IN THE SUPREME COURT
STATE OF GEORGIA

JOSEPH PARK,
APPELLANT

v.

STATE OF GEORGIA,
RESPONDENT

Supreme Court Case No. S18A1211

On Appeal From the DeKalb County Superior Court
Case No. 17CR2065

APPELLANT'S BRIEF

Submitted by:

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STATEMENT OF THE CASE

The Sexual Offender Registration Review Board ("SORRB") classified Park as a sexually violent predator under O.C.G.A. §42-1-14 in August, 2011, based on his conviction on September 29, 2003, for child molestation in Douglas County. Park first sought re-evaluation of his classification, which was upheld on November 22, 2011. Park then sought judicial review of his classification in the Fulton County Superior Court pursuant to O.C.G.A. §42-1-14(c), but his classification was upheld.

Park was indicted by the DeKalb County Grand Jury on April 13, 2017, for, "knowingly and without authority destroy[ing] an electronic monitoring device used for the purpose of monitoring the accused, while wearing said electronic device[1] as required by O.C.G.A. §42-1-14," in violation of O.C.G.A. §16-7-29(b)(5), the enforcement/penalty provision for O.C.G.A. §42-1-14.

On June 28, 2017, Park timely filed a general demurrer to the indictment, arguing that O.C.G.A. §16-7-29(b)(5)'s predicate statute, O.C.G.A. §42-1-14, violated a number of his rights under the United States and Georgia Constitutions. The court held a hearing on the matter on September 26, 2017, and

[1] Along with enhanced reporting obligations, O.C.G.A. §42-1-14 requires Park to wear a GPS monitor with, "[t]he capacity to timely report or record a sexually dangerous predator's presence near or within a crime scene or in a prohibited area or the sexually dangerous predator's departure from specific geographic locations." O.C.G.A. §§42-1-14(e) & (f).

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then solicited post hearing briefs from the parties. The court ordered the state to prepare an order overruling Park's demurrer, which was signed and entered on January 19, 2018. Park then filed a Request for Certificate of Immediate Review on January 22, 2018. On January 23, 2018, the court entered an order certifying the issues raised in Park's pretrial demurrer for immediate review.

Park then filed a timely Application for Interlocutory Appeal on February 2, 2018. This Court granted Park's application on March 19, 2018, directing the parties to address the issue, "[w]hether the trial court erred in rejecting Park's claim that O.C.G.A. §42-1-14 is unconstitutional." The matter was docketed on May 9, 2018. Park applied for and was granted an extension of time in which to file his brief on May 10, 2018. See Ex. 1. Park now timely files his opening brief.

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STATEMENT OF JURISDICTION

The Supreme Court has exclusive jurisdiction over this interlocutory appeal pursuant to Art. 6, §6, ¶II of the Georgia Constitution, which vests the Court with such jurisdiction over, "[a]ll cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question."

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STATEMENT OF FACTS

At the motions hearing, the state called Sergeant Christopher Bothwell of the DeKalb County Sheriff's Department ("DCSD"), who is responsible for supervising Park's sex offender obligations. Bothwell testified that the GPS monitoring involved in Park's case was indistinct from that of, "somebody who is on electronic monitoring for parole or probation." See (Motions Hearing Transcript, ("T.") at 37). Bothwell added that DCSD is, "required to ankle monitor through a company called VeriTracks that we monitor specifically, daily, and we make contact with the individual periodically." (T. 16). VeriTracks is not "part of the Sheriff's Department," is not, "P.O.S.T. certified in any way," is not staffed by sheriffs or deputy sheriffs and is, instead, "a contracted company that provides the equipment" and monitors Park's movements. (T. 58). There is nothing in the record to indicate what – if any – security measures VeriTracks has taken to assure that Park's information, e.g. a 24/7 record of his movements, is not exposed beyond those who are monitoring him.

Park's GPS monitor is designed to receive a signal from a cell tower or satellite, but its coverage range is not total, i.e. there are times when Park is lawfully present at a location, but no signal given from his GPS monitor. (T. 48-50). Should VeriTracks alert DCSD about a lost signal, DCSD would first attempt

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to contact Park by phone and, if he did not answer or, like his GPS monitor, was out of signal range, they would, "go to his house." (T. 43; 60). Bothwell conceded that the monitor can lose its signal, for instance, "in certain places because of the concrete." (T. 50). However, there is no evidence that DCSD has any way of being aware that Park is, for instance, lawfully in a concrete building and not in a restricted area before taking investigative action, e.g. going to his home.

Park's movements are monitored as if he were on probation, but whereas general conditions of probation typically do not limit specific locations where a probationer can go (e.g. parks, schools, etc.), O.C.G.A. §42-1-14 does.[2] As happened in this case, when Park's monitor is out of range, malfunctioning or has a low battery, the DCSD attempts to contact him, at times coming to his home. (T. 17). Bothwell also testified that the monitor needs to be charged at least twice a day and conceded that the need to charge the monitor in turn requires Park to have daily access to electrical outlets for the rest of his life. (T. 48).

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[2] The trial court found that "[t]here are no limits on where Defendant Park can travel," because of O.C.G.A. §42-1-14. The plain language O.C.G.A. §42-1-14(e)(2), which dictates that Park's GPS monitor have, "[t]he capacity to timely report or record" his presence, "near or within a crime scene *or in a prohibited area*," flatly contradicts this conclusion. If there are areas prohibited to offenders, then there are limits on where Park can travel. See O.C.G.A. §42-1-17.

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ISSUE ON APPEAL

I. ***Whether The Trial Court Erred In Rejecting Park's Claims That O.C.G.A. §42-1-14 Is Unconstitutional***

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STANDARD OF REVIEW

This Court reviews "a trial court's ruling on a general ... demurrer *de novo* in order to determine whether the allegations in the indictment are legally sufficient." State v. Cohen, 302 Ga. 616, 618(1), 807 S.E.2d 861 (2017).

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ARGUMENT & CITATION OF AUTHORITY

I. *O.C.G.A. §42-1-14 VIOLATES EX POST FACTO PROHIBITIONS*

A. The Statute Is Punitive In Effect

Citing Smith v. Doe, 538 U.S. 84, 90(I)(A), 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), and conflating O.C.G.A. §42-1-14 with, "a whole scheme related to convicted sexual offenders," the trial court concluded that O.C.G.A. §42-1-14 is "civil regulatory mechanism" and thus does not violate either Article 1, §10 of the United States Constitution, or Art. 1, §1, ¶X of the Georgia Constitution.

In Smith, the United States Supreme Court held that Alaska's Sex Offender Registration and Notification Act consisting of a, "registration requirement and

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notification system" was, "nonpunitive," and thus did not violate the United States Constitution's *Ex Post Facto* Clause. This Court has noted, "[a] sexually dangerous predator is subject to requirements and restrictions *in addition to* those requirements and restrictions that apply to sexual offenders generally." (emphasis added) Gregory v. Sexual Offender Registration Review Bd., 298 Ga. 675, 682(1), 784 S.E.2d 392 (2016). See also O.C.G.A. §42-1-14(f). The Smith Court did not address any provisions which were in any way analogous those found in O.C.G.A. 42-1-14 and, therefore, Smith would not dictate any ruling in this case, although it may be relevant to the Court's *ex post facto* analysis, which will be addressed, *infra*. See Does #1-5 v. Snyder, 834 F.3d 696, 705 (6th Cir. 2016)(noting that Smith should not "be understood as writing a blank check to states to do whatever they please in this area").

The trial court held that Park did not demonstrate that O.C.G.A. §42-1-14 was punitive in effect and thus could not negate the General Assembly's boilerplate assertion in the preamble that, "the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender." 2006 Ga. Laws Act 571 (H.B. 1059). See also Thompson v. State, 278 Ga. 394, 395–

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96, 603 S.E.2d 233, 235 (2004)(holding "[i]f the effect of the statute is punitive, the statute is deemed *ex post facto* – even if the statute was intended to be regulatory").

