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

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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.

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,

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[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.

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

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[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

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

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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.*

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,

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[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).

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

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[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).

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]

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[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

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

---

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.

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

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[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.").

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.

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[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).

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

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[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.

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

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[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.

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.

State of South Carolina

Department of Probation, Parole and Pardon Services

NIKKI R. HALEY
Governor

KELA E. THOMAS
Director

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COLUMBIA, SOUTH CAROLINA 29250
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October 7, 2011

The Honorable Daniel E. Shearhouse
Clerk of the South Carolina Supreme Court
Supreme Court Building
P.O. Box 11330
Columbia, South Carolina 29211

RE: The State v. Jennifer Rayanne Dykes

Dear Mr. Shearhouse:

This case was argued before the Supreme Court on September 22, 2011. During this argument an issue was raised concerning any Department policy that might exist regarding the denial of movement by an individual currently on the lifetime Global Positional Satellite monitoring program pursuant to the Sex Offender Accountability and Protection of Minors Act.

I informed the court that the Department currently does not have any policies in place that restrict the movement of an individual on this program. Due to the specific constitutional arguments raised in this case I determined our policy was not a part of the record, so I never reviewed the current policy. I was later informed by my supervisors that I was incorrect regarding our policy, and there exists a Department policy that 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.

For absolute and complete candor with the court I am writing this letter to inform the Court of my error. Please inform each member of my error prior to the final decision.

Your assistance in this matter is greatly appreciated. If you have any further questions or comments regarding this matter please do not hesitate to contact me.

With kind regards I am,

Sincerely,

Tommy Evans, Jr.
Legal Counsel

TE:te

cc: Christopher D. Scalzo, Interim Public Defender, 10th Judicial Circuit
Wanda H. Carter, Deputy Chief Appellate Defender, S.C. Commission on Indigent Defense

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

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September 9, 2011

Christopher D. Scalzo, Esquire
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Greenville County Courthouse
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Greenville, SC 29601

Deputy Chief Appellate Defender Wanda H. Carter
South Carolina Commission on Indigent Defense
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Columbia, SC 29211

Assistant Chief Legal Counsel J. Benjamin Aplin
Legal Counsel Tommy Evans, Jr.
South Carolina Department of
Probation, Parole & Pardon
P. O. Box 50666
Columbia, SC 29250

Re: State v. Dykes, Jennifer Rayanne

Dear Counsel:

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows:

Appellant	15 minutes
Respondent	15 minutes
Appellant in Reply	5 minutes

This case is scheduled for hearing on Thursday, September 22, 2011 at 10:00 a.m.

Very truly yours,

Daniel E. Shearouse, Clerk

By Debbie M. Hopkins
Administrative Assistant

DES/dmh

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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July 21, 2011

Deputy Chief Appellate Defender Wanda H. Carter
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Christopher D. Scalzo, Esquire
Greenville County Public Defender's Office
Greenville County Courthouse
305 E. North St., Rm. 123
Greenville, SC 29601

Re: State v. Dykes, Jennifer Rayanne

Dear Counsel:

The following Order has been endorsed on your Petition to File Supplemental Record and Brief Addressing Additional Liberty, Due Process, *Ex Post Facto*, and Equal Protection Violations Emanating from Appellant's GPS Monitoring Sentence in the above entitled case on appeal.

"Petition denied.

s/ Jean H. Toal C.J.
For the Court

July 21, 2011."

By copy of this letter we are advising opposing counsel of the action of the Court in this matter.

Very truly yours,

Daniel L. Shearouse
BS

CLERK

DES/dmh

cc: Assistant Chief Legal Counsel J. Benjamin Aplin
Legal Counsel Tommy Evans, Jr.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE,

RESPONDENT,

V.

JENNIFER RAYANNE DYKES,

APPELLANT

PETITION TO FILE SUPPLEMENTAL RECORD AND BRIEF ADDRESSING ADDITIONAL LIBERTY, DUE PROCESS, *EX POST FACTO*, AND EQUAL PROTECTION VIOLATIONS EMANATING FROM APPELLANT'S GPS MONITORING SENTENCE

Pursuant to Rule 224 of the South Carolina Appellate Court rules, the undersigned counsel requests leave to address additional liberty, due process, *ex post facto*, and equal protection violations on appeal and to supplement the record with Attachment A to this Petition. These additional violations have resulted from appellant having begun service of her GPS monitoring sentence on April 29, 2011.

Since beginning her lifetime GPS monitoring sentence, appellant has been required to pay a significantly higher cost for GPS monitoring than is reflected in the record on appeal; she is required to plug the GPS unit into an electric wall socket, thus tethering herself to the wall, each day for two hours; she is required to submit to GPS Tracking Program Conditions that further restrict her rights and allows the state further intrusion into her liberty and property

rights; and she has suffered demonstrable physical pain, discomfort, and irritation to her skin as a result of having the GPS device attached to her body.

In support of this petition, counsel presents the following:

1. **Appellant's Release from Prison and Start of GPS Sentence**

Appellant filed Notice of Appeal on April 30, 2010, while appellant was in prison. She was released from prison on April 29, 2011. Appellant was released having satisfied her sentence for the underlying offense, her probation terminated, and with no requirement to be supervised by the S.C. Department of Probation, Parole and Pardon Services (SCDPPP), save for the lifetime GPS monitoring. On April 29, 2011, SCDPPP fit appellant with a GPS monitoring device and began monitoring her.

2. **Increased Cost of GPS Monitoring**

On April 29, 2011, appellant was informed by the SCDPPP that she is required to pay for GPS monitoring at a rate of $60.00 per week, rather than $60.00 a month as originally stipulated by the parties at the lower court hearing on April 22, 2010 (see Stipulation of Facts, R. 121).

3. **Requirement that Appellant Plug-In the GPS Monitor Two Hours Each Day**

SCDPPP requires appellant to plug the GPS monitor that is permanently attached to her ankle into the wall to re-charge for two (2) hours each and every day. Appellant must schedule the plug-in time with SCDPPP; the re-charging time is currently scheduled for 2 a.m. to 4 a.m. The chord used to plug-in is 15 feet long. Appellant is restricted from moving around her home because she is tethered to the wall. If appellant does not plug-in by the scheduled time, SCDPPP will beep appellant with the beeper it provided to appellant (a device she must carry with her at all times) when she was placed on GPS monitoring; if she does not respond to the beep, the

police will be dispatched to her location—and she may be determined to be in violation of SCDPPP rules, which carry criminal sanctions.

4. SCDPP Required Appellant Consent to Further Liberty Restrictions

On April 19, 2011, just prior to her release from prison, appellant was interviewed by agents of SCDPPP in preparation for her court-ordered lifetime GPS monitoring. SCDPPP required appellant to sign Form 1430 (revised on July 1, 2009) entitled "GPS Tracking Program Conditions." Appellant was required to sign Form 1430 on pain of being in violation of her court-ordered submission to lifetime GPS monitoring (see Attachment A: "I understand that these terms and conditions are being imposed by the [SCDPPP] pursuant to Section 23-3-540(J)...and that any wilfull violation of these terms and conditions is a felony, and upon conviction, may result in a sentence of up to ten (10) years imprisonment.").

