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 FIRST SUPPLEMENTAL BRIEF

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ARGUMENT & CITATION OF AUTHORITY

I. Park's Claims Are Not Barred By Collateral Estoppel/Res Judicata And The Right For Any Reason Rule Should Not Apply In Any Event

A. The right for any reason rule is inapplicable

1. the trial court's ruling applied an erroneous legal reasoning

"If it is not apparent that the trial court relied on an erroneous legal theory, its grant of summary judgment[1] is to be affirmed if it is right for any reason." Porquez v. Washington, 268 Ga. 649, 652(3), 492 S.E.2d 665 (1997). The first part of the Court's pronouncement is vital to the analysis in this matter: "cases stating that the trial court will be reversed when it relied on an erroneous legal theory or applied incorrect reasoning appear throughout the history of the appellate courts." City of Gainesville v. Dodd, 275 Ga. 834, 836, 573 S.E.2d 369 (2002). See also City of Albany v. Stanford, ___ Ga. App. ___, 815 S.E.2d 322, 324-25 (June 26, 2018).

[1] This Court has overwhelmingly applied this rule in the context of civil cases, primarily regarding motions for summary judgment. See City of Gainesville v. Dodd, 275 Ga. 834, 842, 573 S.E.2d 369 (2002)(Carley, J. dissenting)(listing fourteen cases that applied the right for any reason rule, none of which were criminal). Park concedes that the rule has been invoked in criminal matters, but not frequently. See e.g. Whatley v. State, 297 Ga. 399, 400-01, 774 S.E.2d 687 (2015)(affirming denial of general demurrer based on facts established in the record, but not cited by the trial court). It appears that the Court is reticent to apply the rule to criminal matters and Park sees no reason why the present matter, in which both the state and the trial court ignored *res judicata*, stands out in such a way that the rule should apply. See Georgia-Pacific, LLC v. Fields, 293 Ga. 499, 504(2), 748 S.E.2d 499 (2013).

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The trial court made detailed factual and legal findings pertinent to Park's claims that O.C.G.A. §42-1-14 neither violated his right against *ex post facto* or retroactive laws, nor his right against double jeopardy. [Order at 5 ¶3]. It also concluded that his due process, vagueness and self-incrimination arguments were, "unsupported by facts or applicable law." [Order at 10 ¶6]. As explored thoroughly in Park's opening brief, it is "apparent" that the trial court "relied on [] erroneous legal theor[ies]" to reach its decision in the case. Porquez, 268 Ga. at 652(3). Consequently, without even reaching the question of whether or not *res judicata* is applicable to this case, the right for any reason rule, as announced in Porquez, should not apply. See Stanford, 815 Ga. App. at 324-25.

2. res judicata was raised for the first time on appeal

The state did not raise *res judicata* in response to Park's demurrer at the trial level. Therefore, the issue was, "waived on appeal." Brockman v. State, 292 Ga. 707, 731(18), 739 S.E.2d 332 (2013). See also Fields, 293 Ga. at 504(2) (declining to apply right for any reason rule where defense raised was not presented at trial level). As recently as three months ago, this Court noted that, where "neither party ever mentioned the issue, much less helped to identify any pertinent facts and law," regarding the defense at issue, the case was "not a good candidate for affirming the Court of Appeals' opinion under the 'right for any

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reason' doctrine." Mondy v. Magnolia Advanced Materials, Inc., 303 Ga. 764, 770(3) n.2, 815 S.E.2d 70 (June 4, 2018). See also Bullington v. Blakely Crop Hail, Inc., 294 Ga. App. 147, 152(3), 668 S.E.2d 732 (2008)(holding that right for any reason rule is only applicable "upon a legal basis apparent from the record and which was fairly presented in the court below").

