

QUESTION PRESENTED

WHETHER THE NORTH CAROLINA GENERAL ASSEMBLY INTENDED TO FURTHER PUNISH SEX OFFENDERS BY ENACTING SATELLITE-BASED MONITORING AS A MANDATORY CONDITION OF PROBATION, PAROLE, POST-RELEASE SUPERVISION, AND LIFETIME SUPERVISION, THEREBY VIOLATING THE *EX POST FACTO* CLAUSE BY ITS RETROACTIVE APPLICATION?

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No. 10-_____

**IN THE
SUPREME COURT OF THE UNITED STATES**

ROBERT PETER VOGT, JR.,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA**

Petitioner, Robert Vogt, Jr., respectfully prays that a writ of certiorari issue to review the orders, opinion, and judgment issued by the Supreme Court of North Carolina in his case. On 7 and 13 October 2010, the Supreme Court denied Mr. Vogt's Motion for Appropriate Relief and on 28 October 2010, the Court issued judgment ruling that imposition of lifetime satellite-based monitoring for sexual offenses committed prior to the enactment of North Carolina's satellite-based monitoring scheme did not violate *ex post facto* guarantees. As the North Carolina General Assembly intended that satellite-based monitoring constitute punishment, or alternatively created a program so punitive in purpose and effect as to negate any intent to constitute a civil regulatory scheme, the United States Constitution prohibits its retroactive application.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is officially reported at *State v. Vogt*, 364 N.C. 425, 700 S.E.2d 224 (2010), and is reproduced in the Appendix. The 13 October 2010 order of the Supreme Court of North Carolina is unofficially reported at 2010 N.C. LEXIS 863, and is reproduced in the Appendix.

JURISDICTION

The judgment of the Supreme Court of North Carolina entered on 28 October 2010.¹ Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a). On 29 December 2010, an extension of time on the filing of this petition was granted until 4 February 2010.

CONSTITUTIONAL AMENDMENTS INVOLVED

U.S. Const., Art. I, §10: "No state shall...pass any...ex post facto law...."

U.S. Const., amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...."

U.S. Const., amend. XIV: "No state shall...deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

A. Introduction

On 15 April 2005, Robert Vogt pled guilty and was convicted of one count of sexual exploitation of a child. On 9 June 2008, Mr. Vogt pled guilty and was convicted of one

¹ The opinion of the Supreme Court of North Carolina was filed on 8 October 2010. The actual judgment of the Supreme Court of North Carolina entered on 28 October 2010 pursuant to N.C. App.R. 32(b), which provides that the clerk shall enter the judgment on the docket twenty (20) days after the date of the filing of the opinion. A copy of the judgment is included in the Appendix. (App. 36)

count of taking indecent liberties with a minor. Both convictions arose from conduct committed before 16 August 2006. On the indecent liberties conviction, the trial court sentenced Mr. Vogt on 9 June 2008 to a term of fifteen to eighteen months imprisonment, suspended for sixty months supervised probation and service of one hundred twenty days in jail. At a continuation of the sentencing hearing on 3 July 2008, Mr. Vogt was determined to be a "recidivist" under N.C.G.S. §14-208.40A and ordered to enroll in satellite-based monitoring as a special condition of his supervised probation and, upon completion of probation, for the remainder of his natural life.

B. On 16 August 2006, North Carolina Enacted Satellite-Based Monitoring of Sex Offenders.

Satellite-based monitoring (SBM) reveals the near-real time location of a person wearing monitoring equipment by sending and receiving signals to and from global positioning satellites and to and from a supervising agency. (App. 85, 96, 161) Effective 16 August 2006, North Carolina adopted SBM for the following classes of sex offenders:

Unless otherwise provided in the section, this section is effective when it becomes law and applies to offenses committed on or after that date. This section also applies to any person sentenced to an intermediate punishment on or after that date and to any person released from prison or post-release supervision on or after that date. This section also applies to any person who completes his or her sentence on or after the effective date of this section who is not on post-release supervision or parole. However, the requirement to enroll in a satellite-based program is not mandatory until January 1, 2007, when the program is established.