SCDPPP required appellant to agree/consent to thirteen different conditions of the GPS monitoring program, including requiring appellant:

i. Report to SCDPPP as instructed by the department;

ii. Not change residence without prior notice and allow SCDPPP agent to "visit me in my home, at my place of employment, or elsewhere, at any time";

iii. Agree to install telephone equipment/service at her residence in compliance with SCDPPP requirements;

iv. Notify agent of loss of residence or employment;

v. Not be permitted to leave South Carolina without permission of agent;

vi. Notify agent of arrest or questioning by law enforcement;

vii. Abide by all schedules set up by agent;

viii. Immediately respond to system alerts or contact by agent;

ix. Abide by exclusion zones; and

x. Pay all fees.

5. Permanently Attaching GPS Causes Appellant Pain, Discomfort, and Skin Irritation

Since having the GPS monitor attached to her body, appellant has experienced physical discomfort and pain. The device "cuts" into her skin, causing irritation and pain. It is "heavy" on the ankle and rubs against the "bone." Appellant cannot take a bath, because the device cannot be submerged in water; but she must wear it when she showers. The moisture that develops between the plastic and her skin has caused a rash and irritation.

6. Implications of these Additional Facts on the Issues on Appeal

The additional facts outlined above are relevant to the issues already raised and briefed on appeal. In some instances, these additional facts update information in the record that is now outdated (*e.g.,* the cost of GPS monitoring is in the record now as $60 per month, but has been increased to $60 per week). Moreover, these additional facts further develop the overall relevant facts underlying the issues on appeal; and because they represent circumstances that are not unique to appellant, the issues are therefore capable of repetition. Yet, if these additional facts and their relevant issues are not considered in the record of this appeal, then the proper and full evaluation of the preserved issues on appeal will be lessened—resulting in the real likelihood that violations that are capable of repetition will evade review.

These additional facts directly affect the following preserved issues on appeal.

i. Implications on the Violation of Substantive Due Process

The requirement that appellant plug-in the GPS device (see paragraph 3 above), along with the GPS Tracking Program Conditions (see paragraph 4 above) and the pain, discomfort, and skin irritation (see paragraph 5 above) further establish that lifetime GPS monitoring infringes on a fundamental liberty right. The requirement to plug-in and the physical effects of having to be

permanently fitted with the device specifically address the fundamental right to control the integrity of one's own body (see Final Brief of Appellant, Argument 1A). The liberty restrictions imposed/required by the GPS Tracking Program Conditions specifically address the fundamental liberty interest violated by court-imposed lifetime GPS monitoring (see Final Brief of Appellant, Argument 1B).

The requirement of a four-fold increase in cost for the lifetime monitoring (see paragraph 2 above) specifically addresses the issue of whether a heightened scrutiny should be applied because appellant must pay the costs or be subject to criminal prosecution (see Final Brief of Appellant, Argument 1C).

All of these issues outlined in paragraphs 3 through 5 specifically address whether, in consideration of substantive due process concerns, the individual or combined nature of these requirements/restrictions turns the ostensibly civil measure into a criminal punishment as discussed in appellant's substantive due process argument (see Final Brief of Appellant, Argument 1D).

ii. Implications on the Violation of Procedural Due Process

Appellant's procedural due process argument is also specifically affected by the requirements/restrictions outlined in paragraphs 2 through 5 above. The statutory denial of a meaningful hearing on the merits of imposing lifetime GPS monitoring on appellant violated her right to procedural due process because the fact (and nature) of monitoring raises liberty and property interests that are protected by the due process clauses of the U.S. Constitution and the S.C. Constitution (see Final Brief of Appellant, Argument 2).

Appellant's liberty rights are clearly implicated by the requirement that she plug-in the GPS device every day for two hours (see paragraph 3 above); that she submit to the GPS Tracking

Program Conditions (see paragraph 4 above); and that she suffer the pain, discomfort, and skin irritation caused by being permanently fitted with a GPS device (see paragraph 5 above).

Appellant's property rights are clearly implicated by the requirement that she pay $60 per week (rather than $60 per month) in costs for the lifetime monitoring (see paragraph 2 above).

iii. Implications on the Violation of *Ex Post Facto* Punishment

The central issue of the *ex post facto* punishment argument is that the imposition of lifetime GPS monitoring is a punishment rather than a civil remedy. Appellant outlines in her Final Brief—applying the seven factors set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)—how lifetime GPS monitoring is a punishment (see Final Brief of Appellant, Argument 3). The requirements/restrictions outlined in paragraphs 2 through 5 above specifically address this issue.

The imposition of a $60 per week cost (see paragraph 2 above) clearly addresses the first and seventh factors.

The remaining issues (see paragraphs 3 through 5) clearly address the first, second, fourth, and seventh factors.

iv. Implications on the Violation of Equal Protection

The issues outlined in paragraphs 2 through 5 above specifically address liberty and property interests. Appellant argues that lifetime GPS monitoring implicates fundamental liberty and property rights which requires the Court to apply strict scrutiny analysis to the statute imposing lifetime GPS monitoring (see Final Brief of Appellant, Argument 4).

The additional facts discussed above are relevant and connected to the issues on appeal. The implications raised by these facts can fairly be considered extensions of the issues on appeal. These issues have been preserved for appellate review.

These issues were raised and addressed by the lower court. The lower court did not base its ruling on the factual implications of lifetime GPS monitoring; nor did it base its ruling on how lifetime GPS monitoring violated appellant's constitutional rights. Instead, the lower court based its ruling on the statutory directive that it must impose the sanction solely upon a finding of a violation of probation. The lower court, in its view of the law, was not permitted by the statute to consider any facts relevant to the need or justification for imposing lifetime GPS monitoring on appellant; and was not permitted by the statute to consider the effects of imposing lifetime GPS monitoring on appellant.

WHEREFORE, based on the foregoing, counsel requests that this petition be granted.

Respectfully submitted,

Wanda H. Carter
Deputy Chief Appellate Defender

Christopher D. Scalzo
Deputy Public Defender

Attorneys for Petitioner

June 28, 2011

Petition denied.

C.J.

For the Court

July 21, 2011

Attachment A

South Carolina Department of Probation, Parole and Pardon Services
Global Positioning Satellite System Tracking Program

GPS Tracking Program Conditions

1. I will report in person to the South Carolina Department of Probation, Parole and Pardon Services office on the day of my sentencing or release and thereafter as instructed by the Department;

2. Upon sentencing or release I will reside at the following address:

will notify

Homeowner's Name: _____

Address: 8 North Main St. Taylors SC

Telephone Number: _____

3. I will not change my residence or employment without the prior notice to my Agent. Further, I shall allow my Agent to visit me in my home, at my place of employment, or elsewhere, at any time.

4. I acknowledge that GPS Monitoring / Tracking requires cellular or landline telephone coverage and agree to install necessary equipment/service at my residence to meet this requirement, if directed by my Agent.

5. I will register as a sex offender as required by the Code of Laws of South Carolina and as described in the Department's *Notice of Sex Offender Registry.*

6. I will notify my Agent if I become homeless or unemployed.

7. I will not leave the State of South Carolina without the permission of my Agent.

8. I will immediately contact my Agent if I am ever arrested or questioned by a law enforcement official for any reason whatsoever.

