APPENDIX

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Anthony Nation, Appellant.

Appellate Case No. 2011-199726

Appeal From Greenwood County
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 27408
Heard February 5, 2014 – Filed July 2, 2014

AFFIRMED

Ernest Charles Grose, Jr., of Grose Law Firm, and Shane Edwin Goranson, both of Greenwood, and Chief Appellate Defender Robert Michael Dudek, of the South Carolina Commission on Indigent Defense, of Columbia, for Appellant.

Matthew C. Buchanan, of the South Carolina Department of Probation, Parole & Pardon Services, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Anthony Nation (Appellant) appeals the circuit court's decision to statutorily impose lifetime global positioning satellite (GPS) monitoring on him due to his prior guilty plea for a sex offense with a minor and subsequent probation violations. *See* S.C. Code Ann. § 23-3-540 (Supp. 2010)

(enumerating the circumstances in which a court may impose GPS monitoring on a person convicted of a sex offense with a minor). On appeal, Appellant asserts various constitutional challenges to section 23-3-540 and contests the validity of five of our previous decisions involving the South Carolina Sex Offender Registry and statutory authorization of GPS monitoring of sex offenders.[1] We affirm.

FACTS/PROCEDURAL BACKGROUND

In 2000, when Appellant was twenty-nine years old, he engaged in a sexual relationship with a fifteen-year-old female (Victim). Victim reported the relationship to the police, and a grand jury subsequently indicted Appellant for both second-degree criminal sexual conduct with a minor (CSCM-Second) and committing a lewd act on a child under the age of sixteen (CSCM-Third).[2] In 2003, Appellant pled guilty to CSCM-Third in exchange for the State dismissing the CSCM-Second charge. The circuit court sentenced Appellant to fifteen years' imprisonment, suspended on the service of twelve years, followed by five years' probation with the South Carolina Department of Probation, Parole and Pardon Services (SCDPPPS).

In 2005—after Appellant's guilty plea, but prior to Appellant's release from the Department of Corrections—the General Assembly amended South Carolina's sex offender registration requirements by enacting the Sex Offender Accountability and Protection of Minors Act of 2006, commonly referred to as "Jessie's Law." *See* S.C. Code Ann. § 23-3-540 (2005). In its original form, Jessie's Law read, in relevant part:

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[1] These cases are: *In re Justin B.*, 405 S.C. 391, 747 S.E.2d 774 (2013), *cert. denied*, 134 S. Ct. 1496 (2014); *State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013), *cert. denied*, 134 S. Ct. 1937 (2014); *In re Ronnie A.*, 355 S.C. 407, 585 S.E.2d 311 (2003); *Hendrix v. Taylor*, 353 S.C. 542, 579 S.E.2d 320 (2003); and *State v. Walls*, 348 S.C. 26, 558 S.E.2d 524 (2002). Together, these cases affirm that South Carolina's Sex Offender Registry—including the GPS monitoring requirement—is a civil remedy and is not penal in nature.

[2] At the time of Appellant's indictment, section 16-15-140 codified the crime of "lewd act upon a child under sixteen." S.C. Code Ann. § 16-15-140 (1996). However, the General Assembly later renamed this crime CSCM-Third and re-codified it in S.C. Code Ann. § 16-3-655(C) (Supp. 2010). For ease of reference, we refer to "lewd act upon a child under sixteen" as CSCM-Third.

(C) A person who is required to register [as a sex offender] pursuant to this article for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16–3–655(A)(1), or *committing or attempting a lewd act upon a child under sixteen, pursuant to Section 16–15–140, and who violates a term of probation*, parole, community supervision, or a community supervision program *must* be ordered by the court or agency with jurisdiction to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

(D) A person who is required to register [as a sex offender] pursuant to this article for *any other* [*sex*] *offense* [*with a minor*] *listed in subsection (G),* [*including CSCM-Second,*] *and who violates a term of probation*, parole, community supervision, or a community supervision program, *may* be ordered by the court or agency with jurisdiction to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

Id. (emphasis added); *see also State v. Dykes*, 403 S.C. 499, 502–04, 744 S.E.2d 505, 507–08 (2013) (explaining the requirements of section 23-3-540).

