders "as a class" already have a high risk to re-offend without any need for further findings. Since sex offenders have an inherently high risk to re-offend, the lack of an individualized assessment and finding of future dangerousness should not prohibit the Legislature from acting to strengthen the goals of the registry by mandating satellite monitoring for a more narrowly defined class of criminals who have been convicted of sex crimes against children. In Appellant's case, Section 23-3-540(C) only requires placement on satellite monitoring because she is a registered sex offender, she committed the sex offense against a minor, and she failed to comply with the conditions of probation imposed by the sentencing court even after being given verbal and written notice that a probation violation would trigger mandatory satellite monitoring for as long as she would have to register.

According to Appellant, satellite monitoring was created "to protect the public from sex offenders who pose a high risk of re-offending." (Brief of Appellant, p. 6). However, nowhere

in Sex Offender Accountability and Protection of Minor's Act does the law state that it was created to protect the public only from an undefined sub-group of child sex offenders who pose a "high risk" of re-offending. The mandatory provisions of the statute are clear, it applies to all individuals convicted of CSC 1st w/minor and lewd act, regardless of an individualized determination of potential dangerousness. The State submits this is because the General Assembly has already made this risk determination when it comes to individuals convicted of these two offenses, by legislatively requiring satellite monitoring if they fail to follow the conditions of their probation or community supervision. Section 23-3-540(C) demonstrates the General Assembly's determination that certain child sex offenders pose a significantly enough risk of re-offending to warrant satellite monitoring regardless of age, gender, or an individualized risk assessment.

The State, Appellant, and presumably this Court agree that deterring future sex crimes and helping law enforcement agencies solve such crimes are important government interests. The rational basis test "demands no more than a 'reasonable fit' between government purpose . . . and the means chosen to advance that purpose." Reno v. Flores, 507 U.S. 292, 305 (1993) (upholding a law that permitted detained juvenile aliens to be released only to their parents). The State submits here there is a reasonable fit between mandatory satellite monitoring and both primary goals of the sex offender registry, one of which (assisting law enforcement in investigating and solving sexual assaults against children) was not even challenged by Appellant in this appeal. Furthermore, the State submits the duration of the monitoring requirement is not excessive in relation to the State's legitimate non-punitive purpose. A child thirty or forty years

from now is no less deserving of protection than a child in the present. To the extent satellite monitoring can accomplish its stated purpose, it can do so now or in the future.

Because there is no way to absolutely determine if a person will or will not re-offend, the sex offender registry and satellite monitoring were enacted to protect the citizens of South Carolina for as long as the convicted sex offender is alive, which is a legitimate state interest. The statute itself explains the purpose for the monitoring of sex offenders, and it has nothing to do with the individual level of likelihood of re-offending. This is because there is no way to know if a person is going to re-offend. Even Appellant's expert witness, Dr. Dwyer, testified that he cannot predict the future, and that it is possible Appellant could re-offend. (R. p. 85, lines 9-12). Since there is no way to absolutely determine if a person is going to re-offend, the State submits satellite monitoring is a legitimate effort by the State to protect minors. Any re-offense carries devastating results for the child victim, regardless of how likely that re-offense was to occur. For all of these reasons, the State submits Section 23-3-540(C) is rationally related to the government interests identified in the registry, and therefore comports with substantive due process.

II. The Court exceeded the proper scope of its judicial authority in attempting to add a risk-assessment procedure that was not enacted by the Legislature and cannot be found in the statute.

The controlling opinion finds that: "the mandated lifetime satellite monitoring and absence of any judicial review related to an assessment of an individual's likelihood of re-offending renders the challenged provision arbitrary." The opinion also finds "the lack of risk assessment within section 23-3-540(C) not rationally related to [protecting the public from sex

offenders who may re-offend], and thus unconstitutional." State v. Dykes, (Kittredge, J., concurring)(emphasis added). Based on these findings this Court ultimately orders:

> Accordingly, the circuit court on remand will exercise discretion to determine Dykes' risk of re-offending.. If it finds she has a low risk or re-offending but nevertheless imposes monitoring, Dykes will be able to petition for release from the monitoring after ten years, consistent with section 23-3-540(H).