9. I will abide by all schedules intended to meet GPS equipment operation and maintenance requirements as directed by my Agent. All schedule changes will be with the prior approval of my Agent.

10. I will comply with the GPS Monitoring / Tracking conditions as set forth in the GPS Monitoring Program Participant Rules Acknowledgment and Agreement.

11. I will immediately respond to any system alerts or contacts by my Agent.

12. I will not enter areas that are defined to be off-limits (exclusion zones).

13. I will pay all fees related to GPS Monitoring.

I have read, or had read to me, the above conditions and I understand their meaning. I have received a copy of these conditions. I understand that these terms and conditions are being imposed by the South Carolina Department of Probation, Parole and Pardon Services pursuant to Section 23-3-540 (J) of the South Carolina Code, and that any willfull violation of these terms and conditions is a felony and, upon conviction, may result in a sentence of up to ten (10) years imprisonment.

4-19-11
Offender Signature Date

4-19-11
Agent Signature Date

JD Jennifer Dykes
Offender Name (printed)

Jennifer Dykes

FRED M. Brown
Agent Name (printed)

1703961
SID

Form 1430: Revision 2 - Revision Date July 1, 2009

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE,

RESPONDENT,

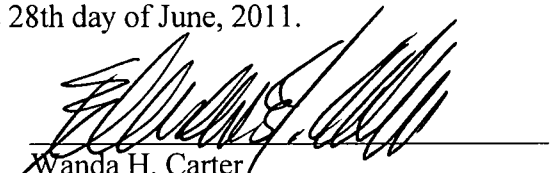
V.

JENNIFER RAYANNE DYKES,

APPELLANT

CERTIFICATE OF SERVICE

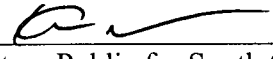
The undersigned attorney hereby certifies that a true copy of the Petition to File Supplemental Brief and Record with Additional Liberty and Due Process Violations Emanating from Appellant's GPS Monitoring in the above referenced case has been served upon opposing counsel, on Tommy Evans, Jr., Esquire, this 28th day of June, 2011.



Wanda H. Carter
Deputy Chief Appellate Defender

Attorney for Petitioner

SUBSCRIBED AND SWORN TO before me
this 28th day of June, 2011.


(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE, ... RESPONDENT

v.

JENNIFER R. DYKES, ... APPELLANT

RETURN TO PETITION TO FILE SUPPLEMENTAL RECORD AN D BRIEF

The Respondent files this return to the Appellant's petition to file a supplemental record on appeal and brief addressing additional liberty, due process, ex post facto and equal protection violations. The Respondent will argue that the argument raised by the Appellant in her supplemental brief was not presented to the lower court; therefore, should not be considered in this appeal.

Within her supplemental brief the Appellant argues that she is being denied various liberties, and constitutional rights, due to her placement in the Global Positional Satellite (GPS) program pursuant to the Sex Offender Accountability and Protection of Minors Act. She argues that she is being treated unfairly due to the amount she is responsible to pay; the amount of time

required to charge the unit; other requirements under the program; and, the accused pain and discomfort to her ankle caused by the GPS unit itself. The Respondent will address to the Court that none of these allegations were raised before the lower court prior to the ruling of her wilful violation of parole; therefore, they should not be considered as part of this appeal. Issues not raised below could not be raised for the first time on review and, likewise issue not property preserved by time exception may not be heard on appeal. Murphy v. Hagan, 275 S.C. 334, 271 S.E.2d 311 (1980). None of these matters including Attachment A were introduced during a probation violation hearing so it is not subject to consideration.

The Respondent is of the opinion that none of these matters are reviewable. If this court feels these matters pertain to the Appellant original argument, the Respondent argues, that many of the facts raised by the Appellant regarding the GPS program are either exaggerated, or could be easily remedied by the Department.

Within the supplemental brief the Appellant argues, that the amount it cost to be placed on the program exceeds the amount originally stated in the record on appeal. The cost of the GPS program is set by the Department of Probation, Parole and Pardon Services (Department), which is not subject to removal by the Courts. South Carolina law specifically states:

> Every person placed on electronic monitoring must be assessed a fee to be determined by the Department of Probation, Parole, and Pardon Services in accordance with Section 24-21-80 as long as he remains in the electronic monitoring program.

S.C. Code Ann. §24-21-85 (Supp. 2010).

These fees are set by the Department, and does not go to the agency, but to maintain the program. All fees generated by this assessment must be retained by the department to support the

electronic monitoring program and carried forward for the same purpose. S.C. Code Ann. §24-21-85. However, as stated within their final brief, the Department 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 determines that exceptional circumstances exist such that these payments cause severe hardship to the person. S.C. Code Ann. §23-3-540(K). So any problem the Appellant may have with the payment of the monitoring fees can be easily remedied if the Department is made aware of this hardship.

The Appellant also alleges that the Department requires that she "tether herself to the wall" for two hours in order to charge the devise. It is true that the GPS devise must be charged daily; however, that charge lasts between thirty minutes and an hour and a half. During the charging period she is allowed to temporary unplug the devise to move around the house, to use the bathroom, go to the kitchen, etc. The Department also does not have a specific hour of the day that the charging must be done. The time period mentioned within the supplemental brief was probably agreed upon by the Appellant and her agent. This time period that can be easily changed with notification to her agent. If the unit is not charged a beeper will go off, and if the Appellant fails to contact her agent, that agent will respond to the Appellant's residence. The local police will not be notified, and the Appellant will not be subject to arrest unless the device is removed or tampered with.

None of the arguments within her supplemental brief was brought to the attention of the lower court; therefore, these arguments should not be considered as part of this appeal. The Respondent will still proclaim that since the GPS program was not created by the legislature to

be punitive, but a measure to monitor those who committed crimes against minors, there exist no violation of due process.

CONCLUSION

For all of the reasons set forth above, the Respondent submits this Court should deny this Petition due to none of the arguments or the attachment was previously submitted to the lower court.

Respectfully submitted,

Tommy Evans, Jr.
Legal Counsel

South Carolina Department of
Probation, Parole and Pardon Services
P.O. Box 50666
Columbia, South Carolina 29250

BY: _____
Tommy Evans, Jr.
Legal Counsel

Columbia, South Carolina
July 5, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE, ... RESPONDENT

v.

JENNIFER RAYANNE DYKES, ... APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Return to Petition to File Supplemental Record and Brief* dated July 5, 2011, on Appellant this 5th day of July, 2011, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Wanda Carter, Deputy Chief Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, S.C. 29211-1589

Christopher Scalzo, Esquire
Deputy Public Defender
Greenville County Public Defender's Ofc
305 E. North Street, Suite 213
Greenville, SC 29601

I further certify that all parties required by Rule to be served have been served.