Nonetheless, the state asks the Court to resort to the right for any reason rule to animate its claim of *res judicata*. The Court should decline to apply the rule. See Fields at 504(2). *Res judicata* was not, "fairly presented in the court below;" it has been raised and argued for the first time in the state's response brief in spite of the fact that the state had an opportunity to file a response to the demurrer, a post-hearing brief *and* was tasked with drafting an order for the trial court denying the demurrer. Bullington, 294 Ga. App. at 152(3). Even overlooking the state's repeated failures to invoke the doctrine at the trial level, *res judicata* is not, "apparent from the record," because in order for it to be so, the state would have had to have tendered the record of the proceedings it claims to estop Park's arguments and it has not done so. Bullington at 152(3). See also Waggaman v. Franklin Life Ins. Co., 265 Ga. 565, 566, 458 S.E.2d 826 (1995). Consequently, in addition to asking that the Court partially affirm based on a

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defense which was waived, the state is asking the Court to divine facts which are not in the record to support that waived defense.

The record does not demand the application of *res judicata,* the state failed to raise it when it would have been appropriate to do so and the trial court did not address the issue in its order (even though it had the state served as its muse in composing the proposed order). This case is, therefore, not a "good candidate" for invocation of the right for any reason rule. Mondy, 303 Ga. at 770(3) n.2.

B. The record does not support the state's claim of res judicata

1. the record does not show that there was a previous adjudication on the merits

As the state noted in its brief, this Court recently carefully explained that, "three prerequisites must be satisfied before *res judicata* applies – (1) identity of the cause of action, (2) identity of the parties or their privies, and (3) previous adjudication on the merits by a court of competent jurisdiction." Coen v. CDC Software Corp., ___ Ga. ___, 816 S.E.2d 670, 675(2) (June 29, 2018). Identity of "cause of action," means, "the entire set of facts which give rise to an enforceable claim with special attention given to the wrong alleged." (cit.s and internal quotations omitted). 816 S.E.2d at 675(2).

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A party claiming *res judicata* against a "constitutional attack," must do so "in the initial hearing … to assert it as a defense on appeal." Trend Development Corp. v. Douglas County, 259 Ga. 425, 426(2), 383 S.E.2d 123 (1989). The state bears the burden to provide certified copies of all relevant documents supporting such claim(s) in order to establish the elements of *res judicata*. See Waggaman at 566. See also In re B.A.S., 254 Ga. App. 430, 442, 563 S.E.2d 141 (2002) cert. denied (June 10, 2002)(holding that *res judicata* must be raised at the trial level or it is waived at the appellate level).

The state argues that each element of *res judicata* is satisfied in this case, but it is wrong. Although the state argues that Park made constitutional challenges in his classification hearing and "[t]he superior court rejected those challenges on the merits," it has not established that as a fact in the record and therefore the state has failed to prove one of the elements of *res judicata*. See e.g. Waggaman at 566. The problem for the state is that no "record [was] introduced in support of such claim," and therefore this Court has no basis for accepting its claim of estoppel based on a denial of claims on the merits. Gunnin v. Carlile, 195 Ga. 861, 863, 25 S.E.2d 652 (1943). See also Drummond v. Fulton County Dept. of Family and Children Svc.s, 237 Ga. 449, 454(1), 228 S.E.2d 839 (1976); Bradley v. British Fitting Group, PLC, 221 Ga. App. 621, 623(2), 472 S.E.2d 146 (1996).

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The state's citation to a Fulton County proceeding which is not part of the record of this case subtly concedes that it never put "certified portions of the record of the prior proceeding necessary to prove" a claim of *res judicata* in the record of this case at the trial level. Waggaman, supra. Even if the Court were inclined to entertain a defense which was not raised below, the record of the case does not support that claim. See B.A.S., 254 Ga. App. at 442.

2. the causes of action are not identical

The state also cannot establish, "identity of the cause[s] of action" between the classification hearing and the proceedings below. The state invites the Court to focus on the trees, not the forest by arguing that both proceedings "arise out of the same set of facts: SORRB's decision to classify Park as a sexually dangerous predator." [App'e Br. at 12]. This argument would reduce an entire, "cause of action" to one specific issue – the constitutionality of the statute – the determination of which was not necessary to resolution of either matter.[2]

In Coen, the Court held that *res judicata* did not apply because, "the two suits are based on different wrongs and different sets of operative facts." 816 S.E.2d at 676(3). While Park's classification proceedings arose from SORRB's decision to classify him as a sexually dangerous predator, the proceedings below

[2] The state also relies on the Court accepting its word as to what was at issue in the classification proceedings, since they are not part of the record in this case.