1. *GPS monitoring constitutes a serious deprivation of liberty*

Using the analytical framework from Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 544, 9 L.Ed.2d 644 (1963), and incorporated in Smith, the trial court held that, "there are inconveniences associated with wearing the device, and larger policy issues associated with monitoring someone's movements day to day." (Order at 5). "However," the court continued, "the electronic monitoring as described in O.C.G.A. §42-1-14 is hardly akin to probation, incarceration or other traditionally punitive measures." Id.. Thus, the trial court concluded that Park's GPS monitoring did not "impose[] an affirmative restraint or disability," and that the scheme has not, "traditionally been regarded as punishment" Kennedy, 372 U.S. at 168(IV)(C).

On the other hand, this Court observed, "[t]he requirement that [an offender] submit to such electronic monitoring and tracking by means of a device attached to his person is – quite clearly, we think – a serious restraint on his liberty," and that the monitor is, "physically affixed to the person of a sexually dangerous predator ... adds, we think, to the weight of the liberty interest at

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stake." (cit.s omitted) Gregory, 298 Ga. at 686(2); 687-88(3). The New Jersey Supreme Court, in Riley v. New Jersey Parole Bd., 98 A.3d 544(I)(B) (N.J. 2014), held that the state's similarly configured sex offender monitoring program ("SOMA"), "looks like parole, restricts like parole, serves the general purpose of parole, and is run by the Parole Board. Calling this scheme by any other name does not alter its essential nature."

Park's GPS monitoring is indistinct from "somebody who is on [sic] an electronic monitoring for parole or probation." (T. 37). Like a probationer, Park must meet with law enforcement at least twice a year, is monitored "specifically, daily," by the DCSD and a third-party contractor and is restricted in terms of where he can travel. (T. 16; 60). Unlike a probationer, Park may not travel "to places where there are no electrical outlets," or "to places without GPS reception," without risking interaction with the DCSD, whether by phone, a visit to his home or, presumably, a warrant for his arrest if the first two do not work. Riley, 98 A.3d at 559(VII)(B). Whereas general conditions of probation typically do not limit specific locations where a probationer can go (e.g. parks, schools, etc.),[3] Park's movements are. Park's GPS monitor needs to be charged at least

[3] In cases of crimes against persons or property, terms of probation or parole often involve no contact orders with the victim, but that is a far cry from restricting Park from entire areas within

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twice a day[4] and that the need to charge the monitor in turn requires Park to have access to electricity for the rest of his life. (T. 48).

Park is monitored and controlled as if he were on probation or parole, if not more strictly. Compare O.C.G.A. §§42-1-14(e) & (f) with O.C.G.A. §§42-8-35(a)(3) & (14). These burdens demonstrate a "serious" and, "affirmative disability or restraint" created by monitoring on at least one fundamental life activity: travel, as examined further, *infra*. Gregory at 686(2). Therefore, Riley's analogy of sex offender monitoring to probation is appropriate, as is its observation that they, "have historically been viewed as punishment," and "impose an affirmative disability or restraint." Riley at 554(I)(B). See also Gregory, supra. So the trial court's observation that, "the electronic monitoring as described in O.C.G.A. §42-1-14 is hardly akin to probation, incarceration or other traditionally punitive measures" is demonstrably erroneous and the first two Mendoza-Martinez factors indicate that O.C.G.A. §42-1-14 is punitive.

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the state, which is more akin to banishment, which is traditionally associated with punishment. See e.g. Snyder, 834 F.3d at 701.

[4] Park has been instructed not to charge the monitor while sleeping or driving, such that he is not able to charge it when he might otherwise be inactive. Park has also been instructed not to submerge the charger, so that he is effectively prevented from taking a bath or swimming in a pool or large body of water. (T. 33). The offender, "must connect the ankle bracelet to the charging unit at least twice a day for a minimum of 30 minutes per day." (T. Ex. 2). Park notes that crging twice a day is more frequent than the interval (every 16 hours) the Court in Riley, infra, found to be constitutionally intolerable.

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2. *O.C.G.A. §42-1-14 promotes the traditional aims of punishment – retribution and deterrence*

Gregory observes that an offender's "classification [is] based principally on the written recommendation of a clinical evaluator, who relied in significant part on documentary evidence of the circumstances that led to" his conviction. 298 Ga. at 684(1). Thus, based "principally" on his conviction,[5] Park is subject to the monitoring and additional reporting requirements of O.C.G.A. §42-1-14. The fact that Park's conviction is necessary for his placement as an offender creates a direct tie between "necessary criminal responsibility" and his obligations under O.C.G.A. §42-1-14. Kansas v. Hendricks, 521 U.S. 346, 362(II)(B), 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). This smacks of, "retribution for a past misdeed," one of the two traditional goals of a punitive statute. Hendricks, 521 U.S. at 362(II)(B). See also Mendoza-Martinez at 168(IV)(C). As to the other traditional goal, deterrence, Bothwell candidly testified that his purpose in monitoring Park was as, "a deterrent." (T. 39). See also Smith, 538 U.S. at 102(II)(B).

In his concurrence in Hendricks, Justice Kennedy warned:

> [i]f ... civil confinement were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that

[5] "To the extent that a sexual offender is subject to [the registration requirements of O.C.G.A. §42-1-12] and residency and employment restrictions, it is his conviction alone that renders him subject to the requirements and restrictions." Gregory at 679-80(1).

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> civil detention is justified, our precedents would not suffice to validate it. Hendricks at 373 (Kennedy, J. concurring).

Addressing Justice Kennedy's concern about using "too imprecise a category" to justify a liberty deprivation, the Supreme Court observed:

> [t]he numerous procedural and evidentiary protections afforded here demonstrate that the Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards. Hendricks at 364(II)(B).

SORRB has the authority to classify anyone convicted of an offense subject to registration as a sexual predator and there are no precise criteria indicating what makes an offender a predator. The designation of an offender as a predator is, consequently, "too imprecise a category to offer a solid basis for concluding that" the liberty deprivation "is justified." Id. at 373 (Kennedy, J. concurring).

GPS monitoring confines Park within the monitor's signal range, in addition to excluding him from certain areas required by law. Bothwell testified that its purpose was deterrence and Park was saddled with the monitor almost entirely based on his prior conviction. The totality of these facts show that the monitoring program serves the dual purposes of deterrence and retribution and is, therefore, punitive.

3. *O.C.G.A. §42-1-14 is only rationally connected to punishment*

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a. *the record lacks evidence that recidivism is a problem among those classified as sexually violent predators*

The trial court's order does not directly address the third significant Mendoza-Martinez factor, "whether an alternative purpose to which [the statute] may rationally be connected is assignable for it." 372 U.S. at 169(IV)(C)(1). The Smith Court deemed this factor the "most significant" in discerning whether or not the statute in question was punitive. Smith, 538 U.S. at 102(II)(B). Elsewhere in its order, the court did note that the HB 1059's preamble "stated that it sought to address the extreme threat to the public that certain sex offenders present, noting that many offenders are likely to use physical violence and repeat their offenses." (Order at 5). See also 2006 Ga. Laws Act 571 (H.B. 1059). It also referenced a claim in Smith that such rates are, "'frightening and high.'" (Order at 8). But see Snyder, 834 F.3d at 704 (quoting Smith at 103(II)(B)).[6] Thus to establish a rational connection between the requirements of O.C.G.A. §42-1-14 and its stated goals, the state must show that recidivism was a problem, particularly among predators, and that monitoring predators reduces recidivism.

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[6] The origin of the "frightening and high" characterization is a curious matter, as it originated from a, "bare assertion" in *Psychology Today*, a "mass market magazine aimed at a lay audience." See Ira and Tara Ellman, "Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics, 30 Const. Comment. 495, 498 (2015). See also State v. Peterson-Beard, 327 P.3d 1127, 1146-47, 304 Kan. 192 (Kan. 2016)(Johnson, J. dissenting). Once that phrase entered the echo chamber, it was repeatedly cited in appellate decisions and legislative materials, as well as the state's post-hearing brief in this case, but never bolstered by any type of scientific evidence. See e.g. Smith, supra.