Dawn K. Nichols
Executive Administrative Assistant

South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250

The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Deputy Chief Appellate Defender Wanda H. Carter

From: Daniel E. Shearouse

Date: July 18, 2011

RE: September Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the September 2011 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of September 20, 21 and 22. Please notify this office in writing prior to July 25, 2011 as to any scheduling conflicts for the September term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

State v. Dykes, Jennifer Rayanne

The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Christopher D. Scalzo, Esquire

From: Daniel E. Shearouse

Date: July 18, 2011

RE: September Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the September 2011 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of September 20, 21 and 22. Please notify this office in writing prior to July 25, 2011 as to any scheduling conflicts for the September term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

State v. Dykes, Jennifer Rayanne

The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

To: Assistant Chief Legal Counsel J. Benjamin Aplin
Legal Counsel Tommy Evans, Jr.

From: Daniel E. Shearouse

Date: July 18, 2011

RE: September Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the September 2011 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of September 20, 21 and 22. Please notify this office in writing prior to July 25, 2011 as to any scheduling conflicts for the September term, and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

State v. Dykes, Jennifer Rayanne

State of South Carolina

Department of Probation, Parole and Pardon Services

NIKKI R. HALEY
Governor

KELA E. THOMAS
Director

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

July 5, 2011

Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, S.C. 29211

RE: **State v. Jennifer Dykes**

Dear Mr: Shearouse:

Enclosed please find the original and six (6) copies of the *Return to Petition to File Supplemental Record and Brief* dated July 5, 2011, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Tommy Evans, Jr.
Legal Counsel

TE:dkn
Enclosures

cc: Wanda Carter, Deputy Chief Appellate Defender
Christopher Scalzo, Esquire

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

June 27, 2011

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
PO Box 11330
Columbia, SC 29211

Re: State of South Carolina v. Jennifer Rayanne Dykes

Dear Mr. Shearouse:

Enclosed are an original and six copies of the Petition to File Supplemental Brief and Record with Additional Liberty and Due Process Violations Emanating from Appellant's GPS Monitoring in the above-captioned case. Thank you for your assistance in this matter.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/kam

Enclosure

cc: Tommy Evans, Jr., Esquire
Christopher Scalzo, Esquire
Jennifer Rayanne Dykes

State of South Carolina

Department of Probation, Parole and Pardon Services

NIKKI HALEY
Governor

KELA THOMAS
Director

2221 DEVINE STREET, SUITE 600
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www.state.sc.us/ppp

June 6, 2011

The Honorable Daniel E. Shearouse
S. C. Supreme Court Clerk
P. O. Box 11330
Columbia, South Carolina 29211

RE: **The State v. Jennifer Dykes**

Dear Mr. Shearouse:

Enclosed please find five additional copies of the *Final Brief of Respondent* dated June 3, 2011.

Sincerely,

Tommy Evans, Jr.
Legal Counsel

TE:dkn
Enclosures

cc: Wanda Carter, Deputy Chief Appellate Defender
Christopher Scalzo, Public Defender

State of South Carolina

Department of Probation, Parole and Pardon Services

NIKKI HALEY
Governor

KELA THOMAS
Director

2221 DEVINE STREET, SUITE 600
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www.state.sc.us/ppp

June 3, 2011

The Honorable Daniel E. Shearouse
S. C. Supreme Court Clerk
P. O. Box 11330
Columbia, South Carolina 29211

RE: **The State v. Jennifer Dykes**

Dear Mr. Shearouse:

Enclosed please find the original and nine (9) copies of the *Final Brief of Respondent* dated June 3, 2011, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Tommy Evans, Jr.
Legal Counsel

TE:dkn
Enclosures

cc: Wanda Carter, Deputy Chief Appellate Defender
Christopher Scalzo, Public Defender

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
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Columbia, South Carolina 29211-1589
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Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

May 19, 2011

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: State v. Jennifer R. Dykes

Dear Mr. Shearouse,

Enclosed please find the original and five copies of the petition to relax Rule 209, SCACR, and leave to include additional designated record on appeal matter out of time in the above case.

If you have any questions concerning this matter, please contact me.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/kam

Enclosures

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 20, 2011

Deputy Chief Appellate Defender Wanda H. Carter
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: State v. Dykes, Jennifer Rayanne

Dear Counsel:

The following Order has been endorsed on your Petition to Relax Rule 209, SCACR, and Leave to Include Out of Time an Additional Exhibit as Designated Matter to be Placed in the Records in the above entitled case on appeal.

"Granted.

Jean H. Toal C.J.
For the Court

By s/ Brenda F. Shealy
Chief Deputy Clerk

May 20, 2011."

By copy of this letter we are advising opposing counsel of the action of the Court in this matter.

Very truly yours,

Brenda J. Healy

CHIEF DEPUTY CLERK

BFS/dmh

cc: Christopher D. Scalzo, Esquire
Deputy Director for Legal Services, Teresa A. Knox
Assistant Chief Legal Counsel J. Benjamin Aplin
Legal Counsel Tommy Evans, Jr.

State of South Carolina

Department of Probation, Parole and Pardon Services

NIKKI HALEY
Governor

KELA THOMAS
Director

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April 6, 2011

Wanda Carter, Deputy Chief Appellate Defender
S.C. Commission on Indigent Defense
Office of Appellate Defense
Post Office Box 11589
Columbia, S.C. 29211-1589

RE: State v. Jennifer Dykes

Dear Ms. Carter:

Please find enclosed copies of the matter we designated for inclusion in the Record on Appeal.

Sincerely,

Tommy Evans, Jr.
Legal Counsel

TE:dkn

cc: The Honorable Tanya A. Gee
Clerk of the South Carolina Court of Appeals

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
MAY 19 2011
S.C. Supreme Court

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

THE STATE,

RESPONDENT,

V.

JENNIFER RAYANNE DYKES,

APPELLANT

PETITION TO RELAX RULE 209, SCACR,
AND LEAVE TO INCLUDE OUT OF TIME
AN ADDITIONAL EXHIBIT AS DESIGNATED
MATTER TO BE PLACED IN THE RECORDS

Pursuant to Rule 224 of the South Carolina Appellate Court Rules, the undersigned counsel requests leave to place an exhibit (defense exhibit #4), which was inadvertently excluded from the designated matter list in the initial brief, as matter to be included in the record on appeal in this case. In support of this motion, counsel submits the following.

1.) The initial brief and designation of matter to be included in the record on appeal in this case were filed on February 4, 2011. However, a document labeled defense exhibit #4 was inadvertently omitted from the designated matter list. Counsel requests leave to include defense exhibit #4 to the list of designated matter out of time. As required by Rule 209, SCACR, exhibit #4 is matter that is relevant to the appellate issues briefed in the case. See Rule 209, SCACR.

2.) In this case on appeal, counsel argued that appellant's lifetime GPS sentence is contrary to due process for numerous reasons (as outlined in the brief), particularly where appellant had little to no risk of re-offending.

3.) During the trial court hearing held in the case, trial counsel referred to defense exhibit #4, which was a report from Dr. Karl Bodtorf, who evaluated appellant at the request of the South Carolina Department of Probation, Pardon and Parole Services while supervising appellant on probation, in support of the argument that the error in appellant's GPS sentence is especially exacerbated by the report's showing that appellant poses a low risk of re-offending. The exhibit was marked as defense exhibit #4 during the hearing. See Tr. p. 53, ll. 23-25. Also, see Tr. 54, where on direct examination of appellant's expert witness, counsel referenced this exhibit and the expert witness testified to the contents of the exhibit. Tr. 54, ll. 1 – 25. Furthermore, the solicitor voiced no objections in connection with the exhibit during the hearing.

