

**TABLE OF CONTENTS**

Table of Authorities. . . . . ii

Statement of Appellant’s Issues on Appeal. . . . . iv

Statement of the Case. . . . . 1

Arguments:

1. The Appellant’s substantive and procedural due process rights were not violated by the order of the lower court imposing lifetime GPS monitoring pursuant to §23-3-540(C) of the South Carolina Code of Laws. . . . . 2

2. The mandatory imposition of GPS monitoring pursuant to section 23-3-540(C) of the South Carolina Code does not violate the equal protection clause of the fourteenth amendment of the united states constitution. . . . . 12

3. The mandatory imposition of GPS monitoring pursuant to section 23-3-540(C) of the South Carolina Code does not violate the ex post facto clauses of the United States or South Carolina Constitutions. . . . . 14

4. The Appellant’s Fourth Amendments rights were never violated through the mandatory imposition of lifetime GPS monitoring pursuant to South Carolina law. . . . . 22

Conclusion. . . . . 26

**TABLE OF AUTHORITIES**

**CASES**

Bee v. Graves, 744 F.2d 1387 (1984). . . . . 10

Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523,  
87 S.Ct. 1727 (1967). . . . . 25

City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333(2000). . . . . 23, 24

Denene, Inc. V. City of Charleston, 359 S.C. 85, 596 S.E.2d 917 (2004). . . . . 12

Doe v. Bredesen, 507 F.3d 998 (6<sup>th</sup> Cir. 2007) . . . . . 18

Doe v. Pataki, 120 F.3d 1263 (2<sup>nd</sup> Cir. 1997) . . . . . 16

Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367 (1960) . . . . . 16

Fraternal Order of Police v. South Carolina Dep’t of Rev., 352 S.C. 420, 574 S.E.2d 717  
(2002). . . . . 13

GTE Sprint Commc’ns Corp. v. Pub. Sev. Comm’n of South Carolina, 288 S.C. 174,  
341 S.E.2d 126 (2002). . . . . 12

Hawker v. New York, 170 U.S. 189, 18 S.Ct. 573 (1989) . . . . . 16

Hendrix v. Taylor, 353 S.C. 542, 579 S.E.2d 320 (2003) . . . . . 4, 5

Jernigan v. State, 340 S.C. 356, 531 S.E.2d 507 (2000). . . . . 13

Jones v. Murray, 962 F.2d 302, 309 (4<sup>th</sup> Cir. 1992) . . . . . 16

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997). . . . . 11, 16

Kellogg v. Travis, 298 A.D.2d 323, 750 N.Y.S.2d 12 (2002) . . . . . 16

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963). . . . . 16,17, 18

Mayer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923). . . . . 7

Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412  
(1990). . . . . 24

<u>Miller v. Florida</u> , 482 U.S. 423, 107 S.Ct. 2446 (1987) .....	15
<u>Moore v. Moore</u> , 376 S.C. 467, 657 S.E.2d 743 (2008). .....	8,9
<u>Municipal Association of South Carolina v. AT&amp;T Communications of the Southern States, Inc.</u> , 361 S.C. 576, 606 S.E.2d 468 (2004). .....	6
<u>North Dakota v. Norman</u> , 660 N.W.2d 549 (2003) .....	16
<u>Rodgers v. Tennessee</u> , 532 U.S. 451, 121 S.Ct. 1693 (2001). .....	21
<u>Roller v. Gunn</u> , 107 F.3d 227 (1997). .....	21
<u>Russell v. Gregoire</u> , 124 F.3d 1079 (9 <sup>th</sup> Cir. 1997) .....	17
<u>Schmerber v. California</u> , 384 U.S. 757, 86 S.Ct. 1826 (1966). .....	10
<u>Smith v. Doe</u> , 538 U.S. 84, 123 S.Ct. 1140, (2003) .....	16,18
<u>State v. Hamilton</u> , 333 S.C. 642, 648, 511 S.E.2d 94, 96 (Ct. App. 1999) .....	19
<u>State v. Hook</u> , 356 S.C. 421, 590 S.E.2d 25 (2004). .....	25
<u>State v. Huiett</u> , 302 S.C. 169, 394 S.E.2d 486 (1990) .....	15
<u>State v. Walls</u> , 348 S.C. 26, 558 S.E.2d 524 (2002). .....	15
<u>State v. Wilson</u> , 315 S.C. 289, 433 S.E.2d 864 (1993) .....	15
<u>Terry v. Ohio</u> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). .....	11,24
<u>Union Pacific R. Co. v. Botsford</u> , 141 U.S. 250 (1891). .....	10
<u>United States v. Sczubelek</u> , 255 F.Supp.2d 315 (D. Del. 2003) .....	16
<u>United States v. Ward</u> , 448 U.S. 242, 100 S.Ct. 2636 (1980) .....	16
<u>U.S. v. Charters</u> , 829 F.2d 479 (4 <sup>th</sup> Cir. 1987). .....	10
<u>U.S. v. Martinez - Fuerte</u> , 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). .....	24