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The record lacks any evidence – statistical, scientific or anecdotal – to support the assertion that it is necessary to monitor those the state has deemed "predators" more closely than other sex offenders, let alone other convicted felons in general, to protect the public.[7] On the other hand, when the Sixth Circuit considered an *ex post facto* challenge to Michigan's registration and notification statute, which also was premised on concerns about, "recidivism rates of sex offenders," it disputed the assertion:

> [o]ne study suggests that sex offenders (a category that includes a great diversity of criminals, not just pedophiles) are actually *less* likely to recidivate than other sorts of criminals. Even more troubling is evidence in the record supporting a finding that offense-based public registration has, at best, no impact on recidivism. In fact, one statistical analysis in the record concluded that laws such as SORA actually *increase* the risk of recidivism, probably because they exacerbate risk factors for recidivism by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities. Tellingly, nothing the parties have pointed to in the

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[7] In his concurrence in Smith, Justice Souter cast some doubt on the incantation of "public safety" as a one-size-fits-all solution to the regulatory goal question:

> [t]he fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on, when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones. (cit.s) Smith, 538 U.S. at 108-09 (Souter, J. concurring).

O.C.G.A. §42-1-14 was enacted at the same time the General Assembly enhanced punishments for a number of sex offenses. See generally 2006 Ga Laws Act 571 (H.B. 1059). Knowing it could not overtly go back and enhance the punishment for offenders already convicted under those laws, the General Assembly transparently created a back door to punishing them further *vis-à-vis* O.C.G.A. §42-1-14.

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> record suggests that the residential restrictions have any beneficial effect on recidivism rates. (citations omitted). Snyder at 705 (quoting Smith at 103(II)(B)).

This case involves a statute more aggressive than a registration and notification statute like the one in Snyder, but Snyder cites J.J. Prescott & Jonah E. Rockoff, Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?, 54 J.L. & Econ. 161 (2011), which is instructive. After surveying a number of studies of recidivism rates for sex offenders before and after the enactment of registration and notification statutes, they note, "these studies find little evidence that such laws have had any meaningful influence on the overall number of sex offenses." Prescott & Rockoff at 163. They make the stunning suggestion that such laws may be, "encouraging recidivism among registered offenders, perhaps because of the social and financial costs associated with the public release of their criminal history and personal information. When a registry is of average size, adding a notification regime effectively increases the number of sex offenses by more than 1.57 percent." Prescott & Rockoff at 192.

In this case, "nothing the [state has] pointed to in the record suggests that the [enhanced obligations] have any beneficial effect on recidivism rates." Id.. Thus the record establishes no connection between O.C.G.A. and any function besides punishment.

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b. *the statute makes no provision for attempting to treat or rehabilitate offenders*

The lack of any sort of treatment plan or, "mechanism to reduce or end [monitoring] upon a showing the offender is no longer a threat to the community" further shows that punishment and not any sort of regulation is the goal of O.C.G.A. §42-1-14. Starkey v. Oklahoma Dept. of Corrections, 305 P.3d 1004, 1028(IV)(4), 2013 OK 43 (Okla. 2013). See also State v. Dykes, 744 S.E.2d 505, 507, 403 S.C. 499 (S.C. 2013). Imposition of the obligations under O.C.G.A. §§42-1-14(e) & (f) is for "the remainder of his or her natural life," there is no prospect of relief from the obligations and therefore no provision of treatment for offenders, either. The total absence of treatment and/or continuing review means that, even if the risk of Park re-offending diminishes with time, he has no way of seeking to have his obligations relaxed or removed.[8] The goal of the statute, then, is demonstrably nothing more than punishment and incapacitation of certain offenders. See Smith at 108-09 (Souter, J. concurring).

4. *The statute is excessive*

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[8] It is noteworthy in this regard that the Department of Justice found that "[t]he first year [after release from prison] is the period when much of the recidivism occurs, accounting for nearly two-thirds of all the recidivism in the first 3 years." Patrick A. Langan & David J. Levin, Bureau of Justice Stat., Dep't of Justice, Recidivism of Prisoners Released in 1994 at 3 (2002). It also demonstrated that the rate of recidivism among released prisoners declines markedly with age/the passage of time. Langan & Levin at 7 (Tab. 8).

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The arguments, *supra*, also have relevance to the question of whether or not O.C.G.A. §42-1-14 is excessive in relation to its alleged non-punitive purpose, the next Mendoza-Martinez factor. 372 U.S. at 169(IV)(C). The statute imposes lifetime monitoring of Park's every movement at his own expense, re-registration every six months (as opposed to every year), restriction of his movements to his GPS monitor's signal capabilities (which are narrower than any travel restrictions imposed by statute) and compelled incapacitation at least twice a day to charge the monitor. The state offered no record evidence that the enhanced obligations prevent or reduce recidivism among predators and the legislature's boilerplate declarations in the law's preamble cannot alone justify the statute's "serious restraint on [Park's] liberty." Gregory at 686.

Viewing the Mendoza-Martinez factors in their totality shows that the trial court should have concluded that the statute was punitive in effect and therefore violates the *Ex Post Facto* Clauses of the United States and Georgia Constitutions. See Riley, 98 A.3d 544, 560 (VII)(B).

B. *O.C.G.A. §42-1-14 Also Violates Georgia's Prohibition Of Retroactive Laws By Affecting His Vested Rights*

This Court has held that, "legislation which affects substantive rights may operate prospectively only," noting that, "substantive law is that law which

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creates rights, duties, and obligations." Daimler Chrysler Corp. v. Ferrante, 281 Ga. 273, 274, 637 S.E.2d 659 (2006)(quoting Enger v. Erwin, 245 Ga. 753, 754, 267 S.E.2d 25 (1980) and Polito v. Holland, 258 Ga. 54, 55, 365 S.E.2d 273 (1988)). In Hayes v. Howell, 251 Ga. 580, 584, 308 S.E.2d 170 (1983), this Court noted, "[u]nlike the federal constitution, our state constitution protects not only against the impairment of contracts, but also against retroactive (or retrospective) laws." The Court, in Candler v. Wilkerson, 223 Ga. 520, 521, 156 S.E.2d 358 (1967), explained that a statute may not, "be applied to vested rights fixed by judgments," which were rendered prior to enactment of the statute, because, "[t]o do so would cause the Act to offend the constitutional inhibition against retroactive laws." See also McCullough v. Comm. of Virginia, 172 U.S. 102, 123-24, 19 S.Ct. 134, 43 L.Ed.2d 382 (1898).

This Court has acknowledged that a party which continues to deprive a prisoner of his liberty beyond the term of his sentence has done so, "unlawfully," and, therefore, that the, "detention was illegal." Chattahoochee Brick Co. v. Goings, 135 Ga. 529, 69 S.E. 865, 867-868 (1910). See also Douthit v. Jones, 619 F.2d 527, 532 (5th Cir. 1980)(holding that continued deprivation of liberty thirty days beyond expiration of prisoner's sentence, absent a facially valid court order or warrant, "constitutes a deprivation of due process"). The principle driving

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these decisions was that one who is deprived of his liberty due to a criminal conviction is entitled to know when the deprivation will end and to not suffer any further deprivation (based on that conviction) afterward. Even a criminal defendant has a vested right to know the extent of the judgment against him.

In this case, Park had a "vested right[] fixed by judgment[]" in having his liberty deprived for twelve years, and no more, as a result of his conviction for child molestation. Candler, 223 Ga. at 521. See also Chattahoochee Brick Co., 69 S.E. at 867-868. O.C.G.A. §42-1-14 extended the deprivation of his liberty by the state, based on that conviction, to "the remainder of his ... natural life." O.C.G.A. §42-1-14(e)(3). Thus, O.C.G.A. §42-1-14 also offends the Georgia Constitution's prohibition of retroactive laws. See Daimler Chrysler Corp., 281 Ga. 273 at 274.