4.) Inasmuch as Rule 209, SCACR, allows for the inclusion of matter in the record that is considered relevant to the appeal,[1] and where defense exhibit #4 is therefore relevant, counsel requests the relaxation of Rule 209, SCACR, and leave to list out of time defense exhibit #4 as designated matter to be included in the record on appeal.

WHEREFORE, counsel requests that Rule 209, SCACR, be relaxed and leave be granted to include defense exhibit #4 as additional designated matter to be placed in the records. The signature below indicates that opposing counsel has no objections to this petition for the same.

Respectfully submitted,

Wanda H. Carter
Deputy Chief Appellate Defender

May 19, 2011

I CONSENT:

for Tommy Evans, Jr.

Granted.

Jean H. Toal C.J.
For the Court

By Brenda J. Shealy
Clerk
Chief Deputy
May 20, 2011

[1] The designation shall be accompanied by a certification signed by the party's counsel of record that the designation contains no matter which is irrelevant to the appeal.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE,

RESPONDENT,

V.

JENNIFER RAYANNE DYKES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies the petition to relax Rule 209, SCACR, and leave to include additional designated record on appeal matter out of time in the above referenced case has been served upon Tommy Evans, Jr., Esquire, at the South Carolina Department of Probation, Parole & Pardon Services, PO Box 50666, Columbia, SC 29250, this 19th day of May, 2011.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 19th day of May, 2011.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013 .

The Supreme Court of South Carolina

The State, Respondent,

v.

Jennifer Rayanne Dykes, Appellant.

The Honorable Charles B. Simmons, Jr.
Greenville County
Trial Court Case No. 2006-GS-39-02116

ORDER

The request for an extension to serve and file the record on appeal is granted and extended until June 6, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda J. Shealy
CHIEF DEPUTY CLERK

Columbia, South Carolina

May 9, 2011

cc: Christopher D. Scalzo, Esquire
Deputy Chief Appellate Defender Wanda H. Carter
Deputy Director for Legal Services, Teresa A. Knox
Assistant Chief Legal Counsel J. Benjamin Aplin
Legal Counsel Tommy Evans, Jr.

ORIGINAL

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Columbia, South Carolina 29211-1589
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Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED
MAY - 6 2011
S.C. Supreme Court

May 6, 2011

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Jennifer Rayanne Dykes v. State of South Carolina

Dear Mr. Shearouse:

The record on appeal in the above-referenced case is due to be served and filed today. Because of a newly discovered issue with Appellant's designation that needs to be resolved, I respectfully request a thirty-day extension of this deadline. No prior extensions have been requested in this case.

By copy of this letter, I am informing Tommy Evans, Jr., Esquire, of the Department of Probation, Parole and Pardon Services, of this extension request.

Thanking you for your cooperation and assistance in this matter.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/kam

cc: Tommy Evans, Jr.
Christopher D. Scalzo

State of South Carolina

Department of Probation, Parole and Pardon Services

NIKKI HALEY
Governor

KELA THOMAS
Director

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April 6, 2011

The Honorable Tanya Gee
Clerk of the South Carolina Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

RE: **Jennifer Dykes v. SCDPPPS**

Dear Ms. Gee:

Enclosed please find the original of the *Initial Brief of Respond*ent and Designation of Matter dated April 6, 2011, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Tommy Evans, Jr.
Legal Counsel

TE:dkn
Enclosures

cc: Wanda Carter, Deputy Chief Appellate Defender
Christopher Scalzo, Esquire

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

THE STATE, ... APPELLANT

v.

JENNIFER RAYANNE DYKES, ...RESPONDENT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* dated April 6, 2011, on Appellant this 6th day of April, 2011, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Wanda Carter, Deputy Chief Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, S.C. 29211-1589

Christopher Scalzo, Esquire
Deputy Public Defender
Greenville County Public Defender's Ofc
305 E. North Street, Suite 213
Greenville, SC 29601

I further certify that all parties required by Rule to be served have been served.

Dawn K. Nichols
Executive Administrative Assistant

South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250

State of South Carolina

Department of Probation, Parole and Pardon Services

NIKKI HALEY
Governor

KELA THOMAS
Director

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www.state.sc.us/ppp

April 6, 2011

The Honorable Tanya Gee
Clerk of the South Carolina Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

RE: **Jennifer Dykes v. SCDPPPS**

Dear Ms. Gee:

Enclosed please find the original of the *Initial Brief of Respond*ent and Designation of Matter dated April 6, 2011, along with proof of service in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Tommy Evans, Jr.
Legal Counsel

TE:dkn
Enclosures

cc: Wanda Carter, Deputy Chief Appellate Defender
Christopher Scalzo, Esquire

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
APR 12 2011
S.C. Supreme Court

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

THE STATE, ... RESPONDENT

v.

JENNIFER RAYANNE DYKES, ... APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* dated April 6, 2011, on Appellant this 6th day of April, 2011, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Wanda Carter, Deputy Chief Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, S.C. 29211-1589

Christopher Scalzo, Esquire
Deputy Public Defender
Greenville County Public Defender's Ofc
305 E. North Street, Suite 213
Greenville, SC 29601

I further certify that all parties required by Rule to be served have been served.

Dawn K. Nichols
Executive Administrative Assistant

South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250

The Supreme Court of South Carolina

The State, Respondent,

v.

Jennifer Rayanne Dykes, Appellant.

The Honorable Charles B. Simmons, Jr.
Greenville County
Trial Court Case No. 2006-GS-39-02116

ORDER

The request for an extension to serve and file the Initial Brief of Respondent and Designation of Matter is granted and extended until April 6, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda J. Shealy
Chief Deputy CLERK

Columbia, South Carolina

March 1, 2011

cc: John Benjamin Aplin, Esquire
Tommy Evans, Jr., Esquire
Deputy Chief Appellate Defender Wanda H. Carter

State of South Carolina

Department of Probation, Parole and Pardon Services

NIKKI HALEY
Governor

KELA THOMAS
Director

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www.state.sc.us/ppp

February 24, 2011

The Honorable Tanya A. Gee
Clerk of the S.C. Court of Appeals
P. O. Box 11629
Columbia, South Carolina 29211

Re: State v. Jennifer Dykes

Dear Ms. Gee:

Please find enclosed a *Motion for Extension of Time* dated February 24, 2011, along with proof of service in the above referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Tommy Evans, Jr.
Legal Counsel
TE:dn

Enclosures

cc: Wanda Carter, Esquire
Christopher Scalzo, Esquire

STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
FEB 25 2011
SC Court of Appeals

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

THE STATE, ... RESPONDENT

v.

JENNIFER RAYANNE DYKES, ... APPELLANT

MOTION FOR EXTENSION OF TIME TO FILE RESPONDENT'S INITIAL BRIEF AND DESIGNATION OF MATTER

Comes now, Tommy Evans, Jr., Legal Counsel for the South Carolina Department of Probation, Parole and Pardon Services (the Department), and respectfully requests an extension of time of thirty (30) days from the March 4, 2011, due date to file Respondent's Initial Brief due to Respondent's present workload.