**STATUTES**

S.C. Code Ann. §23-3-400 (2007). . . . . 6

S.C. Code Ann. §23-3-400 (Supp.2010). . . . . 2

S.C. Code Ann. §23-3-460(2010). . . . . 4

S.C. Code Ann. § 23-3-540 (Supp. 2010) . . . . . 21

S.C. Code Ann. §23-3-540(A)(2010). . . . . 3

S.C. Code Ann. §23-3-540(C)(2010). . . . . 4

S.C. Code Ann. §23-3-540(K)(2010). . . . . 9

S.C. Code Ann. §23-3-540(M)(1)(2006). . . . . 25

S.C. Code § 23-3-540(P) (Supp. 2010) . . . . . 17

S.C. Code Ann. §24-21-290(2007). . . . . 25

**CONSTITUTION**

Art. I, § 4 . . . . . 15

Art. I, § 10 . . . . . 15

U.S. Const. Amend. IV. . . . . 23

U.S. Const. Amend. V. . . . . 7

U.S. Const. Amend. XIV. . . . . 12

STATEMENT OF APPELLANT'S ISSUES ON APPEAL

1. 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 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 OFFENSE 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**

The Respondent has no objection to the to the statement of the case presented by Appellant.

## ARGUMENTS

### **1. APPELLANT'S SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE ORDER OF THE LOWER COURT IMPOSING GPS MONITORING PURSUANT TO §23-3-540(C) OF THE S.C. CODE OF LAWS.**

Appellant argues that placing her on a Global Positional Satellite (GPS) monitoring device without the benefit of a hearing is in violation of both substantive and procedural due process. She argues that there should have been a determination by the lower court regarding her future dangerousness, before being placed on lifetime GPS. The Respondent (the State) disagrees, and argues that GPS monitoring is not punitive, so due process does not apply to the statute mandating her placement on GPS as a result of her violating probation. The application of GPS monitoring should be considered an extension of the sex offender registry. The purpose of the registry is explained in Section 23-3-400 of the South Carolina Code of Laws which states:

The sex offender registry will provide law enforcement with the tools needed in investigating a criminal offense. Statistics show that sex offenders often pose a high risk of re-offending. 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).

The Sex Offender Accountability and Protection of Minors Act, also known in South Carolina as "Jessie's Law" was enacted in 2006, in part as a result of the abduction, rape, and murder of Jessica Lunsford. Jessica, a nine year old girl, was abducted from her home in Homosassa, Florida, and was held captive over the weekend where she was sexually assaulted and murdered by John Couey, a forty-seven (47) year old registered sex offender. Mr. Couey later

confessed to the crimes and was convicted of the offenses of first degree murder, kidnapping, and sexual battery. He was sentenced to death for the offense of murder.<sup>1</sup> After considering the circumstances surrounding the Lunsford case, both the Florida legislature and subsequently the South Carolina legislature determined that further monitoring methods other than the sex offender registry were necessary for the protection of children. Therefore, the Sex Offender Accountability and Protection of Minors Act (Jessie's Law) was enacted with an effective date of July 1, 2006. Pursuant to this Act, any person convicted of the offenses of criminal sexual conduct in the first degree with a minor (CSC 1<sup>st</sup> / minor) or committing or attempting a lewd act on a child under sixteen, (Lewd Act), with an offense date on or after July 1, 2006, was required to be ordered by the court to be monitored with an active electronic monitoring (GPS) device for the duration of the time that individual was required to register as a sex offender. S.C. Code Ann. § 23-3-540(A).

Appellant was convicted on January 29, 2007, of lewd act upon a minor for an offense that occurred prior to July 1, 2006. This was due to a sexual relationship she had at age twenty-six (26), with a fourteen (14) year old girl. She was given a sentence of fifteen (15) years incarceration suspended upon the service of three (3) years incarceration and three (3) years probation. (R.p.127; R.p.141-p.142). Because her conviction was based on acts that took place before the establishment of the Act, Appellant was not placed on GPS monitoring at the time of her plea, but did become subject to placement if it was determined by a Circuit Court Judge that she violated her conditions of probation on or after July 1, 2006. The State submits that

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<sup>1</sup> Before the sentence could be carried out John Couey died of natural causes on September 30, 2009.

mandatory GPS monitoring is merely an extension of the sex offender registry, because, GPS placement is required only as long as an offender is required to register as a sex offender. The South Carolina Code of Laws specifically state:

A person who is required to register pursuant to this article for committing Criminal Sexual Conduct with a minor in the first degree, pursuant to Section 16-3-655(A)(1), or committing or attempting a lewd act upon a child under 16 pursuant to Section 16-15-140 and who violates a term of probation, parole, community supervision, or a community supervision program must be ordered by the Court or agency with jurisdiction to be monitored by the DPPPS with an active electronic monitoring device.

S.C. Code Ann. §23-3-540(C)(Supp. 2010).

Appellant argues that the placement of a GPS monitoring device upon her is in violation of due process due to the fact that the statute does not allow her to appear and argue her lack of a threat to minors. However, Appellant is only required to be placed on GPS because she is a registered sex offender; committed that sex offense against a minor; and, then failed to comply with the conditions of probation imposed by the sentencing court as a result of her conviction. Pursuant to South Carolina law, a person convicted of sex offenses is required to register as a sex offender for the remainder of his or her natural life.<sup>2</sup> The establishment of lifetime GPS monitoring is in direct correlation with the sex offender registry; as long as Appellant has to register she will be monitored with GPS.

It has been held by the South Carolina Supreme Court that the sex offender registry is not considered punitive; therefore, due process does not apply. Hendrix v. Taylor, 353 S.C. 542, 579

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<sup>2</sup> A person required to register under this article is required to register annually for life. S.C. Code Ann. § 23-3-460 (2010).

S.E.2d 320 (2003). Requiring registration as a sex offender is non-punitive, such that the length of time an individual is required to register is non-punitive, and thus the length of time on the registry was not a deprivation of a constitutionally protected liberty interest for purposes of a due process analysis. Id. It is the position of the State that since lifetime GPS monitoring is an extension of the sex offender registry, it also cannot be considered punitive, but a law enforcement device in order to pinpoint registered sex offenders who have committed crimes against minors.

The State's argument is related to the intent of the legislature regarding the connection of the sex offender registry, to the lifetime GPS requirement. This intent is shown by, first, the statute specifically stating that as long as a person has to register he must be placed on GPS, and "Jessie's Law" being placed in Article 7 of Title 23 of the South Carolina Code of Laws, which is specifically entitled "Sex Offender Registry." It is obvious that the legislature intended for the GPS requirement to be a linked to, and part of, the sex offender registry. Based on Hendrix, this suggests the legislature intended GPS not to be punitive, thereby not requiring due process prior to placement.

According to Appellant, GPS monitoring was created "to protect the public from sex offenders who pose a high risk of re-offending." Brief of Appellant at p. 6. However, nowhere in Jessie's law does the law state that it was created to protect the public only from some undefined sub-group of sex offenders who pose a high risk of re-offending. The mandatory provisions of the statute are clear, it applies to all individuals convicted of CSC 1<sup>st</sup> w/minor and lewd act, regardless of an individualized determination of potential dangerousness. The State submits this is because the legislature has already made this determination for people convicted

of these two offenses by requiring mandatory GPS placement. Indeed, the only mention of the purpose of the registry statute as a whole can be gleaned from the introduction to the sex offender registry itself. The Code states, “statistics show that sex offenders often pose a high risk of re-offending.” S.C. Code Ann. § 23-3-400 (2007). In other words, contrary to Appellant’s position that Jessie’s Law reaches too far without providing procedural due process, it appears that Jessie’s may not reach far enough, because it fails to include all registered sex offenders, whom the legislature already determined pose a “high risk of re-offending.”

This portion of the registry statute shows that the legislature believed all sex offenders are at a high risk of re-offending regardless of age, crime committed, or sex; therefore, it is critical for public safety that both the public and law enforcement know the location of convicted sex offenders. This is why the sex offender registry exists. To further protect our precious minors, the legislature determined that law enforcement needs to know the constant location of individuals who have committed sex acts upon minors. This is a result of many offenders on the sex offender registry having committed heinous crimes against children. By looking at the statute, the court must look at the intent of the legislature in the interpretation of the law. The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statutes operation. Municipal Association of South Carolina v. AT&T Communications of the Southern States, Inc., 361 S.C. 576, 606 S.E.2d 468 (2004). In the plain words of the statute, it is clear the legislature intended for these mandatory statutes to apply regardless of the a specific offender’s risk level of re-offending. Consequently, the fact a doctor has evaluated Appellant and opined that she has a low risk of re-offending is irrelevant, and certainly does not require consideration of that opinion to satisfy procedural due

process.

To the extent this Court disagrees, and determines that the placement of GPS is punitive, the Respondent submits the circumstances of this case demonstrate that Appellant was not denied procedural due process. She was granted an opportunity to appear before the Court regarding the violation of probation; she was represented by competent counsel; she was allowed to answer all of the allegations; she was allowed to present witnesses on her behalf; and she was allowed to cross-examine any witness against her. If the lower court determined that Appellant did not violate the terms and conditions of her probation, she would not have been placed on GPS monitoring. The Due Process clause of the United States Constitution specifically states that no one shall be deprived life, liberty, or property without the due process of law. U.S. Const. Amend. V. Appellant is simply not being deprived of a protected liberty interest through the application of a GPS monitor. The Courts have defined liberty as:

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 of free men.

Mayer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923). The mandatory decision of the lower court to impose GPS monitoring does not deprive Appellant of any right to engage with others, to live in her home, to raise children, or to attend any worship she chooses. It is a monitor that allows the State to determine her whereabouts at all times in an effort to protect children, and to assist law enforcement with investigating new crimes.

Appellant argues that Jessie's Law should allow the lower court to have a separate

hearing to determine if there is a likelihood of her re-offending, and that determination should allow the lower court to deny her placement on GPS monitoring, regardless of whether she violated probation. Appellant was allowed to appear before the Court to attempt to demonstrate she did not violate probation; therefore, she had an opportunity to defend against the allegation that ultimately caused her GPS placement. Appellant had notice that her violation of probation would result in GPS monitoring for as long as she is on the sex offender registry. Because there is no way to absolutely determine if a person will or not re-offend, the sex offender registry and the Sex Offender Accountability and Protection of Minors Act was created for the protection of the citizens of South Carolina, which is a legitimate state interest. The statute itself explains the purpose for the monitoring of sex offenders, and it has nothing to do with the possibility of re-offending. This is because there is no way to know if a person is going to re-offend. Even Dr. Dwyer stated that he cannot predict the future, and that it is possible Appellant could re-offend. (R. p. 85, lines 9-12). Since there is no way to determine if a person is going to re-offend, the State submits these measures are necessary for the protection of minors. If another minor is sexually assaulted, it is impossible to “un-ring” that bell.