State v. Dykes, (Hearn, J.) The State submits that by ordering such an assessment on remand, the Court has effectively exceeded the scope of its judicial authority and has invaded the province of the legislature, thereby violating the doctrine of separation of powers.

Although certain provisions of Section 23-3-540 give the lower court discretion over whether to impose satellite monitoring, S.C. Code Ann. §§ 23-3-540(B), -540(D) and -540(F), no existing provision specifically contemplates an assessment of an individual's likelihood or risk of re-offending. The Court has effectively enacted a procedure that must be conducted before a person found in violation of probation or community supervision may be placed on satellite monitoring under Section 23-3-540(C), a procedure that cannot be found in the legislation. See State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, must take the statute as we find it, giving effect to the legislative intent as expressed in its language. We cannot under our power of construction supply an omission in the statute."). By requiring a procedure not required under the statute, the Court exceeded the scope of its judicial authority, authority which was simply to answer the question of whether the challenged statute was constitutional or not. See Bray v. Marathon Corp., 356 S.C. 111, 117, n.6, 588 S.E.2d 93, 96 (2003) ("In any event, we are without authority to graft the Kinard bystander anaylsis on [Section] 15-73-10. Where the legislature has, by statute, acted upon a subject, the judiciary is

limited to interpretation and construction of that statute. If the Act is to be amended, this must be accomplished by the legislature, not the court."); Henderson v. Evans, 268 S.C. 127, 130, 232 S.E.2d 331, 333 (1977) ("Any other construction of the statute would be amendatory; certainly it is not the province of this Court to perform legislative functions."); Page v. Winter, 240 S.C. 516, 518, 126 S.E.2d 570, 571 (1962) ("[I]t is the function of the legislature, not the courts, to make, amend or repeal laws. . . . We do not have the right 'to repeal, alter, modify, or change the law of the land, even when it plainly appears that the law in force may be wrong.' " (citations omitted)); Hadden v. South Carolina Tax Comm'n, 183 S.C. 38, 190 S.E. 249, 253 (1937) ("This court is not a lawmaking body[.]"); see also State v. Byrd, 267 S.C. 87, 91-92, 226 S.E.2d 244, 246 (1976) ("We bear in mind that when a court is called upon to determine the constitutionality of a legislative enactment, it must be careful not to usurp the legislative function."). To the extent the Court answered the constitutionality of the statute question in the negative, the Court's decision fell within their constitutional authority. However, when the Court then modified the statute by adding the risk assessment requirement, it went beyond its authority and stepped into the legislature's role. See Lang v. Comm'r of Internal Revenue, 289 U.S. 109, 113 (1933) ("If the legislation here under review results in imposing an unfair burden upon the taxpayer, the remedy is with Congress, and not with the courts."); see, e.g., L.P. Steuwart & Bro., Inc. v. Bowles, 322 U.S. 389, 404 (1944) ("It would transcend both the judicial and administrative function to make additions to those which Congress has placed behind a statute."). It is beyond this Court's power to effect a change in the statutes enacted by the Legislature. State v. Corey D., 339 S.C. 107, 529 S.E.2d 20 (2000) (citing Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (the

Court does not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly)).

The State respectfully submits that even if this Court stands by its ruling that the challenged provisions of the statute are unconstitutional, the remainder of its holding exceeded the Court's constitutional authority. The Court properly held the severability rules save the remainder of the statute; however, it is solely within the legislature's purview to decide whether to implement the procedure proposed by the Court in an effort to bring the stricken portions into constitutional compliance. The State respectfully submits the Court's attempt to add a risk assessment procedure on its own violates separation of powers. Thus, unless and until the General Assembly acts, the State submits first-degree criminal sexual conduct with a minor and lewd act would fall under the requirements of sub-section (D) for probation, parole and community supervision violations, and would fall under the requirements of sub-sections (B) and (F) for the remaining mandatory placement provisions currently in subsections (A) and (E). The State further submits applying the surviving discretionary placement provisions of Section 23-3-540 to all the offenses listed in sub-section (G) fits within the overall scheme since that sub-section specifically includes first-degree CSC with a minor and lewd act. Also, since the Court struck the last sentence in sub-section (H), the State submits everyone placed on satellite monitoring would be eligible to petition the court for removal from that monitoring after ten-years. By limiting its decision to striking the unconstitutional portions of Section 23-3-540, the Court can make the monitoring requirements for those offenses entirely discretionary until the legislature decides to act, which would solve all the implementation and applicability problems raised by the Court's holding. Therefore, the State respectfully asks this Court to alternatively

consider issuing an amended opinion limited to striking the unconstitutional portions of the law and ordering appropriate consideration of all affected individuals under the portions of the law saved by the severability clause, without attempting to add an undefined risk-assessment procedure that cannot be found in the existing legislation.