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arose from the state's prosecution of Park for allegedly violating O.C.G.A. §16-7-29(b)(5), the enforcement provision of O.C.G.A. §42-1-14. Although Park maintains that O.C.G.A. §42-1-14 is a punitive statute and that classification proceedings are therefore criminal, not civil in nature, the wrongs in the cases are distinct: punitive classification as a sexual predator best analogized to a sentencing hearing *versus* trial for a violation of a criminal statute.[3] Coen at 676(3). The operative facts are also not the same in both cases: with some variance, a classification proceeding will generally involve facts similar to those recited in Gregory v. Sexual Offender Registration Review Bd., 298 Ga. 675, 684(1), 784 S.E.2d 392 (2016); the state alleges that the facts giving rise to the present matter, as recited in the indictment,[4] are that Park, "did knowingly and without authority destroy an electronic monitoring device used for the purpose of monitoring the accused, while wearing said electronic device as required by O.C.G.A. §42-1-14." The "two suits are based on different wrongs and different

[3] This Court has not readily applied the doctrine of *res judicata* when at least one of the proceedings is a criminal matter. See Sheffield v. State, 184 Ga. App. 141, 142(1), 361 S.E.2d 28 (1987)(declining to apply *res judicata* from a prior civil matter to a criminal matter). But see Malloy v. State, 293 Ga. 350, 354(2)(a) n.7, 744 S.E.2d 778 (2013)(holding that *res judicata* may apply in criminal matters). The United States Supreme Court has noted that *res judicata* would not apply in *habeas corpus* proceedings because, "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." Sanders v. United States, 373 U.S. 1, 7-8(I), 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). The Court's position should apply in this case, where Park faces a maximum five year sentence for violation of O.C.G.A. §16-7-29(b)(5).

[4] Park disputes the facts alleged in the indictment.

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sets of operative facts" and therefore *res judicata* would not apply even if the Court were inclined to invoke the right for any reason rule. Coen at 676(3).

II. O.C.G.A. §42-1-14(e) Triggers A Constitutionally Unreasonable Search

Conceding, *per* Grady v. North Carolina, ("Grady I") ___ U.S. ___, 135 S.Ct. 1368, 1371, 191 L.Ed.2d 459 (2015), that permanent GPS monitoring of Park constitutes a search, the state argues that Park's lack of expectation of privacy as a convicted felon, coupled with the state's interest in enhancing public safety "by targeting recidivism" render that search reasonable. [App'e Br. at 36].

A. The state's burden to show reasonableness is "weighty"

In State v. Gordon, ___ S.E.2d ___, 2018 WL 4200886 at *6 (N.C. App. Sept. 4, 2018), the North Carolina Court of Appeals observed that, "[n]either the State's application nor the trial court's order place limitations on the State's ability to access this information." Gordon, 2018 WL 4200886 at *5. The order subjecting the offender to GPS monitoring, then, "resembles, in essence, a general warrant." Gordon at *5. In part, this led the court to conclude, "[g]iven the unlimited and unfettered discretion afforded to State officials with the satellite-based monitoring system," the burden to establish reasonableness was, "especially weighty." Id..

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For the purposes of analyzing the search at issue in this case, North Carolina's SBM (satellite-based monitoring) program is substantively similar to Georgia's program under O.C.G.A. §42-1-14(e).[5] Georgia's GPS monitoring program also grants "unlimited and unfettered discretion afforded to State officials" regarding access and use of the data. Id.. Park believes that Gordon's assertion that the state has an "especially weighty" burden to show the reasonableness of its lifetime search is appropriate in this case as well. Id..

