ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

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

THE STATE,

RESPONDENT,

V.

JENNIFER RAYANNE DYKES,

APPELLANT

FINAL BRIEF OF APPELLANT

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Did it violate appellant's substantive due process rights for S.C. Code § 23-3-540(C) to mandate the lower court impose lifetime GPS monitoring on appellant without considering any evidence of the level of risk appellant poses for committing a sex offense in the future and despite evidence that she does not pose a high risk of committing a sex offense in the future?

2.

Did it violate appellant's right to procedural due process for the lower court, pursuant to S.C. Code § 23-3-540(C), to impose lifetime GPS monitoring on appellant without holding a meaningful hearing on the merits of whether lifetime GPS monitoring should be imposed on appellant?

3.

Did it violate appellant's right to protection from *ex post facto* punishment under Article I, § 10 of the United States Constitution and Article I, § 4 of the South Carolina Constitution for S.C. Code § 23-3-540 (C) to mandate the lower court impose lifetime GPS monitoring on appellant based solely on a violation of the probationary portion of appellant's original sentence and the original offense for which she was convicted?

4.

Does S.C. Code § 23-3-540(C) violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by arbitrarily and unreasonably classifying similarly situated people convicted of sex offenses in order to impose lifetime GPS monitoring on them?

5.

Does the mandatory order imposing lifetime GPS monitoring on appellant pursuant to S.C. Code § 23-3-540(C) aimed at protecting against future criminal conduct but not based on specific evidence of a present risk of criminal conduct violate appellant's right to protection against unreasonable, warrantless search and seizure under the Fourth Amendment to the United States Constitution and Article I, § 10 of the South Carolina Constitution?

STATEMENT OF THE CASE

Appellant was indicted for a single count of Lewd Act Upon a Child ("Lewd Act") by a Pickens County grand jury on October 17, 2006. The indictment alleged the offense was committed on May 31, 2006. Indictment, R. 141. The child was fourteen years old and appellant was twenty six years old. R. 82, l. 18 – 83, l. 9.

On January 29, 2007, appellant appeared before the Honorable Edward W. Miller and pled guilty to Lewd Act. Sentencing Order, R. 127. Pursuant to a negotiated sentence, Judge Miller ordered appellant committed to the South Carolina Department of Corrections for a period of fifteen years provided on the service of three years, with the balance of the sentence suspended during five years of probation. Sentencing Order, R. 127.

Appellant was not, however, ordered by Judge Miller to submit to mandatory lifetime monitoring via permanent attachment of a Global Positioning Satellite ("GPS") device to her body because the offense date preceded the enactment of S.C. Code § 23-3-540. Sentencing Order, R. 127.

Appellant was released from prison on April 1, 2008, and set up residence in Greenville County. Violation Report, R. 129. The South Carolina Department of Probation, Pardon, and Parole Services ("SCDPPP") transferred monitoring of appellant's case to Greenville County and began monitoring her on April 1, 2008. Violation Report, R. 129.

On June 11, 2009, the Greenville County probation office served appellant with citation C-23-09-0640. Violation Report, R. 129. The alleged violation centered on

appellant's contact with Daphney Smith, a thirty year old female with a felony record. Violation Report, R. 129; R. 9, l. 21.

On July 28, 2009, the Greenville County probation office arrested appellant on probation violation warrant W-23-09-0776. Violation Report, R. 129. The alleged violation centered on appellant's continued contact with Daphney Smith. Violation Report, R. 129.

On July 29, 2009, the Greenville County probation office served appellant with citation C-23-09-0880. Violation Report, R. 129. The alleged violation was for drinking a beer at a local pizzeria. Violation Report, R. 129.

On July 30, 2009, appellant applied for and was granted representation by the Greenville County Public Defender office. Assistant Public Defender Christopher D. Scalzo was assigned to represent appellant.

On April 22, 2010, a probation revocation hearing was held at the Greenville County Courthouse before the Honorable Charles B. Simmons, Jr, acting special circuit court judge. R. 1, ll. 9-12. Appellant was represented by Mr. Scalzo. R. 1, l. 15. The state was represented by Tommy Evans, counsel for SCDPPP. R. 1, l. 13.

Jurisdiction in Pickens County was waived on the record by both parties. R. 3, ll. 16 - 25.

Appellant moved the court for a ruling that mandatory lifetime GPS monitoring via permanent attachment of a GPS device to her body as set forth in S.C. Code § 23-3-540(C) not be imposed. R. 8, ll. 13-17; R. 16, ll. 9-25. The grounds for appellant's motion were that permanently attaching an electronic GPS device to her body and monitoring her physical location every minute of the day for the rest of her life as

mandated by § 23-3-540(C) violated (1) substantive and procedural due process, R. 17, l. 9 - 19, l. 8, 22, l. 25 - 25, l. 6, 33, l. 1 - 34, l. 6; (2) the equal protection clause, R. 41, l. 12 - 42, l. 12; (3) the *ex post facto* clause, R. 20, l. 2 - 22, l. 17, 34, l. 7 - 35, l. 15; and (4) the Fourth Amendment to the United States Constitution and Article I, § 10 of the South Carolina Constitution, R. 30, l. 15 - 32, l. 25.

In support of her motion, appellant presented expert testimony of R. Gregg Dwyer, M.D., Ed.D., an assistant professor at the University of South Carolina School of Medicine and director of the medical school's Sexual Behavioral Evaluation and Treatment Clinic and Laboratory. R. 43, l. 18 - 77, l. 5; Curriculum Vitae of Dr. Gregg Dwyer at 1, R. 99.

Judge Simmons denied appellant's motion and, as mandated to do by S.C. Code §23-3-540(C), ordered appellant to submit to mandatory lifetime monitoring via attachment of a GPS device to her body. R. 96, ll. 1 – 15; Probation Revocation Order, R. 128.

Judge Simmons ruled that appellant willfully violated the terms of her original probation sentence. R. 95, ll. 12 – 14. He revoked two years of her sentence, ordered that appellant receive mental health counseling while in prison, and terminated the balance of probation. Form 9 Order, R. 128; R. 95, l. 1 – 97, l. 11.

This appeal follows.

FACTS

Appellant has been ordered to submit to lifetime GPS monitoring. R. 96, ll. 21 – 23. As a result, she now must submit herself to the state for permanent attachment of a GPS tracking device to her body and to monitoring of her physical location every minute of the day for the rest of her life. Stipulation of Facts at 1, R 121.

Lifetime GPS monitoring was not ordered as part of the original sentence issued by Judge Miller on January 29, 2007. Sentencing Order, R. 127. It was ordered by Judge Simmons at the conclusion of appellant's probation violation hearing on April 22, 2010. R. 96, ll. 21 – 23.

At the probation revocation hearing on April 22, 2010, Judge Simmons was prohibited by § 23-3-540(C) from holding a hearing on the merits of imposing lifetime GPS monitoring on appellant; the statute mandated lifetime GPS monitoring be imposed on appellant solely for violating her original probationary sentence. R. 95, ll. 12 – 14; 96, ll. 7 – 23. At the time of the probation hearing, two psychiatrists had determined appellant posed a low risk of committing a sex offense in the future. Bodtorf Evaluation at 1, R. 123; R. 52, ll. 11 – 12.

The purpose of lifetime GPS monitoring is to protect the public from sex offenders who pose a high risk of re-offending. S.C. Code § 23-3-400. Section 23-3-540(C), however, mandated Judge Simmons order appellant to submit to lifetime GPS monitoring regardless of "whether the violation relate[d] to the underlying crime or whether it [was] just a violation in some other regard"; or whether monitoring appellant with GPS for life is consistent with the intent and purpose of the statute. R. 96, ll. 4 – 10; S.C. Code § 23-3-540(C).

Statutory Procedures for Imposing Lifetime GPS Monitoring

There are two procedures for imposing lifetime GPS monitoring on a person convicted of a sex offense. One procedure gives a court the discretion to impose lifetime GPS monitoring; the other mandates the court impose it. Which procedure must be used is determined by what offense the person was convicted of or adjudicated for in a particular case. See S.C. Code §§ 23-3-540(A) through (F).

When a person is convicted of Criminal Sexual Conduct with a Minor in the First degree ("CSC with a Minor 1st degree") under § 16-3-655(A)(1) or Lewd Act under § 16-15-140, lifetime GPS monitoring is imposed automatically – what we will call the "mandatory procedure." S.C. Code §§ 23-3-540(A), (C), and (E). When a person is convicted of any sex offense other than CSC with a Minor 1st degree or Lewd Act, lifetime GPS monitoring is imposed at the court's discretion – what we will call the "discretionary procedure." S.C. Code §§ 23-3-540(B), (D), (F), and (G).