In 2009, upon his release from the Department of Corrections, Appellant began his probation; however, within two years, Appellant accrued several unexplained probation violations. At Appellant's probation revocation hearing, the State recommended imposing mandatory lifetime GPS monitoring on Appellant in accordance with the requirements of Jessie's Law. *See* S.C. Code Ann. §23-3-540(C). In response, Appellant challenged the constitutionality of Jessie's Law and offered testimony in mitigation,[3] but did not deny he had violated his probation.

The circuit court rejected Appellant's constitutional challenges and found Appellant in willful violation of his probation. Therefore, the court found that Jessie's Law mandated that it impose lifetime GPS monitoring on Appellant.

This appeal followed. *See* Rule 203(d)(1)(A)(ii), SCACR.

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[3] Specifically, Appellant introduced evidence that he qualified for one of the lowest levels of supervision that SCDPPPS provided.

ISSUE

Whether the mandatory imposition of GPS monitoring on a sex offender convicted prior to a statute's effective date violates:

a. the Ex Post Facto, Equal Protection, Due Process, or Double Jeopardy Clauses of the United States or South Carolina Constitutions?

b. the Fourth Amendment's prohibition on unreasonable searches and seizures?

c. the Eighth Amendment's prohibition on cruel and unusual punishment?

STANDARD OF REVIEW

All statutes are presumed constitutional, and when possible, courts must construe statutes so as to render them valid. *In re Justin B.*, 405 S.C. 391, 395, 747 S.E.2d 774, 776 (2013) (citing *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001)). "A statute will not be declared unconstitutional unless its repugnance to the constitution is clear beyond a reasonable doubt." *Id.* (citing *In re Lasure*, 379 S.C. 144, 147, 666 S.E.2d 228, 229 (2008)). "The party challenging the statute's constitutionality bears the burden of proof." *Id.* (citing *In re Treatment of Luckabaugh*, 351 S.C. 122, 135, 568 S.E.2d 338, 344 (2002)).

ANALYSIS

Although Appellant raises numerous challenges to the constitutionality of Jessie's Law, we have explicitly rejected each of these challenges in two of our recent opinions. *See Justin B.*, 405 S.C. at 391, 747 S.E.2d at 774, *cert. denied*, 134 S. Ct. 1496 (2014); *Dykes*, 403 S.C. at 499, 744 S.E.2d at 505, *cert. denied*, 134 S. Ct. 1937 (2014).

In *State v. Dykes*, Dykes—similar to Appellant—committed CSCM-Third prior to the enactment of Jessie's Law, but violated her probation after its enactment. 403 S.C. at 503–05, 744 S.E.2d at 507–08. The circuit court imposed GPS monitoring pursuant to Jessie's Law. *Id.* at 505, 744 S.E.2d at 508. Dykes appealed, contending that the statute violated the Ex Post Facto, Equal Protection,

and Due Process Clauses of the United States and South Carolina Constitutions, as well as her Fourth Amendment right to be free of unreasonable governmental searches and seizures. *Id.* at 505, 510 n.9, 744 S.E.2d 508, 511 n.9.

A majority of this Court rejected Dykes's arguments, holding that mandatory GPS monitoring did not violate Dykes's right to substantive due process. *Id.* at 503, 744 S.E.2d at 507; *see also id.* at 510 n.9, 744 S.E.2d at 511 n.9 (rejecting Dykes's remaining arguments). Specifically, we disagreed with Dykes's assertion that, as a convicted sex offender, she had a *fundamental* right to be "let alone." *Id.* at 505–06, 744 S.E.2d at 508–09 ("The United States Supreme Court has cautioned restraint in the recognition of rights deemed to be fundamental in a constitutional sense." (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997))).[4] However, notwithstanding the absence of a fundamental right, we found that lifetime GPS monitoring "implicates a protected liberty interest to be free from permanent, unwarranted governmental interference." *Id.* at 506, 744 S.E.2d at 509. In light of the General Assembly's intent to protect the public from sex offenders and aid law enforcement,[5] we held that an initial, mandatory imposition of GPS monitoring for certain sex crimes involving children was rationally related to the law's stated purpose. *Id.* at 507–08, 744 S.E.2d at 509–10.

