STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

RECEIVED
JAN 06 2017
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DAVID WILKINS ROSS,

APPELLANT

APPELLATE CASE NO 2016-000738

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	
	)	COURT OF GENERAL SESSIONS
COUNTY OF GREENVILLE	)	
State of South Carolina,	)	
	)	
v.	)	Case No. 1979-GS-23-01758
	)	
David Wilkins Ross,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within Hearing in the above-captioned matter was held on October 26, 2015, before The Honorable Robin B. Stilwell, in Courtroom No. 8 of the Greenville County Courthouse, 305 East North Street, Greenville, South Carolina; attended by counsel as follows:

APPEARANCES:

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THE COURT: Good morning.

MR. BUCHANAN: We are moving before this Court for an Order placing Mr. Ross on an active GPS device pursuant to Jessie's Law, 23-3-540(e).

We would show that Mr. Ross was convicted of attempted lewd act on a minor on July 29th, 1979. He was therefore placed on the sex offender registry for that offense.

Then on January 19, 2011, he was convicted in Greenville magistrate court of a violation of the Sexual Offender Registry Act, which basically is that he failed to register. Pursuant to that offense, the Court must order that he be monitored by the Department with an electronic monitoring device.

Again, as with the other two individuals, the Department has already proactively had him placed on the GPS monitoring, but as a departmental policy we decided to bring these cases back in front of the General Sessions court for these affirmative Orders, because the statute is very clear. It says that the Court must

Order that these individuals who are on the Registry for child sex offenses be placed under GPS tracking if they violate the sex registration law.

THE COURT: Mr. Scalzo, do you have a position, sir?

MR. SCALZO: Yes, if it please the Court, Your Honor. I guess first is a little bit of a practical matter, which I'd ask the Court to -- as Mr. Buchanan just said, the statute says that there must a court Order as opposed to that the Department can just put it on somebody without a court Order. We take the position that the statute actually requires an Order. One did not exist in this instance.

I understand that they are making a Motion to have one issued, but there are some practical and real legal consequences of the fact that there was not one; the reason of which Mr. Ross has been wearing it on his ankle at the insistence and direction of the State for a period of time prior to this. So there's the practical side of the fact that he's been living with it. There are legal

consequences that he has already suffered. He was charged with violating the criminal aspect of this statute with regarding to the charging or failing-to-charge, and the monetary issues of that. So there are some real legal and factually practical issues that stem out of the very first basis, being the State never had a valid Order.

I am not saying that that precludes the hearing or the Motion of the State being granted, but it does strike me as sort of the first issue to address with the court as far as the Court -- at least presenting it. I'm not saying that the Court has to decide right now.

THE COURT: Yeah, ---

MR. SCALZO: I presented it as one of the first issues to be addressed. So if you want me to argue more on it or if you want to hear from the State, I -- however you want to proceed, Judge.

THE COURT: Well, I guess the question that I had in that regard is that -- I don't know that I necessarily disagree with you. I guess the question is, what is the remedy at

this point?

MR. SCALZO: Well, I think because we are now here at the State's behest, in its Motion, ultimately Your Honor is going to rule one way or the other on the State's Motion.

I guess what I am asking the court to do is either make a finding within that Order, or it could be a separate finding, more or less so that everybody is clear about where we are realistically.

I mean, you know this has left Mr. Ross in a bit of a legal limbo. Here he is being required to comply with a statute that requires a court Order ---

THE COURT: Right.

MR. SCALZO: --- and now if Your Honor should grant the State's Motion it becomes extremely unfair with it all being prior to that, and there are obviously legal ramifications, so I guess that's what I am asking. The remedy that I am asking from the court is essentially a finding that prior to today that it wasn't in compliance with the statute.

THE COURT: Okay. In my review of the statute, I can make a finding of law that applies to this case specifically. To the extent that could be construed as advisory as to any and all other outstanding cases, I would suggest to you that is not the intent of the court. I don't have jurisdiction or the authority to do that.

MR. SCALZO: And we're not asking the court to make such an advisory opinion, Judge.

THE COURT: Okay. All right. Yes, sir?

MR. BUCHANAN: Your Honor, if I may, regarding that, as you may be aware, the GPS tracking, also known as Jessie's Law, is a lifetime registry; although pursuant to the *State v. Dykes* decision, the Supreme Court struck a particular portion that made it mandatory life and now actually allows for a ten-year review after having the device on for ten years.

What we would essentially request in this Order -- and this actually helps Mr. Ross out as well -- is that if you were to

essentially ratify or make this Order retroactive to the date when he was placed on GPS tracking, that way he would have ten years from the date of actually having the device on rather than ten years from the date of today. So that's an additional four, almost five, years of credit that he will not get. Certainly that's not something that we are asking that the clock start today but this would in fact, this Department would hold an Order to be retroactive and actually bring him -- so that he would be that much closer to reaching that ten-year line when he would be able to submit to the court a request to have the device taken off.

THE COURT: All right, I will decide all that. It sounds to me like that as a very practical matter that right now the Department has taken the position that the statute does say that there must be an Order from the court to administer the tracking. Okay.

What is the next issue?

MR. SCALZO: Your Honor, from the defense, I believe the next legal issue that

we need to address would be the automatic nature of the Court's Order, that specific subsection (e) that says that it must be ordered by the Court. It is saying that essentially there is no discretion to the court to order it.

It is our position that the United States Supreme Court ruled in *Nathaniel Grady v. North Carolina* 135 Supreme Court 1368, which came out on March 30th, 2015. I believe that this is the latest, most recent Opinion, and it is from the United States Supreme Court. I believe that it would be also be within the state of South Carolina regarding GPS monitoring as well. It certainly comes after *Dykes* and it certainly comes after the *in re: Justin* that was cited earlier.

I believe, based on the holding of *Grady*, that what the Court found was that the use of an electronic monitor that is physically attached to someone's body is a search and is subject -- is a search by the State and is subject to the Fourth Amendment. It applies the Fourth Amendment; it says

specifically the "reasonableness that is required by the Fourth Amendment."

The reason that I said that changes the game with regard to this statute is because clearly this statute was written before -- clearly our Supreme Court has been rejecting -- they rejected it in *Dykes*. I argued it and they rejected the Fourth Amendment analysis in *Dykes*. Then the United States Supreme Court comes back after the fact and says it is a search and it is subject to analysis.

So I think the distinction is that the State has been operating on what our Supreme Court has said, and now the United States Supreme Court has come in and changed things.

The way that it has changed things is that you can't have a reasonableness analysis, which is what *Grady* says. The reasonableness analysis takes a couple of different forms, but one of them is the court says that you have to balance the equation of the invasion of rights versus what the State's interest is. Any kind of balancing

is the exact opposite of an automatic stay by the court.

So we're taking the position that in the United Supreme Court saying that because it is a search, had not been deemed a search prior and now that it is a search, now that reasonableness must be applied, you can't have an automatic determination that someone should have a GPS monitor and that would, of itself, be reasonable. That's where I believe that you get into, in essence, the unconstitutionality of subsection (e) of our statute that says that it has to be automatic.

So I guess that is the prime/first legal issue to address. Obviously I can address it further if Your Honor wants me to, but that's one of a couple things depending on how ---

THE COURT: I understand. I understand. Do you have a copy of *Grady*?

MR. SCALZO: I do. It's a little bit marked up.

THE COURT: That's okay. I prefer it marked up.

MR. SCALZO: (Tenders).

THE COURT: That way I know what is relevant. Thank you. All right. Does the State have a position with respect to the issue of discretion, i.e. reasonableness of *Grady v. North Carolina*?

MR. BUCHANAN: Yes, Your Honor. I believe that our Supreme Court, the South Carolina Supreme Court, has in fact never taken the position that North Carolina did. That is that in North Carolina, in *Grady* they believe that GPS, flat out, was not a search.

I don't believe that our Supreme Court in either *In Re: Justin Bee*, in *Dykes*, never held that, that that was not one of their holdings. Now, they analyzed the state statute and the GPS tracking in the South Carolina context, analyzed it as a reasonable search thanks to the various Constitutional protections that are placed in the statute.

They made those findings as it being a civil remedy. They've applied the *Kennedy/Mendoza* factors that looked at whether or not something was considered to be punitive versus civil, and found that it was a civil matter, that it was not punitive.

Therefore, the analysis of whether or not it was a reasonable search was taken care of. They actually did analyze it. And one of the reasons that we can take that is because in both *Justin Bee* and *Dykes* and *State v. Anthony Nation* -- *State v. Nation* was the most recent and that was a case that was listed -- and even the Court called it factually identical to the *Dykes* decision, or the facts surrounding the *Dykes* decision. All those were appealed to the United States Supreme Court. The Supreme Court denied *cert* on each one of those.

And also, tellingly, a month prior to the Decision that was handed down by the Supreme Court in *Grady*, they denied *cert* in *Anthony Nation*. So it would seem pretty obvious that, since the Supreme Court was looking at this matter with *Grady* and they were deciding and ruminating on *Grady*, that they would have *Nation* right there in their lap that they could have picked up and tied it to *Grady* if they felt that it was similar. Instead they believed -- they denied *cert*. So essentially the South Carolina Supreme Court got our

statute right, distinct from the erroneous finding of *Grady*, which said that basically the GPS was not a search at all. I don't believe that our Supreme Court ever made that finding, so they never based its decisions on an erroneous holding like that.

THE COURT: Okay. Good enough.

MR. SCALZO: Your Honor, ---

THE COURT: Yes, sir?

MR. SCALZO: I don't quite understand the logic, to be honest with you, Judge. Obviously *certiorari* is completely discretionary by the United States Supreme Court. Their denial makes no comment, really, on the validity of anything as far as what the lower courts did. But their Opinion obviously does. The United States Supreme Court generally doesn't take up an Opinion and solely write it so that it can only apply to one state. My guess is that they took *Grady* because it had application to multiple states, including South Carolina.

Our Supreme Court rejected the Fourth Amendment claims. Whether it was very specific about the search or not, -- well, in

Dykes they wrote it in the footnote. There was no analysis, they just simply rejected the claim. So to say because our Supreme Court didn't say that it wasn't a search, that now Grady doesn't apply, I really can't follow the logic. I think that the United States Supreme Court has ruled that attaching a GPS monitor to somebody's body, physically doing that constitutes a search and that the states and the federal government now must apply the Fourth Amendment to those circumstances where each government is trying to put a GPS monitor -- regardless of what they write in their statute, the statute doesn't trump the Fourth Amendment.

I don't really quite follow the State's logic in saying that it would not apply to this statute.

I don't think that that means that Your Honor is in essence going out on a legal limb here in finding something unconstitutional that no court has sort of commented on because so far a case has not reached our Supreme Court with this issue. But the United States Supreme Court has ruled on it.

So I don't think that Your Honor is going out beyond his authority or the law or getting ahead of law. I think that Your Honor could find that that statute is unconstitutional unless read consistent with *Grady*, which would require some kind of analysis of the reasonableness.

And I believe that this may be the second issue, that it has to be an individualized assessment to Mr. Ross. So I'll kinda stage that and see where we go with that. Judge, that's where we are.

THE COURT: Okay. I understand both of your arguments. The State's position is that this has been argued and decided. The defense's position is that it is a novel issue in context with *Grady v North Carolina*.

So I'm just going to go back and read all those cases, because I'm not in a position to weigh in here right now. So I'll take that under advisement.

Your next issue?

MR. SCALZO: Judge, our next issue is basically related to what we were just discussing. If the Court is going to apply

the reasonable analysis that I think the Supreme Court is requiring it to do, then what we get into is kinda 'what does that look like?' The United States Supreme Court and obviously the states in compliance have done various balancing tests and things to fit reasonableness depending on context. I guess the way that I would say it is is, uh, -- let's talk about some of the things that it is not. It's not like a drug test for kids in school or a drug test of somebody on a job where the United States Supreme Court has said, 'look, those are special needs that you don't have to get to the same level of individualized suspicious or individualized evidence of wrongdoing; that you can, in essence, have a little bit lower level before you actually can do this type of search. I don't think that this falls into that category.

GPS monitoring in the context that this state has done it fall into the category, I believe, of probable cause, just like a crime. If you look at 23-3-400, that's the first section of the registry statute where

obviously Jessie's Law has been put, that is the purpose statute. In other words, that says "here is the purpose of this whole article." And what it says -- and I believe that the Court cites this in *Justin Bee* and some other cases as well, it says with reference to the section GPS monitoring is now been pulled under, and our Supreme Court has equated them from the standpoint of being civil, it applies the same ideas for the registry as to the monitoring. "It is a tool needed in investigating criminal offenses." That is the language of the 23-3-400.