B. Park has a greater privacy interest than a probationer/parolee

The centerpiece of the state's argument that an interminable lifetime search of Park is constitutionally reasonable is that, "privacy expectations of sexually dangerous predators are significantly diminished as a consequence of their serious criminal activities." [App'e Br. at 32-33]. Citing Samson v. California, 547 U.S. 843, 857, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006) and United States v. Knights, 534 U.S. 112, 119, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001), the state

[5] In Gordon, the Court described the program:

> [s]tate officials have the ability to access the details of a monitored defendant's private life whenever they see fit. A defendant's trip to a therapist, a church, or a family barbecue are revealed in the same manner as an unauthorized trip to an elementary school. At no point are officials required to proffer a suspicion or exigency upon which their searches are based or to submit to judicial oversight. Rather, the extent of the State's ability to rummage through a defendant's private life are left largely to the searching official's discretion, constrained only by his or her will. 2018 WL 4200886 at *6. Compare N.C. Gen. Stat. §14-280.40 with O.C.G.A. §42-1-14(e)(placing no limitation on law enforcement's discretion to review records of sexually dangerous predator's movements).

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argues that, "certain kinds of legal relationships with the State can reduce an individual's legitimate privacy expectations." [App'e Br. at 33].

As it did in the trial court, the state conflates the status of a citizen who has been convicted of a crime, served his sentence and is then discharged from his service to the state, with a probationer or parolee. The relationship is far more nuanced. See State v. Griffin, ___ S.E.2d __, 2018 WL 3732560 at *5 (N.C. App. August 7, 2018). On remand from the United States Supreme Court, in State v. Grady, ("Grady II") 817 S.E.2d 18, 24(III)(B)(N.C. App. 2018), the North Carolina Court of Appeals addressed the expectation of privacy:

> [s]olely by virtue of his legal status, then, it would seem that defendant has a greater expectation of privacy than a supervised[6] offender. Yet, as a recidivist sex offender, defendant must maintain lifetime registration on DPS's statewide sex offender registry. The sex offender registry provides public access to 'necessary and relevant information' about defendant, including his name, home address, offense history, driver's license number, fingerprints, and current photograph. Defendant's expectation of privacy is therefore appreciably diminished as compared to law-abiding citizens.

[6] The Court of Appeals explained:

> North Carolina's SBM program includes supervised and unsupervised offenders. Supervised offenders include probationers and individuals under post-release supervision following active sentences in the custody of the Division of Adult Correction … Unsupervised offenders, however, are statutorily required to submit to SBM, but are not otherwise subject to any direct supervision by State officers. Grady II, 817 S.E.2d at 24(III)(B).

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Consistent with that analysis, Judge Easterbrook, in his concurrence in Green v. Berge, 354 F.3d 675, 680 (7th Cir. 2004)(Easterbrook, J. concurring), suggested "four major categories" of persons subject to a Fourth Amendment search:

- '[p]risoners [whose] privacy interests are extinguished by the judgments placing them in custody;'
- '[p]ersons on conditional release – parole, probation, supervised release,' etc., who, 'have acquired additional liberty but remain subject to substantial controls;'
- '[f]elons whose terms have expired,' whose, '[e]stablished criminality may be the basis of legal obligations that differ from those of the general population' and
- '[t]hose who have never been convicted of a felony,' for whom '[w]hat is 'reasonable] under fourth amendment for a person on conditional release, or a felon,' may be unreasonable. Green, 354 F.3d at 680 (Easterbrook, J. concurring). See also Belleau v. Wall, 811 F.3d 929, 941(I)(Flaum, J. concurring)(suggesting that, "a felon's expectation of privacy lies somewhere in-between that of a parolee or probationer and an ordinary citizen").

While the law would seem to support a baseline conclusion that Park's status as a convicted felon reduces his Fourth Amendment expectation of privacy as to certain matters, the state incorrectly asserts a blanket equivalence between Park and a probationer or parolee like the one in Samson, which has no relevance to the present matter. 547 U.S. at 850. See also Green, supra; Grady II at 24(III)(B). The state suggests that lifetime GPS monitoring is simply the next step – from prison to probation to sex offender to predator – for Park. This argument

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suffers the obvious flaw of not being logical in its progression. The evolution from prisoner to registered sex offender represents a diminution in state control – and proportional expansion of privacy/Fourth Amendment rights – at each progressive stop. See Green, supra. However, as the Griffin court put it, "the continuous and dynamic location data gathered by SBM is far more intrusive than the static information gathered as a result of sex offender registration." 2018 WL 3732560 at *5(II)(D). See also Grady II, supra. The status change from registered sex offender to sexually violent predator is indisputably *re*-gressive, both in terms of the individual's liberty and his privacy/Fourth Amendment rights. See Gregory, 298 Ga. at 687(3).