II. *O.C.G.A. §42-1-14 ALSO VIOLATES DOUBLE JEOPARDY PRINCIPLES*

Gregory found that, "classification [is] based principally on the written recommendation of a clinical evaluator, who relied in significant part on documentary evidence of the circumstances that led to" Park's conviction. 298 Ga. at 684(1). In Hendricks, the Supreme Court noted that one was not subject to involuntary civil commitment merely based on a criminal conviction; other requirements were necessary to trigger it. 521 U.S. at 370(II)(B)(1). This

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demonstrates that since Park's criminal conviction caused his classification, he is being punished a second time for acts for which he has already served his sentence in violation of the Double Jeopardy Clauses of both the United States and Georgia Constitutions. See U.S. Const. Amend V.. See also Ga. Const. Art. 1. §1, ¶XVIII. See Sentence Review Panel v. Moseley, 284 Ga. 128, 132(2), 663 S.E.2d 679.

III. *O.C.G.A. §42-1-14 DENIES PARK DUE PROCESS OF THE LAW*

A. *The Statute Fails To Provide Park With The Minimal Constitutional Protections Required In A Criminal Proceeding*

At Park's judicial review hearing, he was not guaranteed an attorney if he could not afford one, he was not protected against self-incrimination[9] and he was not afforded the opportunity to have a jury determine his classification. See also McDaniel v. State, 202 Ga. App. 409, 413(1), 414 S.E.2d 536 (1992)(right to counsel); Lejeune v. McLaughlin, 296 Ga. 291, 292(1), 766 S.E.2d 803 (2014)(right against self-incrimination); Geng v. State, 276 Ga. 428, 430(2), 578 S.E.2d 115 (2003)(right to trial by jury). The trial court gave the matter little attention, but, in Gregory, this Court at least hinted that it should be addressed:

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[9] Park had the burden of persuasion in the judicial review proceeding, which is inconsistent with preserving his right against self-incrimination since the Court could make adverse inferences based on Park's declining to testify. See O.C.G.A. §42-1-14(c)(stating that SORRB's findings "shall be considered *prima facie* evidence of the classification"). See also Matter of Redding, 269 Ga. 537, 538, 501 S.E.2d 499 (1998).

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> [w]e express no opinion about whether the Board, if it elects to establish procedures for an administrative hearing, would be required to afford a right of compulsory process to the sexual offender, whether the offender would have a right to counsel, and what rules of evidence would apply in such an administrative proceeding. 298 Ga. at 691(3) n. 20.

The Court's reference to the minimal constitutional protections attendant to a criminal proceeding as set forth in Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), suggests that the question of whether these protections should have been extended to Park in a classification hearing turns on whether that hearing constituted a punitive/criminal proceeding or not. Park has addressed that question in addressing the statute's *ex post facto* violation, but emphasizes that the failure to provide these protections when such a "serious restraint on [Park's] liberty" is at stake amounts to a due process violation. Gregory, supra.

B. O.C.G.A. §42-1-14 fails to provide for continuing review

The trial court found that O.C.G.A. §42-1-14's "limited duration" contributed to its finding that the statute was not excessive and therefore not punitive. (Order at 5). However, as noted *supra*, O.C.G.A. §42-1-14 is not limited in duration, it is permanent; Park is a predator, "for the remainder of his ... natural life" with no hope of being reclassified. O.C.G.A. §42-1-14(e).

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Continuing judicial review, that is, the ability for an offender to have his classification – and thus his obligations – under O.C.G.A. §42-1-14 reconsidered in light of changed circumstances or even merely the passage of time, is a hallmark of schemes similar to this one which have passed constitutional muster in other jurisdictions. See generally Hendricks at 367(II)(B). Compare O.C.G.A. §42-1-14(e)(requiring GPS monitoring "for the remainder of his or her natural life") with N.C. Gen. Stat. Ann. §14-208.43 (permitting review of GPS monitoring status in as little as a year) and S.C. Code Ann. §23-3-540(H)(permitting review of monitoring status ten years from the date the person begins to be monitored). See also Dykes, 744 S.E.2d at 507; Starkey, 305 P.3d at 1028(IV)(4). In his concurrence in Hendricks, Justice Kennedy highlighted the Kansas law's "attendant protections, including yearly review and review at any time at the insistance of the person confined," as indicia that the statute was, "within this pattern and tradition of civil confinement." 521 U.S. at 372 (Kennedy, J. concurring). No such protections are available to Park and their absence constitutes a continuing violation of his right to due process of the law which has resulted, among other things, in his prosecution in this case, since he

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has had no opportunity to demonstrate that he no longer should be required to wear a GPS monitor. [10]

The lack of any provision for continuing review[11] of Park's status, like the failure to provide him with the basic constitutional protections of counsel, a jury and silence violates his right to due process. See Dykes at 507.

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[10] O.C.G.A. §42-1-19(a) does allow certain offenders to seek relief from "registration requirements," and, "any residency or employment restrictions." In Gregory, this Court, citing this Code section, said in *dicta* that, "although there are procedures by which a sexual offender may seek to be released from the registration requirements and residency and employment restrictions, the standard for release is, quite understandably, more onerous for Level II risk assessments and sexually dangerous predators," but does not indicate whether or not relief under §42-1-19 would extend to obligations under §42-1-14. 298 Ga. at 684(1). There is no reference to O.C.G.A. §42-1-14(e), which is neither a registration requirement, nor a residency or employment restriction, in O.C.G.A. §42-1-19(a) and *vice versa*. Further, in order even to give a Superior Court discretion to remove Park from the "registration requirements," he would have to show that his conviction meets the criteria of O.C.G.A. §17-10-6.2, which he may not be able to do. See O.C.G.A. §42-1-19(a)(4). See also Yelverton v. State, 300 Ga. 312, 316(1), 794 S.E.2d 613 (2016).

[11] The state echoed an argument asserted by SORRB in Sexual Offender Registration Review Bd. v. Berzett, 301 Ga. 391, 801 S.E.2d 821 (2017), that, "an offender can seek review of his classification level, and thus his obligation to wear a monitor, ten years after his previous classification was determined," citing Ga. Comp. R. & Regs. r. 594-1-.04(e)(2). (State's Resp. to Demurrer at 15). SORRB is not an "agency" as that term is defined by O.C.G.A. §50-13-2(1), so neither this Court, nor the trial court may take judicial notice of any alleged rule or regulation created by SORRB and no such regulation was pled or proven in the lower court. See generally State v. Ponce, 279 Ga. 651, 619 S.E.2d 682 (2005). Even assuming the state could navigate around this procedural failure, it would have to confront the fact that the cited regulation contains *absolutely no such review provision.* It appears from the history of that regulation that SORRB cynically removed a provision providing a classification review like the one described in the court's order about a month after Berzett was decided, on July 11, 2017. This was precisely why Berzett had argued he could not rely on the purported regulation for continuing review: not only did SORRB lack the authority to propound the regulation in the first place, it can withdraw it any time without warning, leaving predators with no recourse. This Court should give positively no weight to any assertion that such a regulation assures continuing review of Park's classification.

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C. *O.C.G.A. §42-1-14 Authorizes An Unlawful Taking*

The trial court concluded that O.C.G.A. §42-1-14 does not authorize an unlawful taking because, there is, "absolutely no evidence of any cost imposed on Defendant Park associated with the monitoring, no evidence of his ability/inability to pay, no effort to enforce payment of fees and no consequence as a result of not paying." (Order at 6).