Respectfully submitted,

Tommy Evans, Jr,
Legal Counsel
South Carolina Department of Probation,
Parole and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250

RECEIVED
FEB 28 2011
S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Court of Appeals

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

THE STATE, ... RESPONDENT

v.

JENNIFER RAYANNE DYKES, ... APPELLANT

CERTIFICATE OF SERVICE

I, Dawn K. Nichols, Executive Administrative Assistant to counsel for Respondent, certify that I have served the within Motion for Extension of Time February 24, 2011, on Appellant this 24th day of February, 2011, by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
Deputy Chief Appellate Defender
Division of Appellate Defense
PO Box 11589
Columbia, South Carolina 29211-1589

Christopher Scalzo, Esquire
Deputy Public Defender
Greenville County Public Defender's Office
305 E. North Street, Suite 123
Greenville, South Carolina 29601

Dawn Nichols
Executive Administrative Assistant
South Carolina Department of Probation,
Parole, and Pardon Services
P. O. Box 50666
Columbia, South Carolina 29250

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE,

RESPONDENT,

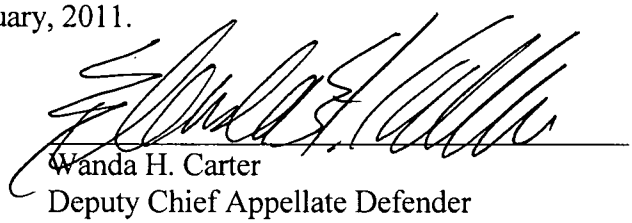
V.

JENNIFER RAYANNE DYKES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the South Carolina Department of Probation, Parole & Pardon Services, PO Box 50666, Columbia, SC 29250, this 4th day of February, 2011.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 4th day of February, 2011.


(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013 .

The Supreme Court of South Carolina

The State, Respondent,

v.

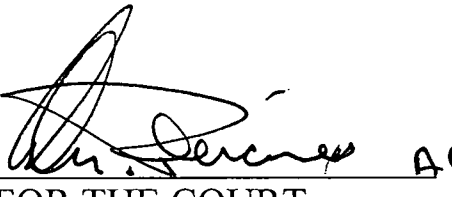
Jennifer Rayanne Dykes, Appellant.

The Honorable Charles B. Simmons, Jr.
Greenville County
Trial Court Case No. 2006-GS-39-02116

ORDER

Appellant seeks a fourth extension of time to serve and file the Initial Brief of Appellant and Designation of Matter in the above entitled matter, and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension. The request for an extension is granted until February 4, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.



A.C.J.

FOR THE COURT

Columbia, South Carolina

January 24, 2011

cc: John Benjamin Aplin, Esquire
Deputy Chief Appellate Defender Wanda H. Carter

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

RECEIVED

JAN 21 2011

S.C. Supreme Court

Appeal from Greenville County

Charles B. Simmons, Jr., Special Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JENNIFER RAYANNE DYKES,

APPELLANT

PETITION FOR EXTENSION TO FILE INITIAL BRIEF OF APPELLANT AND DESIGNATION OF MATTER

The undersigned counsel would respectfully request a **final two week** extension, until **February 4, 2011**, in which to file the initial brief of appellant and designation of matter in the above–referenced case. In support of this motion, counsel would respectfully show the Court the following exigent circumstances:

1. The initial brief of appellant and designation of matter in this case are due to be served and filed today having been extended by three prior orders of this Court.

2. Counsel is working on the petition for writ of certiorari and accompanying appendix in the case of Herman Lee Beasley v. State, due on January 31, 2011. On January 18, 2011, Counsel filed the initial brief of appellant and designation of matter in the case of State v. Donald Jones. Counsel filed the initial brief of appellant and designation of matter in the case of State v. Abel Jacobs on January 14, 2011. Also, on January 6, 2011, Counsel filed the initial brief of appellant and designation of matter in

the case of State v. Andrew Ladron. Moreover, in December 2010, counsel filed the initial briefs of appellant and designations of matter in the following cases: State v. Benjamin P. Green, State v. Kevin J. Williams, Sr., State v. Craig Stephens Furcron, State v. Otis Lamar Bland, Jr., State v. Darrell L. Williams, State v. Gerald Carlisle, and State v. Michael Paul Cornelius. Furthermore, in December 2010, counsel filed the petitions for writ of certiorari and appendices in the following cases: Emmett Kelly v. State, Edward Davis v. State, and Bruce lee Hudson v. State.

3. This request is made in good faith, and not for purposes of delay.

4. As indicated by her consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a **final two week** extension, until **February 4, 2011**, in which to file the initial brief of appellant and designation of matter in this case. Counsel requests that the time limits for filing the initial brief of appellant and designation of matter be held in abeyance pending a ruling on this motion.

Respectfully submitted,

Wanda H. Carter
Deputy Chief Appellate Defender

Robert M. Dudek
Chief Appellate Defender

T. Patton Adams, IV
Executive Director or
J. Hugh Ryan, III
General Counsel

January 21, 2011

I DO NOT OPPOSE:

Tammy Evans for Benjamin Aplin

J. Benjamin Aplin, Esquire

The Supreme Court of South Carolina

The State, Respondent,

v.

Jennifer Rayanne Dykes, Appellant.

The Honorable Charles B. Simmons, Jr.
Greenville County
Trial Court Case No. 2006-GS-39-02116

ORDER

Appellant seeks a third extension of time to serve and file the Initial Brief of Appellant and Designation of Matter in the above entitled matter. For good cause shown, the request for an extension is granted and extended until January 21, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____

CLERK

Columbia, South Carolina

December 22, 2010

cc: Deputy Chief Appellate Defender Wanda H. Carter
John Benjamin Aplin, Esquire

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

DEC 22 2010

S.C. Supreme Court

Appeal from Greenville County

Charles B. Simmons, Jr., Special Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JENNIFER RAYANNE DYKES,

APPELLANT

PETITION FOR EXTENSION TO FILE INITIAL BRIEF OF APPELLANT AND DESIGNATION OF MATTER

The undersigned counsel would respectfully request a thirty day extension in which to file the initial brief of appellant and designation of matter in the above–referenced case. In support of this motion, counsel would respectfully show the Court the following exigent circumstances:

1. The initial brief of appellant and designation of matter in this case are due to be served and filed today having been extended by two prior orders of this Court.

2. Counsel will be filing the brief of appellant in the case of State v. Gerald Carlisle today. In November, 2010, counsel filed petitions for writ of certiorari and appendices in the following cases: Timothy M. Jones v. State, Christopher L. Grate v. State, Kevin Davonne Cox v. State, Willie Benson v. State, Marion Miller v. State, Terrance Adams v. State and Tracy A. James v. State. Also in November, 2010, counsel filed the initial briefs of appellant and designations of matter in the following cases:

State v. Michael Hillman, State v. Ben Robert Stewart, State v. James Babb and State v. Michael J. Bourgoin. On December 6, 2010, counsel filed the initial brief of appellant and designation of matter in State v. Benjamin P. Green. On December 8, 2010, counsel filed the petition for writ of certiorari and appendix in Emmett Kelly v. State. On December 13, 2010, counsel filed the initial briefs of appellant and designations of matter in State v. Kevin J. Williams, Sr. and State v. Craig Stephens Furcron. The initial brief of appellant and designation of matter was filed in State v. Darrell L. Williams on December 16, 2010. On December 17, 2010, counsel filed the initial brief of appellant and designation of matter in State v. Otis Lamar Bland, Jr., as well as the petition for writ of certiorari and accompanying appendix in Edward Davis v. State.