III. Even if section 23-3-540(C) fails the rational basis test and violates substantive due process, the controlling opinion in this case does not provide adequate guidance to the bench and bar in regard to implementation of the risk-assessment process because it leaves several key questions unanswered.

As noted above, this Court has remanded this matter to the circuit court with instructions to exercise discretion to determine Dykes' risk of re-offending before deciding whether to impose satellite monitoring. See State v. Dykes, (Kittredge, J., concurring). However, after requiring this risk assessment procedure, the Court provides little guidance to the bench and bar in regard to how that procedure must be implemented. The State respectfully requests that the Court provide such guidance by addressing the following issues, thereby ensuring accurate implementation of the risk assessment process added by the Court.

First, the State seeks guidance in regard to which party has the burden of establishing the likelihood of re-offending, and by what burden of proof. Since the statute required mandatory placement on satellite monitoring for the two relevant offenses, the State submits Appellant's high risk should be presumed, and that the burden should fall on Appellant to prove otherwise, by something greater than a preponderance of the evidence. Thus, the State submits a person who is required to register for committing criminal sexual conduct with a minor in the first degree or committing or attempting a lewd act upon a child under sixteen, and who violates a

term of probation, parole, community supervision, or a community supervision program, would be subject to placement on satellite monitoring absent proof, by clear and convincing evidence, that he or she poses a low risk to re-offend.

Second, to the extent an expert is required on remand to establish Appellant's likelihood of re-offense, the State seeks guidance in regard to who is required to pay for that expert. For the same reasons described in regard to the burden of proof, the State submits the cost of any expert evaluation must fall on the person seeking to rebut the presumption that he or she poses a high risk to re-offend, if that person is seeking to avoid mandatory placement on satellite monitoring.

Third, to the extent the circuit court ultimately makes a finding in regard to Appellant's likelihood to re-offend, the State seeks guidance on whether that decision may be appealed, and if so, by whom, subject to what procedure, and subject to what standard of review. The State submits the circuit court's decision to reject or grant a person's attempt to avoid placement on satellite monitoring should be entirely discretionary and not subject to appellate review, particularly where the person "will be able to petition for release from the monitoring after ten years, consistent with section 23-3-540(H)." State v. Dykes, (Hearn, J.). If an appeal is allowed the State submits it should be available to either party, but subject to an "abuse of discretion" standard.

Fourth, the State seeks guidance in regard to how, if at all, the ruling in Appellant's case might apply to individuals who were placed on satellite monitoring pursuant to the mandatory provisions of Section 23-3-540 prior to the effective date of the Court's decision. Although not patently clear, the State assumes the decision applies retroactively. See Bennett v. State, 380 S.C. 215, 669 S.E.2d 594 (2008) (finding that retroactivity may be extended when justice

requires and innocent persons will be adversely affected) (citations omitted). However, the State nonetheless requests clarification from the Court as to whether retroactive application creates a right for affected individuals to petition the circuit court for a risk assessment determination and reconsideration of their placement on satellite monitoring, or if it simply requires immediate removal of affected individuals from further satellite monitoring because they were placed on monitoring pursuant to an unconstitutional statute.

Fifth, to the extent the circuit court determines an individual poses a low risk to re-offend, the State seeks guidance on whether placement on satellite monitoring is nonetheless mandatory, but with the option to petition for removal after ten (10) years, or whether placement is purely discretionary, but also with the option to petition for removal after ten (10) years. In regard to Appellant, the Court's opinion states: ". . . the circuit court on remand will exercise discretion to determine Dykes' risk of reoffending. If it finds she has a low risk of re-offending but nevertheless imposes monitoring, Dykes will be able to petition for release from the monitoring after ten years, consistent with section 23-3-540(H)." State v. Dykes, (Hearn, J.). The State submits it is unclear how the process will actually operate under the Court's ruling. Does the judicial determination in regard to risk of re-offending dictate whether the court has discretion over placement on satellite monitoring? In other words, does discretion over placement only exist after a finding of low risk, or does this Court's decision mean the circuit court also has the discretion to decline satellite monitoring placement after finding a high risk to re-offend?

Finally, the State seeks guidance in regard to whether the determination of a person's likelihood to re-offend should be made at the time of the probation or community supervision violation, or at the time of release from incarceration following any revocation imposed as a

result of that violation. The State submits that an individual's risk to re-offend can change over time as a result of various non-static factors. Simply because a person is at low risk to re-offend at a violation hearing does not mean they remain a low risk to re-offend upon release from prison. Thus, the State submits that where a person is subject to a term of incarceration followed by possible release to satellite monitoring, that person should be required to prove his or her low risk to re-offend by clear and convincing evidence, at or before release from incarceration.

The State respectfully requests that the Court either provide guidance to the bench and bar by addressing the questions above, or that it simply take the action described in Part II above, by striking out the offending portions of the statute without imposing new, non-legislatively approved requirements. This would eliminate the need to address the additional issues, and would leave the ultimate dilemma of whether to try and bring the stricken portions of the statute into constitutional compliance with the General Assembly, which is where that issue belongs.

IV. Conclusion

In conclusion, the State respectfully asks this Court to grant this Petition for Rehearing and issue an opinion affirming the decision of the lower court. Alternatively, the State asks this Court to grant this Petition for Rehearing and to issue an amended opinion limited to striking the unconstitutional portions of the law and ordering appropriate consideration of all affected individuals under the remaining portions of the law, without attempting to add an undefined risk-assessment procedure that cannot be found in the existing legislation. Finally, as a third alternative, the State asks this Court to grant this Petition for Rehearing and issue an amended opinion providing additional guidance to the State, the bench, and the bar regarding the full and

accurate implementation of its current decision by addressing the specific questions raised in Part III above. For all of these reasons, the State respectfully asks this Court to grant this Petition for Rehearing.

Respectfully submitted,

J. Benjamin Aplin
General Counsel

Tommy Evans, Jr.
Legal Counsel

South Carolina Department of
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(803) 734-9220

ATTORNEYS FOR RESPONDENT

BY: _____
J. Benjamin Aplin
General Counsel

June 6, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Charles Simmons, Jr., Special Circuit Court Judge

RECEIVED
JUN 8 2012
S.C. SUPREME COURT

S.C. Sup. Ct. Opinion No. 27124
Heard September 22, 2011 - Filed May 9, 2012

The State, Respondent,

v.

Jennifer Rayanne Dykes, Appellant.

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that this 6th day of June, 2012, I served the following documents:

1. Petition for Rehearing; and

2. Certificate of Service;

by first class mail, postage prepaid as follows:

Wanda Carter, Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

Christopher D. Scalzo
13th Circuit Public Defender
Greenville County Courthouse
305 E. North Street, Suite 123
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Dawn K Nichols

Dawn K. Nichols,
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ATTACHMENT "C"

The Supreme Court of South Carolina

The State, Respondent,

v.

Jennifer Rayanne Dykes, Appellant.

Appellate Case No. 2010-160047

ORDER

The petition for rehearing in the above matter is granted. This case will be re-argued on Tuesday, September 18, 2012, at 9:30 am.

C.J.

J.

J.

We would deny rehearing.

J.

J.

Columbia, South Carolina

July 12, 2012

cc: Tommy Evans, Jr.
John Benjamin Aplin
Wanda H. Carter
Christopher D. Scalzo

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

ANDREW JAMES HARRELSON, JR.,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Motion to Hold Appeal in Abeyance Pending Resolution of Issue By Supreme Court by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 25th day of July, 2012.

Ellen R. DuBois

ELLEN R. DuBOIS
Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

July 25, 2012

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State v. Andrew James Harrelson, Jr. – Appellate Case No. 2011-187406

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the Motion to Hold Appeal in Abeyance Pending Resolution of Issue By Supreme Court, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar No. 76901

MRF/erd
Enclosures

cc: LaNelle Cantey DuRant, Esquire
Victim Services