The state attempts to minimize this elevation of restrictions (even beyond that of a probationer/parolee since not all probationers and parolees are *required* to wear GPS monitors and report to the Sheriff's Department) as an, "'incremental'" next step, but it is a monumental leap from any obligation Park is compelled to meet as a registered sex offender. [App'e Br. at 35]. See also Griffin at *5(D)(II). If the state wishes effectively to return Park to the status a probationer/parolee, it should meet a strict standard for justifying such a relegation and not simply be able to fall back on the fact that he was convicted of a felony. See Griffin, supra. See also Gordon at *5. For purposes of analyzing this

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search's reasonableness, then, Park identifies more closely with the general population than a probationer/parolee.

C. The state has failed to connect its goal of preventing recidivism among sex offenders to its lifetime search of Park

1. the record contains no evidence showing that GPS monitoring of this particular defendant is reasonable

The Grady II court noted that "there must be sufficient record evidence to support the trial court's conclusion that SBM is reasonable as applied to *this particular defendant*." 817 S.E.2d at 26(III)(B)(2). See also Carroll v. United States, 267 U.S. 132, 155-56, 45 S.Ct. 280, 69 L.Ed. 543 (1925)(holding that warrantless searches may be reasonable when they are founded on probable cause which is in turn based on individualized suspicion); United States v. Montoya de Hernandez, 473 U.S. 531, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985)(holding that invasive warrantless search of individual must be founded on "particularized suspicion").

There is no record of what was and was not presented at Park's classification hearing in the record of this case. The record from the motions hearing does not contain evidence sufficient to show that lifetime GPS monitoring is reasonable "as applied to this particular defendant." Grady II at 26(III)(B)(2). The record lacks any evidence that, even if a search were

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reasonable today, it will continue to be reasonable for "the rest of [Park's] natural life," even though that is the search which is authorized pursuant to O.C.G.A. §42-1-14(e)(3). See also Griffin at *5(II)(D)(holding that record was insufficient to support conclusion that search was reasonable, "for any length of time, much less for thirty years").

The search, therefore, is unreasonable. Id..

2. there no evidence in the record linking GPS monitoring of sex offenders with a reduction in recidivism

With the benefit of Grady II's holding regarding particularity to the defendant, the state in Griffin argued that the submission of the defendant's STATIC-99 risk assessment rendered the search reasonable. 2018 WL 3732560 at *4(II)(D). See also Grady II at 26(III)(B)(2). However, the court noted that the state, "presented no evidence regarding whether, or to what degree, SBM would be effective in protecting the public from Defendant committing another sex offense." Id. at *2(I). It later concluded, "unless SBM is found to be effective to actually serve the purpose of protecting against recidivism by sex offenders [through evidence and/or hard data], it is impossible for the State to justify the

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intrusion of continuously tracking an offender's location for any length of time, much less for thirty[7] years." Id. at *5(II)(D).

The Grady II court made an important observation about the record of that case which is relevant to these proceedings:

> [a]t the time of defendant's remand hearing, the SBM program had been in effect for approximately ten years. However, the State failed to present any evidence of its efficacy in furtherance of the State's undeniably legitimate interests … Defendant, however, presented multiple reports authored by the State and federal governments rebutting the widely held assumption that sex offenders recidivate at higher rates than other groups. Although the State faulted defendant for presenting statistics about supervised offenders, the State bears the burden of proving reasonableness at Grady hearings. Here, we are compelled to conclude that the State failed to carry its burden. (cit.s omitted) 817 S.E.2d at 27–28(III)(B)(2).

As the state concedes, the lifetime tracking of the general population's movements is not constitutionally reasonable even "in furtherance of the State's undeniably legitimate interests." Gordon at *6. See also [App'e Br. at 35]; United States v. Jones, 565 U.S. 400, 415, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012)(Sotomayor, J. concurring); Carpenter v. United States, ___ U.S. ___, 138

[7] The Griffin Court noted, "[i]n one aspect, the intrusion of SBM on Defendant in this case is greater than the intrusion imposed in Grady II, because unlike an order for lifetime SBM, which is subject to periodic challenge and review, an order imposing SBM for a period of years is not subject to later review by the trial court." Griffin at *5(II)(D). As Park has pointed out repeatedly, O.C.G.A. §42-1-14 does not provide him with any opportunity for "periodic challenge and review" of his classification.