3. This request is made in good faith, and not for purposes of delay.

4. As indicated by her consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty-day extension in which to file the initial brief of appellant and designation of matter in this case. Counsel requests that the time limits for filing the initial brief of appellant and designation of matter be held in abeyance pending a ruling on this motion.

Respectfully submitted,

Wanda H. Carter
Deputy Chief Appellate Defender

Robert M. Dudek
Chief Appellate Defender

December 22, 2010

I DO NOT OPPOSE:

J. Benjamin Aplin, Esquire

The Supreme Court of South Carolina

The State, Respondent,

v.

Jennifer Rayanne Dykes, Appellant.

The Honorable Charles B. Simmons, Jr.
Greenville County
Trial Court Case No. 2006-GS-39-02116

ORDER

The Initial Brief of Appellant and Designation of Matter were due to be served and filed on or before November 22, 2010 having been extended by prior order of this Court. Appellant has now filed a Petition for Extension of Time and Request to File these Documents Out of Time. The petition is granted and extended until December 22, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
CLERK

Columbia, South Carolina

November 30, 2010

cc: John Benjamin Aplin, Esquire
Deputy Chief Appellate Defender Wanda H. Carter

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Honorable Charles B. Simmons, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JENNIFER RAYANNE DYKES,

APPELLANT.

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE INITIAL BRIEF OF APPELLANT
AND DESIGNATION OF MATTER OUT OF TIME

The undersigned counsel would respectfully request a thirty-day extension in which to file the initial brief of appellant and designation of matter out of time in the above–referenced case. In support of this motion, counsel would respectfully show the Court the following exigent circumstances:

1. The initial brief of appellant and designation of matter in this case was due to be served and filed on November 22, 2010, after having been extended by one prior order of this Court.

2. During the month of November 2010, (and prior to November 22, 2010 when this brief was due), counsel filed a total of nine petitions for writ of certiorari and briefs in the following cases: Timothy M. Jones v. State, Christopher L. Grate v. State, Kevin

Davonne Cox v. State, Willie Benson v. State, Marion Miller v. State, State v. Michael Hillman, State v. Ben Robert Stewart, State v. James Babb, and Terrance Adams v. State.

3. This request is made in good faith, and not for purposes of delay.

WHEREFORE, the undersigned counsel would respectfully request a thirty-day extension in which to file the initial brief of appellant and designation of matter in this case out of time. Counsel requests that the time limits for filing the initial brief of appellant and designation of matter be held in abeyance pending a ruling on this motion.

Respectfully submitted,

Wanda H. Carter
Deputy Chief Appellate Defender

November 29th, 2010

I do not oppose:

J. Benjamin Aplin

The Supreme Court of South Carolina

The State, Respondent,

v.

Jennifer Rayanne Dykes, Appellant.

The Honorable Charles B. Simmons, Jr.
Greenville County
Trial Court Case No. 2006-GS-39-02116

ORDER

The request for an extension to serve and file the Initial Brief of Appellant and Designation of Matter is granted and extended until November 22, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
CLERK

Columbia, South Carolina

October 27, 2010

cc: Deputy Chief Appellate Defender Wanda H. Carter
John Benjamin Aplin, Esquire

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

ORIGINAL

October 25, 2010

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: State of South Carolina v. Jennifer Dykes

Dear Mr. Shearouse:

The initial brief of appellant and designation of matter in the above-referenced case are due to be served and filed on Friday, October 22, 2010. Because of my present workload, I respectfully request a thirty-day extension of this deadline out of time. No prior extensions have been requested in this case.

As indicated by his signature below, Assistant Deputy Attorney General Salley W. Elliott, Esquire consents to this request.

Thank you for your assistance in this matter.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/fkb

I consent:

J. Benjamin Aplin, Esquire

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

August 23, 2010

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Jennifer Rayanne Dykes v. State of South Carolina 8/23/2010

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Loriene French

Loriene French
Legal Services Coordinator

Hopkins, Debbie

From: Allen, Desiree
Sent: Tuesday, August 17, 2010 12:16 PM
To: 'Loriene P. French'
Cc: Hopkins, Debbie
Subject: RE: The State v. Jennifer Rayanne Dykes

Ms. Hiskell reports that she left a message on Mr. French's v. mail indicating the following: Sent on August 6, should have been received on August 9. Ms. Hiskell has not received it back from the post office. She was advised to send another copy today.

From: Loriene P. French [mailto:LFrench@sccid.sc.gov]
Sent: Tuesday, August 17, 2010 12:01 PM
To: Allen, Desiree
Cc: Hopkins, Debbie
Subject: RE: The State v. Jennifer Rayanne Dykes

As of today's date, we have not received this transcript from Ms. Hiskell.

From: Hopkins, Debbie [mailto:DHopkins@sccourts.org]
Sent: Tuesday, August 17, 2010 10:54 AM
To: Loriene P. French
Subject: FW: The State v. Jennifer Rayanne Dykes

Loriene,

This is the e-mail I received from Desiree.

From: Allen, Desiree
Sent: Monday, August 16, 2010 2:44 PM
To: Hopkins, Debbie
Subject: RE: The State v. Jennifer Rayanne Dykes

The CR reports that it has been delivered ("a little after " July 19, though).

From: Hopkins, Debbie
Sent: Monday, August 16, 2010 1:39 PM
To: Allen, Desiree
Subject: The State v. Jennifer Rayanne Dykes

Desiree,

Appellate Defense sent you a late letter in this matter on July 29th. The transcript was due from CR Caroline Hiskell on July 19th.

Please advise of the status of this transcript.

Thank you.

Debbie M. Hopkins

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

July 29, 2010

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

The transcript listed below was requested by this office. Pursuant to Rule 207(a)(2), SCACR, the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

Court Reporter	Due Date	Case Name
Ms. Caroline Hiskell	7/19/10	Jennifer Rayanne Dykes

Trial Date: April 22, 2010

I would appreciate your confirming in writing as to the status of the above-referenced transcript. If you should have any questions, please do not hesitate to contact me.

Sincerely,

Loriene French

Loriene French
Legal Services Coordinator

cc: S.C.Supreme Court
Attorney General's Office

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

May 20, 2010

Ms. Caroline Hiskell
Circuit Court Reporter
109 Unit A Deborah Lane
Greenville, SC 29611

Dear Ms. Hiskell:

Our office has been requested to perfect the appeal arising out of:

Jennifer Rayanne Davis v. State of South Carolina Case #: 06-GS-39-02116.

County: Greenville Date of Trial: April 22, 2010

Presiding Judge: Charles B. Simmons, Jr.