When a person must be subjected to the mandatory or discretionary procedure depends on the date of their offense. For all sex offense convictions or adjudications where the offense date is after July 1, 2006, lifetime GPS monitoring is imposed at sentencing. S.C. Code §§ 23-3-540(A) and (B). When the offense date is before July 1, 2006, it is imposed post-sentencing; only after a sex offender "violates a term of probation, parole, community supervision, or a community supervision program" or a provision of the Sex Offender Registry Law (S.C. Code § 23-3-400 *et. al.*). S.C. Code §§ 23-3-540(C) through (F).

Although convicted of Lewd Act, appellant was not subjected to the mandatory procedure at the time of her conviction because her offense date was May 31, 2006.

Indictment, R. 141. She was, however, subjected to the mandatory procedure on April 22, 2010, when Judge Simmons found her to be in violation of the terms of her original probation sentence. S.C. Code § 23-3-540(C). By statute, Judge Simmons was not permitted under the mandatory procedure to consider any evidence concerning the level of risk appellant posed for committing a sex offense in the future; nor could the court consider the two professional evaluations offered by appellant establishing she did not pose a high risk of committing a sex offense in the future. S.C. Code § 23-3-540(C); R. 96, ll. 1 – 10. As a court imposing the permanent attachment of an electronic device to a person's body and imposing constant monitoring of that person's physical location, Judge Simmons was statutorily prohibited from considering "any evidence or diagnosis of whether the lifetime GPS [tracking of appellant], in fact, meets the [legislature's] intent and purposes." R. 96, ll. 7 – 10.

The "depth and breadth" of the statutory restrictions placed on a court mandated to impose lifetime GPS monitoring on a person "troubled" Judge Simmons. R. 96, ll. 1-3. Nevertheless, Judge Simmons determined he was bound by court precedent, State v. Baesher, Unpublished Opinion No. 2009-UP-421, and by § 23-3-540(C) "unless and until the law is changed." R. 96, ll. 22 – 23.

Evidence Appellant Posed a Low Risk of Re-Offending

The declared purpose of imposing lifetime GPS monitoring on sex offenders is to protect the public from sex offenders posing a high risk of re-offending. S.C. Code § 23-3-400. Consequently, appellant moved the lower court that she not be ordered to submit to lifetime GPS monitoring. R. 8, ll. 13-17; R. 16, ll. 9-25. In support of her motion,

appellant presented evidence that she poses a low risk of re-offending. R. 52, ll. 11 – 12; 55, l. 17 – 56, l. 1; 85, ll. 22 – 23; 88, ll. 6 – 7; Bodtorf Evaluation at 2- 3, R. 123.

Appellant has posed a low risk of re-offending from at least October 16, 2007, when she was evaluated pursuant to the Sexually Violent Predator Act by the Multi Disciplinary Team. R. 72, ll. 2 – 13; Sexual Predator Referral Form, R. 126. All four members of the Multi Disciplinary Team concluded: "The offender does not satisfy the definition of a sexually violent predator and a review by the Prosecutor Review Committee is not warranted." Sexual Predator Referral Form, R. 126; R. 72, ll. 2 – 13.

Two psychiatrists have since evaluated appellant's risk for re-offending and both have determined she poses a low risk of committing a sex offense in the future. Her status as posing a low risk of re-offending has not changed from September 3, 2008, at or around the time she was released from prison, until she was sent back to prison by Judge Simmons on April 22, 2010. Violation Report at 1, R. 129; Bodtorf Evaluation at 1, R. 123; R. 52, ll. 11 – 12.

At the request of SCDPPP for sex offender probation monitoring purposes, Dr. Karl R. Bodtorf, Psy.D., conducted a psychological examination of appellant on September 3, 2008. Bodtorf Evaluation at 1, R. 123; R. 53, l. 23 - 54, l. 7. Dr. Bodtorf determined that appellant was in the low risk range on the ten different scales he used. Bodtorf Evaluation at 1 -3, R. 123.

Appellant scored zero on the Child Molest Scale, showing "[f]ew if any indicators of child molest behavior (pedophilia) ... ." Bodtorf Evaluation at 2, R. 123.

Appellant scored zero on the Sexual Assault Scale, evidencing a low probability that she would commit a sexual assault. Bodtorf Evaluation at 2, R. 123.

Her score was at the third percentile on the Incest Scale, which is considered within the low risk range of zero to the thirty-ninth percentile. This was based on "few, if any, indicators of incestuous behavior." Bodtorf Evaluation at 2, R. 123.

Appellant similarly scored zero on the Exhibitionism Scale, the Alcohol Scale, the Drug Scale, and the Distress Scale. Bodtorf Evaluation at 2 – 3, R. 123.

Appellant scored at the twenty-eighth percentile on the Violence Scale, placing her in the low risk range. Dr. Bodtof noted: "Violent tendencies are not indicated. Others would likely describe her as easy going and peaceful. She can be expected to prefer a non-violent lifestyle." Bodtorf Evaluation at 2, R. 123.

Appellant also exhibited "[f]ew if any indicators of antisocial tendencies." Bodtorf Evaluation at 3, R. 123. People, like appellant, who score a zero and are in the low risk range on the Antisocial Scale "tend to be able to show responsibility and stability, and are able to maintain significant relationships." Bodtorf Evaluation at 3, R. 123. Consistent with that score, appellant also scored zero on the Judgment Scale, placing her "judgment, understanding and comprehension ... within normal limits." Bodtorf Evaluation at 3, R. 123.

Dr. Gregg Dwyer evaluated appellant in preparation for the motion hearing before Judge Simmons on April 22, 2010. R. 47, ll. 24 – 25; R. 82, ll. 10 – 11. Dr. Dwyer was an assistant professor in the neuropsychiatry and behavioral science department at the University of South Carolina School of Medicine; he was also the director of the medical school's Sexual Behaviors Evaluation, Research and Treatment Clinic and Laboratory. R. 44, ll. 12 – 15; Curriculum Vitae of Dr. Gregg Dwyer at 2 – 3, R. 99. Dr. Dwyer specialized in "human sexual behavior, primarily sexual aggression and offending

behavior." R. 45, ll. 18 – 21. He maintained board certifications in general psychiatry, forensic psychiatry, and child and adolescent psychiatry. R. 45, l. 22 – 46, l. 2; Curriculum Vitae of Dr. Gregg Dwyer at 1, R. 99.

Dr. Dwyer was well published in psychiatry, and specifically in the area of human sexual behavior. Curriculum Vitae of Dr. Gregg Dwyer at 7 – 10, R. 99. He also had conducted clinical research in the area of human sexual behavior. R. 47, ll. 18 – 20.

Dr. Dwyer was offered by appellant as an expert witness in human sexual behavior and sexual aggression; the state stipulated to his expertise and Judge Simmons qualified him as an expert. R. 44, ll. 10 - 22.

Dr. Dwyer testified his professional opinion was that appellant posed a low risk of re-offending. R. 51, l. 18 – 52, l. 12. He reviewed Dr. Bodtorf's evaluation report and agreed with Dr. Bodtorf's assessment that appellant posed a low risk of re-offending. R. 53, ll. 20 – 22; R. 54, ll. 13 – 19.

Dr. Dwyer conducted a forensic evaluation of appellant that lasted more than eight hours and spanned two days. R. 51, ll. 7 – 15. There were three components of the evaluation. The first was a clinical review of medical, law enforcement and court documents, as well as interviews of both appellant and members of her family. R. 48, 16 – 23. The second component consisted of "psychological testing and data collection" through the use of peer reviewed instruments and assessment tools. R. 48, l. 24 – 49, l. 3. A total of seven assessment tools were used. R. 50, ll. 4 – 8. All of the assessment tools used by Dr. Dwyer required either specialized training or certification, which Dr. Dwyer had completed. R. 50, ll. 12 – 25.

Dr. Dwyer's opinion was that appellant fell into the low range of risk for re-offending. R. 52, ll. 11 – 12. According to Dr. Dwyer, appellant does not have the characteristics that research has shown lead female offenders to re-offend. R. 55, ll. 19 – 22. Instead, she exhibited characteristics "that compare to the groups that don't end up with another sexual offense." R. 55, ll. 22 – 24. "In fact, she compares to the group that doesn't end up with any other kind of violent offense or criminal offense in general." R., 55, l. 24 – 56, l. 1.

Dr. Dwyer diagnosed appellant with depression. R. 56, ll. 4 – 6. "A mood disorder of depression ... [has] not been linked with an increased risk of sexually offending." R. 56, ll. 10 – 13. Rather, depression is more likely to decrease the risk of sexually offending. R. 56, ll. 13 – 16.

Dr. Dwyer observed appellant to have traits consistent with borderline personality disorder but felt she did not have enough diagnostic traits for him to diagnose her with the disorder. R. 56, ll. 21 – 23. Appellant had been diagnosed with the disorder by Dr. Pam Crawford when appellant was in prison. R. 56, l. 23 – 57, l. 2. Dr. Dwyer did not have reason to believe Dr. Crawford's diagnosis was inaccurate; he simply did not have "enough at this stage" to render that diagnosis. R. 57, ll. 2 – 7. Nonetheless, while there are personality disorders that do lead to sexual offending, borderline personality disorder is not one that "typically" leads to sexual offending. R. 57, ll. 1 – 14. Dr. Dwyer was of the opinion that, assuming appellant even had this personality disorder, it would not manifest itself in a manner leading to sexual re-offending. R. 58, ll. 3 – 13.