Additionally, "law enforcement's efforts to protect communities, conduct investigations, apprehend offenders who commit such offenses are impaired by the lack of information about these convicted offenders."

What that is saying is that the whole point of this statute is to aid in criminal investigations. When you look at it from that point of view, that's why I say it is not a special needs category, the term of art "special needs" doesn't apply.

This is more akin to a roadblock -- I

would cite to the City of *Indianapolis* v. *Edmond*, which is a United States Supreme Court Case about where a law enforcement agency sets up a roadblock. They have to very specific about what they can do, they can't just set up a roadblock so that they can catch any little criminal they want. In the city of Indianapolis, it was drug interdiction. The United States Supreme Court said, 'hey, you can't just stop every car and say, 'hey, we're looking for drugs' and then search all those cars just because you want to look for drugs. They carved out in essence somewhat of an exception when it came to DUIs or public safety with regard to the actual operation of a vehicle, but they didn't allow just generalized criminal investigation.

When you take that and you look at what the GPS monitor statute is doing, what it is saying is -- I would equate it to the tapping of a phone. The tool that law enforcement is going to use to tap the phone, to find out evidence about an ongoing criminal activity or past criminal activity

requires a warrant and a whole process to say 'here's the reason why it would make it reasonable for us to obtain this warrant', because it's investigating a crime.

To do it the way that the State is doing it, there is no crime. The crime has already occurred, that crime has been resolved. There is no crime that is being alleged, there is no crime that is ongoing, there isn't even an allegation that one was about to happen or is about to happen.

So what the statute really is doing is it is disengaging the requirement for an individualized -- evidence of the individualized potential for crime or even one has committed wrongdoing, which is usually where the Opinion is used.

To that extent, I am going to suggest to the court that the standard is a warrant.

Now, whether or not that means you actually need a written warrant versus just the Order of the court, the legal standard in order to get that and for the court to have authority to issue the Order, I think it has to be particularized to the individual having

shown some level of risk to fit into the category that the purpose of the statute sets forth, that there is a crime that needs to be investigated or that there is a crime afoot, so to speak, that is going to take place and therefore we need to utilize this took in order to investigate that.

Otherwise, then it's just that the government can attach GPS monitors to people on the assumption that a crime might be committed. The Fourth Amendment doesn't really allow that. That is why I say that *Grady* changed the dynamics so significantly, because prior to that Opinion nobody was looking at -- South Carolina wasn't looking at this issue from the standpoint of a Fourth Amendment analysis, that it didn't really apply. Now it does and now the ramifications are starting to come through, and I think that is one of them.

THE COURT: Okay. All right.

MR. BUCHANAN: All right. Well, Your Honor, I believe that the statute actually does have an individualized analysis built into it. It requires GPS in very, very

specific instances; specifically individuals who prior -- in the days and times after the statute was enacted in June of 2006 and since then, they have to have committed child sex offenses; either lewd act/CSC with a minor third degree or CSC with a minor in the first degree.

There's other ways of getting placed on a GPS through Jessie's Law. Jennifer Dykes and Anthony Nation were placed on GPS tracking because they were not -- they were not required initially because their offenses happened prior to the enactment of the statute. But they were under supervision during that period of time afterwards and the statute allows for the GPS -- or requires the GPS to be imposed when a person violates probation. They have to do an affirmative act, they have to essentially show that they cannot or will not abide by the provisions of supervision. The violation will then in turn require that person to be monitored under Jessie's Law.

This is the third prong, this is the third way that a person can be -- that is if

they were under -- again, the same type of child sex offense, CSC with a minor first degree or CSC with a minor third degree a/k/a lewd act, on the registry for those offenses and violates that statute, if they do not continue to register as a sex offender they violate that statute, then the GPS become enacted.

So it is an individualized thing. It's not just grabbing people randomly or even semi-randomly out of the population, saying 'we don't trust you.' It's because these individuals have made mistakes and have continued to make the same mistake(s) and made similar type mistake to where the State feels that it is actually safer to monitor them. So it is built into the statute right there.

This claim that it is completely randomized and doesn't have an particularized analyses I think, Your Honor, that falls short.

Again, it is -- both *Nation* and *Dykes* analyzed this when it was in the context of a person violating supervision.

Now, we don't have -- this person, Mr. Ross, and the two that preceded, these folks were under the Registry. They weren't under supervision at the time that they violated again it. The statute was in place when they failed to register and now they are suffering the consequences. Again, the Court must Order -- it just goes back to what the statute says. The statute also says that the Court must order it in the context of probation, when they violate supervision, they must be monitored as sexual offenders, that they must be monitored by GPS in those cases. So that "must" language was reviewed even in the light of evidence showing that these individuals had low probabilities of recidivism.

I believe that with Anthony Nation there was a large amount of evidence put before the Court during that initial violation. However, the Court had no discretion, ruled that that person must have the GPS device placed on him. That was appealed all the way up to the United States Supreme Court and the Supreme Court denied *cert* on that case.

So we have seen these cases go up and pass muster before. This is a little bit different because it is subsection (e), but it has ultimately the same result.

That would be the State's position, is that what we have seen before is grounds for following the statute as it is written today.

THE COURT: Okay.

MR. SCALZO: And, Judge, we would disagree with that analysis, the reason being that if you read *Dykes* -- in *Dykes*, they were doing an analysis of substantive due process. What we argued was that it was a fundamental right. They said, 'well, no, we don't think it's a fundamental right implication, so it's a rational basis.' Reading Dykes, it says, "We find that initial mandatory imposition of satellite monitoring for certain child sex crimes satisfies the rational relationship test."

Here is where it is different, changed the context. The rational relationship test is a due process analysis and is the lowest standard. The Fourth Amendment has its own standard and I believe that it is higher than

-- significantly so, depending on the context -- but it's higher than simply a rational basis test. I think that's where you get back to the United States Supreme Court -- they could have turned around and said 'no rational basis' or it could have been due process in *Grady*. They didn't say that. In *Grady* what they chose to deal with was the, I believe, higher legal standard of the Fourth Amendment and it's individualized, particularized analysis.

On that point, here is where our testimony and evidence become relevant, is -- to say that a particular crime just by the name of it, "lewd act" or "violation of sex offender registry" doesn't tell you anything about any particular individual's danger to the community as different from anybody else with that charge. In other words, what the State is really trying to do is they're saying 'if you've been charged with this, therefore we understand the level of risk that you pose to the community.' I believe what our evidence will show is that from a psychiatric and clinical standpoint that is

inaccurate. It doesn't show that. In order to make that kind of assessment, using SVP and other context, which I think the Fourth Amendment requires, in order to individualize about it you've got to analyze that person. One person's conduct, while it may violate the same offense in the statute, their conduct can be widely different. One can be way more risky to the community, another less so, or even. There's a lot of ramifications to that. So I don't believe that the statute is individualized in the way that the United States Supreme Court meant the Fourth Amendment to be.

That may suffice under our Supreme Court's analyses under other sections of the Constitution but once you -- once -- and of course the court had never applied, South Carolina has never applied it. So once the Untied States Supreme Court says to apply it, again I think you're in a whole new ballpark and I think the standard is now higher. I think our evidence will show the court that if the goal is to measure some degree of risk, that you can't -- you can't do that

simply based on what they were charged with.

If you're doing that, then you are being arbitrary. If you're being arbitrary in their application it certainly would fall below the level of the Fourth Amendment standard. You can't simply just arbitrarily start issuing searches, you have to have a context and a basis for it.

So if that is the degree of individualized analysis for risk, then I think that we fall short of the Fourth Amendment in light of *Grady*. And that's -- again, just so that the court understands, that's where we would present evidence of established facts.

THE COURT: I understand. And I understand exactly what you're saying but, again, I've got to go back and read those cases so that I can make an informed decision. I haven't read them all together in context with *Grady*, so I need to go back and take a look at that. I will take that issue under advisement, as well.

Okay. Next issue.

MR. SCALZO: And, Your Honor, since

I believe that the rest of the issues will progressively move into relying on testimony -- it's up to Your Honor. I can lay out the legal issue and then have testimony or I can put the testimony in and then further lay out the legal issue.

THE COURT: If you will stage those issues just very concisely, then -- or when y'all go to the Court of Appeals or the Supreme Court there are going to be lights that are going to light up, meaning that they have heard too much. Okay? So I want you all to state them as succinctly as possible and then we will -- then I'll hear that evidence which you think is necessary to fully establish the record.

MR. SCALZO: Okay. Judge, the evidence that I believe that you will be presented with will show that Mr. Ross, the individual Mr. Ross, poses a low risk of reoffending, that this was done by a clinical process by someone who is trained, a professional psychiatrist. I believe that you will also get evidence about the only way you can make that kind of assessment is to

apply the kind of testing that was applied in this case.

That leads to, I believe, two more legal issues: the ten-year review period. So if Your Honor imposes GPS monitoring, the ten-year review period applies to Mr. Ross because the ten years is not tied to any level of risk. It just says you go ten years whether you pose no risk or a big risk, it doesn't really matter. That is, I think, unconstitutional in that it is no longer reasonable and it's not based on the risk that this person does or does not pose, it's disconnected from that risk of recidivating.

As well, for the same reasons, it's also punitive to do the ten years. If you're applying it solely because you simply want to apply it, it's disconnected and it has no basis in an individualized demonstration of risk of reoffending, it is now punitive; that's *ex post facto* and it raises all of those issues, which the government is not allowed to do.

I realize those have been addressed -- that those issues have been addressed

broadly, but I don't believe the ten-year part has specifically been addressed; so I will put that in the record, so that it's something that we can deal with.

THE COURT: All right. Okay. Yes, sir?

MR. BUCHANAN: As far as this evidence that Mr. Scalzo and Mr. Ross plan on presenting, the State would just make an objection to it as far as relevance goes because the statute is clear that there is no discretion in the court's hands.

As far as individually, the ten-year review period, as far as he says that is not reasonable or is not based on risk, well, the actually the ten-year review period has a built-in review and risk. It's not arbitrary. It actually has -- after ten years, you can have the information reviewed to see whether or not he is a risk. The court can make that finding.

It's actually imposed the solicitor's office. And if the court finds that it is not, then it's another five years before they can come back. It is potentially life but it

also has that review that is -- that simply will be factored in. After a period of time, it will be reviewed. Then after that, if they are still viewed as having a low risks of reoffending, it comes back after five years. Again, that is also built into the statute.

As far as the punitive nature of it, that's has been reviewed and has been found to be a civil remedy and not a part of the actual punishment, is not a part of the sentence.

THE COURT: Thank you. Next issue?

MR. SCALZO: I believe that should cover the issues in terms of framing the legal issues.

THE COURT: All right.

MR. SCALZO: I can call a witness if Your Honor would like for me to do that.

THE COURT: Absolutely.

MR. SCALZO: The defense would call Dr. William Burke. I have, Your Honor, his resume/CV, which I will hand to the State and to Your Honor.

THE COURT: I have in my possession a

copy of the *curriculum vitae*. Is there any objection to me accepting this as his resume?

MR. BUCHANAN: No objection, Your Honor.

THE COURT: Then I will accept this and you may proceed. I note for the record that The Citadel education.

DR. BURKE: Yes, sir.

(WITNESS TAKES STAND)

WILLIAM BURKE, having been sworn to tell the truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. SCALZO:

Q. Dr. Burke, would you tell the court what it is that you do a living, your professional capacity?

A. I have two jobs. One I'm a professor of Forensic Psychiatry at the Medical University of South Carolina. My job there is to teach psychiatrists and psychologists the tactics and theories and application to the treatment of sex offenders.

Secondary to that, I have a private practice in which I specialize in the

evaluation and treatment of sexual offenders.

Q. How long have you been doing each of those roles?

A. Well, I initially was a professor of Forensic Psychiatry at the University of South Carolina School of Medicine back -- I believe in 2005. Then I live in Charleston and would rather work in Charleston, so I was accepted as professor some five years at MUSC. So I've been evaluating and treating sex offenders fulltime since 1989.

Q. And your education is listed in your CV is accurate?

A. (Affirmative nod).

Q. That's in the record, so I won't go over there unless Your Honor needs me to. Would you explain to the court, have you been admitted as an expert in the field of, I guess, -- well, let me ask you this way, what would you describe your specific field to be?

A. I've been accepted as an expert witness as an expert in the evaluation, assessment of sexual offenders and for the treatment of sexual offenders in General Sessions court, criminal court, and for

sexually-violent predator hearings, both for the State -- working for the Attorney General's Office -- and working for private attorneys. I have also been accepted in military court, Family Court, and three or four other courts: Georgia, Florida and Minnesota.