A statute violates the Takings Clauses of the United States and Georgia Constitutions when it forces, "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (citations and internal quotes omitted) Mann v. State, 278 Ga. 442, 443(2), 603 S.E.2d 283 (2004). Without receiving due process protections, addressed, *supra*, Park is bearing the cost of his monitoring, allegedly in the name of public safety which, therefore "should be borne by the public as a whole." Mann, 278 Ga. at 443(2). See also James B. Beam Distilling Co. v. State, 263 Ga. 609, 612(3), 437 S.E.2d 782 (1993). It seems self-evident that if something presents a threat to the safety of the "public as a whole," then the public collectively would have the responsibility to bear the cost of preventing such a threat. Id..

Park is required to, "pay the cost of" his GPS monitoring. O.C.G.A. §42-1-14(e). Although it is unclear from the statute exactly what specific "cost" Park is

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responsible for paying, the statute clearly burdens Park with the payment of "the cost of" his GPS monitoring. Thus there is conclusive evidence of a cost imposed by law upon Park, contrary to the trial court's finding. O.C.G.A. §42-1-14(e).

Also contrary to the trial court's finding, Park's ability to pay should not factor into his takings claim: just because he has the ability to pay a cost imposed by the government certainly does not mean he should be required to do so if that imposition violates his rights. The fact that Park is unable to pay would not change the equation, either, except to point out that the statute lacks any provision for what happens if Park, a retiree on a fixed income, cannot afford to pay the cost imposed at some point or lacks the resources (e.g. a home with electricity) to keep it functioning properly (i.e. charged twice a day). Cf. Santos, 284 Ga. at 518(1)(finding O.C.G.A. §42-1-12's notification requirements unconstitutionally vague as applied to homeless registrants).

Park believes it is significant that the state places the burden on him to pay for his GPS monitoring, meaning that he risks punishment if he fails to do so without any provision for what he can do if he is unable to pay the fee.[12]

[12] For that matter, O.C.G.A. §42-1-14(e) makes no provision for what should happen if Park were to lose his home. If Park lost his home, he would not be able to keep his monitor, which requires him to have access to a location with an electrical outlet at least twice a day, charged. Cf. Santos at 518(1). Although Georgia as a whole is not prone to extremely low winter temperatures, it should be noted that Park was also instructed not to expose his GPS monitor to

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Massachusetts found this type of burden to be too much for an offender compelled to wear an ankle monitor, even where he was provided with facilities for charging the device. See Commonwealth v. Canadyan, 944 N.E.2d 93, 96(2), 458 Mass. 574 (Mass. 2010). In South Carolina, if an offender, normally compelled to pay for GPS monitoring, shows that "exceptional circumstances exist such that these payments cause a severe hardship to the person," he may be "exempt ... from the payment of a part or all of the cost during a part or all of the duration of the time the person is required to be electronically monitored." S.C. Code Ann. §23-3-540(K). No such provision exists in the law in O.C.G.A. §42-1-14; Park is compelled to pay for his own monitoring or risk imprisonment for evading the GPS monitor's proper functioning. See O.C.G.A. §16-7-29(b)(5).

The trial court concluded that the lack of evidence that Park has ever been compelled to pay for his monitoring was significant to its conclusion that the statute did not authorize an unlawful taking. Whether or not the state has yet chosen to do that which the statute authorizes it to do is irrelevant; it will be of little comfort to Park if the cost of monitoring is not enforced for many months until the state shows up at his door with a large past due bill for his monitoring

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temperatures below -4°F, which could be an issue if he were homeless and subject to the elements. See Each State's Low Temperature Record, U.S.A. Today, August, 2006 (https://usatoday30.usatoday.com/weather/wcstates.htm)(noting that record low temperature in Georgia was -17°F).

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services. There is nothing in O.C.G.A. §42-1-14(e) that would prevent the state from doing just that.

The court's conclusion that there is no consequence for Park's failure to meet his statutory obligations under O.C.G.A. §42-1-14(e) is specious. For instance, if Park fails to pay for a GPS monitor which, due to his nonpayment, eventually becomes inoperable or cannot be replaced without payment of his costs, he is likely to be accused of, "circumvent[ing]" its operation under O.C.G.A. §16-7-29(b)(5).

Burdening Park with the cost of his monitoring, especially when there is no provision for what he is to do if he cannot afford said cost, and particularly when the process by which he so burdened is not constitutionally sound, violates Park's right against unlawful takings. Mann at 443(2). See also Canadyan, 944 N.E.2d at 96(2).

IV. *O.C.G.A. §42-1-14 AUTHORIZES AN UNREASONABLE, LIFETIME WARRANTLESS SEARCH OF PARK*

GPS monitoring of sex offenders is a search subject to Fourth Amendment protections. See Grady v. North Carolina, ___ U.S. ___, 135 S.Ct. 1368, 1371, 191 L.Ed.2d 459 (2015). The question left open in Grady is whether such a search is "unreasonable," within the contemplation of the Fourth Amendment. 135 S.Ct.

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at 1371. Neither this Court, nor the United States Supreme Court, has directly addressed the question since Grady.

The trial court found that O.C.G.A. §42-1-14 does not authorize an unreasonable search of offenders. See (Order at 6-7). The court described warrantless lifetime GPS monitoring vis-à-vis a device affixed to Park's body as, "limited in nature" and authorized by the "State's interests in preventing recidivism of sex offenders." (Order at 7). Although the United States Supreme Court has established that a citizen has a reasonable expectation of privacy in his movements against warrantless GPS monitoring in United States v. Jones, 565 U.S. 400, 428(IV)(B), 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), the trial court relied on Park's "lesser expectation of privacy given his status as a convicted sexual offender," to hold that his monitoring was not an unreasonable search. (Order at 7-8). The court's rationale evolves from the United States Supreme Court's decisions in cases where the subject of the search has a "special" relationship with the state. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653-54(C)(II-III), 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). See also Samson v. California, 547 U.S. 843, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006).

The United States Supreme Court has held:

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> [s]earch regimes where no warrant is ever required may be reasonable where special needs ... make the warrant and probable-cause requirement impracticable, *and* where the primary purpose of the searches is [d]istinguishable from the general interest in crime control." (emphasis added)(cit.s and internal quotes omitted) City of Los Angeles, Calif. v. Patel, ___ U.S. ___, 135 S. Ct. 2443, 2452, 192 L. Ed. 2d 435 (2015).

In order to exempt the lifetime search from the warrant requirement (which it would surely fail), the court aligns Park's situation with the random drug screening at issue in Vernonia School Dist. 47J, 515 U.S. at 653-54(C)(II-III), as both serving, "special needs." In Vernonia School Dist. 47J, the Court emphasized that, "such 'special needs' ... exist in the public school context," as well as the relationship between minors and school administrators acting *in loco parentis*, which it deemed "central" to its holding. 515 U.S. at 653-54(C)(II-III)

The trial court misinterpreted the type of "special needs" that Patel and Vernonia School Dist. 47J said would justify a warrantless search regime. The Patel Court held that the "special need" served by the statute in that case, a municipal code requiring that hotel guest records be made available to any police officer on demand, was to, "ensure compliance with the recordkeeping requirement, which in turn deters criminals from operating on the hotels'

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premises." 135 S.Ct. at 2248(I)(A), 2252(III)(A).[13] The Court cited Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620(III)(B), 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) as an example of "special needs" overcoming Fourth Amendment protections.

Skinner found that toxicological tests of certain railroad employees after certain triggering events (e.g. a major accident), "not to assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs'" justified "dispensing with the warrant requirement." 489 U.S. at 623(III)(B). The Court cited several factors justifying the exemption: the narrowly defined limits of such intrusions; the need to acquire blood and breath samples immediately when a triggering event occurred so as not to frustrate the purpose of the search and the need to rely on persons, "not in the business of investigating violations of the criminal laws or enforcing administrative codes and otherwise hav[ing] little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence." Skinner at 622-24(III)(B).

[13] The Respondent in the case argued that this showed that the principal purpose of the statute was "to facilitate criminal investigation." Patel at 2252(III)(A) n. 2. The Court, having already determined the statute to be unconstitutional, did not reach this issue.