Dr. Dwyer evaluated the role potential drug abuse might play in the risk of appellant re-offending. R. 58, l. 19 – 60, l. 16. He found "no indication" that appellant's *modus operandi* involved using drugs to commit a sexual offense. R. 60, ll. 17 – 21.

Dr. Dwyer determined appellant was not sexually desirous of pre-pubescent children and, thus, was not a pedophile. R. 67, l. 21 – 68, l. 17. Appellant did not have a paraphilia – that is, a psychological disorder "where the individual's interest, the target so to speak[,] of their sexual interest and who arouses them," is wrong or inappropriate in that they are sexually "aroused by some aspect of no consent or some other age group or some other part of the animal kingdom or some inanimate object." R. 62, ll. 5 – 21. He noted that none of the other professional evaluations found appellant to have a paraphilia. R. 62, ll. 20 – 22.

Dr. Dwyer evaluated appellant under the standard for sexually violent predator status. R. 74, ll. 5 – 9. He agreed with the Multi Disciplinary Team that she did not meet the criteria of a sexually violent predator. R. 74, ll. 10 – 14.

The level of risk a sex offender poses for re-offending can change over time. R. 64, ll. 15 – 18. For example, a person who has a paraphilia can be treated, although they cannot necessarily be cured, and depending on the success of treatment may pose a high risk of re-offending. R. 70, ll. 6 – 20. That same person may start out posing a high risk of re-offending; but, over time, their level of risk can decrease to low status. R. 71, ll. 12 – 14. Dr. Dwyer testified about how this kind of change in the level of risk is similar to people found to be Sexually Violent Predators who, after being civilly committed to hospitals, can, in fact, change from posing a high risk of offending to a low risk. R. 73, l. 10 – 74, l. 4.

The rate of re-offending for sex offenders "is not extraordinarily high compared to some other kinds of offenses." R. 52, ll. 20 – 23. The potential risk for a sex offender re-offending is categorized as low, moderate, or high. R. 52, ll. 9 – 10. The level of risk does not go below "low" because "technically there's a risk for everybody" – sex offenders as well as people who have never committed any crime – to commit an offense. R. 84, ll. 3 – 7. There is no "zero" risk level because risk assessments are not made at "random." R. 84, ll. 4 – 14. Assessments are only made on those people who have offended in the past. R. 84, ll. 14 – 16. The assessment is done by comparing the data collected about the subject and comparing them to other people who have committed a crime on one or more occasions. R. 84, ll. 16 – 21.

Dr. Dwyer's evaluation of the risk appellant poses for committing a sexual offense in the future was a professional evaluation; it was not an evaluation that a lay person could perform. R. 50, ll. 9 – 21. Dr. Dwyer's clinical practice, research, teaching and consulting are "all focused on human sexual behavior and primary aggressive behavior." R. 75, l. 24 – 76, l. 4. The forensic evaluation he performed on appellant required the kind of "specialized training in human sexual behavior [and] sexual aggression" that, as a professional, Dr. Dwyer possessed. R. 76, l. 21 – 77, l. 4.

The complexity of performing a risk assessment of a sex offender requires the professional application of scientific principles, techniques, and testing. R. 74, l. 18 – 75, l. 19; R. 50, ll. 9 - 25. Dr. Dwyer testified that the level of risk a sex offender poses for re-offending cannot be determined solely based on the offense for which they were originally convicted. R. 64, ll. 15 – 18. Nor could it be determined solely based on the age of the victim. R. 65, l. 5 – 67, l. 20.

Mechanics of Lifetime GPS Monitoring

There are two aspects to lifetime GPS monitoring: (1) having the GPS device permanently attached to the body and (2) being monitored.

To be initially fitted with a GPS device, appellant must go to a SCDPPP designated location and submit herself to a probation agent, who will physically take hold of her leg, ankle, or other body part in order to permanently attach the GPS device to appellant's ankle. Stipulation of Facts at 1, R. 121. Throughout her life, when the device or the system used by SCDPPP needs to be "changed, upgraded, repaired, or otherwise serviced," appellant must submit herself to a probation agent who, again, will physically take hold of her leg, ankle, or other body part. Stipulation of Facts at 1, R. 121.

SCDPPP will use a GPS device "made of plastic, metal, and other materials" to comply with the statutory requirement that appellant be monitored by "an all body worn device that is not removed from the person's body." Stipulation of Facts at 1, R. 121. The device will monitor and record appellant's location "once every minute twenty-four hours a day," S.C. Code § 23-3-540(P), and is "capable of pinpointing a person's location anywhere to within 15 meters." Stipulation of Facts at 1, R. 121.

Statutory Requirements of Lifetime GPS Monitoring

The Sex Offender Accountability and Protection of Minors Act of 2006 (the "Act") instituted lifetime GPS monitoring of sex offenders. 2006 Act No. 342. The effective date of the Act is July 1, 2006. R. 93, ll. 19 – 22. The date of appellant's offense was May 31, 2006. Indictment, R. 141.

The Act requires appellant to comply with SCDPPP regarding all aspects of lifetime GPS monitoring or face felony criminal sanctions. S.C. Code § 23-3-540(I). If

appellant "intentionally removes, tampers with, defaces, alters, damages, or destroys" the GPS device permanently attached to her body, she faces felony criminal sanctions. S.C. Code § 23-3-540(L).

For the rest of her life, appellant must pay SCDPPP to monitor her; the current fee is sixty dollars per month. Stipulation of Facts at 1, R. 121. If appellant fails to pay, she is subject to felony criminal sanctions. S.C. Code §§ 23-3-540(I) and (K).

In all of these instances, the felony criminal sanction is up to five years in prison and up to five-thousand dollars in fines. S.C. Code §§ 23-3-540(I), (K), and (L).

Appellant must "abide by other terms and conditions set" by SCDPPP concerning lifetime GPS monitoring, or face a different set of felony criminal sanctions. S.C. Code §§ 23-3-540(J) and (M). The criminal sanctions appellant would face are up to ten years in prison without parole. S.C. Code § 23-3-545(A).

Appellant was convicted of Lewd Act, and thus is statutorily prohibited from petitioning for release from court-ordered lifetime GPS monitoring. S.C. Code § 23-3-540(H). Had she been convicted of any other sexual offense – except for CSC with a Minor 1st degree – appellant would have been permitted to petition for release from GPS monitoring after ten years. S.C. Code § 23-3-540 (H).

ARGUMENTS

1.

Appellant's substantive due process rights were violated because S.C. Code § 23-3-540(C) mandated the lower court impose lifetime GPS monitoring on appellant without considering any evidence concerning her level of risk for committing a sex offense in the future and despite evidence that she does not pose a high risk of re-offending.

Substantive due process protects citizens against arbitrary or capricious action by the government regardless of the procedures used to carry out that action. In re Treatment and Care of Luckabaugh, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (S.C. 2002). In this case, appellant's substantive due process rights were violated because § 23-3-540(C) mandated Judge Simmons arbitrarily and capriciously impose lifetime GPS monitoring on her. The imposition was arbitrary and capricious because the decision to order permanent GPS monitoring was not based on any evidence concerning appellant's level of risk for committing a sex offense in the future and despite evidence that she does not pose a high risk of re-offending.

No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. Amend. XIV, § 1; S.C. Const. Art. I, § 3. 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. Luckabaugh, 351 S.C. at 140. Substantive due process "allows a court to examine the constitutionality of the underlying statute as opposed to merely the process by which it is applied to each individual." Id.

The first step in a substantive due process analysis is to determine what level of scrutiny should be applied. See id. The level of scrutiny to apply is determined by the nature of the rights infringed by the statute. A statute that infringes a fundamental right must satisfy strict scrutiny. Id. at 140 – 141. Strict scrutiny requires a statute to be narrowly tailored to achieve a compelling state interest. Id. If a fundamental right is not implicated, then the rational basis test is applied. Id. Under the rational basis test, a statute must be "reasonably designed to accomplish its purpose." Id. (internal quote omitted).

As this Court noted in Luckabaugh, a challenge to a statute under the South Carolina Constitution involves applying the rational basis test. See id. at n. 7 (citing R.L. Jordan Company, Inc. v. Boardman Petroleum, Inc., 338 S.C. 475, 527 S.E.2d. 763 (2000)). On the other hand, a substantive due process challenge under the United States Constitution requires a strict scrutiny analysis. Luckabaugh, 351 S.C. at 140. Appellant makes her challenge under the United States Constitution.

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

A.