Despite generally upholding the constitutionality of Jessie's Law, we found the final sentence of subsection (H) unconstitutional as arbitrary and not rationally related to the statute's purpose. *Id.* at 508, 744 S.E.2d at 510 (citing S.C. Code Ann. § 23-3-540(H)). Prior to our decision, subsection (H) permanently foreclosed persons convicted of CSCM-First or -Third, such as Dykes, from seeking judicial review of the necessity of continued GPS monitoring. *See* S.C. Code Ann. § 23-3-540(H). However, we determined that all sex offenders monitored pursuant to Jessie's Law were entitled to periodic judicial review and thus could "avail themselves of the . . . judicial review process as outlined for the balance of the offenses enumerated in section 23-3-540(G)." *Dykes*, 403 S.C. at 508–10, 744

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[4] "Our rejection of Dykes'[s] fundamental right argument flow[ed] in part from the premise that [GPS] monitoring is predominantly civil." *Dykes*, 403 S.C. at 506, 744 S.E.2d at 509 (citing *Smith v. Doe*, 538 U.S. 84 (2003)); *see also Justin B.*, 405 S.C. at 405–09, 747 S.E.2d at 781–83 (applying the factors from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963), and finding that GPS monitoring of sex offenders is a civil remedy).

[5] *See* S.C. Code Ann. § 23-3-400 (2003).

S.E.2d at 510–11; *see also* S.C. Code Ann. § 23-3-540(H) (outlining the judicial review process and relevant lengths of time for review). Accordingly, we found that Dykes and others convicted of CSCM-First or -Third could petition the courts ten years after the initial imposition of the monitoring, and every five years thereafter. *Dykes*, 403 S.C. at 510, 744 S.E.2d at 511.

To address Appellant's remaining arguments, we next look to *In re Justin B.*, in which Justin B.'s adoptive mother witnessed him sexually molest his adoptive sister and notified the police. 405 S.C. at 394, 747 S.E.2d at 775.[6] Justin B. subsequently pled guilty to CSCM-First, and the family court ordered him to comply with the lifetime GPS monitoring requirement set forth in Jessie's Law. *Id.* at 394, 747 S.E.2d at 775–76. Justin B. appealed, arguing that GPS monitoring constituted cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 394–95, 747 S.E.2d at 776.

We unanimously disagreed. After examining the legislative intent behind Jessie's Law and applying the *Mendoza-Martinez* factors,[7] we held that "electronic monitoring is *not a punishment*," but a civil requirement. *Id.* at 394, 404–08, 747 S.E.2d at 775, 781–83 (emphasis added). We also reaffirmed that all sex offenders subject to GPS monitoring in accordance with Jessie's Law may periodically petition for judicial review of the necessity of continued monitoring. *Id.* at 408, 747 S.E.2d at 783.

In light of our previous holdings in *Dykes* and *Justin B.*, we find that we have fully addressed and rejected each of Appellant's constitutional challenges to Jessie's Law.[8] Further, we decline to overrule either *Dykes* or *Justin B.*, especially

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[6] Like Justin B., the adoptive sister was also a minor at the time of the molestation. *See Justin B.*, 405 S.C. at 394, 747 S.E.2d at 775 (stating that the minor was indicted for CSCM-First); *see also* S.C. Code Ann. §16-3-655(A)(1) ("A person is guilty of [CSCM-First] if . . . the actor engages in sexual battery with a victim who is less than eleven years of age . . . .").

[7] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963) (listing seven factors that aid in distinguishing between civil and penal remedies).

[8] We acknowledge that *Dykes* and *Justin B.* did not explicitly reject Appellant's Double Jeopardy challenge; however, the prohibition on double jeopardy protects against, *inter alia*, "multiple *punishments* for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (emphasis added), *overruled on other grounds*

given that Appellant does not raise any new questions of law; indeed, Appellant's case so closely parallels *Dykes* as to be factually and legally indistinguishable. Thus, we find that Appellant has not carried his burden to show that Jessie's Law is unconstitutional beyond a reasonable doubt. *Justin B.*, 405 S.C. at 395, 747 S.E.2d at 776 (citing *Luckabaugh*, 351 S.C. at 135, 568 S.E.2d at 344).

Accordingly, we affirm the circuit court's imposition of GPS monitoring on Appellant for his probation violations. We likewise note that, although Appellant must comply with the GPS monitoring, he is entitled to avail himself of the judicial review process required by *Dykes* and *Justin B.* *See* S.C. Code Ann. § 23-3-540(H) (providing for judicial review at periodic intervals).

CONCLUSION

For the foregoing reasons, the judgment of the circuit court is

AFFIRMED.

PLEICONES and KITTREDGE, JJ., concur. HEARN, J., dissenting in a separate opinion in which BEATTY, J., concurs.

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by Alabama v. Smith, 490 U.S. 794 (1989). As *Dykes* and *Justin B.* both hold that the GPS monitoring requirement is a civil penalty and not a punishment, Appellant's argument that Jessie's Law "increas[es] and expand[s] his punishment as a violation of double jeopardy" is without merit. *See Justin B.*, 405 S.C. at 394, 747 S.E.2d at 775; *Dykes*, 403 S.C. at 506, 744 S.E.2d at 509.

JUSTICE HEARN: Respectfully, I dissent. For the reasons discussed in my dissent in *State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013), I believe the initial imposition of satellite monitoring without an individualized determination of Nation's likelihood of reoffending violates his right to substantive due process. I would therefore find Section 23-3-540(C) of the South Carolina Code (Supp. 2013) unconstitutional, and would reverse and remand for a hearing to determine whether satellite monitoring should be imposed.

BEATTY, J., concurs.

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

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

Appellate Case No 2011-199726

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

ANTHONY NATION,

APPELLANT.

APPELLATE CASE NO. 2011-199726

PETITION FOR REHEARING

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

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

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

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

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

A. Grounds for Rehearing.

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

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

The probation agent testified "three hours is the standard charg[ing]" time for the monitor's battery. Charging the battery means "somebody has to sit next to a wall, plugged into a wall." When the battery "gets weaker," then "you have to charge them more often." The State provides a "charging schedule" the agents "often encourage people that we supervise . . . to charge that thing . . . if they are watching television or something, just plug it in to kind of give it a boost." Additionally, "[i]f that device gets weak, then [the agents] often call them, tell them to plug in, charge it up." Tr. 50, l. 24 – 52, l. 3.

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

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

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

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

Initially, the Sex Offender Registry applied only to "convictions," and not juvenile adjudications. 1994 Act 497, Part II §112A (S.C. Code §23-3-430). *See State v. Ellis*, 345 S.C. 175, 179, 547 S.E.2d 490, 492 (2001) (a juvenile adjudication is not the same as a conviction). When the General Assembly began requiring juveniles adjudicated of certain offenses to register as sex offenders, the juvenile's information remained confidential. 1996 Act 444 §16 (S.C. Code §23-3-430, 490). It wasn't until 1998 that the General Assembly authorized release of juvenile sex offender information under certain

circumstances. 1998 Act 384 §1 (S.C. Code §23-3-490). Our Supreme Court has held requiring a juvenile to register as a sex offender does not violate due process, at least in situations where the juvenile's "registry information will not be made available to the public because of appellant's age at the time of his adjudication." *In re Ronnie A.*, 355 S.C. 407, 410, 585 S.E.2d 311, 312 (2003).

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

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

Likewise, the actual registration requirement has become harsher. Initially, a sex offender was required to register annually in the offender's county of residence. 1994 Act 497, Part II §112A (S.C. Code §23-3-460). Both of these requirements have been expanded. Offenders are now required to register biannually and, in some cases, quarterly. In addition to the county of residence, offenders must register in any county

where the offender works, attends school, or owns property. S.C. Code §23-3-460. At no point has the legislature reaffirmed the civil intent of the Registry when amending it. Indeed, they have acted to the contrary.

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

In *Smith v. Doe,* 538 U.S. 84 (2003), the Supreme Court of the United State considered an *ex post facto* challenge to Alaska's adult sex offender registry. The majority noted, "The Alaska statute, on its face, does not require these updates to be made in person." *Id.* at 101. That Court, therefore, reserved for another day "[w]hether other constitutional objections can be raised to a mandatory reporting requirement, and how those questions might be resolved." *Id.* at 102. Alaska, however, subsequently recognized that its sex offender registration requirement "treats offenders not much differently than the state treats probationers and parolees subject to continued state supervision." *Doe v. State*, 189 P.3d 999, 1009 (Alaska 2008) (holding sex offender registry violates *ex post facto* clause of state constitution).

Other states have reached the same conclusion as Alaska. Oklahoma applied the "analytical framework used in *Smith v. Doe* and later in *Doe v. State*" and held retroactive application of punitive provisions of that state's sex offender registry violated the *ex post facto* prohibition. *Starkey v. Oklahoma Dep't of Corr.*, 2013 OK 43, 305 P.3d 1004, 1019 (2013). Maryland, likewise, held, "The application of the statute has essentially the same effect upon Petitioner's life as placing him on probation and imposing the punishment of shaming for life, and is, thus, tantamount to imposing an additional sanction for Petitioner's crime." *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535, 568, 62 A.3d 123, 143 (2013).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Finally, the Indiana Supreme Court summarized:

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

Id. at 384.

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

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

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

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

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

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

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

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

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

Conclusion

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

IT IS SO MOVED.

Respectfully submitted,

By _____

E. CHARLES GROSE, JR.
The Grose Law Firm
404 Main Street
Greenwood, SC 29646
(864) 538-4466

ROBERT M. DUDEK
Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Shane E. Goranson
Assistant Public Defender, Eighth Circuit
600 Monument Street, Box P-133
Greenwood, SC 20646
(863) 229-9505

ATTORNEYS FOR APPELLANT

July 17, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenwood County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

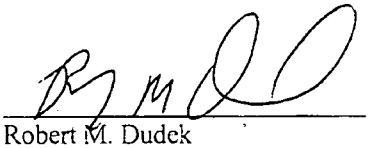
V.

ANTHONY NATION,

APPELLANT

CERTIFICATE OF SERVICE

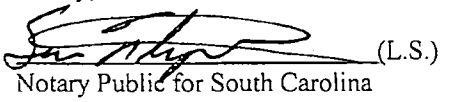
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mathew Buchanan, Esquire, at the South Carolina Department of Probation, Parole & Pardon Services, P.O. Box 50666, Columbia, SC 29250 and Mr. Anthony Nation, at 707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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

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



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

The Supreme Court of South Carolina

The State, Respondent,

v.

Anthony Nation, Appellant.

Appellate Case No. 2011-199726

ORDER

The Petition for Rehearing filed in the above entitled matter is denied.

C.J.

J.

J.

I would grant the Petition for Rehearing.

J.

J.

Columbia, South Carolina

August 6, 2014

cc:
Shane Edwin Goranson, Esquire
Ernest Charles Grose, Jr., Esquire
Robert Michael Dudek, Esquire
Matthew C. Buchanan, Esquire

Code of Laws of South Carolina 1976 Annotated
Title 23. Law Enforcement and Public Safety
Chapter 3. South Carolina Law Enforcement Division
Article 7. Sex Offender Registry (Refs & Annos)

Code 1976 § 23-3-540

§ 23-3-540. Electronic monitoring; reporting damage to or removing monitoring device; penalty.

Effective: June 18, 2012
Currentness

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

(B) Upon conviction, adjudication of delinquency, guilty plea, or plea of nolo contendere of a person for any other offense listed in subsection (G), the court may order that the person upon release from incarceration, confinement, commitment, institutionalization, or when placed under the supervision of the Department of Probation, Parole and Pardon Services shall be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

(C) A person who is required to register pursuant to this article for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or criminal sexual conduct with a minor in the third degree, pursuant to Section 16-3-655(C), and who violates a term of probation, parole, community supervision, or a community supervision program must be ordered by the court or agency with jurisdiction to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

(D) A person who is required to register pursuant to this article for any other offense listed in subsection (G), and who violates a term of probation, parole, community supervision, or a community supervision program, may be ordered by the court or agency with jurisdiction to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

(E) A person who is required to register pursuant to this article for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or criminal sexual conduct with a minor in the third degree, pursuant to Section 16-3-655(C), and who violates a provision of this article, must be ordered by the court to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

(F) A person who is required to register pursuant to this article for any other offense listed in subsection (G), and who violates a provision of this article, may be ordered by the court to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.

(G) This section applies to a person who has been:

(1) convicted of, pled guilty or nolo contendere to, or been adjudicated delinquent for any of the following offenses:

(a) criminal sexual conduct with a minor in the first degree (Section 16-3-655(A));

(b) criminal sexual conduct with a minor in the second degree (Section 16-3-655(B)). If evidence is presented at the criminal proceeding and the court makes a specific finding on the record that the conviction obtained for this offense resulted from illicit consensual sexual conduct, as contained in Section 16-3-655(B)(2), provided the offender is eighteen years of age or less, or consensual sexual conduct between persons under sixteen years of age, then the convicted person is not required to be electronically monitored pursuant to the provisions of this section;

(c) criminal sexual conduct with a minor in the third degree (Section 16-3-655(C));

(d) engaging a child for sexual performance (Section 16-3-810);

(e) producing, directing, or promoting sexual performance by a child (Section 16-3-820);

(f) criminal sexual conduct: assaults with intent to commit (Section 16-3-656) involving a minor;

(g) violations of Article 3, Chapter 15, Title 16 involving a minor;

(h) kidnapping (Section 16-3-910) of a person under eighteen years of age except when the offense is committed by a parent;

(i) trafficking in persons (Section 16-3-930) of a person under eighteen years of age except when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense; or

(2) ordered as a condition of sentencing to be included in the sex offender registry pursuant to Section 23-3-430(D) for an offense involving a minor, except that the provisions of this item may not be construed to apply to a person eighteen years of age or less who engages in illicit but consensual sexual conduct with another person who is at least fourteen years of age as provided in Section 16-3-655(B)(2).

(H) The person shall be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device for the duration of the time the person is required to remain on the sex offender registry pursuant to the provisions of this article, unless the person is committed to the custody of the State. Ten years from the date the person begins to be electronically monitored, the person may petition the chief administrative judge of the general sessions court for the county in which the person was ordered to be electronically monitored for an order to be released from the electronic monitoring requirements of this section. The person shall serve a copy of the petition upon the solicitor of the circuit and the Department of Probation, Parole and Pardon Services. The court must hold a hearing before ordering the person to be released from the

electronic monitoring requirements of this section, unless the court denies the petition because the person is not eligible for release or based on other procedural grounds. The solicitor of the circuit, the Department of Probation, Parole and Pardon Services, and any victims, as defined in Article 15, Chapter 3, Title 16, must be notified of any hearing pursuant to this subsection and must be given an opportunity to testify or submit affidavits in response to the petition. If the court finds that there is clear and convincing evidence that the person has complied with the terms and conditions of the electronic monitoring and that there is no longer a need to electronically monitor the person, then the court may order the person to be released from the electronic monitoring requirements of this section. If the court denies the petition or refuses to grant the order, then the person may refile a new petition every five years from the date the court denies the petition or refuses to grant the order. A person may not petition the court if the person is required to register pursuant to this article for committing criminal sexual conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or criminal sexual conduct with a minor in the third degree, pursuant to Section 16-3-655(C).

(I) The person shall follow instructions provided by the Department of Probation, Parole and Pardon Services to maintain the active electronic monitoring device in working order. Incidental damage or defacement of the active electronic monitoring device must be reported to the Department of Probation, Parole and Pardon Services within two hours. A person who fails to comply with the reporting requirement of this subsection is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years.

(J) The person shall abide by other terms and conditions set forth by the Department of Probation, Parole and Pardon Services with regard to the active electronic monitoring device and electronic monitoring program.

(K) The person must be charged for the cost of the active electronic monitoring device and the operation of the active electronic monitoring device for the duration of the time the person is required to be electronically monitored. The Department of Probation, Parole and Pardon Services may exempt a person from the payment of a part or all of the cost during a part or all of the duration of the time the person is required to be electronically monitored, if the Department of Probation, Parole and Pardon Services determines that exceptional circumstances exist such that these payments cause a severe hardship to the person. The payment of the cost must be a condition of supervision of the person and a delinquency of two months or more in making payments may operate as a violation of a term or condition of the electronic monitoring. All fees generated by this subsection must be retained by the Department of Probation, Parole and Pardon Services, carried forward, and applied to support the active electronic monitoring of sex offenders.

(L) A person who intentionally removes, tampers with, defaces, alters, damages, or destroys an active electronic monitoring device is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years. This subsection does not apply to a person or agent authorized by the Department of Probation, Parole and Pardon Services to perform maintenance and repairs to the active electronic monitoring devices.

(M) A person who completes his term of incarceration and the maximum term of probation, parole, or community supervision and who wilfully violates a term or condition of electronic monitoring, as ordered by the court or determined by the Department of Probation, Parole and Pardon Services is guilty of a felony and, upon conviction, must be sentenced in accordance with the provisions of Section 23-3-545.

(N) The Department of Corrections shall notify the Department of Probation, Parole and Pardon Services of the projected release date of an inmate serving a sentence, as described in this section, at least one hundred eighty days in advance of the person's release from incarceration. For a person sentenced to one hundred eighty days or less, the Department of Corrections shall immediately notify the Department of Probation, Parole and Pardon Services.

(O) When an inmate serving a sentence as described in this section is released on electronic monitoring, a victim who has previously requested notification and the sheriff's office in the county where the person is to be released must be notified in accordance with the requirements of Article 15, Chapter 3, Title 16.

(P) As used in this section, "active electronic monitoring device" means an all body worn device that is not removed from the person's body utilized by the Department of Probation, Parole and Pardon Services in conjunction with a web-based computer system that actively monitors and records a person's location at least once every minute twenty-four hours a day and that timely records and reports the person's presence near or within a prohibited area or the person's departure from a specified geographic location. In addition, the device must be resistant or impervious to unintentional or wilful damages. The South Carolina Criminal Justice Academy may offer training to officers of the Department of Probation, Parole and Pardon Services regarding the utilization of active electronic monitoring devices. In areas of the State where cellular coverage requires the use of an alternate device, the Department of Probation, Parole and Pardon Services may use an alternate device.

(Q) Except for juveniles released from the Department of Corrections, all juveniles adjudicated delinquent in family court, who are required to be monitored pursuant to the provisions of this article by the Department of Probation, Parole and Pardon Services, or who are ordered by a court to be monitored must be supervised, while under the jurisdiction of the family court or Board of Juvenile Parole, by the Department of Juvenile Justice. The Department of Probation, Parole and Pardon Services shall report to the Department of Juvenile Justice all violations of the terms or conditions of electronic monitoring for all juveniles supervised by the department, for as long as the family court or Juvenile Parole Board has jurisdiction over the juvenile. If the Department of Juvenile Justice determines that a juvenile has violated a term or condition of electronic monitoring, the department shall immediately notify local law enforcement of the violation.

Credits

HISTORY: 2005 Act No. 141, § 8; 2006 Act No. 342, § 6, eff July 1, 2006; 2006 Act No. 346, § 3, eff July 1, 2006; 2008 Act No. 335, §§ 15, 20, eff June 16, 2008; 2010 Act No. 289, § 11, eff June 11, 2010; 2012 Act No. 255, § 7, eff June 18, 2012.

Notes of Decisions (10)

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