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In the preamble to O.C.G.A. §42-1-14, the state claims that its search of Park is justified by the threat he and others designated as predators pose to public safety. See Ga. Laws Act 571 (H.B. 1059). The state claims that the threat they pose is their allegedly "frightening and high" rate of recidivism, i.e. their penchant to commit future crimes. Id. See also Smith at 103(II)(B). The purpose of monitoring, then, is, as Bothwell testified, to deter offenders from committing crime (i.e. "a general interest in crime control"), or as O.C.G.A. §42-1-14(e)(3) states, "to timely report and record a sexually dangerous predator's presence near or within a crime scene or in a prohibited area," (i.e. "to assist in the prosecution" of sex offenders when they break the law). Patel at 2452; Skinner at 623(III)(B); (T. 39). The state can hardly argue that the objective of preventing recidivism by predators by saddling them with a device capable of reporting their "presence near or within a crime scene" is one which is, "divorced from the State's general interest in law enforcement." Ferguson v. City of Charleston, 532 U.S. 67, 79, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001).

This distinguishes Park's case from Skinner, where the Supreme Court found that the search was not conducted, "to assist in the prosecution of employees." 489 U.S. at 623(III)(B). Additional distinctions show that this is not a case where "special needs" justify evasion of Fourth Amendment protections:

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whereas the intrusion in Skinner had narrowly defined limits, the intrusion in this case is plenary: O.C.G.A. §42-1-14 authorizes an uninterrupted round-the-clock search of Park's person "for the rest of his ... natural life." O.C.G.A. §42-1-14(e). See also (T. 16). The only need for acquiring Park's location immediately is for crime control, i.e. to locate him near a crime scene or a restricted area, which is distinct from the need in Skinner to acquire blood and urine samples before toxins evaporate. See O.C.G.A. §42-1-12(e)(3). Finally, unlike Skinner, the search conducted in this case is conducted by a P.O.S.T. certified DeKalb County Sheriff who assuredly is in "business of investigating violations of the criminal laws or enforcing administrative codes and otherwise hav[ing] little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence." Skinner at 624(III)(B). Thus, Georgia's purpose for conducting the warrantless search authorized in O.C.G.A. §42-1-14(e) is distinguishable from the FRA's purpose in doing so in Skinner.

The trial court also cited Samson to establish that a "special" relationship existed between Park and the state, justifying[14] a warrantless search. Samson creates a conundrum for the state and this Court: either the state must concede

[14] Park notes that he did not agree to any kind of waiver of his right against unreasonable searches pursuant to his sex offender registration, that he was not otherwise required to do so and that there is no record in this case of any such waiver. Cf. Samson, 547 U.S. at 843.

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that Park, as a law-abiding citizen, has a reasonable expectation of privacy in his movements, like the defendant in Jones, supra, or has a "diminished" expectation of privacy because he is on a "continuum of possible punishments" as a sex offender whose liberty is being deprived by the state as a result of his conviction. 547 U.S. at 849. Conceding the former, under Jones, is tantamount to conceding that the search was unreasonable. 132 S.Ct. at 963(IV)(B). Conceding the latter likewise concedes that Park's obligations under O.C.G.A. §42-1-14 are punitive, which would have consequences as to other issues raised in this appeal.

Accepting the trial court's position regarding the regulatory nature of O.C.G.A. §42-1-14, *arguendo*, Park is not in any way in the custody of the state and should not, therefore, be subject to the type of restraints to which parolees and probationers are subject. Samson at 846-47. Park is also not a child or ward of the state, such that the state is not acting *in loco parentis* in this case and cannot invoke Vernonia School Dist. 47J in claiming that it has a "special" relationship with him. 515 U.S. at 653-54(C)(II-III). Finally, no authority which has alleged that a "special need" justified a search not subject to the Fourth Amendment has authorized search as extensive as the one in the case at bar: a perpetual, lifetime recording of Park's movements.

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Consequently, the warrantless lifetime search of Park authorized by O.C.G.A. §42-1-14(e) violates his right against unreasonable search and seizure under the United States and Georgia Constitutions.

V. O.C.G.A. §§42-1-12(a)(21)(B) & 14 ARE VAGUE

The United States Supreme Court has held that, "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939). See also Wiggins v. State, 288 Ga. 169, 173(5), 702 S.E.2d 865 (2010). In Georgia, a statute must set forth, "'explicit standards,'" which will provide "fair warning" in order to achieve a "'reasonable degree of definitiveness.'" Union City Bd. of Zoning Appeals v. Justice Outdoor Displays, Inc., 266 Ga. 393, 402(5), 467 S.E.2d 875 (1996). So if a statute, "impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications," it is unconstitutionally vague. Thelan v. State, 272 Ga. 81, 82, 526 S.E.2d 60. See also Coates v. Cincinnati, 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971); Satterfield v. State, 260 Ga. 427, 428, 395 S.E.2d 816 (1990). The danger of a vague statute was spelled out by the United States

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Supreme Court in Papachristou v. City of Jacksonville, 405 U.S. 156, 165, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972):

> [i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large.

Georgia may not place Park in "peril of ... liberty" without establishing "'explicit standards,'" for classifying an offender as a sexually dangerous predator. Union City Bd. of Zoning Appeals, 266 Ga. at 402(5).

O.C.G.A. §42-1-14 does not define what a "sexually dangerous predator" is at all. O.C.G.A. §42-1-12(a)(21)(B) defines a "sexually dangerous predator" as an offender, "[w]ho is determined by the Sexual Offender Registration Review Board to be at risk of perpetrating any future dangerous sexual offense." This Court suggested that one may be classified a sexually dangerous predator "upon a finding that a sexual offender presents a significant risk of committing additional dangerous sexual offenses." Gregory at 680(1). This standard is not attributed to any authority, but may be taken from the language of O.C.G.A. §42-1-19(f), which though part of Georgia's Registry scheme, does not reference or purport to relate to an offender's classification under O.C.G.A. §42-1-14. Park cannot find any authority which authorizes such a finding in such circumstances. The only

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standard for classifying a predator which Park could find was the definition in O.C.G.A. §42-1-12(a)(21)(B). This standard is not helpful because it effectively says that a sexually dangerous predator is whatever SORRB says it is. Standards for determining how an offender is classified appear neither in the Code, nor anywhere else. Thus the definition of what is a "sexually dangerous predator" constitutes a plenary and unguided delegation of authority to SORRB. See Thelan, 272 Ga. at 82.

By holding that "much of the evidence relevant to classification as a sexually dangerous predator tends to be subjective in nature," this Court implied what Park now asserts: that O.C.G.A. §§42-1-12(a)(21)(B) & 14 "impermissibly delegate" the standard(s) for determining an offender's risk classification to SORRB, "for resolution on an *ad hoc* and subjective basis" with no objective guideposts or standards to marshal their decision. Thelan, 272 Ga. at 82. See also Gregory at 689(3). Without any standards to consider, Park was unable to, "foreshadow or adequately guard against" his classification as a predator. United States v. L. Cohen Grocery Co., 255 U.S. 81, 90(4), 41 S.Ct. 298, 65 L.Ed. 516 (1921). This impermissibly denied Park his right to "fair warning" of how he would be classified. Union City Bd. of Zoning Appeals at 402(5).

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Applying this Court's observation in Gregory, supra, regarding the "subjective" nature of the classification process to the standards to which such a process must adhere should cause the Court to conclude that Park is alleged to have violated a completely arbitrary and subjective law which fails fairly to notify those potentially subject to it how they might be classified. See Union City Bd. of Zoning Appeals, supra. As such his demurrer should have been granted.