Lifetime GPS monitoring infringes the fundamental right to control the integrity of one's own body because it subjects the person being monitored to the continuous unwanted physical touch of the electronic device and to periodic unwanted physical touching and seizure during fitting, replacement, and maintenance of the device.

A person being monitored by GPS for life is subjected to two kinds of unwanted physical touching. The first kind is periodic; it occurs when the person is initially fitted with the device and when the device is replaced or maintained throughout the person's life. The second kind is continuous; it occurs as a result of the permanent attachment of the device to the person's body for the rest of their life. Whether periodic or continuous, the touching is unwanted and thus an invasion of the fundamental right to control one's own bodily integrity.

The basic right to be "let alone" from the touch of another person is protected by the common law of both England and the United States. See Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 – 252, 11 S.Ct. 1000, 35 L.Ed. 734 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others."); see also U.S. v. Charters, 829 F.2d 479, 490 (4th Cir. 1987) (noting the right "traces its origins to the English common law of the middle thirteenth century ... and today is reflected in the tort of battery which protects the individual against even the slightest unconsented touching") (internal cites omitted); see also State

v. Hill, 254 S.C. 321, 329, 175 S.E.2d. 227, 231 (1970) (recognizing the common law roots of assault and battery in South Carolina).

The right to control the integrity of one's own body is a natural extension of the basic right "to be let alone" – *i.e.*, to be free from unwanted physical contact. It has become the basis for the law of informed consent in medical procedures. See Harvey v. Strickland, 350 S.C. 303, 309 – 310, 566 S.E.2d 529, 533 (2002) (recognizing Botsford, supra, as support for the proposition that the "right to control the integrity of one's own body spawned the doctrine of informed consent"); U.S. v. Charters, 829 F.2d at 491 (4th Cir. 1987); Schloendorff v. New York Hosp., 211 N.Y. 125, 105 N.E. 92, 93 (1914). And, similarly, it forms the basis for the right to refuse unwanted medical treatment. See Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990); see also U.S. v. Charters, supra 829 F.2d at 491.

The right to be let alone from physical touch and restraint by agents of the state has been recognized as a fundamental protection provided by the Fourth Amendment to the United States Constitution. See State v. Brannon, 379 S.C. 487, 498, 666 S.E.2d 272, 277 (2008) and Terry v. Ohio, 392 U.S. 1, 9, 88 S.Ct. 1868, 1874, 20 L.Ed.2d 889 (1968) (both citing Botsford, supra, as support for holding that the right of personal security includes the fundamental Fourth Amendment right to be free from physical search and seizure by the police); see also Schmerber v. California, 384 U.S. 757, 772, 86 S.Ct. 1826, 1836, 16 L.Ed.2d 908 (1966) ("The integrity of an individual's person is a cherished value of our society.").

Bodily integrity has been specifically protected as a fundamental right in the context of corporal punishment as well. See Ingraham v. Wright, 430 U.S. 651, 674, 97

S.Ct. 1401, 1414, 51 L.Ed.2d 711 (1977) (quoting Botsford, supra, as support for holding corporal punishment of a student by school authorities infringes on an historic liberty interest that encompasses physical restraint and punishment).

In turning the focus of the fundamental right to be let alone on lifetime GPS monitoring we find that permanently attaching a GPS device to a person's body involves touching them when they do not want to be touched. This unwanted touching occurs in two ways: one is periodic and the other is continuous.

The initial fitting, as well as the replacement and maintenance of the device throughout the person's life, is a periodic unwanted touching and seizure of the person. Initially fitting the device requires, in the least, a state agent grabbing the person's ankle; it likely means that their entire leg or body will be physically restrained by a state agent. Stipulation of Facts at 1, R. 121. Certainly the subject of monitoring is required to report at the direction of the state to the physical location where they will be fitted (or re-fitted and the device maintained), which, being a form of custody, is certainly a restraint. See Terry v. Ohio, supra. Throughout their life, when the device is replaced or maintained, the person must again be subjected to the same process of physical restraint and custody. Stipulation of Facts at 1, R. 121.

The unwanted touching does not end, however, with initially attaching the device. The device must remain permanently attached to the body. S.C. Code §§ 23-3-540(H) and (P). This constitutes a continuous life-long unwanted touching of the person from which they cannot escape except upon pain of criminal sanction. S.C. Code §§ 23-3-540(H) through (L).

While the physical contact and restraint are not minor, it is important to note that whether a liberty right is fundamental is not measured by the degree to which that right is invaded by government action. Even a slight intrusion or touch violates bodily integrity.

The Botsford court established as much in 1891 when it held "[t]he inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel any one, especially a woman, to lay bare the body, or to submit it to the touch of a stranger ... is an indignity, an assault, and a trespass." Botsford, 141 U.S. at 252. The unwanted touching in Botsford involved a court-ordered medical examination of the plaintiff as requested by the defendant in a tort case. Id. at 257. Botsford held the court order violated the right to be let alone because it imposed an unjustified and unwarranted physical touching. Id. Presumably, the examination ordered in Botsford would have lasted minutes or, at most, a couple of hours. The Court's analysis, though, was not based on the degree of physical touching but on the fact that the person was touched. See Botsford, 141 U.S. 251 – 257.

Similarly, a brief stop-and-frisk by the police infringes on the fundamental right to personal security. Where the person is not arrested, the encounter will last perhaps only minutes or even seconds. Yet, it will still implicate fundamental liberty interests. See Terry v. Ohio, 392 U.S. at 9; State v. Brannon, 379 S.C. at 498. The same is true when police extract evidence from a person's body. The extraction itself might be shocking, *e.g.* stomach pumping (see Rochin v. California, 342 U.S. 165, 172 – 173, 72 S.Ct. 205, 209 – 210, 96 L.Ed. 183 (1952)), or it might be minimal, *e.g.* blood testing (see Schmerber v. California, 384 U.S. at 772). Regardless of the degree of intrusion, both methods infringe the fundamental right to personal security (*i.e.,* bodily integrity) and

thus trigger a heightened constitutional scrutiny. It is the fact of the touch itself being imposed on a person against their will that makes it a violation of bodily integrity.

When it comes to lifetime GPS monitoring the unwanted touch is not limited to minutes or hours. It is not even limited to a single procedure. Lifetime GPS monitoring means the person is grabbed and forced to submit to the permanent touch of an electronic device attached to their ankle. It also means throughout the remainder of their lives they are seized and re-seized by the state to be fitted, re-fitted, and to have the device otherwise maintained. Stipulation of Facts at 1, R. 121.

The concept of ordered liberty inevitably begins with the basic right to be free from an unwanted physical touch by anyone – including agents of the state. There can be no true freedom if one is physically taken hold of and, every minute of every day for life, not let go. Lifetime GPS monitoring as mandated by § 23-3-540(C) infringes the fundamental right to control the integrity of one's own body because it involves periodic physical touching and restraint, and because it is ultimately a continuous unwanted touching by the GPS device itself.

On this basis alone, § 23-3-540(C) should be subject to strict scrutiny. There is, however, another fundamental liberty interest infringed by lifetime GPS monitoring.

B.

Lifetime GPS monitoring infringes the fundamental right to be free from unwanted invasion into personal privacy by subjecting the person to lifetime minute-by-minute tracking of their physical location.

If freedom means anything it means that free people have the right to be let alone from each other and from their government. The right to be let alone is a right fundamental to the concept of liberty. The right to be let alone is comprehensive. Beyond the right to simply be free from unwanted physical touching, it includes the right to be free from unwanted interference into the privacy of one's life.

In Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), Justice Brandeis in his dissenting opinion wrote that the makers of our Constitution:

> 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.*

Id. at 478 (BRANDEIS, J., dissenting) (emphasis added).

As Justice Brandeis described it, the right to be "let alone" is comprehensive. Principally, it is the right to be free from unwanted physical touching. See Botsford, supra. But it "includes more than the absence of physical restraint." Washington v. Glucksberg, 521 U.S. 702, 719, 117 S. Ct. 2258, 2267, 138 L. Ed. 2d 772 (1997). The United States Supreme Court succinctly described the depth and breadth of the fundamental right to be let alone in Washington v. Glucksberg:

> In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry; to have children; to direct the education and upbringing of one's children; to marital privacy; to use contraception; to bodily integrity; and to abortion. We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.

Id. at 720 (internal citations omitted); see also S.C. Dept. of Social Services v. Wilson, 352 S.C. 445, 453, 574 S.E.2d 730, 734 (2002) (recognizing the "fundamental right to freedom from State interference with [a parent's] relationship with [their child]"). Collectively, all of these fundamental rights are encompassed by the right to be let alone.

This Court recognized in Harvey v. Strickland, supra, that "[t]he individual's right to make decisions vitally affecting his private life according to his own conscience...is difficult to overstate...because it is, without exaggeration, the very bedrock on which this country was founded." 350 S.C. at 309 – 310.

Recognizing that a broad array of "personal decisions that profoundly affect bodily integrity, identity, and destiny should be largely beyond the reach of government," the United States Supreme Court has held the fundamental right to privacy includes an array of specific areas. Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833, 926 – 927, 112 S.Ct. 2791, 2846, 120 L.Ed.2d 674 (1992). "Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1927). "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." Bolling v. Sharpe, 347 U.S. 497, 499 – 500, 74 S. Ct. 693, 694, 98 L. Ed. 884 (1954).

The right to be let alone encompasses all of the fundamental rights described above. Together they stand for the proposition that the Constitution offers some level of protection from government action that intrudes on the personal privacies of every-day life, such as marrying and raising a family, as much as it protects against gross intrusions like stomach pumping and forced medical procedures. But particularly it encompasses the right to the privacy of one's every-day life: to the comings and goings of a person free from the state's watchful eye. This is an essential protection offered by the Fourth Amendment, as well as the line of cases protecting, among other rights, the personal decisions of marriage and raising a family, abortion, and freedom of religion.

Tracking a person's physical location every minute of the day for the rest of their life is surely as much of an infringement on privacy as taking a blood sample or criminalizing contraception and abortion. Lifetime GPS tracking is as Orwellian in scope as it is in design. The unwanted interference into personal privacy of lifetime GPS tracking infringes the fundamental right to be let alone to pursue one's life in freedom.

C.

Heightened scrutiny of S.C. Code § 23-3-540(C) is required because the subject is required to pay for the imposed monitoring on pain of criminal sanctions.

A person ordered to submit to lifetime GPS monitoring must pay the state a fee for the imposed monitoring. S.C. Code § 23-3-540(I). Currently, that fee is sixty dollars per month. Stipulation at 1, R. 121. Failure to pay subjects the person to felony criminal sanctions. S.C. Code § 23-3-540(K). Consequently, a heightened scrutiny should be applied.

The facts of this case are similar to Moore v. Moore, 376 S.C. 467, 657 S.E.2d 743 (2008). In Moore v. Moore, a Family Court-issued Order of Protection was challenged (along with the underlying statute) as violating substantive due process. Id. at 469 – 470. Among the implications of having an Order of Protection imposed were a reduction in financial resources and "criminal prosecution or contempt proceedings" for violating the order. Id. at 473 – 474. The Court held that the reduction in financial resources resulting from an Order of Protection issued by the Family Court infringed a constitutionally protected right to property. Id. at 746 – 747.

The Court should find that the requirement to pay a monthly fee or face criminal sanctions pursuant to an order imposing lifetime GPS monitoring requires a heightened scrutiny be applied under substantive due process.

D.

S.C. Code § 23-3-540(C) is not narrowly tailored to achieve its declared purpose of protecting the public from sex offenders who pose a high risk of re-offending because it (a) does not require the court to issue its order based on a finding that the person poses a high risk of re-offending, (b) does not permit the court to consider evidence that the person does not pose a high risk of re-offending, and (c) does not allow for removal when the person no longer poses a high risk of re-offending.

Substantive due process requires § 23-3-540(C) be narrowly tailored to achieve a compelling state interest because lifetime GPS monitoring infringes fundamental liberty and constitutionally protected property rights. Protecting the public from sex offenders who pose a high risk of re-offending is a compelling state interest. However, § 23-3-540(C) is not narrowly tailored to achieve its purpose and therefore violates substantive due process.

The declared purpose of imposing lifetime GPS monitoring on convicted sex offenders is to protect the public from sex offenders who "often pose a high risk of re-offending." S.C. Code § 23-3-400 (emphasis added). The potential risk for a sex offender re-offending ranges from low to moderate to high. R. 52, ll. 9 – 10. The operative word in § 23-3-400 is "often". Using the word often to modify the remainder of the clause, the legislature explicitly focused lifetime GPS monitoring on offenders posing a high risk – not offenders posing a low or moderate risk – for re-offending. See S.C. Code § 23-3-400.

Appellant concedes that protecting the public from sex offenders who pose a high risk of re-offending is a compelling state interest. However, it is not a compelling state

interest to use lifetime GPS monitoring to protect the public from people, like appellant, who pose a low risk. For one, they are in the same category of risk as people who have not committed a sex offense. R. 84, ll. 4 – 14. More importantly, though, people at the low risk level have characteristics like appellant: they are not likely to be violent or to commit new criminal offenses (including sex offenses); they are not likely to have sexual disorders that are harmful to others; they are not likely to be pedophiles; and they are likely able to appropriately use judgment and discretion.

When Dr. Dwyer compared appellant's characteristics to other sex offenders, he found that she compared to sex offenders who do not commit more sex offenses – and, in fact, found that she "compares to the group that doesn't end up with any other kind of violent offense or criminal offense in general." R. 55, l. 22 – 56, l. 1. Dr. Bodtorf found that appellant did not have violent tendencies and that others would find her "easy going." Bodtorf Evaluation at 2, R. 123. He also found that she was able to have normal, stable relationships; that she could be responsible; and had normal judgment. Bodtorf Evaluation at 3, R. 123.

Both Dr. Dwyer and Dr. Bodtorf found that appellant was not a pedophile. R. 67, l. 21 – 68, l. 17; Bodtorf Evaluation at 2, R. 123. Dr. Dwyer and the Multi Disciplinary Team determined that she does not qualify for consideration as a sexually violent predator. Sexual Predator Form, R. 126; R. 74, ll. 5 – 14.

Given that the compelling interest of lifetime GPS monitoring is protecting against only those offenders posing a high risk of re-offending, § 23-3-540(C) is not narrowly tailored to achieve its purpose. Instead of narrowly applying lifetime GPS monitoring only to high risk offenders, it broadly imposes lifetime GPS monitoring on

people convicted of criminal sexual offenses regardless of the risk they pose for re-offending.

Under § 23-3-540(C), when the underlying offense is CSC with a Minor 1st degree or Lewd Act, lifetime GPS monitoring is mandatory not discretionary. S.C. Code § 23-3-540(C).[1] This means that a person convicted of committing either of these offenses after the effective date of § 23-3-540(C), July 1, 2006, will have lifetime GPS monitoring automatically imposed on them by the trial court without any consideration of the risk the person poses for re-offending. Id.

For those offenses committed before July 1, 2006, mandatory lifetime GPS monitoring is triggered by any violation of a "term of probation, parole, community supervision, or a community supervision program." Id. The violation need not be related in any way to the level of risk the person poses for re-offending. See id. For instance, willfully failing to pay probation fees would trigger mandatory lifetime GPS monitoring of a person on probation for CSC with a Minor 1st degree or for Lewd Act.

Lifetime GPS monitoring is statutorily mandated based on factors that cannot, by themselves, accurately assess the level of risk a person poses. As Dr. Dwyer testified at appellant's motion hearing, the level of risk a sex offender poses for re-offending cannot be determined solely based on the offense for which they were originally convicted. R. 64, ll. 15 – 18. Moreover, evaluating a sex offender's risk for re-offending requires a professional evaluation by a professionally trained evaluator. R. 50, ll. 9 – 21. A lay person is not qualified to perform the forensic evaluation necessary to determine a sex

[1] Even for those underlying offenses where ordering lifetime GPS monitoring is discretionary, there is no standard of proof upon which the decision to impose such monitoring is required to be made. See S.C. Code § 23-3-540.

offender's risk of re-offending. R. 50, ll. 9 – 21. Dr. Dwyer spent more than eight hours evaluating appellant and used seven different assessment tools for which he needed professional certification. R. 51, ll. 7 – 15. Dr. Bodtorf, the psychiatrist used by SCDPPP, relied on ten different scales to assess appellant's level of risk for re-offending. Bodtorf Evaluation at 1 -3, R. 123. Yet, § 23-3-540(C) does not permit the trial court to hear evidence of any kind, let alone expert testimony or assessments of the risk the person poses for re-offending.

Mandatory imposition means that the trial court has no ability to ensure it is accurately imposing lifetime GPS monitoring on sex offenders who, in fact, pose a high risk of re-offending. Consequently, trial courts are being mandated by § 23-3-540(C) to impose lifetime GPS monitoring on people, like appellant, who do not pose a high risk of re-offending. This happens because the decision to require permanent GPS monitoring is not based upon any standard of proof (not good cause, preponderance of the evidence, or clear and convincing evidence) and because the monitoring is imposed solely on the basis of the underlying criminal offense and any violation of probation (or other supervision by the state). See S.C. Code § 23-3-540(C). As a result, monitoring is not ordered based on reliable evidence that the person indeed poses a high risk of re-offending or that such invasive monitoring is necessary.

Two independent psychiatrists conducted forensic evaluations of appellant and determined that she posed a low risk of re-offending. Bodtorf Evaluation at 1 -3, R. 123; R. 51, l. 18 – 52, l. 12. Section 23-3-540(C) mandated Judge Simmons ignore this evidence and order appellant to submit to lifetime GPS monitoring – never to be removed

for any reason – because she violated a condition of probation completely unrelated to sexual re-offending. Such a scheme is broadly – not narrowly – tailored.

The law concerning civil commitment of the mentally ill and sexually violent predators offers an instructive parallel to the substantive due process analysis of court-imposed lifetime GPS monitoring.

Civil commitment infringes the fundamental right to be free from physical restraint. See Foucha v. Louisiana, 504 U.S. 71, 80, 112 S.Ct. 1780, 1785, 118 L.Ed.2d 437, 448 (1992) (holding that civil commitment of a mentally ill person infringes freedom from bodily restraint which is "at the core of the liberty protected by the Due Process Clause"); see also Kansas v. Hendricks, 521 U.S. 346, 356, 117 S.Ct. 2072, 2079, 138 L.Ed.2d 501(1997) (holding civil commitment of a sex offender also infringes freedom from bodily restraint). Consequently, civil commitment triggers a heightened scrutiny under substantive due process analysis. Luckabaugh, 351 S.C. at 140.

This heightened scrutiny has led to three general requirements for civil commitment statutes under substantive due process. All three requirements work together to narrowly tailor the use of civil commitment to achieve the intended goal of protecting the public from those people who, because of mental illness or sexual disorder, pose a danger to themselves or the community – but only those people.

The first requirement is obvious: there must be a basis for the commitment. A person cannot be civilly confined unless a mental illness or abnormality causes them to be a danger to themselves or to the community. O'Connor v. Donaldson, 422 U.S. 563, 576, 95 S.Ct. 2486, 2494, 45 L.Ed.2d 396 (1975); see Foucha v. Louisiana, 504 U.S. at 75-75 (citing Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979));

see Kansas V. Hendricks, 521 U.S. at 358 ("a finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment" – proof of dangerousness must be coupled with a mental illness or abnormality).

Second, the basis for the commitment must meet a standard of proof. Addington v. Texas, supra, held that the standard for establishing the basis for a civil commitment is, at least, clear and convincing evidence. 441 U.S. at 432. "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding [sic], is to instruct the factfinder [sic] concerning the degree of confidence our society thinks we should have in the correctness of factual conclusions for a particular type of adjudication." Id. at 423 (internal quotations omitted). Legal proceedings function to "minimize the risk of erroneous decisions." Id. at 425. While the state has a legitimate interest in protecting the public, "[the] individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." Id. at 426 – 427. "To meet due process demands, the standard [of proof] has to inform the factfinder [sic] that the proof must be greater than the preponderance-of-the-evidence standard applicable to other categories of civil cases." Id. at 432 – 433.

Third, there has to be a mechanism for release when the person no longer poses a danger. If the basis for civilly confining a person is no longer present, then the person is entitled to an adequate procedure for establishing that they should no longer be confined. Foucha v. Louisiana, 504 U.S. at 79; O'Connor v. Donaldson, 422 U.S. at 575 – 576. A

mechanism for release prevents a civil commitment from becoming punishment. Foucha v. Louisiana, 504 U.S. at 80; Kansas v. Hendricks, 521 U.S. at 358.

Lifetime GPS monitoring under § 23-3-540(C) does not satisfy all of the substantive due process requirements outlined above. There is a declared basis for lifetime GPS monitoring. It is to protect the public from those sex offenders who pose a high risk of re-offending. S.C. Code § 23-3-400. In the language of strict scrutiny, this is the compelling state interest. The basis for civil commitment is two-pronged: there must be (1) a mental abnormality that (2) causes the person to be dangerous. The declared purpose of lifetime GPS monitoring also is two-pronged: the person must be (1) a sex offender and must (2) pose a high risk of re-offending. This, however, is where the two statutory schemes part ways constitutionally.

As discussed above, lack of both a standard of proof and a mechanism for release were fatal flaws to the constitutionality of civil commitments under substantive due process. Their absence in § 23-3-540(C) is equally fatal to lifetime GPS monitoring.

There is no standard of proof for imposing lifetime GPS monitoring on a person convicted of CSC with a Minor 1st degree or for Lewd Act in § 23-3-540(C); nor is there a mechanism for releasing such a person from lifetime GPS monitoring once it has been imposed. These constitutional flaws result in erroneously imposing lifetime GPS monitoring on people who do not pose a high risk of re-offending.

There is literally no standard of proof under § 23-3-540(C) for people like appellant convicted of Lewd Act. In Addington v. Texas, 441 U.S. 418, the Court held that the preponderance of evidence standard was unconstitutional under a substantive due process analysis because it created a "risk of increasing the number of individuals

erroneously committed." Id. at 426. A greater risk exists in this case for erroneously imposing lifetime GPS monitoring on a person who does not pose a high risk of re-offending than existed in Addington. The lowest standard of proof (preponderance of the evidence) was insufficient in Addington. No standard of proof is wholly insufficient when it comes to lifetime GPS monitoring.

Lastly, the state is ostensibly using lifetime GPS monitoring as a civil measure – not as criminal punishment. See cf. Argument 3, infra. In Foucha v. Louisiana, the Court held that it was a violation of substantive due process to continue to hold a mentally ill person in civil confinement until the person proved they were no longer dangerous. 504 U.S. at 84. Part of the Court's reasoning was that holding a person who was not mentally ill (or where the state could not otherwise satisfy the civil commitment requirements) was penal rather than civil in nature. Id. at 79. With respect to lifetime GPS monitoring under § 23-3-540(C), the lack of a mechanism for release makes the imposition a punishment rather than a civil tool for protecting against dangerous people. Disconnecting the imposition of lifetime GPS monitoring from a determination of whether the person indeed poses a high risk of re-offending undermines the purported intent to use the monitoring to accomplish a civil goal rather than as punishment.

It is clear that 23-3-540(C) is not narrowly tailored to achieve its declared purpose of using lifetime GPS monitoring to protect the public from only those sex offenders posing a high risk of re-offending. Under the mandates of § 23-3-540(C), imposing lifetime GPS monitoring is divorced from any evidence or determination of whether the subject actually poses a high risk of re-offending. Appellant's substantive due process rights therefore were violated by § 23-3-540(C).

2.

Appellant's procedural due process rights were violated by the mandatory imposition of lifetime GPS monitoring pursuant to S.C. Code § 23-3-540(C) because she was not provided a meaningful hearing on the merits of imposing GPS monitoring on her for life.

Procedural due process is required where government action deprives a citizen of liberty or property. Matthews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976). Lifetime GPS monitoring implicates both liberty and property interests. Therefore, the denial of a meaningful hearing on the merits of imposing lifetime GPS monitoring on appellant violated her right to procedural due process.

Whether appellant is entitled to the requirements of procedural due process is based on whether or not lifetime GPS monitoring as mandated by § 23-3-540(C) deprives her of a liberty or property right. See id., 424 U.S. at 332; U.S. Const. Amend. XIV, § 1; S.C. Const. Art. I, § 3.

As discussed in Argument 1A and 1B, supra, lifetime GPS monitoring infringes fundamental rights. However, under procedural due process, government action does not have to infringe a fundamental right; it need only deprive a person of a liberty or property interest. See Matthews v. Eldridge, 424 U.S. at 332. Permanently attaching an electronic device to appellant's body and physically seizing her when she is fitted or re-fitted with the device deprives appellant of her right to control the integrity of her own body.

The South Carolina Constitution affords protection from unreasonable intrusions into privacy. S.C. Const. art. I, § 10; State v. Forrester, 343 S.C. 637, 644 – 645, 541 S.E.2d 837, 841 (2001). The permanent attachment of the device to the body, as well as

the lifetime minute-by-minute monitoring of appellant's physical location, both deprive her of this liberty interest rooted in our state constitution.

Moreover, appellant has a conditional liberty interest at risk for failing to comply with the requirements set forth in § 23-3-540. When conditional liberty interests are at risk of being taken by a court, procedural due process requires a meaningful hearing on the merits. Dangerfield v. State, 376 S.C. 176, 181, 656 S.E.2d 352, 355 (2008) (procedural due process requires a meaningful hearing when a person is at risk for losing their liberty for failing to pay restitution in a magistrate court criminal case); Moore v. Moore, 376 S.C. at 473 – 474 (procedural due process requires a meaningful hearing when a violation of a Family Court order of protection places a person at risk for losing their liberty).

A hearing is also required before the government can take property. Matthews v. Eldridge, 424 U.S. at 333; see also Moore v. Moore, 376 S.C. at 473–474, 657 S.E.2d at 747 (holding deprivation by court order of loss of children, financial resources, possession of marital home, and exposure to risk of criminal prosecution for violation of order triggered liberty and property interest requiring procedural due process). Appellant must pay sixty dollars per month to the SCDPPP to be monitored or face criminal sanctions. Stipulation of Facts at 1, R. 121; S.C. Code §§ 23-3-540(I) and (K).

North Carolina has held GPS monitoring of sex offenders infringes liberty rights protected by the Due Process Clause. In State v. Stines, 683 S.E.2d 411 (N.C. App. 2009), the Court of Appeals of North Carolina addressed a procedural due process challenge to the application of North Carolina's Satellite-Based Monitoring program. Id. The program uses a GPS tracking system to monitor sex offenders after their release from

state supervision. Id. at 412 – 414. The Stines court held that the GPS tracking system used by North Carolina "implicate[d] a protected liberty interest." Id. at 413.

In finding that GPS tracking of sex offenders infringed the subject's liberty, the Stines court reasoned the device (1) was physically attached to the person and (2) provided continuous surveillance of the person. Id. at 414 (following the reasoning in Commonwealth v. Cory, 454 Mass. 559, 911 N.E.2d. 187 (2009)).

Permanently attaching a GPS device to a person's body is "'dramatically more intrusive and burdensome' than the burden imposed [by sex offender registry]." Id. (quoting Commonwealth v. Cory, 454 Mass. at 570). The Stines court relied on the following additional reasoning from Commonwealth v. Cory:

> The intended function of the GPS device, continuous reporting of the offender's location to the probation department, also represents an affirmative burden on liberty. While GPS monitoring does not rise to the same level of intrusive regulation that having a personal guard constantly and physically present would impose, it is certainly far greater than that associated with traditional monitoring. And the impact of such intrusion is of course heightened by the physical attachment of the GPS bracelet, which serves as a continual reminder of the State's oversight.

Stines, 683 S.E.2d at 414 (quoting 454 Mass. at 570-571).

Appellant should have been afforded the protections of procedural due process before being ordered to submit to the deprivation of liberty and property imposed by lifetime GPS monitoring.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." Blanton v. Stathos, 351 S.C. 534, 542,

570 S.E.2d 565, 569 (2002). When the government takes action that affects a person's liberty or property interests, procedural due process requires the person be afforded:

(1) adequate notice of the hearing;

(2) the opportunity to be heard;

(3) the opportunity to present evidence;

(4) the right to confront and cross-examine witnesses; and

(5) a meaningful judicial review.

Dangerfield v. State, 376 S.C. at 179; see also Moore v. Moore, 376 S.C. at 473. Appellant received none of these due process protections regarding imposition of lifetime GPS monitoring.

Lifetime GPS monitoring was imposed on appellant by statutory mandate without a meaningful hearing on the merits of imposing lifetime GPS on her. See S.C. Code § 23-3-540(C). The hearing held before Judge Simmons was meaningful solely for the purpose of determining a violation of probation. It was not, however, meaningful on the issue of imposing lifetime GPS monitoring.

The root cause of the violation of procedural due process by § 23-3-540(C) is the prohibition of judicial review – meaning the court could not provide appellant judicial review of the issue. Judge Simmons was statutorily prohibited from using discretion. Therefore, he could not consider evidence concerning appellant's risk of re-offending. Appellant could "present" evidence and the court could "hear" that evidence. But the court could not consider it. Appellant could make arguments and the court could "hear" those arguments. But, again, the court could not consider them. That is not meaningful judicial review; it is a violation of procedural due process.

3.

Appellant's right to protection from *ex post* facto punishment under Article I, § 10 of the United States Constitution and Article I, § 4 of the South Carolina Constitution was violated by the mandate of S.C. Code § 23-3-540(C) that lifetime GPS monitoring be imposed on appellant based solely on (1) a violation of the probationary portion of her original sentence and (2) the offense for which she was originally convicted.

Appellant was mandated by § 23-3-540(C) to submit to court-ordered lifetime GPS monitoring based on two statutory grounds: (1) she violated the conditions of her original sentence when she violated probation and (2) her original conviction was for Lewd Act. Imposing lifetime GPS monitoring on appellant for these reasons was punishment for her original crime. A change in the law that retroactively increases punishment is an *ex post facto* violation. State v. Walls, 348 S.C. 26, 30, 558 S.E.2d 524, 525 (2002). Because lifetime GPS monitoring was imposed on appellant after her original sentencing, it was a violation of her right to protection from *ex post facto* punishment.

Appellant committed her offense on May 31, 2006. Indictment R. 141. The Sex Offender Accountability and Protection of Minors Act of 2006, of which § 23-3-540 is a part, became effective July 1, 2006. Appellant pled guilty January 29, 2007. She was not ordered at that time to submit to mandatory GPS monitoring by the sentencing judge, as is indicated by the unchecked box for mandatory GPS monitoring on the sentencing order. Sentencing Order, R. 127. That was proper because her offense date preceded the effective date of the statute. However, ordering lifetime GPS monitoring on April 22, 2010 was retroactive.

"For the *ex post facto* clause to be applicable, the statute or the provision in question must be criminal or penal in purpose and nature." State v. Walls, 348 S.C. at 30, 558 S.E.2d at 525-526. Purportedly, § 23-3-540(C) is intended to be a civil not penal statute. It has been placed in the code along with the sex offender registry laws that this Court has determined are civil not penal. See State v. Walls, 348 S.C. at 31. However, a statute can, by its purpose and effect, transform what was intended to be a civil remedy into punishment. See Hudson v. United States, 522 U.S. 93, 99, 118 S. Ct. 488, 493, 139 L. Ed. 2d 450 (1997). In order to determine whether a civil remedy has been transformed into a punishment, the factors set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 – 169, 83 S.Ct. 554, 567 – 568, 9 L.Ed.2d 644 (1963) should be applied. Hudson v. United States, 522 U.S. at 99 – 100.

The Kennedy v. Mendoza-Martinez factors are:

(1) whether the sanction involves an affirmative disability or restraint;

(2) whether it has historically been regarded as a punishment;

(3) whether it comes into play only on a finding of *scienter*;

(4) whether its operation will promote the traditional aims of punishment-retribution and deterrence;

(5) whether the behavior to which it applies is already a crime;

(6) whether an alternative purpose to which it may rationally be connected is assignable for it; and

(7) whether it appears excessive in relation to the alternative purpose assigned.

Kennedy v. Mendoza-Martinez, 372 U.S. at 168 – 169.

When these factors are applied to this case it becomes evident that lifetime GPS monitoring was statutorily imposed on appellant as punishment.

First, permanent GPS monitoring is a sanction; it is an unwanted action by the state against appellant in response to appellant's violation of the state's rules. Moreover, the monitoring is a disability. She is required to wear an unwanted electronic device on her body permanently; she is required to experience the public shame and embarrassment of having the device on her body; and she is required to pay for an unwanted device that provides her no tangible benefit.

Further, the requirement to pay for lifetime GPS monitoring is also a violation of the Excessive Fines Clause of the Eight Amendment to the United States Constitution. See Alexander v. U.S., 509 U.S. 544, 558 – 559, 113 S.Ct. 2766, 2775 – 76, 123 L.Ed.2d 441 (1993).

Second, in appellant's case, permanent GPS monitoring is only triggered by a probation violation. It is not triggered by evidence that appellant poses a risk for re-offending. In fact, the triggering probation violation does not need to be related to the special Sex Offender Conditions applied by probation to sex offenders; nor does the triggering violation need to have any connection to re-offending or to sexual misconduct in any way. See S.C. Code § 23-3-540(C).

Third, forcing appellant to submit to permanent GPS monitoring is aimed at deterring future conduct, which is a classic element of punishment. See State v. Price, 333 S.C. 267, 270, 510 S.E.2d 215, 217 (1998) and State v. Cuccia, 353 S.C. 430, 436, 578 S.E.2d 45, 49 (S.C. Ct. App. 2003) (both citing Hudson v. United States, 522 U.S. 93, 99, 118 S. Ct. 488, 493, 139 L. Ed. 2d 450 (1997) (where the U.S. Supreme Court applied the Kennedy v. Mendoza-Martinez factors to federal statutes that imposed monetary penalties and occupational debarment as civil sanctions); see also Furman v.

Georgia, 408 U.S. 238, 343, 92 S. Ct. 2726, 2779, 33 L. Ed. 2d 346 (1972) (MARSHALL, J., concurring) ("Our jurisprudence has always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment."); Kennedy v. Louisiana, 554 U.S. 407, 420, 128 S. Ct. 2641, 2649, 171 L. Ed. 2d 525 (2008) opinion modified on denial of reh'g, 129 S. Ct. 1, 171 L. Ed. 2d 932 (U.S. 2008) ("punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution").

Fourth, electronic monitoring is only used in the criminal justice context. It is used where the court orders a person confined to their home as a substitute for being confined in prison or jail. Active electronic monitoring is not used in the civil context.

Fifth, the sanction is excessive given the evidence that appellant poses a low risk for re-offending. Lifetime GPS monitoring is not a minor inconvenience. It is highly intrusive in the length of time it is applied and the extent to which it is a physical invasion of liberty and privacy. Applying such a sanction to appellant, who Dr. Dwyer determined, in his professional opinion, poses a low risk of re-offending, R. 52, ll. 11 – 12, indeed is excessive. A risk of re-offending is not classified below "low" status. R. 84, ll. 3 – 7. Therefore, everyone has at least a low risk of offending. R. 84, ll. 3- 21. Given that appellant poses the same risk of re-offending that the majority of people pose for offending, lifetime GPS monitoring is an excessive response to a person who poses a low risk of re-offending.

In conclusion, lifetime GPS monitoring is an *ex post facto* violation because it retroactively punishes appellant for the original offense she was convicted of and for violating the terms of her original sentence.

4.

S.C. Code § 23-3-540(C) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by arbitrarily and unreasonably classifying similarly situated people convicted of sex offenses in order to impose lifetime GPS monitoring on them.

Section 23-3-540(C) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it treats similarly situated sex offenders differently. The statute does not classify sex offenders by the level of risk they pose for re-offending. Instead, it arbitrarily classifies sex offenders based on factors that do not fairly or rationally distinguish high risk offenders from low risk offenders. Moreover, it imposes lifetime GPS monitoring on sex offenders who pose risk levels that are different and often contradictory to each other.

Equal protection under the law requires that the law be equally applied to people who are similarly situated. Town of Iva ex rel. Zoning Adminstr. v. Holley, 374 S.C. 537, 541, 649 S.E.2d 108, 110 (S.C. App. 2007). A statute cannot classify people arbitrarily or unreasonably. Id. The statute must justify treating similarly situated people differently by its purpose; it "must rest this difference [in treatment] upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Id. at 110 – 111.

Section 23-3-540 classifies sex offenders by the offense they have committed. S.C. Code §§ 23-3-540(A) through (G). There are two classes: (1) those that commit CSC with a Minor 1st degree or Lewd Act and (2) those that commit any other sex offense. See id. For people, such as appellant, who fit into the first class, lifetime GPS

monitoring is mandatory. S.C. Code § 23-3-540(A), (C), and (E). Those people who fit into the second class are not ordered to submit to lifetime GPS monitoring unless a court, in its discretion, orders lifetime GPS monitoring. S.C. Code § 23-3-540(B), (D), and (F).

Strict scrutiny will be applied to a statute challenged under the Equal Protection Clause if a suspect class is implicated or a fundamental right is abridged. City of Beaufort v. Holcombe, 369 S.C. 643, 648, 632 S.E.2d 894, 898 (Ct. App. 2006). If no suspect class is implicated or a fundamental right is not abridged, then the rational basis test is applied. Id.

Appellant concedes that the classification made by § 23-3-540(C) is not a "suspect" classification; it does not classify by race, religion or national origin. *But it does* impinge on fundamental rights. The classification by § 23-3-540(C) results in loss of fundamental liberty (as discussed above in Argument 1A and 1B, supra). As was discussed in Argument 1D, supra, § 23-3-540(C) fails to meet strict scrutiny because it is not narrowly tailored to achieve the statute's purpose of protecting the public from sex offenders who pose a high risk of re-offending. Instead, it allows for broad imposition of lifetime GPS monitoring on those offenders, like appellant, posing a low risk of re-offending.

Section 23-3-540(C) does not pass the rational basis test under an equal protection analysis. The rational basis test requires that a statute's classification "(1) bear a reasonable relation to the legislative purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis." City of Beaufort v. Holcombe, 369 S.C. at 648.

The classification of sex offenders by § 23-3-540(C) is not reasonably related to protecting the public from those offenders who pose a high risk of re-offending. The statute bases its classification solely on the offense the person was convicted of or adjudicated for. S.C. Code §§ 23-3-540(A) through (F). As Dr. Dwyer testified, a person's level of risk for re-offending cannot be determined solely based on the offense. R. 64, ll. 15 – 18. Nor can it be determined solely based on the age of the victim. R. 65, l. 5 – 67, l. 20. Because there are a whole host of psychological and psychiatric tests that must be professionally conducted, it is not reasonable to classify all people who commit CSC with a Minor 1st degree and Lewd Act as posing a high risk of re-offending. Moreover, as Dr. Dwyer testified, the level of risk a person poses can change over time. R. 64, ll. 15 – 18. This means it is not reasonable to classify these offenders as automatically and permanently posing a high risk of re-offending.

Let us take two people: person A and person B. A has been convicted of Lewd Act. B has been convicted of Criminal Sexual Conduct with a Minor in the 2nd degree. Both A and B pose a low risk of re-offending. The statutory scheme of § 23-3-540(C) will subject A to the mandatory procedure; and A will have lifetime GPS monitoring automatically imposed regardless of the level of risk they pose for re-offending. On the other hand, B will be subjected to the discretionary procedure, allowing the trial court to use its discretion and not impose lifetime GPS monitoring on B because B poses a low risk of re-offending. Thus, similarly situated people are treated differently.

Section 23-3-540(C) classifies sex offenders based on their underlying offense. The result is that § 23-3-540(C) requires trial courts use different procedures and impose different requirements on sex offenders who pose the same level of risk. That is a

violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

5.

The mandatory order imposing lifetime GPS monitoring on appellant pursuant to S.C. Code § 23-3-540(C) is aimed at protecting against future criminal conduct but not based on specific evidence of a present risk of criminal conduct and, therefore, violates appellant's right to protection against unreasonable, warrantless search and seizure under the Fourth Amendment to the United States Constitution and Article I, § 10 of the South Carolina Constitution.

Lifetime GPS monitoring of appellant pursuant to § 23-3-540(C) violates appellant's Fourth Amendment right to be protected from unreasonable searches and seizures. The state will seize appellant in order to permanently attach the GPS device and then will retrieve her location every minute of the day for the rest of her life. Because the state does not have a particularized basis for believing that appellant will commit or has already committed a crime, the imposition of lifetime GPS monitoring is an unconstitutional use of search and seizure for general crime control.

The stated intention of § 23-3-540(C) is to assist law enforcement with the investigation of sex offenses. S.C. Code § 23-3-400 One of the clear intentions of continuous, minute-by-minute monitoring using GPS is to assist law enforcement in its investigation into future, uncommitted sex offenses. The Fourth Amendment does not allow law enforcement to use search and seizure in this way.

The U.S. Supreme Court has held that a state cannot use a program that seizes people when the primary purpose is general crime control. City of Indianapolis v. Edmond, 531 U.S. 32, 37, 121 S.Ct. 447, 451, 148 L.Ed.2d 333 (2000) ("A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of

wrongdoing."). In Edmond, the Court rejected a highway checkpoint used by the Indianapolis Police Department for the primary purpose of conducting drug interdiction. Id. at 453 – 454. The Court noted that it has "never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." Id. at 454.

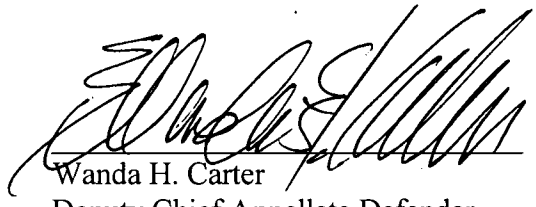
The program created by § 23-3-540(C) is aimed at general crime control. It has no specific basis for investigating a crime that is imminent; all crime is in the future—it might happen. The government cannot provide probable cause that a crime has been committed. It cannot even provide articulable facts that a crime is afoot.

Using permanent GPS monitoring amounts to seizing appellant for the purpose of investigating a future crime without probable cause or reasonable suspicion to believe that she has committed or would even commit the crime. It is like tapping a phone without probable cause or reasonable suspicion because the state "thinks" (but has no evidence) that a person might use the phone to commit a crime.

CONCLUSION

By reason of the foregoing arguments, the mandatory order imposing permanent Global Positioning Satellite (GPS) monitoring on appellant pursuant to S.C. Code § 23-3-540(C) should be reversed.

Respectfully submitted,



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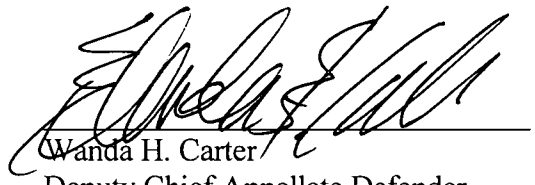
This 15th day of June, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

June 15th, 2011



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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

THE STATE,

RESPONDENT,

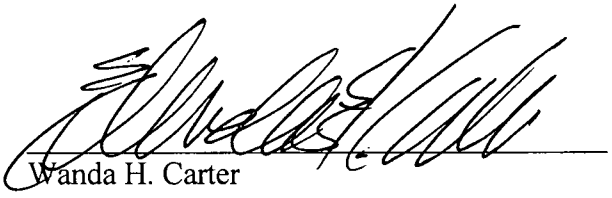
V.

JENNIFER RAYANNE DYKES,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant 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 15th day of June, 2011.



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SUBSCRIBED AND SWORN TO before me
this 15th day of June, 2011.


(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013 .