Appellant next argues that since the terms of Jessie’s law require her to pay for the GPS device, a heightened scrutiny should be applied for due process analysis. She relies in part on the South Carolina Supreme Court’s opinion in the family court case of Moore v. Moore, 376 S.C. 467, 657 S.E.2d 743 (2008). In Moore, the Supreme Court ruled that because of the possible impact on a husband’s financial resources that could result from the family court issuing an order of protection, the father’s constitutional right to property was implicated by the court proceeding, and therefore he was entitled to due process protections. The Moore decision, where the father

was denied counsel, does not apply to the case at bar. In Moore, Appellant was not allowed counsel prior to an emergency hearing for an order of protection. The court ruled that procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and, (4) the right to confront and cross-examine witnesses. Id., at 473. Here, Appellant was given notice of the alleged probation violations by service of a warrant. She was allowed to appear before the a lower court to challenged the violations, she had the opportunity to cross-examine any witness or present evidence in her behalf, and she was represented by competent counsel. Therefore, she was not denied procedural due process, as described in Moore. In the Moore decision the Court also decided that in order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. Id., at 472. With the placement of GPS Appellant has not shown that she is being deprived any property interest, or the availability of movement. She has not shown this monitor will deny her any contact with anyone or any specific right afforded her under the Constitution.

As for the payment for the device, under state law all monies collected must be retained by the Department and applied to support the active electronic monitoring of sex offenders. S.C. Code Ann. §23-3-540(K) (Supp. 2010). So the money collected is only used for the continuation of the program. There are also remedies in place to aid an offender who does not have the ability to pay. The Department may exempt a person from payment of all or part, for all or part of the duration of the time the person is on GPS if the Department determines that exceptional circumstances exist that the payment will cause a severe hardship on a person. S.C. Code Ann. § 23-3-540(K) (Supp. 2010). The non-payment of the fee, or any intentional damage done to the

device may result in prosecution. However, Appellant's rights to due process would be in place during the entire criminal process, including the right to a jury trial. If it was found that Appellant wilfully become two months or more behind in the payment of fees, the Department must seek an arrest warrant from a local magistrate, however, that request can be denied in the absence of probable cause. Even if the warrant is issued, the charges still must be prosecuted by the local circuit court solicitor, who under the authority of law can decline to pursue prosecution. Appellant also has the right to due process with this case as would any criminal prosecution; therefore, there is no denial of substantive or procedural due process simply because the individual is required to pay fees to remain in the program.

Finally, Appellant argue that GPS monitoring infringes on the fundamental right to control the integrity of ones own body due to the slight "touching" of the ankle in order to attach the monitor. In her brief she describes several cases regarding the integrity of the right of a person to control his or her own body. None of these cases apply, because each case involve a much more offensive touching than the mere touching of an ankle to attach a GPS monitor. . U.S. v. Charters, 829 F.2d 479 (4<sup>th</sup> Cir. 1987) (addressing the Government's desire to make a criminal defendant to take an antipsychotic drugs to become competent); Union Pacific R. Co. v. Botsford, 141 U.S. 250 (1891) (addressing the court denying a surgical procedure prior to trial); Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966)(finding that blood taken from a driving under the influence defendant against his will is admissible); Bee v. Graves, 744 F.2d 1387 (holding the state could not justify forcing antipsychotic drugs to make a defendant become competent for trial). In each one of these cases, there exists a much greater intrusion into the privacy and body of the defendant. Here, there is a slight touching on the ankle to attach the GPS

ankle bracelet. This touching takes minutes or even seconds during which the person remains clothed, suffers no penetration of either the surface or a cavity of his or her body, and is not forced to ingest any drugs. This slight touching simply does not equate to an infringement of any right to control the body of Appellant.

The United States Supreme Court has held that the involuntary commitment of “sexually violent predators” within mental health facilities is considered constitutional. Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072 (1997). This practice is being done in South Carolina today. (R. p. 77, line 25-p.82 line 5). By comparison, the mere touching of an ankle must also be considered proper under the Constitution. Although freedom from physical restraint has always been at the core of liberty protected by due process clause from arbitrary governmental action, that liberty interest is not absolute. Of course the specific content and incidents of this right must be shaped by the context in which it is asserted. For what the constitution forbids is not all searches and seizures, but unreasonable searches and seizures. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). The slight touching of an ankle does not equate to a seizure, nor does it deny Appellant the freedom to control her own body in violation of any of her Constitutional rights.

In conclusion, the State submits that since lifetime GPS monitoring is a legitimate legislative extension of the sex offender registry, which was created for monitoring and not punitive purposes, substantive and procedural due process as posited by Appellant does not apply. If the court determines GPS monitoring is punishment, the State submits Appellant received due process by way of her hearing for the determination of the probation violation.