VI. LIFETIME MONITORING OF PARK'S MOVEMENTS AND UNLAWFUL DISCLOSURE THEREOF VIOLATE PARK'S RIGHT TO PRIVACY

This Court has held that the right to privacy means, "protection for the individual from unnecessary public scrutiny," as well as the right, "to be free from the publicizing of one's private affairs with which the public has no legitimate concern." Powell v. State, 270 Ga. 327, 330(3), 510 S.E.2d 18 (1998). See also Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S.E. 68 (1905)). The Court noted that publication of a photograph without the subject's consent, "tends to bring plaintiff into ridicule before the world, and especially with his friends and acquaintances." Pavesich, 50 S.E. at 69. Discussing the right to privacy, the Court stated:

> [a]ny person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private, and there are matters public so far as the individual is

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> concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. Id. at 69-70.

The Supreme Court therefore concluded:

> [a]n individual has a right to enjoy life in any way that may be most agreeable and pleasant to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor, or violate public law or policy. Id..

By acknowledging the, "right to enjoy life in any way," vis-à-vis the right to privacy, the Court held:

> the individual who desires to live a life of seclusion cannot be compelled, against his consent, to exhibit his person in any public place, unless such exhibition is demanded by the law of the land. He may be required to come from his place of seclusion to perform public duties-to serve as a juror and to testify as a witness, and the like; but, when the public duty is once performed, if he exercises his liberty to go again into seclusion, no one can deny him the right. Id..

Although Georgia has not spoken on the issue of privacy as it relates to sex offender obligations of any kind, the seminal law for all sex offender registries, New Jersey's so-called "Megan's Law," was found to, "implicate[]" a registrant's privacy interests by disclosing their home addresses publicly. Paul P. v. Verniero, 170 F.3d 396, 404(III)(3d Cir. 1999). As argued, *supra*, "longer term GPS monitoring ... impinges on expectations of privacy." Jones at 415 (Sotomayor, J. concurring). In doing so, "GPS monitoring generates a precise, comprehensive

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record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious and sexual associations," and recording such information, "enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on." Id..

Per O.C.G.A. §§42-1-12(h)(2)(C)(v) & (i)(2), a record of Park's movements is required to be stored by the DCSD and provided to the GBI. The Code requires this information to be treated as "private data" and may only be disclosed to law enforcement agencies for law enforcement purposes and government agencies conducting background checks. See O.C.G.A. §42-1-12(o). However, Bothwell testified at the hearing that *all* of Park's tracking data is collected by a monitoring company, VeriTracks, which actually monitors Park and alerts the DCSD as to any irregularities. (T. 16; 21; 41; 57-58; 60). VeriTracks is not "part of the Sheriff's Department," is not, "P.O.S.T. certified in any way," is not staffed by sheriffs or deputy sheriffs and is, instead, "a contracted company that provides the equipment" and monitors Park's movements. (T. 58).

The GPS Monitoring Conditions which the DCSD presented to Park on February 9, 2016, are not consistent with these laws, in that the document states, "all movement will be tracked and stored as an official record." See (T. Ex. 2).

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"[O]fficial record" is not a term defined anywhere in the Code, though when the term is used in statutes irrelevant to the present matter, it alludes to records which are generally available to the public. See e.g. O.C.G.A. §24-9-902(4)(stating that an "official record" is a self-authenticating document).

Characterizing the record of Park's daily movements as an, "official record" in that sense would directly contravene O.C.G.A. §42-1-12(o), inevitably inviting "encroachment by the public upon [Park's] rights which are of a private nature" and "compel[ling Park], against his consent, to exhibit his person in a[] public place." Pavesich at 70. In fact, recording Park's movements every day and not strictly limiting access to that data ostensibly renders everywhere Park goes a "public place." Id.. Moreover, the use of a third party which is neither a law enforcement agency, nor a government agency to observe and collect records of Park's daily movements is a blatant violation of O.C.G.A. §42-1-12(o) which also subjects Park to, "unnecessary public scrutiny" vis-à-vis the disclosure of what the law has deemed to be private data to the public, i.e. VeriTracks.[15] Powell, 270 Ga. at 330(3).

[15] The prospect of a data breach and the consequences thereto are not far-fetched or insignificant in this regard. There is nothing in the record to indicate what security measures VeriTracks has taken to assure that Park's information is not exposed beyond those who are monitoring him.

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O.C.G.A. §42-1-14(e) not only violates Park's, "right to a 'legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation,'" by permanently affixing a tracking device to him, it curbs his ability to move himself, "to whatsoever place [his] own inclination may direct," even though his doing so in no way infringes on any other citizen's right to do the same. Pavesich at 70. As such, the state's permanently attaching a GPS monitor to Park's body, when he is neither a probationer, nor parolee, is a violation of his right to privacy and the statute must therefore be struck.

VII. *O.C.G.A. §42-1-14 OBLITERATES AN IMPORTANT ASPECT OF PARK'S RIGHT AGAINST SELF-INCRIMINATION*

O.C.G.A. §42-1-14(e)(2) requires Park to wear a GPS monitoring system which has, "[t]he capacity to timely report or record a sexually dangerous predator's presence near or within a crime scene or in a prohibited area or the sexually dangerous predator's departure from specific geographic locations." The specific requirement that the device have the ability to report or record Park's presence, "near or within a crime scene," by definition surrenders Park's right against self-incrimination pursuant to the Fifth Amendment to the United States Constitution and the Art. 1, §1, ¶XVI of the Georgia Constitution.

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If Park is not being punished, but merely regulated, by the state, confronting him with this sort of Hobson's choice is completely inconsistent with his rights under the Fifth Amendment to the United States Constitution and its parallel provision, Art. I, §1, ¶XIII of the Georgia Constitution. See Marchetti v. United States, 390 U.S. 39, 48, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968). See also Grosso v. United States, 390 U.S. 62, 66, 88 S.Ct. 709, 19 L.Ed.2d 906 (1968); Leary v. United States, 395 U.S. 6, 53-54, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); Albertson v. Subversive Activities Control Board, 382 U.S. 70, 78, 86 S.Ct. 194, 15 L.Ed.2d 165 (1965).

VIII. *O.C.G.A. §42-1-14 VIOLATES PARK'S RIGHT TO EQUAL PROTECTION OF THE LAWS BY TREATING HIM DIFFERENTLY THAN OTHER CONVICTED FELONS*

Where, "state laws impinge on personal rights protected by the Constitution," strict scrutiny is applied and the law, "will be sustained only if they are suitably tailored to serve a compelling state interest." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 440(II), 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).[16] Where legislation does not implicate a fundamental right or involve a

[16] Among the authorities City of Cleburne cited to support this point was Shapiro v. Thompson, 394 U.S. 618, 629(III), 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), which, much like Pavesich, supra, acknowledged a citizen's right, "to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement."

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suspect class, "[t]he Supreme Court holds that in order to withstand scrutiny under the Fifth and Fourteenth amendments to the United States Constitution, a statute or ordinance must bear a rational relationship to a legitimate legislative goal or purpose." American Canine Foundation v. City of Aurora, Colo., ___ F.Supp.2d ___, 2008 WL 2229943 at *7 (D. Colo. 2008).

Even where a legitimate legislative goal or purpose may be articulated, the state must then connect the legislative action taken with the goal sought to establish a rational relationship. See American Canine Foundation, 2008 WL 222934 at *8. The state may not rely on a classification whose relationship to the goal is so attenuated as to render the distinction arbitrary or irrational. Further, "some objectives – such as 'a bare ... desire to harm a politically unpopular group –' are not legitimate state interests." City of Cleburne, 473 U.S. at 446-47(III)(quoting U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 534(II), 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973)).

Subjecting Park to O.C.G.A. §42-1-14 impairs his right to travel anywhere he wishes. See Pavesich, supra. See also Riley, supra. Park, who is not on parole or probation, may not travel anywhere where his GPS monitor cannot get a signal, essentially confining him to cell phone range. (T. 48-50). Consequently, O.C.G.A. §42-1-14 "impinge[s] on personal rights protected by the Constitution,"

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and the statute, "will be sustained only if they are suitably tailored to serve a compelling state interest." City of Cleburne, 473 U.S. at 440(II). The question which this presents the Court is whether the state has shown that sexual predators threaten public safety in a way that other convicted felons – not subject to classification and supervision under O.C.G.A. §42-1-14 – do not. If it has, the next question is whether O.C.G.A. §42-1-14 is "suitably tailored[17] to serve a compelling state interest." City of Cleburne at 440(II).