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S.Ct. 2206, 2217(III)(A), ___ L.Ed.2d ___ (June 22, 2018). The state tethers GPS monitoring to its interest in curbing recidivism, not through any evidence or hard data,[8] but by suggesting, that, "an offender who knows his location is being monitored and recorded is less likely to commit another sexual offense because his location data will link him to the crime." [App'e Br. at 36]. The state in Griffin, supra, made nearly the same argument. The court countered that this proposition was not sufficient because, "the State must present some evidence to carry its burden of proving that SBM actually serves that governmental interest." 2018 WL 3732560 at *5(II)(D).

The state has failed to show that GPS monitoring of offenders in Georgia "is … effective to actually serve the purpose of protecting against recidivism[9] by sex offenders," nor did the trial court make any such finding. Griffin at *5(II)(D). The state has therefore failed to show that the interminable lifetime search of Park is reasonable.

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[8] Like North Carolina, Georgia's program for GPS monitoring of sex offenders has been in place for more than, "ten years." Grady II at 27(III)(B)(2). The state did not offer any data as to the efficacy of its monitoring regime under O.C.G.A. §42-1-14(e) in the trial court.

[9] The state also argued that the mere fact that sexually dangerous predators are aware that they are being monitored shows that, "[e]lectronic monitoring of individuals classified as sexually dangerous predators is rationally connected to" preventing recidivism. [App'e Br. at 24]. The state further claimed that it did not need to "provide … evidence that sexual offenders are more likely to reoffend," because, "those individuals are monitored based on an *individualized determination* based on a variety of evidence that each is in fact likely to commit another dangerous sexual offense in the future." Id. at 24-25. Park's arguments, *supra*, would apply with equal weight to these deficient *ex post facto* arguments.

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3. the special needs doctrine does not apply

The state gives little attention to the special needs doctrine, which Park has argued is inapplicable. Park notes that the recent North Carolina cases have not looked favorably on applying the special needs doctrine to this type of search:

> because the special needs doctrine is typically used to uphold sweeping programmatic searches, it is a closely guarded exception to the warrant requirement, which only applies to a limited 'class of permissible suspicionless searches.' In order for the exception to apply, the special need advanced to justify dispensing with a warrant or individualized suspicion must be divorced from the State's general interest in law enforcement. Grady II at 22(II)(B).

III. The Right To Privacy Includes Park's Right To Live In Seclusion

The state argues that GPS monitoring "generally does not publicize anything about the offenders subject to it." [App'e Br. 39-40]. Park disagrees.

O.C.G.A. §42-1-12(o) requires the data produced by Park's GPS tracking is to be treated as "private data" which may only be disclosed to law enforcement agencies for law enforcement purposes[10] and government agencies conducting

[10] It should be noted that the state has attempted to make the difficult-to-fathom argument that it is not imposing lifetime GPS monitoring of Park for normal law enforcement purposes, i.e. "to discover evidence of criminal wrongdoing." [App'e Br. at 37 n.13 (quoting Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653(C)(II), 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)]. Yet, "law enforcement purposes" would be one of two reasons that the data produced by this search can be disclosed to anyone under O.C.G.A. §42-1-12(o), strongly indicating that it was the legislature's primary intent to collect the data for law enforcement purposes. This is relevant to Park's arguments that the statute violates his right to privacy and that the lifetime search authorized by O.C.G.A. §42-1-14(e) is not constitutionally reasonable. See City of Los Angeles, Calif. v. Patel, ___ U.S. ___, 135 S. Ct. 2443, 2452, 192 L. Ed. 2d 435 (2015)(holding

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background checks. See O.C.G.A. §42-1-12(o). When that "private data" is disclosed to anyone else for any other reason, Park believes he is subjected to "unnecessary public scrutiny" in violation to his right to privacy. 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, 70 (1905). As Park previously argued, recording his movements every day for the rest of his life and not strictly limiting access to that data according to O.C.G.A. §42-1-12(o) ostensibly renders everywhere Park goes a "public place." Pavesich 50 S.E. at 70.

The record in this case establishes that the DCSD has abdicated its statutorily-mandated responsibility to monitor Park's movements and keep that data "private." See O.C.G.A. §§42-1-12(i) & (o). See also Sexual Offender Registration Review Board v. Berzett, 301 Ga. 390, 394, 801 S.E.2d 821 (2017); (T. 16; 21; 41; 57-58; 60). A private company, VeriTracks, collects the data, stores it and alerts DCSD as to any irregularities. Id.. 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 DSCD has shared

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that search is only reasonable under special needs doctrine where the primary purpose of the searches is, "[d]istinguishable from the general interest in crime control").

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Park's tracking data with a party not authorized to see it and therefore exposed him to "unnecessary public scrutiny." Powell, 270 Ga. at 330(3).

Park also notes that the United States Supreme Court recently held that, "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured[11] through CSLI." Carpenter, 138 S.Ct. at 2217(III)(A). The Court's declaration that one has a right to privacy with regard to his physical location and movements confirms a position that this Court took over one hundred years ago. In Pavesich, the Court acknowledged, "the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct," as part of a broader right to privacy. 50 S.E. at 70. Thus Carpenter confirms that "the 'right to let alone' guaranteed by the Georgia Constitution [which] is far more extensive than the right to privacy protected by the U.S. Constitution," extends to Park's physical location. Powell at 330–31(III)(citing Bowers v. Hardwick, 478 U.S. 186, 191–92, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986)). The state's publication of its records of Park's physical location beyond what is authorized by O.C.G.A. §42-1-12(o) thus constitutes a

[11] Nothing in the record of this case or the opinion in Carpenter shows a meaningful difference between the storage of tracking data through CSLI and the storage of tracking data collected by VeriTracks.

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violation of the right to privacy as that right as been previously defined by this Court. See Powell, supra.

IV. The Right Against Self-Incrimination Precludes Compelled Lifetime GPS Monitoring

The state alleges that, by wearing the GPS monitor, Park "allows his monitor's presence at that particular location to be recorded voluntarily," so if that location is a crime scene, he has given that information to the state by consent. [App'e Br. at 30].

The United States Supreme Court has taken a dim view upon situations where a statute compels a citizen to choose between complying and exercising his Fifth Amendment privilege against self-incrimination. See e.g. Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). It has found that laws compelling citizens to disclose their association with the Communist Party in the first half of the 20th Century, gambling activities, marijuana transactions and ownership of unregistered firearms violated the privilege. See Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 78-79(II), 86 S.Ct. 194, 15 L.Ed.2d 165 (1965). See also Marchetti v. United States, 390 U.S. 39, 48(II), 88 S.Ct. 697, 19 L.Ed.2d 889 (1968). Leary v. United States, 395 U.S. 6, 53-54, 89

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S.Ct. 1532, 23 L.Ed.2d 57 (1969); Haynes v. United States, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968).

Where a citizen is, "required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in a chain' of evidence tending to establish his guilt," he may assert the privilege. Marchetti, 390 U.S. at 48–49(II). "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." Marchetti at 53(III). See also Leary, 395 U.S. at 18(I)(C). Where the law compels the citizen to share information which would, "directly and unavoidably have served to incriminate him," the assertion of privilege is "neither extreme nor extravagant." (internal quotes omitted) Grosso v. United States, 390 U.S. 62, 66(I), 88 S.Ct. 709, 19 L.Ed.2d 906 (1968). To determine whether or not a statute presents such a hazard, a Court must determine if it is, "directed at a highly selective group inherently suspect of criminal activities," seeking information which "might involve the petitioners in the admission of a crucial element of a crime." Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 78-79(II), 86 S.Ct. 194, 15 L.Ed.2d 165 (1965).

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Interminable lifetime monitoring of Park's movements including his presence, "at or near a crime scene or in a prohibited area," compels him to share information which would "directly and unavoidably have served to incriminate him." Grosso, 390 U.S. at 66(1). His compliance with O.C.G.A. §42-1-14 thus creates the "real and appreciable hazard of incrimination." Leary at 18(I)(C). The statute was "directed at a highly selective group," convicted sex offenders whom the state deems, "inherently suspect of criminal activities," namely an allegedly high risk of recidivism. Albertson, 382 U.S. at 78-79(II). See also [App'e Br. at 30]. In Marchetti, the Court observed:

> [t]he constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege's protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it. 390 U.S. at 51(III).

The implies that Park is consenting to being monitored, including when he is at or near a crime scene or restricted area,[12] but his GPS monitoring is indisputably compulsory, so there is no consent. Nor would Park's being "near or within a crime scene or in a prohibited area" waive his constitutional privilege; as Marchetti explains, even if he chooses to commit a crime, he has not waived the

[12] The privilege of self-incrimination applies, in certain circumstances, to future acts. Marchetti at 53(III).

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privilege. Id.. As such, Park should be able to assert his Fifth Amendment rights against application of O.C.G.A. §42-1-14(e) to him. See Albertson at 78-79(II).

V. Due Process Requires Continuing Review

Although the state argues that "Park offers no real support for his argument that due process requires additional review of his classification at some point in the future," Park did, in fact, cite significant persuasive authorities which make that very point. See 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 State v. Dykes, 744 S.E.2d 505, 507, 403 S.C. 499 (S.C. 2013); Starkey v. Oklahoma Dept. of Corrections, 305 P.3d 1004, 1028(IV)(4), 2013 OK 43 (Okla. 2013). In addition to the authorities already cited, the Court might also refer to Riley v. New Jersey State Parole Bd., 98 A.3d 544, 558(VII)(A), 219 N.J. 270 (N.J. 2014), which held that, unlike civil commitment, New Jersey's SOMA program, which it ultimately ruled was unconstitutional, did not permit yearly review of classification. See also People v. Younger, ___ N.E.3d ___, 2015 WL 5554994 at ¶41 (Ill. App. 2015)(distinguishing Illinois monitoring statute from Dykes because it authorizes continuing review). Wisconsin's program, at issue in Belleau, permits continuing

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review twenty years after imposition of lifetime tracking. Wis. Stat. Ann. §301.48(6)(b)(2).

Park provided ample persuasive authority supporting his position that due process requires the state to provide some form of continuing review if it wishes to impose lifetime obligations on sex offenders. On this issue, which this Court has yet to address directly, the state that has failed to point out any statute or authority which would allow the type of lifetime obligation imposed by O.C.G.A. §42-1-14(e) without the availability of any form of continuing review.[13]

VI. Park Preserved His Argument Regarding Retroactive Laws

The state alleges that Park asserted his argument concerning O.C.G.A. §42-1-14's violation of Ga. Const. art. I, §I, ¶X, "for the first time in a post-hearing reply brief in the trial court and the trial court did not address it." Neither is true. First, Park's initial demurrer alleges that the statute violates Park's right against being subject to *ex post facto* legislation under the United States and Georgia Constitutions. As such, when the trial court's order stated that O.C.G.A. §42-1-14

[13] The state again attempts to peddle the notion that Park may rely on an alleged SORRB standing procedure which is not part of the record of this case "to seek further review ten years after their initial classification." [App'e Br. at 44 n. 16]. The state is not credible in this regard. As Park noted in his opening brief, the state has played games with this type of procedure in the past, instilling it so that it may be cited in pending litigation only to withdraw it once that litigation has ended. The alleged procedure cited by the state does not have the force of law, is not a procedure in which SORRB is even authorized to engage and therefore should not factor into this Court's consideration of Park's arguments regarding continuing review.

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"violates neither the Ex Post Facto nor the Double Jeopardy clauses of the State or Federal Constitutions," it addressed Park's claim under Ga. Const. art. I, §I, ¶X, and the issue is properly before this Court.

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 24 day of September, 2018.

Respectfully Submitted,

//s// Mark Yurachek

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_____

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the ***Appellant's First Supplemental 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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This 24 day of September, 2018.

Respectfully Submitted,

//s// Mark Yurachek

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