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

Loriehe French
Legal Services Coordinator

cc: S.C Supreme Court
Attorney General's Office

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 7, 2010

Christopher D. Scalzo, Esquire
Greenville County Public Defender's Office
Greenville Cnty. Courthouse
305 E. North St., Rm. 123
Greenville, SC 29601

Re: State v. Davis, Jennifer Rayanne - Case Tracking No. 2010160047

Dear Mr. Scalzo:

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

CLERK

DES/jjp

cc: Office of Appellate Defense
John Benjamin Aplin, Esquire

OFFICE OF THE PUBLIC DEFENDER

THIRTEENTH JUDICIAL CIRCUIT
Greenville County Courthouse
305 East North Street, Suite 123
GREENVILLE, SOUTH CAROLINA 29601

John I. Mauldin
Public Defender

TEL (864) 467-8522
FAX (864) 467-8521

April 30, 2010

Via Regular Mail
The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

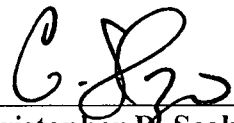
Re: ***State v. Jennifer Rayanne Dykes***
Case No(s).: C-23-09-0640, W-23-09-0776, C-23-09-0880, 2006-GS-39-02116

Dear Mr. Shearouse:

Enclosed for filing please find the notice of appeal in the above referenced matter. Also enclosed are (1) proof of service of the notice of appeal on the respondent, S.C. Dept. of Probation, Pardon & Parole Services; and (2) a copy of the order being challenged on appeal. This appeal is being filed with the Supreme Court pursuant to Rule 203(d) because it involves a challenge to the constitutionality of S.C. Code of Laws § 23-3-540.

Thank you for your attention to this matter.

Yours very truly,



Christopher D. Scalzo, Esq.
Office of the Public Defender, 13th Judicial Circuit
Greenville County Courthouse
305 E. North Street, Suite 123
Greenville, SC 29601
(864) 467-8522
ATTORNEY FOR APPELLANT

Enclosures
cc: J. Benjamin Aplin, Esq. (S.C. Probation, Pardon & Parole)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Charles B. Simmons, Jr., Special Circuit Court Judge

Case No. 2006-GS-39-02116

The State, ...Respondent,

v.

Jennifer Rayanne Dykes, ...Appellant.

NOTICE OF APPEAL

Jennifer Rayanne Dykes appeals the provision of the April 22, 2010 probation revocation order of the Honorable Charles B. Simmons, Jr., that denied appellant's motion to strike the requirements of S.C. Code of Laws § 23-3-540 and ordered her to be permanently monitored by a GPS system pursuant to § 23-3-540(C). This appeal is filed with the Court pursuant to Rule 203(d).

April 30, 2010

Christopher D. Scalzo, Esq.
Office of the Public Defender, 13th Judicial Circuit
305 E. North Street, Suite 123
Greenville, SC 29601
(864) 467-8522
ATTORNEY FOR APPELLANT

Other Counsel of Record:
J. Benjamin Aplin, Esq.
S.C. Department of Probation, Pardon & Parole Services
Post Office Box 50666
Columbia, South Carolina 29250
(803) 734-9220

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Charles B. Simmons, Jr., Special Circuit Court Judge

Case No. 2006-GS-39-02116

The State, ...Respondent,

v.

Jennifer Rayanne Dykes, ...Appellant.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Notice of Appeal in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the State of South Carolina Department of Probation, Parole, and Pardon Services, Post Office Box 50666, Columbia, South Carolina 29250, by placing it in the U.S. Mail with the proper postage on this 30th day of April, 2010.

Christopher D. Scalzo, Esq.
Office of the Public Defender, 13th Judicial Circuit
Greenville County Courthouse
305 E. North Street, Suite 123
Greenville, SC 29601
(864) 467-8522
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of April, 2010.

Notary Public for South Carolina
My Commission Expires: 11-8-2014.

JW317

Created by the South Carolina Department of Probation, Parole a ion Services

STATE OF SOUTH CAROLINA

County of Greenville

STATE VS.

Jennifer Rayanne Dykes

AKA:

Race: W Sex: F

DOB: 07/23/1980

SSN: 457-85-5176

SID#: 01703961

IN THE COURT OF GENERAL SESSIONS

INDICTMENT#:

06 -GS- 39 - 02116

C/W#: C-23-09-0640; W-23-09-0776; C-23-09-0880 C-23-09-1109; W-23-09-1163

Name of Original Offense: Lewd Act Upon A Child

Conviction S.C. Code §: 16-15-140

Conviction CDR Code #: 2, 4, 6, 8

Date of Original Offense: 10-08-05

Original Sentence: 15 yrs SS 3 yrs & 5 yrs probation

ORDER

The above named defendant has been charged with violating the conditions of probation ordered on 01/29/2007 in the Court of General Sessions of Pickens County as set forth in the attached warrant ~~or~~ AND citation dated */__/__. After hearing the evidence and being duly advised, in the (presence/~~absence~~) of the defendant, I find that the above named defendant has violated the following condition(s) of probation: (List by number or indicate special condition as provided in the affidavit) 1, 4, 9, 10 & sex offender conditions 2

* 6-3-09; 7-28-09; 7-29-09; 9-4-09; 11-18-09

Therefore, IT IS ORDERED that:

☑ the suspended sentence be revoked and the above named defendant be required to serve 2 ~~months~~/years, ~~the remainder~~ of the original sentence, and/or pay $__.

☐ the suspended sentence be revoked and the above named defendant be required to serve __ months/years of the original sentence and/or pay $__; thereupon to be reinstated on probation, subject to the conditions set forth in the attached order and not inconsistent with this order.

☐ the above named defendant is continued on probation as provided for in the original sentence, subject to the conditions set forth therein and not inconsistent with this order.

☐ probation is reduced to time served under supervision and the defendant is discharged from supervision on this date.

☑ Additional Conditions ordered by the Court: Balance of probation terminated; GPS imposed under 23-3-540 due to the violation; The offender is to receive mental health treatment/evaluation by Department of Corrections ~~Inmate~~ upon Arrival at reception and evaluation, JS

motion by Defendant denied as stated on the record. JBS

☒ The defendant is given credit for pre-revocation hearing detention time on current probation violation to be calculated and applied by the SC Department of Corrections.

☒ The defendant has previously served 3 ~~months~~/years on this sentence.
(split sentence time and/or prior partial revocation time)

This 22 day of April, 2010,

GREENVILLE, SC.

Presiding Judge

Charles B. Simmons Jr 13th Judicial Circuit

You are hereby advised that under the law the Court may at any time revoke or modify any condition of this probation; impose any lawful conditions it deems proper; or extend your period of probation not to exceed five (5) years. At any time within the period of your probation, the Court may require you to serve any part of the original sentence imposed.

This is to certify that I have read, or have had read to me, the order and the conditions set out therein. I agree to comply with such conditions and the conditions of my attached probation order during the period of my probation. I have received a copy of this Court's order and all attachments.

Offender's Signature	Witnessed by

Signed this ____ (Day) day of ____ (Month), ____ (Year), at ____ (City), SC

Form 9 (Stock) Revision: B Revision Date 03-24-2003 Copy Distributions - White-Clerk of Court; Yellow-SCDC; Pink-Offender File; Gold-Offender

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Greenville County Courthouse
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