The state believes that what distinguishes predators from other felons is the "high level of threat that a sexual predator presents to the public safety and the long-term effects suffered by victims of sex offenses." 2006 Ga Laws Act 571 (H.B. 1059). American Canine Foundation dealt with an analogous situation: a municipal ordinance "which banned the ownership of specific dog breeds (including pit bull breeds) after January 31, 2006," and justified the same based on those breeds' threat to public safety. 2008 WL 222934 at *2. The court contrasted that case with several similar cases from other jurisdictions wherein, "substantial evidence was submitted that pit bulls presented a special threat to the safety of the residents of the village over and above that presented by other breeds of dog." American Canine Foundation at *8 (citing Garcia v. Village of Tijeras,

[17] Park touched on this issue in his *ex post facto* arguments and incorporates those arguments, *infra*, by reference.

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767 P.2d 355, 361(2), 108 N.M. 116 (N.M. 1988)). Unlike those cases, "no evidence or facts have been presented as to why the Aurora City Council believed that the ordinance was necessary to protect the safety of its residents." Id. at *9.

Aside from a bare statement in the preamble to O.C.G.A. §§42-1-14, there is no concrete evidence in the record of this case to support the claim that a sexual predator presents any higher level of threat to public safety than any other kind of convicted felon. Cf American Canine Foundation at *9. Predators' penchant for recidivism – and thus their threat to public safety – is gospel without a Bible. There is no record evidence which would show that it is rational to single out sexual predators for heightened scrutiny, regulation, supervision, etc. when compared to other convicted felons. Id..

Significant evidence in the public record contradicts the General Assembly's findings underpinning O.C.G.A. §42-1-14. A study, published by the United States Department of Justice in 2002 and surveying two-thirds of all prisoners released in the United States in 1994, found that, in the three years after their release, although the overall rate of recidivism for newly released prisoners (regardless of the crime of incarceration) was high, prisoners with the lowest rearrest rates among those who re-offended were those previously imprisoned for:

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homicide; rape; "other sexual[18] assault" and driving under the influence. See Langan and Levin at 1. Those characterized as, "property offenders," "released drug offenders" and "public-order offenders" were far more likely than sex offenders to be rearrested, but Georgia has no registry for them. Id. at 2, 8, Tab. 9.

Among those rearrested within the first three years of release, less than one percent were rearrested for rape. Id. at 8, Tab. 9. Rearrest was far more likely for all of the other offenses surveyed than it was for rape (the only offense surveyed for those purposes which would qualify for registration under O.C.G.A. §42-1-12). Id. at 9. "Of the 3,138 released rapists, more were rearrested for something other than rape ... than were rearrested for another rape." Id..

A more detailed study focused on sex offenders from a similar sampling over the same period of time. See Patrick A. Langan, Erica L. Schmitt and Matthew R. Durose, Bureau of Justice Stat., Dep't of Justice, Recidivism of Sex Offenders Released from Prison in 1994 at 1 (2003). The study found:

> [c]ompared to non-sex offenders released from State prison, sex offenders had a lower overall arrest rate. When rearrests for any type of crime (not just sex crimes) were counted, the study found that 43% (4,163 of 9,691) of the 9,691 released sex offenders were

[18] The analysis defines, "other sexual assault" as: "(1) forcible or violent sexual acts not involving intercourse with an adult or minor, (2) nonforcible sexual acts with a minor (such as statutory rape or incest with a minor), and (3) nonforcible sexual acts with someone unable to give legal or factual consent because of mental or physical defect or intoxication." Langan and Levin at 15.

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> rearrested.[19] The overall rearrest rate for the 262,420 release non-sex offenders was higher, 68% (179,391 of 262,420). Id. at 1-2; 14.

The study compared the reconviction rate for sex offenders with that of non-sex offenders with regard to sex crimes:

> [a]ssuming that the 517 sex offenders who were rearrested for another sex crime each victimized no more than one victim, the number of sex crimes they committed after their prison release totaled 517. Assuming that the 3,328 non-sex offenders rearrested for a sex crime after their release also victimized one victim each, the number of sex crimes they committed was 3,328. The combined total number of sex crimes is 3,845 (517 plus 3,328 = 3,845). Released sex offenders accounted for 13% and released non-sex offenders accounted for 87% of the 3,845 sex crimes committed by all the prisoners released in 1994 (517 / 3,845 = 13% and 3,328 / 3,845 = 87%). Id. at 24.

The study also notes that a lower percentage (seventy-five to eight-four) of sex offenders who were rearrested were rearrested for felonies, as compared to non-sex offenders. Id. at 14.

These studies erode the General Assembly's claim that sexual predators are more of a threat to public safety than other convicted felons who aren't subject to potential lifetime GPS tracking. Statistically, sex offenders in general are much *less* likely to reoffend than non-sex offender felons who walked out of prison the same day. Id.. In fact, the non-sex offender felons who walked out the same day

[19] The reconviction rate comparison was even more stark: "[t]he reconviction rate for the 9,691 released sex offenders was 24.0%, compared to 47.8% for 262,420 non-sex offenders released in 1994." Langan, Schmitt & Durose at 14.

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were responsible for eighty-seven percent of the rearrests *for sex crimes* among the group. Id.. Both of these studies were available to the General Assembly when it wrote O.C.G.A. §42-1-14.

O.C.G.A. §42-1-14's segregation of predators among the population of potential recidivists, i.e. convicted felons, is unsustainable because its rationale for doing so is, "counter factual," and would even "fail[] rational basis review," let alone strict scrutiny. Real Alternatives, Inc. v. Burwell, 150 F.Supp.3d 419, 437(IV)(B)(1)(b) (M.D. Pa. 2015)(citing March for Life v. Burwell, 128 F.Supp.3d 116, 126-27(Analysis II) (D.D.C. 2015)). Even if Park concedes that the state's goal of public safety is legitimate, the state has failed to show that characterizing certain felons as sexual predators and subjecting them to punishment under O.C.G.A. §42-1-14 bears *any* sort of relationship to that goal, let alone the narrow tailoring required by City of Cleburne, supra. See American Canine Foundation at *8. Instead, the statute smacks of the General Assembly's, "desire to harm a politically unpopular group." City of Cleburne at 446-47(III).

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CONCLUSION

WHEREFORE, Park prays that this Court **reverse** the trial court's denial of his demurrer and **declare** O.C.G.A. §42-1-14 unconstitutional and void, rendering O.C.G.A. §16-7-29(b)(5) void and unenforceable against Park.

This 8 day of June, 2018.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the ***Appellant's Brief*** on opposing counsel by hand delivery, by facsimile transmission, electronic filing or by depositing a copy of same in the United States Mail with sufficient postage attached thereon, addressed as follows:

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EXHIBIT 1

SUPREME COURT OF GEORGIA
Case No. S18A1211

Atlanta, May 14, 2018

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

JOSEPH RAYMOND PARK v. THE STATE

Your request for an extension of time to file the brief of appellant in the above case is granted. You are given an extension until June 08, 2018.

Appellee's brief shall be filed within 20 days after the filing of appellant's brief.

A request for oral argument must be independently timely filed, except in direct appeals from judgments imposing the death penalty, every interim review which is granted pursuant to Rule 37, appeals following the grant of petitions for writ of certiorari, applications of certificates of probable cause to appeal in habeas corpus cases where a death sentence is under review, and appeals in habeas corpus cases where a death sentence has been vacated in the lower court, where oral argument is mandatory. Rule 50(1)-(2). No extensions of time for requesting oral argument will be granted. Rule 50(3).

A copy of this order **MUST** be attached as an exhibit to the document for which you received this extension.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk