

State of South Carolina
Department of Probation, Parole and Pardon Services

NIKKI R. HALEY
Governor



JERRY B. ADGER
Interim Director

2221 DEVINE STREET, SUITE 600
POST OFFICE BOX 50666
COLUMBIA, SOUTH CAROLINA 29250
Telephone: (803) 734-9220
Facsimile: (803) 734-9440
www.dppps.sc.gov/

January 29, 2015

The Honorable Scott S. Harris, Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

RE: Anthony Nation v. South Carolina
No. 14A441

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S.C. SUPREME COURT

Dear Mr. Harris:

Please find enclosed for filing the original and ten copies of the Brief in Opposition in the above referenced case.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew C. Buchanan".

Matthew C. Buchanan
General Counsel

MCB/dn

Cc: E. Charles Grose, Jr., Esquire

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina

No. 14A441

In the Supreme Court of the United States

ANTHONY NATION,

Petitioner,

v.

SOUTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SOUTH CAROLINA SUPREME COURT

BRIEF IN OPPOSITION

Matthew C. Buchanan
Counsel of Record
South Carolina Department of Probation,
Parole, and Pardon Services
2221 Devine Street, Suite 600
P.O. Box 50666
Columbia, South Carolina 29250
Tel: (803)734-9220
Fax: (803)734-9324

Counsel for the Respondent

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S.C. SUPREME COURT

QUESTIONS PRESENTED

1. Whether the Sex Offender Accountability and Protection of Minors Act of 2006, S.C. Code of Laws §23-3-540(C), placing a Global Positional Satellite (GPS) monitor for a minimum of ten years, is in violation of the *ex post facto* clause of the United States Constitution, if the monitoring is a civil requirement rather than punitive?
2. Whether the imposition of satellite monitoring while an offender is on probation for a violation of that probation is a violation of the double jeopardy clause, if the monitoring is a civil requirement rather than punitive?
3. Whether Due Process requires an individualized determination before the state may impose satellite monitoring?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

There are no corporations involved in this proceeding.

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Respondent.

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BRIEF IN OPPOSITION

The Respondent the State of South Carolina files this brief in opposition to the petition for a writ of certiorari filed by the petitioner Mr. Anthony Nation.

FORMAL DESCRIPTION OF OPINIONS BELOW

The South Carolina Supreme Court originally decided this case on May 9, 2012. The Court denied the Appellant's petition for re-hearing. Order of the denial for rehearing is unpublished. The trial court's order revoking the petitioner's probation and ordering GPS monitoring is also unpublished.

JURISDICTION

The Respondent agrees with the jurisdiction established by the Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Respondent agrees with the South Carolina statutory scheme presented by the Petitioner within his petition for writ of certiorari.

STATEMENT OF FACTS

On July 16, 2003, the Petitioner was convicted of the offense of lewd act upon a minor child under the age of sixteen. He was given a sentence of fifteen years suspended upon the service of twelve years incarceration followed by probation for five years.

The Sex Offender Accountability and Protection of Minors Act was enacted in South Carolina in 2006. This Act was a response to the abduction, rape and murder of Jessica Lunsford, a nine old girl who was abducted from her home in Homosassa, Florida, by a convicted sex offender. She was held captive over a weekend where she was sexually assaulted and then murdered. The Sex Offender Accountability and Protection of Minors Act¹ was then enacted by the South Carolina General Assembly with an effective date of July 1, 2006. Pursuant to this act, any person convicted of the offenses of criminal sexual conduct in the first degree with a minor (CSC 1st w/minor)², or committing or attempting a lewd act on a child under sixteen, (CSC 3rd w/minor)³, with an offense date on or after July 1, 2006, is required to be monitored with an active electronic Global Position Satellite (GPS) device for the duration of time that individual was required to register as a sex offender. Furthermore, any person serving a period of supervision for those offenses who violates that supervision must be subject to GPS monitoring.

Because his conviction took place prior to the establishment of the act, the Petitioner was not placed on GPS monitoring at the time of his release from incarceration. He was made aware, however, that during his period on probation, if it was determined by the Court that he willfully

¹ S.C. Code Ann. §23-3-540.

² S.C. Code Ann. §16-3-655(A).

³ S.C. Code Ann. §16-15-140. In 2010, the South Carolina General Assembly changed the name of the offense of lewd act on a minor to criminal sexual conduct with a minor in the third degree, and re-codified it in S.C. Code Ann. §16-3-655(C).

violated the conditions of supervision, the court would require the Petitioner to wear a GPS monitoring device and he would be required to wear this device as long as he remains on the sex offender registry.⁴

On September 14, 2012, Petitioner appeared before the Honorable Frank R. Addy, Jr., South Carolina Circuit Court Judge, answering to a violation of probation for the offense of lewd act with a minor. Upon conclusion of this hearing Judge Addy determined that Petitioner did willfully violate probation for having missed two report dates, and due to this violation he was subject to placement within the GPS monitoring program. The court revoked five months of his suspended sentence and continued him on probation. The court also ordered that upon his release from incarceration he was to be placed on the GPS monitoring program pursuant to the Sex Offender Accountability and Protections of Minors Act. The Petitioner immediately filed a notice of appeal before the South Carolina Supreme Court.

The Petitioner argued that the satellite monitoring violated the *Ex Post Facto* clauses of the South Carolina and U.S. Constitutions, that it violated double jeopardy, and that it violated Due Process. The South Carolina Supreme Court determined that the statute's mandatory imposition of satellite monitoring is a non-punitive civil requirement for those individuals convicted of certain sexual crimes against children. Therefore, the statute did not violate the *Ex Post Facto*, Double Jeopardy, or the Due Process clauses of the Constitution. Upon the denial of Petitioner's rehearing by the South Carolina Supreme Court, the Petitioner presents this petition for writ of certiorari. Within this petition the Petitioner claims the Federal and State Court are split as to whether GPS tracking of a sex offender violates *Ex Post Facto*; that the state court's decision conflicts with this

⁴ The South Carolina Supreme Court Case *State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013), discussed *infra*, struck a portion of S.C. Code Ann. §23-3-540 to allow judicial review after 10 years with the device.

Court's decisions in *Kansas v. Hendricks*, 521 U.S. 346 (1997), and *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140 (2003); that the lower court misconstrued this Court's Due Process jurisprudence; and the lower court failed to correctly decide an important question that should be settled by this Court.

The Respondent requests this petition be denied because the perceived conflicts between the lower courts are because of factual differences and not due to a split in jurisprudence because identical facts would have resulted in identical results in the cases the Petitioner deems are in conflict; and the decision of the lower court is a valid interpretation of this Court's jurisprudence.

REASONS FOR DENYING THE PETITION

The Petitioner begins his request for certiorari by listing the states that have invalidated their sex offender registry restrictions. The vast majority of these have based their decisions solely on their own state constitutional grounds, being mindful that this Court's reasoning in *Smith v. Doe*, 538 U.S. 84, would uphold the retroactivity of the sex offender registry on federal grounds.

The states that overturned the registry solely on their own constitutions are Alaska, Indiana, Maryland, Ohio, and Oklahoma. *Doe v. State*, 189 P.3d 999 (Alaska 2008); *State v. Pollard*, 908 N.E.2d 1145 (Ind. 2009); *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535, 62 A.3d 123 (2013); *State v. Williams*, 129 Ohio St. 3d 344, 952 N.E.2d 1108 (2011); and *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004 (Oklahoma 2013). Maine and Kentucky both cite the U.S. Constitution along with their own when striking down the retroactivity of their sex offender registry laws. *State v. Letalien*, 2009 ME 130, 985 A.2d 4 (2009); and *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009).

However, the vast majority of jurisdictions follow this Court's guidance in *Smith v. Doe*, as does South Carolina.⁵

I. The different outcomes of the lower court cases are attributable to different facts, and not a legal disagreement.

Within his petition, the Petitioner argues that there is a split regarding whether the retroactive imposition of satellite monitoring violates the *Ex Post Facto* Clause of the Constitution.

1. South Carolina's GPS statute is unique, as it is not imposed retroactively.

Petitioner fails to state a key difference in South Carolina's GPS statute that sets it apart from all other states. S.C. Code Ann. §23-3-540 does not impose the GPS monitoring retroactively on those who had been convicted of certain child sex offenses prior to the date the law went into effect. Instead, it only operates prospectively.

The law does, however, state that individuals on supervision for CSC 1st w/minor or CSC 3rd w/minor and violate that supervision must be placed under GPS monitoring.

⁵ South Carolina determined the registry does not violate the *Ex Post Facto* Clause in *State v. Walls*, 348 S.C. 26, 558 S.E.2d 524 (2002). Other states that have done the same include, *inter alia*, Pennsylvania, Louisiana, Arkansas, Colorado, Connecticut, Arizona, Minnesota, New Hampshire, New York, North Dakota, South Dakota, and Virginia. See *Commonwealth v. Perez*, 97 A.3d 747, 760 (Pa. Super., 2014); *State v. Trosclair*, 89 So. 3d 340, 357 (La. 2012), *Kellar v. Fayetteville Police Dept.*, 339 Ark. 274, 287, 5 S.W.3d 402, 410 (Ark., 1999); *Jamison v. People*, 988 P.2d 177, 180 (Colo.App., 1999); *State v. Kelly*, 256 Conn. 23, 91, 770 A.2d 908, 952-3 (Conn., 2001); *State v. Noble*, 171 Ariz. 171, 178, 829 P.2d 1217, 1224 (Ariz., 1992); *State v. Manning*, 532 N.W.2d 244 (Minn.App., 1995); *State v. Costello*, 138 N.H. 587, 589, 643 A.2d 531, 533 (N.H., 1994); *People v. Langdon*, 258 A.D.2d 937, 685 N.Y.S.2d 877 (N.Y.A.D. 1999); *State v. Burr*, 298 N.W.2d 147, 158-9 (N.D., 1999); *Meinders v. Weber*, 604 N.W.2d 248, 261 (S.D., 2000); and *Kitze v. Com.*, 23 Va.App. 213, 220, 475 S.E.2d 830, 834 (Va.App., 1996). All U.S. Districts similarly uphold the retroactivity of sex offender registries. See *U.S. v. Parks*, 698 F.3d 1, 6; *United States v. Young*, 585 F.3d 199, 204 (5th Cir.2009); *United States v. Hinckley*, 550 F.3d 926, 936-37 (10th Cir.2008), *cert. denied*, 556 U.S. 1240, 129 S.Ct. 2383, 173 L.Ed.2d 1301 (2009); *United States v. May*, 535 F.3d 912, 919 (8th Cir.2008), *cert. denied*, 556 U.S. 1258, 129 S.Ct. 2431, 174 L.Ed.2d 229 (2009); *United States v. Lawrance*, 548 F.3d 1329, 1333-34 (10th Cir.2008); see also *United States v. Cotton*, 760 F.Supp.2d 116, 135-36 (D.D.C.2011), *appeal dismissed*, 2012 WL 1183728, 2012 U.S.App. LEXIS 8464 (D.C.Cir. Apr. 9, 2012); *United States v. Talada*, 631 F.Supp.2d 797, 806-08 (S.D.W.Va.2009) *aff'd*, 380 Fed.Appx. 255 (4th Cir.2010), *cert. denied*, — U.S. —, 131 S.Ct. 821, 178 L.Ed.2d 561 (2010).

(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.

S.C. Code Ann. §23-3-540(C). The Petitioner's GPS monitoring was imposed because of a violation of his probation, which occurred *after* the enactment of the Sex Offender Accountability and Protection of Minors Act. The Petitioner's claims of a violation of the Ex Post Facto Clause cannot be met because he was made aware of the change in the law yet he still chose to violate his probation.

Consequently, even if this Court finds a divide among the lower courts relating to the retroactivity of GPS monitoring conditions, this case's unique facts set it outside the controversy and therefore certiorari should not be granted.

2. The differing outcomes in the state cases can be attributed to other factors.

Petitioner's assertion of a deep divide between the lower courts falls short. The lower cases that ruled that the imposition of GPS monitoring is a violation of *ex post facto* present a different set of facts than what exists in the present case. Hence, the different facts are the reasons for the different rulings, and not a different application of the law.

Petitioner cites the decisions in Massachusetts, Florida, New Jersey, and California in his request for certiorari.

In *Commonwealth v. Cory*, 911 N.E.2d 187 (Mass. 2009), a Massachusetts law placed certain sex offenders on GPS monitoring while on probation. In *Cory*, the Appellant was required to be placed on GPS monitoring for the entire length of probation, a period of twenty-five years.

This monitoring included geographic exclusion zones a condition that does not apply to the Petitioner, who is free to travel at his leisure. Furthermore, there existed no statement of civil intent in Massachusetts' preamble, title or text; and, it was imposed only in the criminal context when an offender is sentenced to probation. The court in *Cory* made the determination that this is a criminal statute so this is considered a punishment; therefore, a violation of *ex post facto*. In contrast, it is clear the South Carolina Supreme Court in the Petitioner's case determined that the purpose of GPS monitoring was civil only. They ruled that 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. *Dykes*, 403 S.C. at 507, quoting, *State v. Walls*, 348 S.C. 26, 31, 558 S.E.2d 524, 526 (2002). If the South Carolina Supreme Court had found the GPS monitoring program was criminal, there would have been an identical result as in the *Cory* decision. However, in light of the clear legislative intent by the South Carolina legislature, the court correctly determined it to be civil.

In *Witchard v. State*, 68 So.3d 407 (Fla. Dist. Ct. App. 4th Dist. 2011), the Florida court found the statute criminal due to it only applying to cases committed after September 1, 2005. The matter that the statute might be civil in nature was never an issue due to the fact the statute never mentioned any civil intent, and the legislature applied prospective language to all other provisions within the statute. The law as written was limited to individuals who had committed their offense after the establishment of the statute. In contrast, South Carolina law specifically states that the purpose of the Sex Offender Accountability and Protection of Minors Act is not punishment but to monitor child sex offenders. GPS monitoring is allowed for an individual who is on supervision after the effective date of the act, but only upon a violation of said supervision. The statute in *Witchard* does not allow for this; which further shows Florida's statute was created specifically

with punitive intent. Identical facts within Petitioner's case would have forced the South Carolina courts to deem the statute a punishment; therefore, a violation of *ex post facto*.

In *Riley v. New Jersey State Parole Board*, 98 A.3d 544, 219 N.J. 270 (2014), the Appellant was released from incarceration with no period of supervision. Twenty years after the Appellant's offense, the GPS monitoring statute was enacted. Though he was not on any type of supervision, he was subjected to GPS monitoring pursuant to the newly-enacted law. The court ruled that the retroactive application of this sex offender monitoring statute violated the *Ex Post Facto* Clause. The Petitioner is in a far different situation because of the different statutory scheme. The Petitioner was on supervision after the Sex Offender Accountability and Protection of Minors Act passed, and subsequently violated his probation. If the Petitioner was in the identical position as the Appellant in *Riley*, he would not have been subject to GPS monitoring, because he would not have been on any form of supervision he could have violated.

Lastly, the California case *Doe v. Schwarzenegger*, 476 F. Supp 2d 1178 (E.D. Cal. 2007) holding GPS monitoring was not retroactive was decided based on state grounds, as Petitioner concedes.

The apparent divide presented by the Petitioner regarding the conflicting decisions made by other courts is due to a factual difference not due to differing legal interpretations. Were the facts identical to the case regarding the Petitioner, the Respondent is confident they would have garnered an identical result. Furthermore, none of these cases presented by Petitioner ruled that the GPS monitoring program is a violation of due process. The argument of the Petitioner regarding the different decisions made by the lower courts should not cause this Court to grant this petition. The different outcomes of the lower courts are simply attributable to different facts, rather than a question of law being interpreted differently.

II. The decision of the South Carolina Supreme Court was the correct determination.

The Petitioner's arguments of Double Jeopardy and Due Process depend upon the sole premise that GPS monitoring is punitive rather than a civil penalty. Without such a finding, Double Jeopardy or Due Process is not at stake.

South Carolina courts have consistently ruled that the GPS monitoring is civil rather than punitive. GPS monitoring is frequently used as a condition of bond, which cannot be considered punitive because it is imposed in a pre-adjudicatory context.⁶

Also, using this Court's jurisprudence, GPS monitoring falls squarely within the civil framework.

Whether the legislature means for a statute to be civil, courts are to look for two things: legislative intent and whether the statutory scheme is so punitive either in purpose or effect as to negate the state's intention to deem it civil. *Smith*, 538 U.S. at 92. If the legislative intent was to impose punishment, that ends the inquiry as the statute would be unquestionably criminal. If not, the court must further examine the regulatory scheme employing the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).

In *State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013) the South Carolina Supreme Court was asked to make a determination on the constitutionality of the Sex Offender Accountability and Protection of Minors Act. It was the Appellant's position that the Act was a violation of due process and *Ex Post Facto*. In *Dykes*, the court decided to review whether the Appellant had a fundamental right to be "let alone." *Dykes*, 403 S.C. at 506. The court ruled that the statute did not violate a

⁶ While no South Carolina statute specifically states that GPS monitoring may be imposed as a condition of bond, S.C. Code Ann. §17-15-10(A)(4) allows a court to impose reasonable conditions as a condition of bond. Furthermore S.C. Code Ann. §24-13-425(A)(2) specifically contemplates a monitoring device being ordered as a condition of bond.

fundamental right due to the fact GPS is a predominantly civil statute. The court did rule that the requirement of satellite monitoring did amount to a liberty interest; therefore, having served his sentence, the Petitioner's mandatory enrollment in the satellite monitoring program invokes minimal due process protection. *Id.*, at 507.