Q. As a rough time, how many times have you testified as an expert in this capacity?

A. A couple of thousand.

Q. I think you said it but I want to be clear, based on your training and your skill, are you able to test for and render an opinion about the potential risk that a sex offender may pose to reoffending?

A. Yes, sir. By following the standards of care establish by the association for the treatment of sexual offenders and other association, APPLE, which is the psychiatric arm, uh, -- by following those standards, (affirmative nod).

I really don't look at it as rendering an opinion. I view it as more of a kind of answer to a math equation.

Q. Okay. But that is something that

you're trained to do and you're able to do in evaluating ---

A. (Affirmative nod), I've been trained to do and I've been accepted as an expert every time that I've testified, and I train other people.

MR. SCALZO: Your Honor, at this time we would offer him as an expert in psychosexual evaluation and treatment.

THE COURT: Any objection or voir dire?

MR. BUCHANAN: No objection.

THE COURT: Okay. So accepted.

DIRECT EXAMINATION CONTINUED

BY MR. SCALZO:

Q. Explain to the court, first in general and then we are to talk specifically about Mr. Ross, but general if you're tasked with trying to evaluate the risk of a sex offender. What is necessary to do -- what is it that you would do for you to do to render that opinion?

A. Well, first you establish a baseline mental status to make sure that you understand that the person understands what you

are trying to do, what the assessment process is.

Then you look for different kinds of psychological or psychiatric disorders which may be comorbid contributors to increase or decrease the likelihood of recidivism.

Then we use actuarial scales which are borrowed from the insurance industry. For example, if you smoke, eat red meat and don't exercise you're probably not going to live as long as someone who does the opposite, who works out and takes care of themselves. It's called survival curves.

So there are some innate static variables than an individual brings to an evaluation that we put into these actuarial scales. We use that as a baseline to start with.

So we have a baseline level of risk.

Then we add or subtract to that baseline any sort of psychological disorders, any other incidences involving law enforcement, any catastrophic events in their life, losing a loved one, a child or spouse or something like that.

Then also very importantly is the

objective evidence of sexual arousal and sexual interest, which presently can only be done by penile plethysmography; you know, in a plethysmograph laboratory. Then we also have a secondary objective measure, which is not -- it doesn't measure sexual arousal, it measures sexual interest, which is a visual response test.

Q. Sorry to interrupt you. You described those as objective, is that because they involve some physical or physiological type test?

A. Right. It's not someone's opinion, it's subjective evidence.

In response to the plethysmograph, it measures direct blood flow to and from the penis, which is presently the only way to establish sexual arousal.

We do this -- they are in a separate structure, with privacy, and are exposed to twenty-seven different stimulus presentations.

So that is very valuable -- from a statistical standpoint regarding rape and sexual abuse of children, it is the number

one predictor of recidivism.

Q. That particular test?

A. That particular test, (affirmative nod).

Q. We're going to come back to that. Of all the tests that you have described using, are those tests that you have come up with or it is that developed by other people?

A. Well, mostly developed by -- of the twelve tests, eleven have been developed by someone else. One, I developed and was part of.

Q. Those twelve, are those accepted by other experts in the field ---

A. Yes.

Q. --- and used ---

A. Yes, sir.

Q. I guess let me move on to a couple more general questions. We heard earlier in the arguments about this idea that if somebody is charged with their offense, a lewd act for example, and the only thing we know is that literal -- that literally lewd act is the charge. Based on your experience and training, is that sufficiently -- is that

enough information to be able to determine somebody's risk for recidivating.

A. Certainly not. It is wholly inadequate.

Q. What about that plus -- what other specific piece of information that may be a violation of the sex offender registry which would constitute either failing to come in and update your address or giving the wrong information or things of that nature. Can you take both of those or one or the other of those and get a valid risk assessment?

A. Well, from the perspective of a clinician who specializes in this filed and as a professor who teaches other professionals to do the same, it doesn't meet any code of ethics, it doesn't meet any code of standard of care for an evaluation. If I were to do that based on those two things, it would be malpractice.

Q. Besides it being malpractice, what is it about that limited information that is not either reliable or valid from a clinical standpoint?

A. When I say malpractice, I'm talking

about me as a clinician. I'm not talking about any attorneys or anything like that.

Q. Right.

A. I'm sorry. Ask me again.

Q. What is the problem with just taking one or both of those examples that I just gave you and making a risk assessment out of those two? What is the difference between that and what you do? Why is it unreliable to do it that way?

A. Well, there are so many factors associated with risk assessment that to just focus on two data points is insufficient. The more data points that you have the better risk assessment that you can make.

Q. All right. You described using twelve different tests?

A. Yes, sir.

Q. Is there a minimum number of tests that are expected to be used?

A. I would say that those are the minimum according to the standard of care. If you look at my report, I list them in association with the standard of care.

Q. Okay. Let's turn our attention to

Mr. Ross specifically. Were you asked to evaluate Mr. Ross from the standpoint of his risk to recidivate?

A. Yes, sir, I was.

Q. Did you conduct that evaluation?

A. Yes, sir.

Q. How long did that evaluation take to conduct?

A. About eight hours or so.

Q. And you described you used twelve different tests.

A. (Affirmative nod).

Q. Did that include the objective physiological test that you were talking about earlier?

A. Yes, sir.

Q. Were you able with all of these tests and your interaction with Mr. Ross to come to a determination, a professional determination about the kind of risk that he poses?

A. The specific question that I was tasked with addressing, which was his level of risk to commit a sex crime, a sexual offense, and he came out in the lowest

category of risk.

Q. Okay. I'd like to direct your attention to his age and ask you -- how old is he? Let me start there.

A. Sixty years old.

Q. At the time that you tested him, he was sixty years old?

A. Yes, sir.

Q. Is there anything significant about Mr. Ross and him being sixty years old with regard to your assessment of his risks?

A. Yes, sir. As I testified earlier, we start with actuarial scales to get a baseline level of risk. He had three factors that -- he scored three points.

One point was for having a CDV conviction. That is considered as evaluating one's risk.

A second point was that he'd been before a judge more than four times.

The third point was that the victim was not a blood/family member.

Now, the fact that he was sixty, in the equation you subtract two points from their level of risk because they are sixty. As

Your Honor stated earlier, the older that we get the less testosterone that we have -- and that's all been scientifically evaluated for risk assessment. The older -- the longer one lives, the less likely they are to reoffend.

Q. Okay. That is Mr. Ross presently?

A. Yes.

Q. And you did this evaluation when?

A. On the 20th.

Q. Last week?

A. Yes, sir.

Q. You also indicated before in your testimony that the physical evaluation that you did, I think you said was the number one predictor ---

A. According to Hanson and Bichiya -- and I am not sure that I am pronouncing the Frenchman's name correct absolutely correctly, -- in 2001, they did a meta-analysis of two hundred-some studies and found that the greatest predictor of recidivism was positive arousal of children in the laboratory, in a ppg laboratory. There is a whole lot of other data to support that the rape of an adult male or female has

higher response rates in the laboratory as well, so therefore it is reasonable to assume that's valid information as well.

Having said that, he didn't respond to anything in the laboratory significantly, which I think must be due to his age.

Q. Let's be clear, when you say that he didn't respond you mean a physiological response?

A. Right. It's mathematically a flat line, meaning that the blood flow to his penis didn't correlate to anything that he was exposed to, to any significant degree.

Q. And in your evaluation, do you test for -- or were you able to test for with Mr. Ross -- the condition of pedophilia?

A. Well, there's a couple of standards -- and it's recently changed, it changed last year.

It used to be that pedophilia used to be the worst diagnosis that you could give someone. Well, now that's changed. You can have pedophilia, and what that means is that you are chronically aroused to children, but you've never acted on it. They've changed

it. It is now to pedophilic disorder. Pedophilic disorder means that you have acted on it.

Well, in addition to that, to meet that criteria for pedophilic disorder, you have to have that condition -- you had to have acted out over a six-month period of time. I didn't have any evidence that had occurred. The evidence shown to me was a one-time occurrence in a very limited amount of time.

Secondary to that there's the visual sexual preference test where he showed no responses or sexual interest in children. He showed sexual interest in adult males and adult females.

He maintains that he is heterosexual. My experience tell me, especially when you've been incarcerated quite a while often times you can develop a coterminous or pararel sexual arousal pattern to involve men that is absent once you're out of prison.

Then, as I stated earlier, he didn't respond to children in the plethysmograph laboratory.

Those things combined, he did not meet

the criteria for pedophilia or pedophilic disorder.

Q. And for clarity's sake, when you're talking about the images you're essentially showing him pictures of children?

A. What we do is that we show nude images, initially, of adult women and adult children -- I'm sorry, adult women and men. The thought behind that is that you want to give the person an opportunity to respond to something that would be appropriate to respond to. Beyond that, there are no nude images.

What you have is a picture of a clothed child and then you hear a story. In this particular stimulus set, which was one of the things that I was involved with ten years ago, developing. There are real children's voices in the stimulus set. People who are attracted to children respond much greater to children's voices in the previous stimuli, which was used for thirty years, which is a monotone male voice telling the story.

Q. All right.

A. Uh, --

Q. Besides pedophilia, I guess there are conditions of paraphilia.

A. (Affirmative nod).

Q. Can you explain what that is? What paraphilia is?

A. Paraphilia is an abnormal sexual behavior or arousal, abnormal sexual arousal.

Q. Okay. And did he have any -- any of those that would have contributed to his risk to the community?

A. Well, what we look for in this particular plethysmograph laboratory study is that we look for arousal to appropriate stimuli, which we didn't find any.

Then we have arousal to age categories of children, male and female, and what we call persuasive scenarios and that is where the person is talking a child into sexual behavior.

Then we have those same categories in coercive scenarios, which is very blantantly clearly the rape of a child, forcing themselves.

Then we have nonsexual violence, which is a presentation of a child being

beaten, which is pretty horrible to hear.

Then we have those same categories for adults, male and female, as well.

He just didn't respond to anything.

Q. Bear with me one moment -- (reviewing file).

MR. SCALZO: I think that's all that I have at the moment, Judge.

THE COURT: Okay. Any questions?

SOLICITOR HOLLOWAY: No questions.

THE COURT: Thank you. Appreciate it.

(WITNESS STEPS DOWN)

THE COURT: Did you introduce the report as part of the ---

MR. SCALZO: I did not. Thank you, Judge. I previously shared that with Mr. Buchanan. I can hand this up to Your Honor, -- (tendering).

THE COURT: Thank you.

MR. SCALZO: I don't believe, other than his name, Mr. Ross' name, that there are any other identifiers -- social security numbers or anything like that, as far as the report goes. I would submit that for Your Honor.

COURT REPORTER: Defendant's Exhibit 1.

THE COURT: If there is no objection, I think that I would like to mark this as Court's Exhibit 2 and then the *curriculum vitae* as Court's Exhibit 3.

SOLICITOR HOLLOWAY: I just have my standard objection as to the relevance of this Motion.

THE COURT: I understand.

(SO ENTERED AS COURT'S EXHIBIT 2)

(SO ENTERED AS COURT'S EXHIBIT 3)

THE COURT: Thank you. Anything further for the record in this matter?

MR. SCALZO: The only thing I would do, Judge, is -- just a little bit of context. As you heard from Dr. Burke, the reasonableness in this context is a very complicated issue. You know, perhaps on like a drug test, you're being tested and you either have drugs in your system in a certain amount of you don't. While very important and maybe complex from a chemical standpoint, it's straightforward that it is either in your system or it is not.

Even as to the effect that it may have on human beings, as to impairment,

there's a much more clear-cut, easier way to determine what effect it will have.

This is an extremely individualized process. It is something that is not one test, but twelve tests -- as you've heard: the physiological, more objective physiological tests that are applied. Just the very nature of what we are dealing with is not something that lends itself to an easy 'you were convicted or this offense and therefore there is a risk level that you impose.' That in and of itself is not reasonable under the Fourth Amendment, the fact that Mr. Ross himself poses a low risk of reoffending presently, I would suggest is not reasonable for him individually to be given -- or Ordered -- to submit to GPS monitoring when the goal of that is to be able to investigate some crime as opposed to being likely to commit in the future. I address the idea that in itself is anathema to the Fourth Amendment, just the idea that the government can do things on future crimes with no particularized information.

Given what has been presented, there

is just no information that he is presently committing a crime or a likelihood so great that there needs to be some preventive measure. I think all of that goes back to the reasonableness analysis that needs to be had, that is individual to Mr. Ross. Thank you, Judge.

THE COURT: All right, good enough. I will take the matter under advisement. I will either issue an Order or I will direct one of y'all to issue one.

MR. BUCHANAN: Your Honor, I did prepare a memorandum in support as well as an Order, which I would like to pass up to the Court -- and I'll give a copy to Mr. Scalzo.