**2. THE MANDATORY IMPOSITION OF GPS MONITORING PURSUANT TO SECTION 23-3-540(C) OF THE SOUTH CAROLINA CODE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.**

The United States Constitution states, “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV.

Appellant argues that she is being denied equal protection of the laws because under “Jessie’s Law,” only individuals convicted of CSC 1<sup>st</sup> w/minor or Lewd Act are subject to mandatory GPS monitoring. The State disagrees and submits that since each person with an identical charge as Appellant is treated identically, there is no violation of equal protection. Equal protection requires all persons to be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed. GTE Sprint Commc’ns Corp. v. Pub. Sev. Comm’n of South Carolina, 288 S.C. 174, 341 S.E.2d 126 (1986).

Appellant argues that her treatment is not identical to other sex offenders; however, she does not have the fundamental right not to be placed on GPS monitoring, nor does she fall under a suspect class. The rational basis test is used to determine if equal protection is being violated.<sup>3</sup> Under the rational basis test, the requirement of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and, (3) the

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<sup>3</sup> If the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test is used. Denene, Inc. v. City of Charleston, 359 S.C. 85, 596 S.E.2d 917 (2004).

classification rests on some reasonable basis. Fraternal Order of Police v. South Carolina Dep't of Rev., 352 S.C. 420, 574 S.E.2d 717 (2002). Jessie's Law was enacted for the purpose of the monitoring sex offenders whose victims were children. The GPS monitor is used to be able to monitor these offenders in case another child has been subject to a sexual assault, and to pinpoint the whereabouts of these offenders either for prosecution or exoneration. All individuals convicted of CSC 1<sup>st</sup> w/minor and Lewd Act are treated alike. This law was not created for the monitoring of all sex offenders, only those whose victims were children. Children require more protection so the intent of the legislature is to create laws specifically created for the protection of those children. As stated in Jessie's Law, the purpose of the statute is to provide law enforcement with the tools needed in investigating criminal offenses, particularly against children, and the use of GPS monitoring is certainly reasonable for the enhanced monitoring of child sex offenders. Jessie's Law and the placement of GPS monitoring on Appellant is appropriate pursuant the rational basis test; therefore, there is no violation of equal protection.

**3. THE MANDATORY IMPOSITION OF GPS MONITORING PURSUANT TO SECTION 23-3-540(C) OF THE SOUTH CAROLINA CODE DOES NOT VIOLATE THE EX POST FACTO CLAUSES OF THE UNITED STATES OR SOUTH CAROLINA CONSTITUTIONS.**

Jessie's Law became effective on July 1, 2006. Appellant committed a lewd act on her victim prior to the effective date of Jessie's Law. Appellant argues that because her crime was committed prior to the effective date, the mandatory imposition of GPS as a result of her probation violation for that crime violates the ex post facto clause. The State disagrees.

The State submits the ex post facto clauses of the South Carolina and United States Constitutions are inapplicable to the facts of this case both because GPS placement is not punishment, and because the law has not been applied retroactively to Appellant. The prohibition against ex post facto laws is set forth in Art. I, § 4 of the South Carolina Constitution and Art. I, § 10 of the United States Constitution. When addressing the issue, the South Carolina Supreme Court has looked to federal authority in order to determine whether a law is indeed violative of the ex post facto clauses of both state and federal constitutions. See State v. Huiett, 302 S.C. 169, 394 S.E.2d 486 (1990); State v. Wilson, 315 S.C. 289, 433 S.E.2d 864 (1993). Therefore, review of both federal and state case law is appropriate. In order for a law to be prohibited by the ex post facto clause, two elements must be present: (1) The law must be retrospective so as to apply to events occurring before its enactment; and (2) the law must disadvantage the offender affected by it. Miller v. Florida, 482 U.S. 423, 107 S.Ct. 2446 (1987); Huiett, supra. However, before this two part analysis can even begin, the statute in question must be found to be punitive in nature such that it inflicts punishment merely by requiring the conduct called for in the law. State v. Walls, 348 S.C. 26, 558 S.E.2d 524 (2002). Without such a

finding, the ex post facto clause is inapplicable. Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140, (2003). Kansas v. Hendricks, 521 U.S. 346, 370-71, 117 S.Ct. 2072, 2086 (1997); Flemming v. Nestor, 363 U.S. 603, 80 S.Ct. 1367 (1960); Jones v. Murray, 962 F.2d 302, 309 (4<sup>th</sup> Cir. 1992). Huiett, *supra*. Therefore, if this Court determines Jessie's Law is civil rather than punitive, no ex post facto violation can exist. United States v. Sczubelek, 255 F.Supp.2d 315 (D. Del. 2003); North Dakota v. Norman, 660 N.W.2d 549 (2003); Kellogg v. Travis, 298 A.D.2d 323, 750 N.Y.S.2d 12 (2002).

Since the late 1800's, the United States Supreme Court has focused on the legislative intent underlying the enactment of a statute in determining whether a statute was penal or civil. Doe v. Pataki, 120 F.3d 1263 (2<sup>nd</sup> Cir. 1997)(citing Hawker v. New York, 170 U.S. 189, 18 S.Ct. 573 (1989). The Supreme Court articulated a two-step analysis in United States v. Ward, 448 U.S. 242, 100 S.Ct. 2636 (1980):

First, we have set out to determine whether congress, in establishing the penalizing mechanism, indicated whether expressly or impliedly a preference for one label or the other. Second, where congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention. In regard to the latter inquiry, we have noted that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."

Id. At 248 (quoting Flemming, *supra*)(emphasis added). In addition, courts have sometimes looked to the factors enumerated in Kennedy v. Mendoza-Martinez<sup>4</sup> to help make the

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<sup>4</sup> 372 U.S. 144, 83 S.Ct. 554 (1963). The factors are: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has been historically regarded as punishment; (3) whether it comes to 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. This analysis requires weighing of all of the above factors. Only a clear

determination of whether the statute in question was so punitive in effect as to overcome the legislative intent. See, e.g., Russell v. Gregoire, 124 F.3d 1079 (9<sup>th</sup> Cir. 1997).

Initially, the Department submits that where, as here, the statute in question is so clearly intended to serve a legitimate, non-penal legislative purpose, the ex post facto inquiry need not extend to consideration of the Kennedy factors. First, as explained above, the non-penal purpose of Jessie's Law is demonstrated by the legislature's decision to include it in Article 7 of Chapter 3, Title 23, as an enhancement to the "Sex Offender Registry," which has already been determined to be non-punitive in nature. Second, the title of the Act reveals legislative intent. It is called the Sex Offender Accountability and Protection of Minors Act - aimed at protecting minors and making sex offenders accountable, not at punishing them further for their crimes. Third, the preamble to the Act explains its purpose was: "To amend Section 23-3-540, relating to the electronic monitoring of sex offenders, so as to establish the persons who shall or may be electronically monitored and to establish the procedures for monitoring these persons." In other words, the Legislature passed Jessie's Law to monitor particular sex offenders, not to punish them. Fourth, the device itself is defined as one that: ". . . actively monitors and records a person's location at least once every minute twenty-four hours a day and that timely records and reports the person's presence near or within a prohibited area or a person's departure from a specific geographic location." S.C. Code § 23-3-540(P) (Supp. 2010). This definition supports the legislative intent described by the location, title, and preamble to Jessie's Law. Finally, the primary effect of the law is to aid law enforcement efforts to investigate new crimes, which is clearly a non-punitive function of GPS monitoring. Based on these reasons, the State submits

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finding of congressional intent to punish under the factors will evidence a punitive effect. Id.

Jessie's Law's obvious purpose is not punitive; therefore, there is no ex post facto violation.

Smith v. Doe, supra; Doe v. Bredesen, 507 F.3d 998 (6<sup>th</sup> Cir. 2007).

In any event, the State submits that even under an analysis of the Kennedy factors, the Petitioner has not shown the "clearest proof" that the statutory scheme is so punitive either in purpose or effect as to negate that clear intention of the legislature. First, GPS monitoring does not involve an affirmative disability or restraint. As explained above, GPS monitoring is not a sanction. It is not incarceration, or even home detention. There is virtually no restriction on Appellant's liberty to move throughout the State. As long as she keeps it charged and operational, she is free to live, work, or travel. Appellant is not being denied movement at any time of the day. She is free to go where she wants, when she wants, and the State submits use of the device subjects her to no more shame than already exists from her having to be on the sex offender registry.<sup>5</sup>

Second, GPS placement has not historically been regarded as a punishment. It is not akin to historical punishments like humiliation or shaming. Indeed, the device is neither designed nor intended to draw specific attention to the individual wearer, or to invite public condemnation. As technology has advanced, the tracking device has become smaller and less obtrusive. It is more like requiring an individual to provide a photograph, fingerprint, or DNA sample - a method of identification or tracking - that punishment. In addition, a GPS monitor is sometimes used before the punishment stage of a criminal prosecution has even occurred, to track a person as a condition of bond.

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<sup>5</sup> The sex offender registry lists the name, address, and offense committed, and is accessible to the public. By comparison, the public has no access to information about GPS placement or tracking information.

Third, the GPS placement does not only comes into play upon a finding of scienter. If is being imposed due to a conviction for a crime, then scienter is required. However, for a probation violation, like Appellant's scienter is not necessary. In South Carolina, the court can find a probationer in violation of the terms and conditions of probation without finding the violation was willful. State v. Hamilton, 333 S.C. 642, 648, 511 S.E.2d 94, 96 (Ct. App. 1999). Whatever the case, this factor is not particularly germane. By tying GPS placement to the finding of a violation of supervision, the Legislature appears to have simply created a prospective trigger, so as to avoid ex post facto problems altogether.

Fourth, use of a GPS device does not primarily promote the traditional aims of punishment-retribution and deterrence. While it does serve as a specific and general deterrent, this does not take away from the legitimate, non-punitive purposes of protecting children and aiding in law enforcement. The device is used to help identify a person who re-offends or to provide an credible alibi if Appellant is wrongfully accused.

Fifth, requiring Appellant to be placed on GPS monitoring due to a probation violation does not necessarily depend on behavior which is already a crime. A probation violation is sometimes based on the commission of a new crime, but often the violation involves behavior that is not in and of itself criminal. Whatever the case, this factor is not particularly germane. By tying GPS placement to the finding of a violation of supervision, the Legislature appears to have simply created a prospective trigger, so as to avoid ex post facto problems altogether.

Sixth, use of a GPS monitor has an rational relationship to an alternative stated purpose. That purpose is to protect children and to solve crime. A GPS monitor is not used solely for home detention. It is also used to monitor a person outside the home, allowing Appellant to

move freely. It can be used either to place her at a crime scene, or confirm an alibi.

Seventh, GPS monitoring certainly does not appear excessive in relation to the alternative purpose assigned. The burdens placed on Appellant by having to wear the device are far outweighed by the purpose - to protect children. She may believe that mandatory lifetime monitoring is what makes it excessive; however, the State submits that children 40 years from now are no less deserving of protection that children in the present. To the extent the monitoring can actually accomplish it's purpose, it can do so now or in the future. Simply nothing out there to suggest a person with an inclination towards sexual contact with children can be "cured." This is why there is a national consensus for pursuing a "containment approach" to sexual deviance. Appellant was convicted of committing a lewd act on a child when she was 26 and the victim was 14. She also violated probation by failing to avoid persons with a criminal record by living with a convicted felon; and continuing to live with her after being advised it was against the conditions to do so. Finally, she lied to her agent regarding the conduct when asked; she consumed alcoholic beverages; was terminated from sex offender counseling; changed her residence without notifying her agent; and failed to diligently work at a lawful occupation. All of these suggests Appellant may have trouble refraining from committing lewd acts upon minors in the future, and her general unwillingness to abide to authority. The State submits it is obligated to use all legal means available to protect children, particularly when those means are not excessive in comparison to the protection afforded.

The State also submits that even if this Court determines GPS placement is effectively a punishment that disadvantages Appellant, the ex post facto still does not apply because Jessie's Law is not retrospective. Here, the law that required the probation revocation court to impose

lifetime GPS monitoring on Appellant due to her probation violations was enacted pursuant to 2005 Act No. 141, with an effective date of July 1, 2006. S.C. Code Ann. § 23-3-540 (Supp. 2010). The probation arrest warrant charging Appellant with violating the conditions of her probation was issued after the effective date of the Act. Indeed, Appellant committed the probation violations for which the court found her in violation after the law was changed; thus, she was on notice of the current version of the statute and the possibility of facing lifetime GPS for a probation violation at the time she chose to violate her probation. The State submits that since the event triggering Appellant's GPS placement occurred after Jessie's Law was enacted, the law is not retrospective, there can be no ex post facto violation, and the ex post facto clauses are entirely inapplicable.

Indeed, the State submits Jessie's Law cannot be considered a violation of ex post facto because the placement of GPS is not punishment, but procedural. The law as written does not subject Appellant to GPS monitoring unless she violates probation, which must be determined by a Circuit Court Judge. The law, as applied to those under supervision, creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of "punishment" for covered crimes and such conjectural effects are insufficient under any threshold the court might establish under the ex post facto clause. Roller v. Gunn, 107 F.3d 227 (1997). The prohibition against ex post facto laws is intended to prevent an additional punishment added to a sentence after conviction, due to the lack of notice. The ex post facto clauses safeguard common interests, in particular the interests in fundamental fairness (through notice and fair warning), and the prevention of the arbitrary and vindictive use of the laws. Rodgers v. Tennessee, 532 U.S. 451, 121 S.Ct. 1693 (2001). Here, Appellant was on statutory

notice of the possibility of GPS placement. But even beyond that general notice, she received specific written and verbal notice that any violation of probation would automatically result in lifetime GPS administration. (R.p.90 lines 6-15 & p.91 lines 3-22). The notice requirement is critical to an ex post facto analysis, which is why individuals convicted prior to the establishment of the statute only become subject to lifetime GPS upon finding of a violation of probation. Appellant was notified of this effect, as well as of being prohibited from associating with a known felon. She choose to violate the conditions after being duly notified; therefore, ex post facto should not apply.

**4. APPELLANT'S FOURTH AMENDMENT RIGHTS WERE NEVER VIOLATED THROUGH THE MANDATORY IMPOSITION OF GPS MONITORING PURSUANT TO SOUTH CAROLINA LAW.**

Appellant argues that the mandatory imposition of a GPS monitoring device violates her Fourth Amendment right to be free from unreasonable search and seizure. Appellant contends that the State does not have a particularized basis for believing she would commit or has already committed a crime, and as a result, subjecting her to GPS monitoring is an unconstitutional search and seizure being used for general crime control. The State disagrees.

The Fourth Amendment of the United States Constitution specifically states:

The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend IV. Appellant is of the opinion that the day to day monitoring of her location amounts to an unreasonable search and seizure of her person, in violation of the Fourth Amendment. However, the State submits any alleged intrusion on the property or the privacy of Appellant by wearing this monitor is reasonable under any Fourth Amendment analysis. The Fourth Amendment governs all intrusions by public agents upon personal security. Terry v. Ohio, 392 U.S. at 16. Here, the GPS monitoring device does not prevent Appellant from doing anything she pleases. She is not restricted or restrained from going where she pleases when she pleases; therefore, there exists no seizure.

Appellant's argument relies in part on the case of City of Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000), in which the United States Supreme Court ruled that the state cannot use a program that "seizes" people when the primary purpose is crime

control. In Edmond, traffic stops were being used to investigate drug trafficking, circumstances that do not apply to the case at bar. As noted above, in Appellant's case, there is no seizure. In Terry, "seizure" is defined as an individual being restrained from his freedom to walk away and a "search" is defined as the careful exploration of the outer surfaces of a person's clothing in an attempt to find a weapon. Terry, 392 U.S. at 16. Appellant's mandatory GPS monitoring does not fit either definition. Neither her person nor her residence is searched by the device, and there is no restraint to her movement. In Edmond, checkpoints have been declared in violation of the Fourth Amendment due to it not being indistinguishable from the general interest in crime control. Edmond, at 531 U.S. at 32. However, if the stop is in the interest of a specific crime, and the use of the highway checkpoint is a legitimate means to stop this specific crime, the Supreme Court has found it not to be in violation of the 4<sup>th</sup> Amendment. U.S. v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116(1976), (suspicionless seizures at a fixed checkpoint designed to intercept illegal aliens); Michigan v. Dept. of State Police v. Sitz, 496 U.S. 444, 110 S.Ct. 2481, 110 L. Ed.2d 1990)(a sobriety checkpoint aimed at removing drunk drivers from the road). The use of a GPS monitor is specific to the monitoring of convicted sex offenders who specifically committed crimes against minors. This is far from a fishing expedition because it is a specific, targeted population based on a legitimate state interest that does not infringe on the privacy or rights of Appellant. The State submits it therefore cannot be considered a violation of the Fourth Amendment.

Even if the Court finds that there is a minor intrusion of Appellant's privacy, that intrusion is overridden by the public interest of the government in the protection of minors. In weighing such an intrusion against public interest, the Court examined the government interests

advanced to justify such routine intrusions “upon the constitutionally protected interests of private citizen, and concluded that under the circumstances the government interests outweighed those of a private citizen.” Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 87 S.Ct. 1727 (1967).

The State submits the application of GPS monitoring is less intrusive than the sex offender registry. The sex offender registry lists the offender’s name, address, offense, eye and hair color, height, weight, and includes a photograph. GPS monitoring records gathered and maintained by probation agents with the Department of Probation, Parole and Pardon Services are privileged and not subject to public disclosure. Indeed, all information and data obtained in the discharge of his official duty by a probation agent is privileged information, is not receivable as evidence in a court, and may not be disclosed directly or indirectly to anyone other than the judge or others entitled under this chapter to receive reports unless ordered by the court or the director. S.C. Code Ann. §24-21-290 (2007). The original version of Jessie’s Law made a specific exception to this non-disclosure statute.<sup>6</sup> However, that language was subsequently removed, demonstrating the legislative intent that GPS tracking information not be public. According to the statute, such information is also not admissible in court. By its terms, §24-21-290 makes information gathered by a probation agent from his offender inadmissible as evidence in court. State v. Hook, 356 S.C. 421, 590 S.E.2d 25 (2004). Therefore, unless Appellant is being prosecuted for damaging or removing the unit, wilfully failing to pay the fees, or some other violation of her GPS tracking conditions, any information gathered under pursuant to the

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<sup>6</sup> Notwithstanding the provisions of Section 24-21-290, information gathered by a probation agent pursuant to the provisions of Section 24-21-540 is admissible in a criminal prosecution. S.C. Code Ann. §23-3-540(m)(1)(2006).

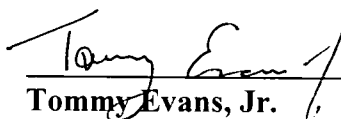
GPS monitoring program is privileged, and will not be released.

Based on all of these reasons, the State submits Appellant did not have any privacy rights unreasonably infringed by having the GPS monitor placed on her. There was no search of her premises, nor is the device capable of conducting a search. There was also no seizure because Appellant was not detained, and is allowed to move freely anywhere she wishes to go. Since Appellant will not be subjected to a search or seizure, there exists no violation of the Fourth Amendment.

**CONCLUSION**

The lower Court committed no error in ordering lifetime GPS monitoring for Appellant. Therefore, the Respondent respectfully request this Honorable Court to affirm the decision of the lower court.

Respectfully submitted,



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June 3, 2011

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

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

JUN - 6 2011

**S.C. Supreme Court**

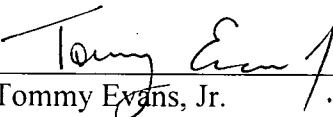
THE STATE, ..... RESPONDENT

v.

JENNIFER RAYANNE DYKES, ..... APPELLANT

***CERTIFICATE OF COUNSEL***

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR and with the South Carolina Supreme Court's order dated August 13, 2007.

  
\_\_\_\_\_  
Tommy Evans, Jr.  
Legal Counsel

June 3, 2011

STATE OF SOUTH CAROLINA  
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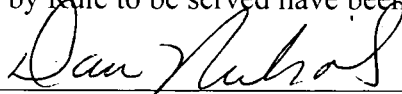
**CERTIFICATE OF SERVICE**

I, Dawn K. Nichols, Executive Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated June 3, 2011, on Appellant this 3rd day of June, 2011, by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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



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