As for *Ex Post Facto*, in order for a law to be prohibited by the *Ex Post Facto* clause, two elements must be present: (1) the law must be retrospective so as to apply to events occurring before its enactment; and, (2) the law must disadvantage the offender affected by it. *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446 (1987). The analysis that determines if a statute is in violation of *ex post facto* is first predicated on whether or not it is civil or criminal. Initially, whether a statutory scheme is civil or criminal is a question of statutory construction. A court first considers the statute's text and its structure to determine the legislative objective. *Smith*, 538 U.S. at 92. The South Carolina Supreme Court ruled it was clear by the intent of the legislature that GPS monitoring is a civil matter and not punishment. First, the title of the act is "Sex Offender Accountability and Protection of Minors Act." This act is found in the same section as the "Sex Offender Registry." Within this section it states:

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.

Dykes, 403 S.C. at 507, quoting, S.C. Code Ann. §23-3-400(2007).

It is obvious by the reading of the statute the South Carolina General Assembly did not intend for this to be a punishment. This monitoring was made for the protection of children and

the assistance of law enforcement to investigate crimes against children. It also exists to ensure a prior sex offender is not prosecuted for a crime he did not commit.

The South Carolina Supreme Court found in *Dykes* that, although the statute was not meant for criminal punishment, the lifetime GPS monitoring without judicial review was in fact arbitrary and not rationally related to the legislature's purpose of protecting the public from those with a high risk of re-offending. *Id.*, at 508. To remedy this, the court determined that all sex offenders against minors are to be allowed judicial review regarding a likelihood of re-offending in order to be possibly removed from GPS monitoring. This review was already in the statute for all sex offenses against minors except those convicted of committing CSC 1st w/minor and CSC 3rd w/minor pursuant to section 23-3-540(H).⁷ *Id.* So in *Dykes* the court struck the unconstitutional imposition of lifetime satellite monitoring by affording the same opportunity for judicial review as all others convicted of child sex crimes. *Id.*

The South Carolina Supreme Court re-examined their holdings again *State v. Nation*, 408 S.C. 474, 759 S.E.2d 428 (2014). The court found the facts of *Nation* so similar to those of *Dykes* "as to be factually and legally indistinguishable." *Id.* at 482.

The South Carolina Supreme Court did not decide Petitioner's case in conflict with this Court's holdings. Though Petitioner tries to equate the GPS monitoring with the involuntary civil commitment found in *Kansas v. Hendricks*, 521, U.S. 346, these two regulatory schemes are wildly different. Instead, the GPS monitoring, being a public safety measure, falls squarely within this Court's holding in *Smith v. Doe*, 538 U.S. 84.

⁷ 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. S.C. Code Ann. §23-3-540(H).

In fact, *Doe*'s holding that "[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences" comports squarely with the *Dykes* ruling. *Id.* at 103.

An observation of all the opinions offered by the Petitioner shows no discrepancy between this case and other holdings across the country. As with other cases relating to the GPS monitoring of sex offenders, the South Carolina Supreme Court first observed whether the legislature intended this to be a criminal punishment or civil regulation. By ruling the statute was civil in nature, it was therefore not a violation of *ex post facto*. While the court determined that a permanent attachment of GPS without any possible relief is unconstitutional, that has been remedied by the addition of judicial review. The Petitioner has a remedy available to him under South Carolina law. Under the same set of facts, this would have been probably the identical result of the other jurisdictions.

Due to the proper determination being made by the South Carolina Supreme Court, there should be no review by this esteemed Court. The Respondent respectfully requests that the petition for certiorari be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

By: 

Matthew C. Buchanan

Counsel of Record

South Carolina Department of Probation,
Parole and Pardon Services

P.O. Box 50666

Columbia, South Carolina 29250

(803) 734-9220

mbuchanan@ppp.state.sc.us

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S.C. SUPREME COURT

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CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that this 29th day of January, 2015, I served the following documents:

1. Brief in Opposition to Petitioner's Writ of Certiorari; and
2. Certificate of Service;

by first class mail, postage prepaid as follows:

E. Charles Grose, Jr., Esquire
The Grose Law Firm, LLC
404 Main Street
Greenwood, South Carolina 29646



Dawn K. Nichols,
Executive Administrative Assistant
S. C. Department of Probation, Parole and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250
(803) 734-9220