THE COURT: Okay. Mr. Scalzo, did you have a formal written Order that was filed with the Clerk?

MR. SCALZO: I did not. I can compose one ---

THE COURT: No, no, no. Not a written Order. I'm sorry. A Motion?

MR. SCALZO: Uh, -- no, because it was the State's Motion and I anticipated that we would simply object.

THE COURT: That's not a problem. I just wanted to make sure that I have everything that y'all have submitted be sometimes the Motions, particularly in General Sessions court, are filed with the Clerk and I don't have them when I -- when we come to a hearing on that. Thank you.

MR. SCALZO: And, Judge, I'm happy to provide you with a memorandum if Your Honor feels like he --

THE COURT: No, I think I got it. I think I got it. Thank you.

(HEARING CONCLDUED)

STATE OF SOUTH CAROLINA)
) CERTIFICATE
COUNTY OF GREENVILLE)

I, the undersigned Deborah Garrison, Circuit Court Reporter for the 9th Judicial Circuit, hereby certify that the foregoing is a complete and accurate transcript of the hearing held in the within action heard on October 26, 2015, before The Honorable Robin B. Stilwell;

I further certify that I am neither kin nor counsel to any of the parties and have no interest in the outcome of this action.

Deborah Garrison
Deborah Garrison

Greenville, South Carolina
February 5, 2016

State of South Carolina
The Circuit Court of the Thirteenth Judicial Circuit

Robin B. Stilwell
Judge

Greenville County Courthouse
305 East North Street, Suite 315
Greenville, SC 29601-2113
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rstilwellj@sccourts.org

November 23, 2015

Mr. Matthew C. Buchanan
General Counsel
SC DPPPS
2221 Devine Street
Columbia, SC 29250

Mr. Christopher D. Scalzo
Public Defender's Office
Suite 123
305 East North Street
Greenville, SC 29601

RE: State of South Carolina vs. David Wilkin Ross
1979-GS-23-1758

Gentlemen:

Enclosed herewith please find a copy of an Order in the above-referenced matter which has been executed by Judge Stilwell and filed in the Clerk of Court's Criminal Records Office. Please feel free to let me know should you have any questions or comments.

With kindest regards,

CAROLE O. RING
Secretary to the Honorable Robin B. Stilwell

cor
Enclosure

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
State of South Carolina,	)	
	)	**ORDER**
vs.	)	
	)	
David Wilkin Ross,	)	
	)	
Defendant.	)	1979-GS-23-1758

FILED GREENVILLE COUNTY CLERK OF COURT
2015 NOV 23 AM 11:06

This matter comes before the Court upon Motion of the South Carolina Department of Probation Parole and Pardon Services to require electronic monitoring of the Defendant pursuant to Section 23-3-540(E) of the South Carolina Code of Laws, 1976, as amended. The Defendant objects to GPS monitoring, arguing that the US Supreme Court case of *Grady v. North Carolina* 135 S.CT. 1368 (2015) requires that the trial court make a specific determination of the reasonableness of GPS imposition within the context of a search and seizure. The State argues that the imposition of GPS monitoring is mandatory under the relevant statute and that the trial court has no discretion in ordering GPS monitoring.

This Court has heard arguments from the parties, reviewed all submissions and memoranda of law, and reviewed the relevant case law. The South Carolina Supreme Court has reviewed the constitutionality of the mandatory imposition of GPS monitoring for sex offenders in *State v. Dykes*, 403 S.C. 499 (2013). The Court specifically found that the mandatory imposition of GPS monitoring was a reasonable exercise of government authority under a constitutional due process analysis. The US Supreme Court's holding in *Grady v. North Carolina* simply holds that the several states must review the civil remedies in the context of constitutional due process and citizens' reasonable expectations of privacy. Unlike North

Carolina, the Supreme Court in the State of South Carolina has analyzed this issue within the constitutional due process context prescribed by the US Supreme Court.

THEREFORE, the Court finds that the Defendant is required to register as a sex offender for Committing or Attempting a Lewd Act Upon a Child Under Sixteen pursuant to Section 16-15-140 of the South Carolina Code of Laws, 1976 as amended. Furthermore, Section 23-3-540(E) of the South Carolina Code mandates that this Court order the Defendant be monitored by the South Carolina Department of Probation, Parole and Pardon Services, with an active electronic monitoring device.

AND IT IS SO ORDERED.

ROBIN B. STILWELL

November 23, 2015
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
THE STATE	)	
	)	
v.	)	**MEMORANDUM IN SUPPORT OF COURT ORDER PURSUANT TO S.C. CODE 23-3-540(E)**
DAVID WILKIN ROSS	)	

COMES NOW the Department of Probation, Parole and Pardon Services (hereinafter, the Department), by and through its counsel, hereby moves this Court for an order directing the Department to monitor Mr. Ross with an active electronic monitoring device.

The Department submits the following in support of its motion:

1. Mr. Ross was convicted of Attempted Lewd Act on a Minor on July 29, 1979.
2. Mr. Ross was placed on the Sex Offender Registry pursuant to S.C. Code 23-3-430.
3. On January 19, 2011, Mr. Ross was convicted in Greenville Magistrate Court of a violation of the Sex Offender Registry pursuant to S.C. Code 23-3-470(B)(1), found in Article 7 of Title 23.
4. At the time of Mr. Ross's conviction for Failure to Register as a Sex Offender, S.C. Code 23-3-540(E) read:

> 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 sixteen pursuant to Section 16-15-140, and who violates a provision of this article, must be ordered by the court to be monitored by the Department of Probation, Parole and Pardon Services with an active electronic monitoring device.[1]

1 Section 23-3-540(E) was amended effective June 18, 2012, when the legislature substituted Criminal Sexual Conduct with a Minor in the Third Degree for Lewd Act on a Child under Sixteen.

5. In compliance with S.C. Code 23-3-540(E), the Department required Mr. Ross to be monitored by a GPS monitor.

At the time of Mr. Ross's conviction for Failure to Register as a Sex Offender, the magistrate court did not order the Department to monitor him. Because the language of the statute was read in mandatory terms, the Department still contacted Mr. Ross and affixed an active electronic monitoring device.

The Department submits that the mandatory language of S.C. Code 23-3-540(E) does not give the court discretion or the ability to refuse to order the GPS monitoring. Therefore, in the absence of an affirmative court order, the statute will operate to mandate the GPS monitoring anyway.

In the alternative, the magistrate court's error can be remedied by an order at a later date which will direct the Department to monitor Mr. Ross with the GPS device.

In State v. Boggs, 388 S.C. 314, 696 S.E.2d 597 (S.C. App. 2010), the trial court refused to grant the defendant credit for pre-trial detention despite the mandatory language contained in S.C. Code 24-13-40. The trial court refused to check the box on the sentence sheet which ordered the calculation of jail time credit, knowing that if he did not check the box, it would not be done. The language of S.C. Code 24-13-40 reads, "In every case in computing the time served by a prisoner, full credit against the sentence *must be given* for time served prior to trial and sentencing (emphasis added)."

The Court of Appeals ruled that because the language is mandatory, the trial court cannot deny jail time credit to the defendant. This would seem to operate even in cases where, instead of deliberate omission in the case of Boggs, the court erroneously fails to make the order due to oversight.

In the instant case, the mandatory language of S.C. Code 23-3-540(E) would operate similarly to the requirement that defendants receive credit for pre-trial detention. As the court has no discretion to not order the GPS monitoring, then the GPS monitoring must be ordered. In light of the magistrate court's oversight in Mr. Ross's situation, it would therefore be appropriate for this court to order the Department to monitor Mr. Ross under active electronic monitoring.

Respectfully Submitted,

Matthew C. Buchanan
General Counsel
S.C. DPPPS
2221 Devine Street
Columbia, SC 29250

October 26, 2015

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THE STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF GENERAL SESSIONS THIRTEENTH JUDICIAL CIRCUIT
THE STATE	)	Indictment No.:
v.	)	1979-GS-23-~~36095~~ 1758 (FJ) for CDS
DAVID WILKINS ROSS,	)	
DEFENDANT.	)	

DEFENDANT'S MEMORANDUM IN OPPOSITION TO THE STATE'S REQUEST FOR COURT-ORDERED GPS MONITORING PURSUANT TO S.C. CODE § 23-3-540(E)

The State moved on October 26, 2015, for an order of this Court directing Mr. Ross to submit to GPS monitoring pursuant to § 23-3-540(E). Mr. Ross, by and through undersigned counsel, argued in opposition to the motion and asked this Court to find that § 23-3-540(E) violates the 4th Amendment to the United States Constitution. At the conclusion of the motion hearing, this Court took the matter under advisement.

After oral argument on the motion, the State submitted to the court a "Memorandum in Support of Court Order Pursuant to S.C. Code 23-3-540(E)." Since undersigned counsel did not receive this memorandum prior to the hearing, this Memorandum in Opposition is submitted in response to the State's memorandum.

The State contended at the hearing and in its memorandum that this Court does not have any discretion in granting the requested order to impose GPS monitoring on Mr. Ross. This contention is incorrect. Although § 23-3-540(E), as written, uses mandatory language to direct a court to order GPS monitoring, the Supreme Court of the United States has, since the passage of § 23-3-540(E), issued an opinion putting this mandatory requirement at odds with the

requirements of the 4th Amendment to the United States Constitution. See *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015). There is now tension between § 23-3-540(E) and the 4th Amendment that can only be resolved one way: in favor of the 4th Amendment, which requires government searches be reasonable, and may only be court-ordered based on probable cause that a crime has been committed. The State has failed to establish the reasonableness of the search and has put forth no probable cause that a crime has been committed. Consequently, this Court cannot issue the requested order.

Mr. Ross respectfully submits this Court should find § 23-3-540(E)'s mandate violates the 4th Amendment's reasonableness clause and its warrant clause, and this Court should therefore deny the State's request.[1]

GPS monitoring using a device physically attached to a person's body is a search subject to the 4th Amendment. *Grady*, 135 S. Ct. at 1370. Consequently, the "order" the State seeks to have this Court issue pursuant to § 23-3-540(E) is a search warrant, as it is a court order permitting the State to intrude upon a constitutionally protected area in order to collect evidence. *Id.* As written, § 23-3-540(E) does not permit this Court to determine the reasonableness of the State's request to attach a GPS monitoring device to Mr. Ross, individually, nor does it allow this Court to determine whether the State has sufficient probable cause that a crime has been

[1] This Court is well within its jurisdiction to find § 23-3-540(E) unconstitutional. *See Kizer v. Clark*, 360 S.C. 86 (2004) (upholding trial court's finding that a state statute establishing the contiguity necessary for county incorporation unconstitutional); *Diamond v. Greenville County*, 325 S.C. 154 (1997) (upholding trial court's finding that the county's ordinance enacting a general ban on nudity was unconstitutional); *Shasta Beverages (Div. of Consol. Foods Corp.) v. South Carolina Tax Com.*, 280 S.C. 48 (1983) (upholding trial court's finding that certain provisions of a state statute concerning soft drinks was unconstitutional).

committed and that Mr. Ross committed that crime. As such, § 23-3-540(E)'s mandate violates both the 4th Amendment's reasonableness clause and its warrant clause.[2]

As a general legal proposition, courts have held that the 4th Amendment protects against unreasonable searches and seizures, and a search or seizure without individualized suspicion of wrongdoing, is generally unreasonable. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). The Supreme Court of the United States has held that there are "only limited circumstances" where individualized suspicion is not required. *Id*; *see also Chandler v. Miller*, 520 U.S. 305, 309 (1997) (recognizing that suspicionless searches are a "closely guarded

[2] The State contends in its memorandum that this Court has no discretion under § 23-3-540(E) to order GPS monitoring. It also contended at the hearing on October 26, 2015, that *Grady v. North Carolina*, *supra.*, did not apply to this case (or in South Carolina at all) because our Supreme Court had already ruled on the issue. This is an incomplete description of the case law. Our Supreme Court did address a 4th Amendment challenge to § 23-3-540's mandatory application of GPS monitoring—albeit to a different sub-section—in *State v. Dykes*, 403 S.C. 499, n.9 (2013 (cert. denied, 134 S. Ct. 1937, 188 L. Ed. 2d 964 (2014), resting its holding solely on a single citation in footnote 9 to *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). The *Dykes* opinion cited *Jimeno* solely for the proposition that only unreasonable searches violate the 4th Amendment. *Id.* (quoting *Jimeno*). Even if this single cite, absent any legal analysis, suffices to address the issue, *Grady* still changes the game. *Jimeno* is a case concerning the scope of consent to search by a police officer during a traffic stop. *See* 500 U.S. at 249 . The Supreme Court of the United States has consistently ruled that an acknowledgement of the general proposition that a particular government search is reasonable is not the proper analysis. *See* discussion below.

Moreover, in *Grady* the Court directed the Supreme Court of North Carolina to "examine whether the [North Carolina's] monitoring program [was] reasonable." *Grady*, at 1371. The Court stated that the "reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.* To support this standard of analysis, as well as to direct lower courts on properly analyzing the issue, the Court offered examples by way of *Samson v. California*, 547 U.S. 843 (2006) (analyzing the reasonableness of a suspicionless search of parolees) and *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (analyzing drug testing of student athletes). In both of these examples the Court conducted a totality of the circumstances analysis, with the *Acton* court specifically analyzing whether the drug testing regime fit the "special need" category of searches. *Grady* changes the game from *Dykes* because the Supreme Court of the United States specifically directed lower courts to "examine" the reasonableness of their monitoring programs consistent with the proper analysis the Court applied in 4th Amendment search cases, for example *Samson* and *Acton*. The Supreme Court of the United State meant for its *Grady* opinion to guide the lower courts' 4th Amendment analysis.

category of constitutionally permissible suspicionless searches"). Such suspicionless searches have only been upheld where there was consent, an exigent circumstance, or where they fit the so-called "special need" category as being "beyond the normal need for law enforcement." *Id.* GPS monitoring ordered pursuant to § 23-3-540(E) falls into none of these closely guarded exceptions. The State has never alleged, and there is no evidence, that Mr. Ross consented to GPS monitoring. The State has also never alleged or established any exigent circumstance requiring this type of search, relying solely on § 23-3-540(E)'s mandate for its requested search warrant.

As to the category of so-called "special need" searches, GPS monitoring under § 23-3-540(E) is not similar in application, scope or purpose to the types of searches found to fall into the special need category. What is clear from the case law defining this closely guarded and limited category of suspicionless searches is that the special need searches in question were not specifically directed at either criminal activity or the State's ordinary interest in enforcing its criminal laws. To the contrary, they are primarily directed at furthering the State's non-law enforcement or non-criminal investigatory needs. *See Acton*, 515 U.S. 646 (random drug testing of student-athletes); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (drug tests for U.S. Customs Services employees seeking transfer or promotion); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (drug and alcohol testing of railway employees involved in train accidents or who violate safety regulations); *New York v. Burger*, 482 U.S. 691 (1987) (administrative inspection of premises of a "closely regulated" business); *Michigan v. Tyler*, 436 U.S. 499 (1978) (administrative inspection of premises damaged by fire to determine cause of the fire); *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967) (administrative inspection to ensure city housing code compliance); *United States v. Martinez-*

Fuerte, 428 U.S. 543 (1976) (brief seizure of motorists at fixed Border Patrol checkpoints meant to capture illegal aliens); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (brief seizure of motorists at sobriety checkpoints meant to remove drunk drivers from the road); *Delaware v. Prouse*, 440 U.S. 648 (1979) (brief seizure of motorists at a roadblock meant to verify drivers' licenses and vehicle registration).

The Supreme Court of the United States has addressed the distinction at the heart of special need searches and those requiring individualized suspicion. *See Ferguson v. City of Charleston*, 532 U.S. 67, 78-81 (2001); *Chandler v. Miller*, 520 U.S. 305 (1997); *Edmond, supra*. The distinction is that, in cases where the search was upheld as a special need, the—to quote *Ferguson*—"'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement." *Id.* at 79. Clearly, *Edmond*, *Chandler*, and *Ferguson* stand for the proposition that searches primarily intended to (*Edmond* and *Chandler*) and those primarily served by (*Ferguson*) a general interest in the investigation or enforcement of crime do not fit the special need category.

In *Edmond*, the City of Indianapolis set up vehicle checkpoints in order to aid in the interdiction of illegal drugs. 531 U.S. at 34. The Court repeatedly noted that it had "never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." *Id.* at 41; *see also id.* at 38, 43, 44 and 47. The clear distinction drawn by the Court between the checkpoint at issue in *Edmond* and the checkpoints it had approved in the past was that those previously approved were "designed primarily to serve purposes closely related to...the necessity of ensuring roadway safety." *Id.* at 41. The Court held that drug interdiction is not related to roadway safety:

> Nor can the narcotics-interdiction purpose of the checkpoints be rationalized in terms of a highway safety concern similar to that present in *Sitz* [sobriety checkpoint aimed at drunk driving]. The detection and punishment of almost any criminal offense serves broadly the safety of the community, and our streets would no doubt be safer but for the scourge of illegal drugs. Only with respect to a smaller class of offenses, however, is society confronted with the type of immediate, vehicle-bound threat to life and limb that the sobriety checkpoint in *Sitz* was designed to eliminate.

Id. at 43.

In *Chandler*, Georgia enacted a statue requiring candidates for certain political offices to certify that they had passed a drug test. 520 U.S. at 308. The Court analyzed whether the "certification requirement [was] warranted by a special need." *Id.* at 318. Relying on the standard that the "special need for drug testing must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion," the Court determined Georgia had failed to meet the standard. *Id.* Georgia argued that drug use called an official's "judgement and integrity" into question, as well as jeopardized law enforcement efforts and "undermined public confidence and trust in elected officials." *Id.* Georgia acknowledged its ultimate purpose was "to deter unlawful drug users from becoming candidates and thus [stopping] them from attaining high office." *Id.* The Court found that Georgia failed to present a sufficient "concrete danger" and that the danger it did put forth was "simply hypothetical." *Id.* at 319. Ultimately, the Court summarized its holding this way:

> We reiterate... that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable"—for example, searches now routine at airports and at entrances to courts and other official buildings. ... But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.

Id. at 323.

In *Ferguson*, MUSC Hospital in Charleston implemented a policy wherein hospital staff would identify pregnant patients who may be abusing drugs, then test those patients and report the positive tests to law enforcement. 532 U.S. at 70-72. Again the Court sought to answer the question of whether this testing regime fit the "closely guarded category" of a special need search. *Id.* at 78. The Court found the testing regime did not fit the special need category, and therefore the warrantless and suspicionless search violated the 4th Amendment. *Id.* at 84. One of the relevant characteristics of the testing regime that established the goal was not a "beneficent" effort to help drug addicts—as the proponents argued—but established the law enforcement purpose of the regime was law enforcement's involvement at every stage. The policy was developed by the Charleston prosecutors and police, who "were extensively involved in the day-to-day administration of the policy." *Id.* at 82. The Court wrote:

> While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal. The threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose... was to ensure the use of those means. In our opinion, this distinction is critical. Because law enforcement involvement always serves some broader social purpose or objective... virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose. Such an approach is inconsistent with the Fourth Amendment.

Id. at 84 (italics included in original).

These three particular cases—not to mention the general rule that special needs does not include investigation of ordinary criminal wrongdoing—define the contours of the distinction between special need searches and searches requiring individualized suspicion.

From *Edmond* we derive an immediacy of danger requirement. And, so, unlike the immediate safety concern that a drunk driver poses on the roadway, Mr. Ross does not pose the same level of immediate risk to community safety. As Dr. Burke testified at the hearing on October 26, 2015, Mr. Ross presents a low risk of re-offending. *See also* Dr. Burke's report, *Defense Exhibit 1*, at 17 ("Mr. Ross's level of risk according to the Static 99, Stable 2007, and Acute 2007 were group classified in the lowest level of risk category. He does not appear to meet the diagnostic criteria for Pedophilic Disorder."). Moreover, Dr. Burke testified that a risk assessment based solely on either the name of the offense or the violation of the Sex Offender Registry or both was not only scientifically insufficient and unreliable, but that it was unethical for a psychiatrist to base a diagnosis on such a limited data set. There has been no presentation by the State of any immediate danger that GPS monitoring helps to alleviate—other than the potential enforcement of future, uncommitted criminal sexual conduct offenses.[3]

From *Chandler*, we derive an actual danger requirement. Like the hypothetical danger that a political candidate might abuse drugs, the danger that Mr. Ross—or any sex offender with a low risk of reoffending—poses remains hypothetical and not actual. This fact is recognized by the stated purpose of Article 13 itself: "Statistics show that sex offenders often pose a high risk of re-offending." S.C. Code of Laws § 23-3-400. The operative words being "statistics" and "often." Both establish that there is no actual or direct link to an immediate or even high risk of re-offending. They establish merely that it is possible, potential, hypothetical that some limited group of offenders pose a risk—those that "statistics" would tell us are most likely to re-offend.

[3] This uncontested evidence also establishes that, even if § 23-3-540(E)'s monitoring regime were to fit the "special need" category, it would not satisfy the requirement that the search be calibrated to the risk posed. *See Chandler*, 520 U.S. at 323. Since GPS monitoring is mandatory under the statute, it is divorced from the risk level Mr. Ross poses; consequently, there is no calibration between the dangers the search is meant to protect against and the actual risk Mr. Ross poses because risk of individualized reoffending is not considered.

This is exactly what Dr. Burke's uncontested testimony establishes: that actual risk cannot be assessed by merely looking to the offenses for which they were convicted; a much more thorough and individualized assessment of risk must be done by a trained professional. Grounding the basis for the search in "statistics" establishes that there are, in fact, circumstances where a person would and would not pose a danger—since statistics are a collection of data showing various levels of danger. Were it otherwise, then the danger sex offenders pose would not be a statistical possibility but a scientific fact.

From *Ferguson*, we derive a non-law enforcement means requirement. Without being too colloquial, this requirement is basically a version of "if it walks like a duck, swims like a duck and quacks like a duck, it's probably a duck." So, where MUSC's drug testing regime was administered almost exclusively by law enforcement to generate evidence for law enforcement purposes, general claims of beneficent purposes couldn't change the fact that, ultimately, the searches were not intended to address an immediate danger but to aid in the enforcement of ordinary crime. Section 23-3-540(E) similarly "quacks" like a program designed to aid in the enforcement of ordinary crime.

The Department of Probation, Pardon & Parole Services ("DPPPS") is a law enforcement agency. Its probation agents are trained at the police academy and have the authority to make arrests. It is an agency whose purpose is to aid in the carrying out of criminal sentences. DPPPS is statutorily responsible for conducting the monitoring. S.C. Code of Laws § 23-3-540(H). It is also responsible for collecting the fees. *Id.* at (K). It is DPPPS's responsibility to place a GPS monitor on offenders being released from SCDC. *Id.* at (M). It is a crime, for which DPPPS and/or local law enforcement can bring an arrest warrant, for tampering with or otherwise

violating the monitoring program. *Id.* at (I), (L). This is a program statutorily directed to be administered in every respect by a law enforcement agency for law enforcement purposes.

Under § 23-3-400, the purpose is to "provide law enforcement with the tools needed in investigating criminal offenses." S.C. Code of Laws § 23-3-400. This is clearly criminal investigation of ordinary crime. The aid referred to in the statue is meant to be provided to criminal investigations and comes in the form of "information about these convicted offenders who live within the law enforcement agency's jurisdiction." *Id.* Just as the drug test in *Ferguson* (and *Chandler*), and the checkpoints in *Edmonds*, were aimed at providing information about criminal violations, the "information" collected pursuant to GPS monitoring under § 23-3-540(E) is evidence of general criminal offenses. Again, the State has not presented any evidence of an immediate danger for which it is collecting evidence 24 hours per day, 7 days a week, 365 days a year for a minimum of 10 years other than for the investigation into ordinary criminal activity.

Moreover, the danger that § 23-3-540(E) is meant to address—sexual assault—is also simply hypothetical. While it is a serious and horrible potential crime, it remains a potential in the same way that drug abuse by potential candidates for elected office would pose merely a potential harm. Those special need searches that have been upheld were meant to address an immediate and existing harm—not a future, potential harm.

CONCLUSION

The GPS monitoring program created by § 23-3-540(E) is a suspicionless search with the goal of collecting unspecified evidence of conventional criminal activity. It is evidence in search of a crime that has not yet been committed. This type of suspicion-less search, where the primary purpose is to "detect evidence of ordinary criminal wrongdoing," lacks what the 4th Amendment requires: "some quantum of individualized suspicion." *Edmond*, at 38, 47; see *Arizona v. Gant*,

556 U.S. 332 (2009) ("searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable"). Therefore, for these reasons and those discussed above, Mr. Ross respectfully asks this Court to find § 23-3-540(E) violates the 4th Amendment and, accordingly, deny the State's request for GPS monitoring.

Respectfully submitted,

GREENVILLE PUBLIC DEFENDER OFFICE

By: _____

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Date: October 30, 2015

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Psychosexual Evaluation Report
PRIVATE

Client: David Ross **Evaluator:** William Burke, Ph.D.

Date of Assessment: October 20, 2015

Date of Birth: April 25, 1955

Waiver of Confidentiality

Prior to the beginning of this assessment Mr. Ross was fully informed that anything he discussed during this consultation could be reported in the following summary to his attorney Ms. Teal. He understood this as demonstrated by his ability to repeat back the conditions of this consultation as described above. He also signed a release of records, so this consultation could be advanced to his attorney Ms. Teal. This report contains personal information pertaining to Mr. Ross, and as such, it should be treated with utmost confidentiality, and should not be advanced forward without the written consent of Mr. Ross.

Warning Regarding the Release of Information

This psychosexual evaluation should not be released to the evaluee other than under the supervision of a mental health practitioner, because the information in this summary may be detrimental to the evaluee's emotional health.

Warning Regarding the Limitations of this Summary

This evaluation relied upon direct information from the patient, and collateral information provided by the patient and other sources. The validity of the information provided has not been established; therefore, the accuracy of this report is limited to the accuracy of the information provided. If additional

information is provided, subsequent to this report, we may reach different conclusions. Under these circumstances, we reserve the right to change our opinions. Given this and other limitations of the evaluation process, we are unable to determine an individual's past behavior or to predict an individual's future behavior with absolute certainty.

Rationale Regarding This Sex Offender Risk Assessment

The following risk assessment is designed to meet the Standards of Care as established by the Association for the Treatment of Sexual Abusers (ATSA). Per ATSA guidelines, an assessment should focus on a client's risk factors, clinical needs, strengths, risk management strategies, and the connections between these risks and needs. Additionally, a comprehensive assessment should include an evaluation of a client's abusive and non-abusive sexual behavior.

According to the ATSA guidelines, the following categories of information should be investigated:

a) Developmental History & Family Background
b) Education & Employment Histories
c) Medical & Mental Health Histories
d) Peer & Romantic Relationship Histories
e) Level of Cognitive Functioning
f) Antisocial Behavior
g) History of Aggression or Violence
h) Official & Unreported History of Sexual & Nonsexual Crimes
i) Psychopathy Assessment
j) Relevant Personality Traits (Empathy, Hostility, Risk Taking, & Impulsivity)
k) Sexual Fantasies, Urges, & Behaviors
l) Sexually Abusive Behavior (Details about victim, tactics, & circumstances in which the abuse occurred)
m) Substance Abuse
n) Use of Sexually Arousing Materials
o) Access to the Internet
p) Collateral Interviews (if available)
q) Relevant Psychological Testing
r) Psychophysiological Testing
s) Review of Official Documents

Assessment Instruments & Objective Measures:
Static 99R
Stable 2007
Acute 2007
Hare Psychopathy Checklist-Revised
Limestone Preftest Penile Plethysmograph
Mini Mental State Evaluation (MMSE)
Personality Assessment Inventory (PAI)
Conners Continuous Performance Test II
Michigan Alcohol Screening Test (MAST)
CAGE Alcohol Screening Test (CAGE)
Rapid Alcohol Problems Screen (RAPS4)
Internet Sex Screening Test (ISST)

Background Information: Mr. Ross is a 60-year-old African American male referred by his attorney for a risk assessment. Mr. Ross served eight years in prison for sexually molesting his niece for which he denies guilt.

Historical Information: Mr. Ross was born and raised in Greenville, SC. He was the third born child of a total of nine children from Frank Ross and Mary Goldsmith. He was raised by his mother and stepfather Garden Goldsmith. His father was from Philadelphia and would visit about once a year. Mr. Goldsmith worked at a furniture company and his mother worked as a cook at Ye Old Fireplace.

At the age of 12 Mr. Ross was placed in John G. Richardson reform school for being incorrigible. He stated, "I was staying out late and not coming home. I did not break the law otherwise." He returned home at around the age of 16. He stopped attending school in the 11th grade because he felt he was too far behind and would rather stay at home and help his mother. He could transport kerosene, cut grass, and deliver papers to help out financially. He stated, "The family was struggling and I needed to help the family."

At the age of 18 he went to work for S&S Cafeteria as a dish washer. He also worked at Ye Old Fireplace with his mother. He then worked as a truck driver transporting a large crane for Bishop and Crane company. After three years he went to work for Metromont Concrete Company driving a truck.

After being released from prison at the age of 27, Mr. Ross married Debra Peningraph who was 25 years old. They separated after three years "due to her

family staying in my business too much." He later lived with Margret Johnson for five years. Mr. Ross has not fathered any children.

He was granted disability for Hepatitis C and poor vision three years ago. He presently lives in boarding house on Trodder Street in Greenville. He also gets $140.00 in food stamps. He will on occasion help a friend who owns a tree service to haul limbs and clean debris. He also collects cans to resell.

Criminal Record: At the age of 19, in 1972 was sentenced to 8 years in prison for Breaking and Entering and Safe Cracking. He has stayed in and out of prison until he was 55 years old. Most releases from prison resulted in him being incarcerated once again within a year. In 1977 Mr. Ross was convicted of Criminal Sexual Conduct with a minor. He received a suspended sentence for 6 years of probation which he violated by another breaking and entering conviction. Mr. Ross denies the index offense.

Sex Offender Treatment History: Mr. Ross reported that he has never undergone any type of sex offender counseling.

Criminal History: Mr. Ross has an extremely long criminal record. His only sexual crime is the index offense which occurred in 1979. His other crimes were primarily burglary, stealing, and physical assaults.

Sexual History: Mr. Ross reported that his first sexual experience was at the age of 15 with a 15 year old female classmate. He estimated having a total of 9 different sexual partners, all female and of legal age.

Use of Sexually Arousing Materials
Mr. Ross reported that he has used the following sexually arousing materials during his lifetime: pornographic magazines. He first viewed pornographic magazines at the age of 18. He denied seeing pornographic movies. He denied ever being on the internet.

Medical History: Mr. Ross denied a history of seizure or head trauma.r He reported being hit in the head on two occasions—both from being assaulted with sticks—resulting in a loss of consciousness. He went to the emergency room both times and was later cleared to go home that same day. He had a surgical procedure while in prison "for a spot on my lung). He does not know why or the outcome of the surgery. Sometime in the early 1970s Mr. Ross was in a car accident resulting in his being hospitalized for 10 days. He has a prominent scar across his nose and

right cheek from this incident. He presently takes medication for hypertension and an ulcer.

Mental Status: Mr. Ross presented with a flat affect that brightened on approach. He appeared open with the assessment procedure and was methodical in his approach to the process. He appeared oriented to all four spheres. He reported no difficulty falling and/or staying asleep. He stated that his appetite was within normal limits. He denied suicidal ideation. He denied homicidal thoughts. He denied symptoms of depression. He denied delusional thought. He denied auditory and/or visual hallucinations. He could not complete Serial 7s but could complete serial 3s.

Mini Mental State Evaluation (MMSE): The MMSE is a brief screening test that quantitatively assesses the severity of cognitive impairment and can be used to document cognitive changes over time if necessary. The MMSE assesses Orientation (10 items), Registration (3 items), Attention & Calculation (1 item), Recall (3 items), and Language (9 items). Raw scores are corrected for age. A score of 23 or lower is indicative of cognitive impairment. Mr. Ross scored 27 on this instrument, suggesting that he does not suffer from any type of cognitive impairment. He could not complete Serial 7s but did complete Serial 3s.

Alcohol & Substance Abuse Screening:
Michigan Alcohol Screening Test (MAST)
CAGE Alcohol Screening Test (CAGE)
Rapid Alcohol Problems Screen (RAPS4)
The three screening tests listed above were utilized to facilitate with assessing potential alcohol or drug problems. Mr. Ross scored 3 on all three screening. This is an indication that he does suffer from some type of alcohol or substance abuse issue. He denied illicit or prescription drug abuse. Mr. Ross reported he began drinking alcohol at the age of 13. He admits to drinking excessively most of his life. He estimated drinking 6 pints of liquor a day up until two years ago. He stated, "Two years ago my doctor told me to cut back so now I drink about a pint a day." He tried marijuana in high school but has not use it since.

Level of Cognitive Functioning
Mr. Ross demonstrated no difficulty in understanding the assessment process. He demonstrated no difficulty understanding the items in each test or the purpose of each test.

Internet Sex Screening Test (ISST): The ISST is a nationally normed test designed to screen individuals for problematic online sexual behavior. The risk classification levels are as follows:

Score of 1 to 8 = **Low Risk Group**. One may or may not have a problem with sexual behavior online.
Score of 9 to 18 = **At-Risk Group**. One is "at-risk" for internet sexual behavior to interfere with significant areas of one's life. At this level of risk, one probably has had experienced consequences for on-line behavior.
Score of 19+ = **Highest Risk Group.** On line behavior may interfere and jeopardize important areas of one's life.

Mr. Ross's score on this scale was 0, categorizing him in the Lowest Risk Group for problematic internet use.

Conner's Continuous Performance Test (CPTII): The CPTII is an objective computer operated, nationally normed psychological test designed to assist in the diagnosis of inattention difficulties. The Confidence Index generated by the program is utilized to quantify the validity of the assessment. Mr. Ross's Confidence Index was 48.1 %. The CPT discriminant function indicates that the results better match a clinical than non-clinical profile. The confidence index can be described in the following way: The chances are 51.9 out of 100 that a clinically significant problem does not exist associated with inattention and impulsivity.

The CPT-II performs a self-diagnostic check of the accuracy of the timing of each CPT administration. There was no indication of any timing difficulties or respondent non-compliance, and the current administration should be considered valid. Overall the CPT-II results suggest that Mr. Ross does not suffer from significant impulse control or inattention problems.

The Hare Psychopathy Checklist-Revised (PCL-R) combines information from a clinical interview and other records. Data from these sources are used to rate 20 items, from which 3 scores are derived. The Total Score indicates overall level of psychopathy, a personality disorder describing individuals who are callous, lack empathy, and engage in destructive behaviors with apparently no concern for the rights or welfare of others. Mr. Ross's total score was 14. This score is elevated but below the clinical cut-off score of 30 (which indicates the presence of psychopathy). Mr. Ross does not appear to have a diagnosis of psychopathy.

Personality Assessment Inventory (PAI): The PAI is a self-report designed for the clinical assessment of psychopathology and personality. The PAI provides a number of validity indices that are designed to provide an assessment of factors that could distort the results of testing. Such factors could include failure to complete test items properly, carelessness, reading difficulties, confusion, exaggeration, malingering, or defensiveness. For this protocol, the number of uncompleted items is within acceptable limits, but one or more scales have a significant number (more than 20%) of missing items. Any interpretation provided in the report should therefore be viewed with caution.

Also evaluated is the extent to which the respondent attended appropriately and responded consistently to the content of test items. The respondent's scores suggest that he did attend appropriately to item content and responded in a consistent fashion to similar items.

The degree to which response styles may have affected or distorted the report of symptomatology on the inventory is also assessed. Certain of these indicators fall outside of the normal range, suggesting that the respondent may not have answered in a completely forthright manner; the nature of his responses might lead the evaluator to form a somewhat inaccurate impression of the client based upon the style of responding described below. The respondent's response patterns are unusual in that they indicate a defensiveness about particular personal shortcomings as well as an exaggeration of certain problems.

With respect to positive impression management, there is no evidence to suggest that the respondent was generally motivated to portray himself as being relatively free of common shortcomings or minor faults. However, certain aspects of the profile raise the possibility of denial of problems with drinking or drug use, as individuals with similar personality characteristics typically report greater involvement with alcohol or drugs than was described by this client. Interpretive hypotheses in this report regarding the abuse of these substances should be reviewed with caution.

With respect to negative impression management, there are indications that the respondent endorsed items that present an unfavorable impression. This result raises the possibility of a mild exaggeration of complaints and problems. Elevations in this range are often indicative of a "cry for help", or of a markedly negative evaluation of oneself and one's life. Although this pattern does not necessarily indicate a level of distortion that would render the test results uninterpretable, the interpretive hypotheses presented in this report could

overrepresent the extent and degree of significant test findings as a result of this tendency.

Clinical Features

The PAI clinical profile is marked by significant elevations across a number of different scales, indicating a broad range of clinical features and increasing the possibility of multiple diagnoses. The configuration of the clinical scales suggests a person with a history of drinking problems who is embittered and angry. His sensitivity and hostility in social interactions probably serves as a formidable obstacle to the development of close relationships, and thus he is likely to be withdrawn and isolated. Alcohol may be playing a functional role in helping him withdraw from such relationships or in reducing the anxiety and threat that they pose. The respondent likely ruminates about his life circumstances, and the urge to drink may be at the center of many of these ruminations. It is likely that there is significant impairment in social role performance that has resulted from his drinking; however, the respondent is more likely to attribute such problems to external factors than to admit their relation to his drinking.

The respondent's self-description indicates significant suspiciousness and hostility in his relations with others. He is quite sensitive in his interactions with others and is quick to harbor strong feelings of resentment as a result of perceived slights and insults. Although he may not describe himself as unduly suspicious, others are likely to view him as hypersensitive, hostile, and unforgiving. Working relationships with others are likely to be strained, despite any efforts by others to demonstrate support and assistance.

The respondent reports that his use of alcohol has had a negative impact on his life. Alcohol-related problems are likely, including difficulties in interpersonal relationships, difficulties on the job, and possible health complications.

The respondent demonstrates an unusual degree of concern about physical functioning and health matters and probable impairment arising from somatic symptoms. He is likely to report that his daily functioning has been compromised by numerous and varied physical problems. He feels that his health is not as good as that of his age peers and likely believes that his health problems are complex and difficult to treat successfully. Physical complaints are likely to focus on symptoms of distress in neurological and musculoskeletal systems, and may involve features often associated with conversion disorders, such as unusual sensory or motor dysfunction. He is likely to be continuously concerned with his health status and physical problems. His social interactions and conversations tend

to focus on his health problems, and his self-image may be largely influenced by a belief that he is handicapped by his poor health.

The respondent reports a number of difficulties consistent with a significant depressive experience. The quality of the respondent's depression seems primarily marked by physiological features, such as a disturbance in sleep pattern, a decrease in level of energy and sexual interest, and a loss of appetite and/or weight. However, he does not appear to be reporting a significant degree of dysphoria or thoughts of worthlessness and hopelessness. This pattern suggests that he might not recognize the aforementioned symptoms as signs of dysphoria and stress or may be repressing the experience of unhappiness to some extent. Certain elements of the respondent's self-description suggests that others are likely to see him as being withdrawn, aloof, and somewhat unconventional.
The respondent mentions that he is experiencing some degree of anxiety and stress; this degree of worry and sensitivity is still within what would be considered the normal range.

According to the respondent's self-report, he describes no significant problems in the following areas: extreme moodiness and impulsivity; unusually elevated mood or heightened activity; problematic behaviors used to manage anxiety.

Self-Concept
The self-concept of the respondent appears to involve a rather negative self-evaluation. He is likely to be self-critical, not handling setbacks very well and blaming himself for past failures and lost opportunities. He may inwardly be more troubled by self-doubt and misgivings about his adequacy than is apparent on the surface. He may tend to play down his successes as a result and probably sees such accomplishments as heavily depending on the efforts or good will of others.
Interpersonal and Social Environment
The respondent's interpersonal style seems best characterized as being very uncomfortable in social situations. He appears to have little interest in or need for interacting with others and likely takes a rather passive, submissive stance when dealing with others. This lack of interest and initiative may result in his being socially isolated, avoiding most social interactions rather than run the risk of being forced to make an active commitment to a relationship.

In considering the social environment of the respondent with respect to perceived stressors and the availability of social supports with which to deal with these stressors, his responses indicate that he is likely to be experiencing notable stress and turmoil in a number of major life areas. A review of his current employment

situation, financial status, and family and/or close relationships will clarify the importance of these in the overall clinical picture. Some of these stressors may involve relationship issues because he experiences his level of social support as being somewhat lower than that of the average adult. He may have relatively few close relationships or be dissatisfied with the quality of these relationships. Interventions directed at any problematic relationships (such as those involving family or marital problems) may be of some use in alleviating one potential source of dissatisfaction.

Treatment Considerations

Treatment considerations involve issues that can be important elements in case management and treatment planning. Interpretation is provided for three general areas relevant to treatment: behaviors that may serve as potential treatment complications, motivation for treatment, and aspects of the respondent's clinical picture that may complicate treatment efforts.

With respect to anger management, the respondent describes his temper as within the normal range, and as fairly well-controlled without apparent difficulty.
With respect to suicidal ideation, the respondent is not reporting distress from thoughts of self-harm.

The respondent's interest in and motivation for treatment is typical of individuals being seen in treatment settings, and he appears more motivated for treatment than adults who are not being seen in a therapeutic setting. His responses suggest an acknowledgement of important problems and the perception of a need for help in dealing with these problems. He reports a positive attitude towards the possibility of personal change, the value of therapy, and the importance of personal responsibility. In addition, he reports a number of other strengths that are positive indications for a relatively smooth treatment process and a reasonably good prognosis.

If treatment were to be considered for this individual, particular areas of attention or concern in the early stages of treatment could include:
He may have initial difficulty in placing trust in a treating professional as part of his more general problems in close relationships.

DSM-IV Diagnostic Possibilities

Listed below are DSM-IV diagnostic possibilities suggested by the configuration of PAI scale scores. The following are advanced as hypotheses; all available sources of information should be considered prior to establishing final diagnoses.

Axis I Diagnostic Considerations:

303.90 Alcohol Dependence
300.4 Dysthymic Disorder

Actuarial Instruments:
As a baseline level of risk, the STATIC 99R actuarial risk assessment instrument will be utilized to assign a general level of risk from which information and collected data will be utilized to determine whether Mr. Ross's dynamic risk factors would suggest that he be classified as a higher or lower (or same) level of risk as the baseline established by the STATIC 99R.

Stable and acute variables are dynamic (i.e. subject to change) and directly impact recidivism rates. Stable Variables are factors such as Intimacy Deficits, Social Influences, Attitudes Supportive of Sexual Assault, Sexual Self Regulation, and General Self Regulation. Acute Variables are factors such as substance Abuse, Negative Mood, Anger/ Hostility, and Opportunities for Victim Access.

STATIC 99R: The STATIC-99 is an instrument designed to assist in the prediction of sexual and violent recidivism for sexual offenders. This risk assessment instrument was originally developed by Hanson and Thornton (1999) based on follow-up studies from Canada and the United Kingdom with a total sample size of 1,301 sexual offenders. The STATIC-99R consists of 10 items and produces estimates of future risk based upon the number of risk factors present in any one individual. The risk factors included in the risk assessment instrument are the presence of prior sexual offences, having committed a current non-sexual violent offence, having a history of non-sexual violence, the number of previous sentencing dates, age of offender at time of assessment, having male victims, having never lived with a lover for two continuous years, having a history of non-contact sex offences, having unrelated victims, and having stranger victims. The STATIC-99R is a valid instrument to be utilized with individuals who have been charged with a sexual crime and have no prior charges or convictions.

The recidivism estimates provided by the STATIC-99R are group estimates based upon reconvictions and were derived from groups of individuals with these characteristics. As such, these estimates do not directly correspond to the recidivism risk of an individual offender. The offender's risk may be higher or lower than the probabilities estimated in the STATIC-99R depending on other risk

factors not measured by this instrument. This instrument should not be used with Young Offenders (those less than 18 years of age) or women.

Mr. Ross scored a -1 on this risk assessment instrument. Individuals with these characteristics, on average, sexually reoffend at 2.1% over 5 years. Based upon the STATIC-99r score, this places Mr. Ross in the **Low** risk category relative to other adult male sex offenders.

Based on a review of other risk factors in this case I believe that this STATIC-99R score accurately represents Mr. Ross's risk at this time regarding sexual recidivism. This predictive score does not take into account dynamic factors like the effect of treatment and supervision.

Stable 2007: The STABLE-2007 was developed to asses change in intermediate-term risk status, assess treatment needs, and help predict recidivism in sexual offenders. Hanson and Harris (2000, 2007) developed this risk assessment instrument based on a large prospective study from Canada and the states of Alaska and Iowa with a total sample size of 997 sexual offenders. The STABLE-2007 consists of 13 items and produces estimates of stable dynamic risk based upon the number of stable dynamic risk factors present in any one individual. The risk factors included are the presence or absence of significant social influences, capacity for relationship stability, emotional identification with children, hostility toward women, general social rejection, lack of concern for others, impulsivity, poor problem solving skills, negative emotionality, sex drive and preoccupation, sex as coping, deviant sexual preference and co-operation with supervision.

Mr. Ross scored an 8 out of a possible 26 points on the STABLE-2007 and this places him as moderate needs this assessment instrument. Men without a child sexual victim are scored out of 24 possible points. The STATIC-99R and the STABLE-2007 are then combined into a composite score. As Mr. Ross scored as a low risk on the STATIC-99R this score is combined with Mr. Ross' STABLE-2007 score of moderate needs to produce estimates of sexual recidivism, violent recidivism, and any criminal recidivism at one, to four years. The complete profile such matching Mr. Ross's has been seen to recidivate sexually at 1.1% over 2 years and 2.0% over 4 years placing him in the low nominal risk category for sexual recidivism. Men with the same risk profile as Mr. Ross have been seen to recidivate violently at 3.4% over 2 years and 4.8% over 4 years placing him in the low nominal risk category for violent recidivism. This combined STATIC-99/STABLE-2007 assessment places Mr. Ross in the lowest 35% percentile of risk in comparison to the samples of origin.

Acute 2007: The ACUTE-2007 was developed to assess change in short-term risk status and help predict recidivism in sexual offenders. This risk assessment instrument was developed by Hanson and Harris (2000, 2007) based upon a large prospective study from Canada and the states of Alaska and Iowa with a total sample size of 997 sexual offenders. The ACUTE-2007 consists of seven items and produces an estimate of risk for sexual and violent recidivism and a second risk of estimate for general recidivism. Estimates of acute dynamic risk are based upon the number of opportunities for victim access, hostility, sexual preoccupation, and rejection of supervision (four items) to produce an estimate of sexual and violent recidivism and then adding emotional collapse, collapse of social supports, and substance abuse for an estimate (seven items) of general recidivism risk. Mr. Ross scored as a lowpriority for sexual and violent recidivism and as a low priority for general recidivism. Combining Mr. Ross's STATIC-99/STABLE-2007 and ACUTE-2007 scores places Mr. Ross as a low Current Risk Priority for sexual and violent recidivism and low for general criminal recidivism.

The recidivism estimates provided by the STATIC-99/STABLE-2007 and ACUTE-2007 are group estimates based upon charges, reconvictions and breaches of conditional release derived from groups of individuals with these risk characteristics. As such, these estimates are based upon a group of offenders with the same risk profile as Mr. Ross. Mr. Ross's risk may be higher or lower than the estimated probabilities depending on other risk factors not measured by this instrument. This instrument should not be used with Young Offenders (those less than 18 years of age) or women.

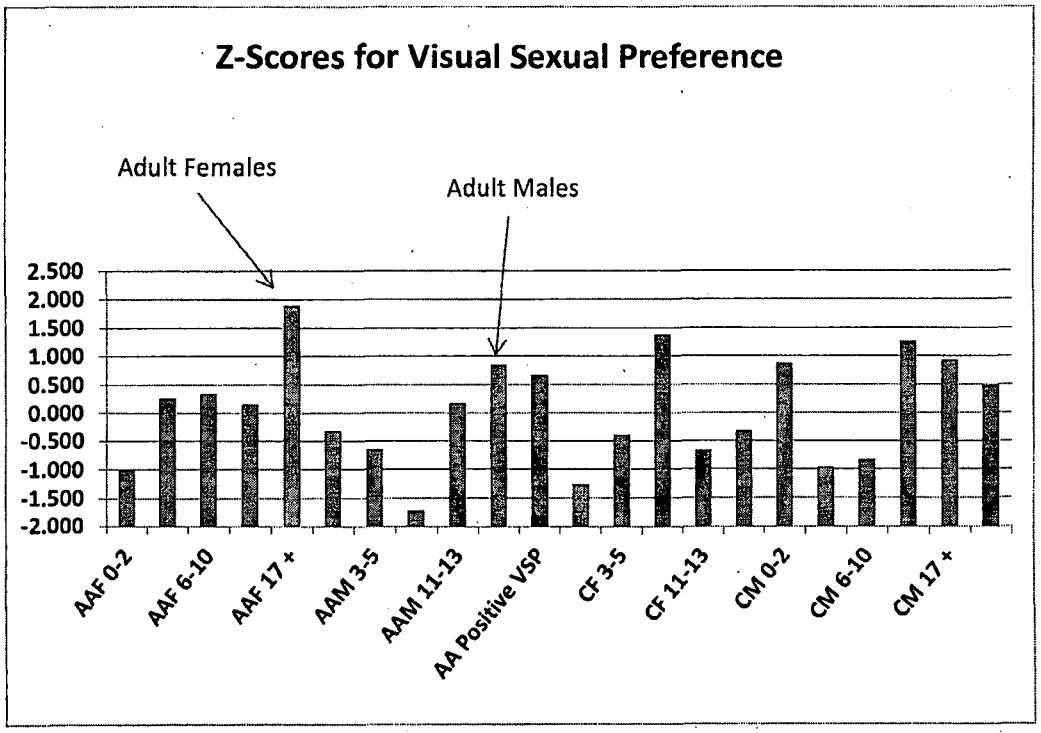
Review of STATIC 99RR, Stable 2007, and Acute 2007 Actuarial Results:

STATIC 99RR Predicts Re-Offense Rates Over 5 years.
Mr. Ross STATIC 99RR predicted recidivism rates are: **2.1%**

Stable 2007 Predicts Re-Offense Rates over the next 365 Days:
Mr. Ross Stable 2007 predicted recidivism rate is **0.7 %.**

Acute 2007 Predicts Re-Offense Rates over the next 45 Days:
Mr. Ross Acute 2007 predicted recidivism rate is **1%.**

Limestone Visual Sexual Preference Assessment (VSP): The Limestone VSP is an objective measure instrument designed to provide a rank order and quantitative comparison of sexual interests.



The Limestone VSP test provides viewing time data across five age ranges, male and female categories, with Caucasian and African American models. The Limestone VSP also provides the following related information:

1) Client's ipsative z-score comparisons of VSP data.
2) Client's profile as compared to know offender groups.
3) Client's endorsement of his or hers sexual interests.
4) Client's endorsements of cognitive distortions.
5) Client's endorsements regarding alcohol and drug abuse.
6) Client's endorsements on a Peer Relations Scale.
7) Two Lie Scales for validity assessment.

The results from the Limestone VSP Assessment provided the following information:

A) Mr. Ross was denying all aspects of the convictions against him.

B) Mr. Ross demonstrated significant visual sexual preference toward the **Adult Female** and **Adult Male** stimulus presentations.

C) Mr. Ross's Pedophilic Approximation Quotient is not applicable to this case.

D) Mr. Ross endorsed that he preferred sexual behavior with adult females in a consensual relationship and is presently not in a committed sexual relationship with an adult close to his age.

E) Mr. Ross did not endorse any cognitive distortions.

F) Mr. Ross maintained that he does not suffer from any type of alcohol or substance abuse problem.

Limestone Penile Plethysmograph: The Limestone Preftest Penile Plethysmograph is designed to measure sexual responsiveness to a variety of stimulus material across gender, age, and sexual activity. Simultaneously with his penile response, the subject's Galvanic Skin Response (GSR), body movement as detected by the Stingray Pneumatic Pad, and Respiration traces are monitored to attempt to detect faking. Penile tumescence is measured by a strain gauge that detects minute changes in penile engorgement. The assessment was conducted using the Limestone Prefest Plethysmograph system. Prior to the assessment, the instrument was calibrated using a "four step cone" between 80 mm and 120 mm utilizing an **Indium-Gallium** gauge.

The standardized stimulus material utilized with this examination was the Real Child Voices Stimulus set. The Limestone PPG test provides data across five age ranges, male and female categories, with persuasive and coercive presentations that utilizes same age and gender actors for each age and gender category. Additionally there are two neutral non-sexual stimuli to facilitate validity determination. The purpose of a physiological assessment for sexual interests was explained to Mr. Ross and a voluntary participation consent form was signed. Mr. Ross said his primary fantasies are about adult females. He stated he had not consumed any illegal drugs. He denied consuming alcohol within the past 24 hours before taking the PPG exam. He denied having a sexually transmittable disease.

The results of the PPG exam indicated that Mr. Ross did not exceed the minimum level of significance (4.7mm of stretch) for a valid profile. There was no indication of response interference.

Real Child Voices Stimulus Set

Trial Name	Max - Min	Z(Max-Min)
introduction	1.26	0.12
Adult Female Challenge	1.12	-0.03
Adult Male Challenge	1.13	-0.02
Child Exhibitionism	0.98	0.36
Grammar School Female Coercive	2.06	1.01
Adult Male Coercive	2.63	1.64
Neutral buildings	0	-1.27
Preschool Female Coercive	1.17	-0.79
Child Female Violence Non-Sexual	2.42	1.01
Infant Female	1.31	-0.85
Adult Female Coercive Adult	4.14	2.02
Grammar School Female	4.13	2.01
Teen female Persuasive	2.28	0.13
Grammar School Male Coercive	1.08	-1.08
Adult Female Exhibitionism	2.48	0.34
Infant Male	0.98	-1.18
Adult Male Persuasive	1.78	-0.37
Preschool Female Persuasive	2.47	0.33
Adult Female Persuasion	2.99	0.85
Preschool Male Persuasive	1.87	-0.28
Teen Female Coercive	2.29	0.14
Grammar School Male Persuasive	2.66	0.52
Teen male Persuasive	2.59	0.45
Nuetral Chairs	1.72	-0.43
Preschool Male Pcoercive	1.21	-0.95
Teen male Coercive	1.52	-0.63

Evaluations of sexual interest and sexual arousal are designed to determine the client's treatment needs and risk level. OBJECTIVE SEXUAL RESPONSE PATTERNS CANNOT AND SHOULD NOT BE INTERPETED AS INDICATIORS OF GUILT OR INNOCENCE REGARDING ANY SPECIFIC SEXUAL ACT.

Conclusions: Mr. Ross does not appear to have chronic **sexual interest** in deviant sexual stimuli, as evidenced by his Visual Sexual Preference Test results. Mr. Ross failed to demonstrate significant **sexual arousal** to any stimulus set during the PPG exam. There was no evidence of response interference during the PPG exam.

Addressing the discrepancy between the Limestone VSP and the Limestone PPG: Sexual interest is a cognitive construct. VRT and VSP are the manifestation of sexual interest. Sexual arousal is a physiological response to specific sexual stimuli. It is the final stage of the continuum of sexual attraction.

Singer (1984) identified three different stages of sexual attraction in males. These stages were: (a) an increased visual attention to the object of attraction, (b) movement toward that object, and (c) subsequent penile engorgement. VRT measures (a) and PPG measures (c).

It is not unusual for PPG and VSP not to match. Possible reasons for the discrepancy are: 1) the transparency of VSP; or 2) the absence of sexual interest in an object (i.e. a child) but having a sexual arousal response to an object (i.e. a child) when presented with the stimuli. Or 3) The PPG utilizes adult, adolescent, and children's voices in contextual sexual situations while VSP is a static picture.

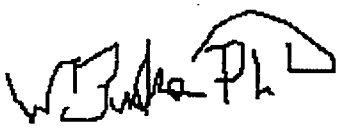
Mr. Ross's test results on the PAI suggested a dual diagnosis of Alcohol Dependence and a Major Depression. Mr. Ross's test results for the Hare PCL-R were elevated but did not suggest a diagnosis of psychopathy. Mr. Ross's level of risk according to the Static 99, Stable 2007, and Acute 2007 were group classified in the lowest level of risk category. He does not appear to meet the diagnostic criteria for Pedophilic Disorder.

Formulation: Mr. Ross is a 60 year old African American male with a very long history of committing primarily the crimes of burglary, assault, and grand larceny. He has one sexual offense conviction from 1979 involving a prepubescent niece which he denies. Given the actuarial formulas and objective testing (i.e. ppg and VSP), it appears Mr. Ross presents a very low level of risk to reoffend sexually.

Diagnostic Assessment:

Alcohol Dependence
Major Depression, moderate

Respectfully submitted;



William Burke, Ph.D. LPC
President & Clinical Director of SEA
Assistant Clinical Professor of Forensic Psychiatry
Medical University of South Carolina

78-GS-23-1758

The State of South Carolina

County of GREENVILLE

COURT OF GENERAL SESSIONS

JULY Term, 19 79

W.A. 6005

PLEAD GUILTY

THE STATE

vs.

DAVID GOLDSMITH W/M
a/k/a DAVID ROSS

Def.

INDICTMENT FOR

LEWD ACT UPON A CHILD

CDR Code: 103

Foreman of Grand Jury

Witnesses

J. L. LaFoy

6/4/79

Verdict

Foreman

NOW COMES THE DEFENDANT
David Goldsmith a/k/a David Ross
Who in open Court pleads guilty to the within Indictment:
And waives the finding of a true bill by the Grand Jury and
consents to sentence this JUL 25 1979 day of ______ 19___
ATTEST:
Rachel E.S. Tolly
Clerk of Court
x David Ross

Let the within defendant David Goldsmith
a/k/a David Ross be confined
in the custody of the State Board of Correction
for a period of ______
____ pay a fine of ______ Dollar

see probation
sentence

JUL 25 1979 _____ 19 ______
Presiding Judge

Form 4

The State of South Carolina
County of GREENVILLE

INDICTMENT FOR
LEWD ACT UPON A CHILD

At a Court of General Sessions, convened on the _____ day of _____
19___, the Grand Jurors of _____ County present upon their oath:

That DAVID GOLDSMITH , a/k/a DAVID ROSS

did in Greenville County on or about the 1st day of June
19 79 did wilfully and lewdly commit or attempt to commit a lewd and lascivious act upon or with the body, or a part or member thereof, of Victim , a child under the age of fourteen years, with the intent of arousing, appealing to or gratifying the lust or passions or sexual desires of the defendant or of such child.

Against the peace and dignity of the State, and contrary to the statute in such case and made and provided.

William H. Wilkins, Jr.
Solicitor

79-NB-1758

Form 9

STATE OF SOUTH CAROLINA — GENERAL SESSIONS COURT

COUNTY OF GREENVILLE — ORDER OF REVOCATION

STATE

-VS-

DAVID GOLDSMITH, Defendant — CASE NO: 150-934

Whereas the defendant, David Goldsmith, was duly sentenced on July 25, 19 79, in the General Sessions Court of Greenville County for the offense of Lewd Act Upon a Child and was given a sentence of six (6) years ~~years~~ in the custody of the Board of Corrections of the State of South Carolina ~~(and)(or) pay a fine of~~ _____, which sentence was suspended upon the service of ~~(and)(or) payment of~~ _____ and the defendant was placed on probation for a period of five (5) years.

THE CONDITIONS OF PROBATION BEING:

(1) Refrain from the Violation of any State, Federal or Municipal Laws.
(2) Refrain from associating with any person who has a criminal record.
(3) Refrain from the unlawful use of intoxicants and you will not frequent places where intoxicants are sold unlawfully.
(4) Refrain from the unlawful use of Narcotic Drugs and you will not frequent places where drugs are sold, dispensed or used unlawfully.
(5) Refrain from having in your possession firearms or other weapons
(6) Work diligently at a lawful occupation.
(7) Remain within the State of South Carolina unless permitted to leave by your supervising Probation Agent.
(8) Agree to waive extradition from any State of the United States.
(9) Follow the advice and instructions of the Probation Agent.
(10) Permit the Probation Agent to visit your home, place of employment or elsewhere at any time.
(11) Report to the Probation Agent as directed.
(12) Pay all fines as ordered by the Court.

SPECIAL CONDITIONS ORDERED BY THE COURT: To keep trash cleaned out from under railroad tressel over Richland Creek in Cleveland Park. To attend Greenville Area Mental Health Clinic.

It is now brought to my attention that this defendant has now violated sections 1 and 9 of the conditions of his Probation by: forfeiting $113 for Disorderly Conduct and $33 for Public Drunk in Greenville Municipal Court on 3-31-80; by forfeiting $113 for DUI - 1st offense, $113 for Resisting Arrest and $80 for Indecent Behavior in Greenville Municipal Court on 4-21-80; and by failing to follow the advice and instructions of his probation agent.

It is therefore ordered that the suspended sentence be revoked and the defendant David Goldsmith be required to serve the term provided for in the sentence as originally imposed, less good behavior allowance as provided by the statute, with defendant being given due credit for any portion of said sentence that has already been served, said sentence to run from date of commitment after suspension has been revoked. This probation is revoked in the absence (Presence) of the defendant. Further, a permanent Bench Warrant is to be issued and upon defendant's apprehension, he is to be afforded a hearing on this action.

This 24th. Day of February, 19 81, Greenville S.C.

Frank Eppes
Presiding Judge
Thirteenth Circuit

5-5-81: Affirmation hearing held this date and revocation action affirmed. To begin as of 12-19-80.

Frank Eppes
Frank Eppes

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,

LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 6th day of January, 2017.

RECEIVED
JAN 06 2017
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

RECEIVED

JAN 06 2017

SC Court of Appeals

Appeal from Greenville County

Honorable Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID WILKINS ROSS,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a copy of the Record on Appeal in the above-referenced case has been served upon Matthew Buchanan, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 6th day of January, 2017.

George Vlasis
Administrative Specialist

SUBCRIBED AND SWORN TO before me
this 6th day of January, 2017.

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