Section 15(l) of Session Law 2006-247, House Bill 1896. (App. 257-258)

Evidence regarding the nature of North Carolina's monitoring scheme was presented at a monitoring eligibility hearing held in *State v. Bowditch*, the transcript of which was

attached to a Motion for Appropriate Relief filed by Mr. Vogt while his case was pending in the North Carolina Supreme Court. (App. 37-241) Testimony established that offenders subject to SBM fall into two categories: offenders ordered to enroll while on probation, parole, or post-release supervision (supervised offenders) and offenders ordered to enroll in lifetime SBM (unsupervised offenders). (App. 162-163) No assessment of future risk is undertaken as to offenders ordered to enroll in lifetime monitoring. (App. 195)

Supervised offenders are overseen by local departments of probation and parole. (App. 84) Unsupervised offenders are overseen by the SBM-electronic house arrest unit within the North Carolina Department of Correction Division of Community Corrections. (App.159) Two probation officers within the Division of Community Corrections assist local probation departments with supervised offenders and local probation departments assist the Division with unsupervised offenders. (App. 134, 159) Alerts for unsupervised offenders generated after 5:00 p.m. are received by local probation officers. (App. 197)

Both groups of offenders are required to sign SBM agreements with the Department of Correction. (App. 90-93) The agreement provides, *inter alia*, that the offender will wear a tamper-proof non-removable ankle bracelet and a miniature tracking device (MTD) twenty-four hours a day, seven days a week; will charge the MTD daily; will display the MTD at all times; and will acknowledge and follow all messages sent via the MTD. (App. 91-93, 200) As the public has to know that a person is wearing the device, the MTD must face out at all times. (App. 92)

All offenders receive their SBM equipment from local probation departments. (App. 178) All offenders are required to cooperate with the Division of Community Corrections, including allowing probation officers to enter their homes every ninety days to check the

equipment. Refusal to allow access is a class 1 misdemeanor. (App. 137, 166, 193) The mandatory cooperation required of unsupervised offenders extends to whoever is overseeing the unsupervised offender at the time. (App. 137)

The MTD loses the signal sent by the ankle bracelet transmitter if the ankle bracelet is more than fifty feet from the MTD on pre-June 2009 models and more than thirty feet on post-June 2009 models. (App. 194) The signal is lost when the ankle bracelet is submerged in two or three feet of water, prohibiting an offender from swimming or sitting in a full bath without generating a "bracelet gone" signal. (App. 88-89, 182, 184) Signals are blocked when an offender is inside a building or vehicle. (App. 89, 106, 129) When the signal is lost, a message appears on the MTD ordering the offender to go outside to reestablish a signal with the satellite. (App. 89, 108, 129) If a signal is not reestablished, a probation officer, correctional employee, or local sheriff attempts to contact the offender by telephone. If that is unsuccessful, calls are made to the offender's friends, family, and employer. If the offender cannot be located, the supervising agent goes to the offender's home. (App. 122, 183-184) If the offender is at home, he is required to stand outside with the supervising agent, regardless of the weather, time of day, or activity he was engaged in, to reestablish contact with the satellite. (App. 122, 184-185)

Medical procedures such as MRIs, ultrasounds, colonoscopies, and whirlpool baths cannot be conducted on persons wearing ankle bracelets. All offenders enrolled in SBM are required to seek and receive permission from the Department of Correction or a local probation department to obtain such treatment and be accompanied to the medical procedure by a probation officer. The probation officer removes the bracelet for the duration of the treatment and reattaches it upon its conclusion. (App. 202-203, 205-206, 208)

SBM interferes with an offender's pursuit of employment due to signal blockage and/or the mere physical attachment of the equipment. (App. 125) A parking lot attendant can frequently generate lost signal alerts due to signal blockage by the parking garage. A janitor required to go to the basement of a building can frequently generate lost signals due to signal blockage by the building. Employment on a production line can be hampered by wearing an MTD. (App. 119, 133-134) Whether an offender can pursue his desired employment is wholly within the discretion of the Department of Correction. (App. 193) An offender at physical risk due to the equipment could be permitted to remove the MTD as long as he agreed not to leave his workplace during working hours. (App. 125)

The MTD functions like a cell phone, in that it has a SIM card and transmits information. (App. 185) An offender cannot remain in an area lacking cell phone coverage or board an airplane. (App. 103, 185-186) The MTD must be recharged four to six hours per day, prohibiting an offender from remaining in a location lacking electricity. (App. 130, 136)

Neither local probation officers nor the Department of Correction watch offender movements on monitors twenty-four hours per day. (App. 115-116, 161) The system stores all addresses visited by an offender. (App. 114, 164) This information is retrieved for criminal investigations and to determine patterns of movement. (App. 163-166, 207) If an unsupervised offender visits the same location on a regular basis, the Department of Correction may ask local law enforcement to determine what is in the area visited. (App. 163) Investigation of patterns of movement could reveal that the unsupervised offender attends political functions or church. (App. 116) The Department of Correction was advised by counsel to randomly check the locations of unsupervised offenders so that it would not appear they were being supervised. (App. 167)

The Department of Correction has the capability of setting inclusion and exclusion zones where an offender is or is not permitted to be. (App. 94-95) An inclusion zone could consist of only the offender's residence. (App. 132) Although the Department was not utilizing inclusion and exclusion zones at the time of the *Bowditch* hearing, a probation officer testified that it was very possible that exclusion zones would be utilized in the future. (App. 106)

Offenders ordered to enroll in lifetime satellite-based monitoring can turn in their equipment, permanently leave North Carolina, and thereby end their enrollment in satellite-based monitoring. (App. 222)

C. How This Issue was Presented and Disposed of on Appeal

The North Carolina Supreme Court rejected Mr. Vogt's arguments that imposition of lifetime satellite-based monitoring for offenses committed prior to the enactment of satellite monitoring violated *ex post facto* guarantees and that his trial counsel provided ineffective assistance for failing to develop an adequate factual record about the nature of satellite-based monitoring. In denying relief, the Court adopted its opinion issued on the same date in *State v. Bowditch*, 364 N.C. 335, 700 S.E.2d 1 (2010). (App. 1-24)

REASONS WHY THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE ALLOWED

THE NORTH CAROLINA GENERAL ASSEMBLY INTENDED TO FURTHER PUNISH SEX OFFENDERS BY ENACTING SATELLITE-BASED MONITORING AS A MANDATORY CONDITION OF PROBATION, PAROLE, POST-RELEASE SUPERVISION, AND LIFETIME SUPERVISION. SATELLITE-BASED MONITORING CANNOT CONSTITUTIONALLY BE IMPOSED UPON OFFENDERS WHO COMMITTED OFFENSES PRIOR TO ENACTMENT OF THE MONITORING SCHEME.

"The *ex post facto* prohibition prohibits the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri*, 4 Wall. 277, 325-326 (1867)). A State's decision, after the fact, to punish a particular person or group more severely than prior law provided is precisely what the *Ex Post Facto* Clause is designed to protect against. See *Miller v. Florida*, 482 U.S. 423, 429 (1987); *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994) (government officials "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals"). Sex offenders have been subjected to increasingly draconian punishment and commitment practices to appease public fear. *E.g.* *United States v. Comstock*, __ U.S. __, 130 S.Ct. 1949 (2010) (civil commitment of sexually dangerous federal prisoners beyond their scheduled release on criminal charges); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (civil commitment of sexually violent predators beyond their release date on criminal charges). North Carolina responded to this national trend by enacting satellite-based monitoring of sex offenders and making it explicitly retroactive to offenses committed before the effective date of the statute. The North Carolina Supreme Court erred in concluding that Mr. Vogt could be ordered to enroll in lifetime satellite monitoring without violating the *ex post facto* guarantee of Article I, §10(1) of the United States Constitution.

Determining whether a change in the law aggravates the punishment attached to a crime in contravention of the *Ex Post Facto* Clause is a two-part inquiry: the new rule "'must apply to events occurring before its enactment,' and it 'must disadvantage the offender affected by it.'" *Lynce v. Mathis*, 519 U.S. 433, 441 (1997). The enacting legislation explicitly

provided that satellite-based monitoring was mandatory to offenders such as Mr. Vogt who had been sentenced to intermediate punishment on or after 16 August 2006 regardless of the date of the commission of the triggering offense. Section 15(l) of Session Law 2006-247, House Bill 1896. (App. 257-258) Lifetime satellite-based monitoring is nothing more than lifetime probation. As freedom from restraint "is the most elemental of liberty interests," *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality opinion), an offender subjected to lifetime monitoring suffers significant disadvantages. The legislation must then be examined to determine if it runs afoul of *ex post facto* guarantees.

In conducting an *ex post facto* inquiry, a court

must 'ascertain whether the legislature meant the statute to establish "civil" proceedings.' *Kansas v. Hendricks*, 521 U.S. 346, 361, 138 L.Ed.2d 501, 117 S.Ct. 2072 (1997). If the intent of the legislature was to impose punishment, that ends the inquiry.

Smith v. Doe, 538 U.S. 84, 92 (2003). This inquiry focuses first upon "the statute's text and its structure to determine the legislative objective. *Flemming v. Nestor*, 363 U.S. 603, 617, 4 L.Ed.2d 1435, 80 S.Ct. 1367 (1960)." *Id.* One can peruse *State v. Bowditch*, 364 N.C. 335, 700 S.E.2d 1 (2010), in vain for an examination of the language and structure of the SBM statutes, as the North Carolina Supreme Court failed to address the multiple statutory references to criminal punishment which clearly indicated an intent to enact penal legislation.

As originally enacted, N.C.G.S. §14-208.35 provided:

Lifetime registration offenders required to submit to satellite-based monitoring for life and to continue on unsupervised probation upon completion of sentence.

Notwithstanding any other provision of law, when the court sentences an offender who is in the category described by G.S.

14-208.33(a)(1) for a reportable conviction as defined by G.S. 14-208.6(4), and orders the offender to enroll in a satellite-based monitoring program, the court shall also order that the offender, upon the completion of the offender's sentence and any term of punishment, or supervised probation that follows the sentence, continue to be enrolled in the satellite-based monitoring program for the offender's life *and be placed on unsupervised probation* unless the requirement that the person enroll in a satellite-based monitoring program is terminated pursuant to G.S. 14-208.36. (emphasis added)

Probation "serves as a disposition of and punishment for a *crime*; it is not a civil program or sanction." *Commonwealth v. Cory*, 454 Mass. 559, 566, 911 N.E.2d 187, 193 (2009) (emphasis in original) (holding Massachusetts SBM program violative of *ex post facto* guarantees). As this Court has explained,

Probation, like incarceration, is 'a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty.' ... Probation is simply one point (or, more accurately, a set of points) on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of community service. A number of different options lie between those extremes, including confinement in a medium- or minimum-security facility, work-release programs, 'halfway houses,' and probation – which can itself be more or less confining depending upon the number and severity of restrictions imposed. ... To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy 'the absolute liberty to which every citizen is entitled, but only...conditional liberty properly dependent on observance of special [probation] restrictions.' *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

Griffin v. Wisconsin, 483 U.S. 868, 874 (1987). Any and every condition of probation constitutes punishment, since probation "substantially restrict[s]" the liberty of offenders subjected to it. *Gall v. United States*, 522 U.S. 38, 48 (2007). North Carolina has long used probation as a punitive mechanism, *e.g.* §15A-1343(a), and specifically enumerates

probation in Article XI, §1 of the North Carolina Constitution as a permissible form of punishment.

Perhaps cognizant of the legal effects of mandating lifetime probation for lifetime offenders, but recognizing the practical reality that SBM cannot succeed without offender supervision², the General Assembly quickly repealed §14-208.35 by Session Law 2007-213, House Bill 29, and replaced it with §14-208.42. Section 14-208.42 provides:

Offenders required to submit to satellite-based monitoring required to cooperate with Department [of Correction] upon completion of sentence.

Notwithstanding any other provision of law, when an offender is required to enroll in satellite-based monitoring pursuant to G.S. 14-208.40A or G.S. 14-208.40B, upon completion of the offender's sentence and any term of parole, post-release supervision, intermediate punishment, or supervised probation that follows the sentence, the offender shall continue to be enrolled in the satellite-based monitoring program for the period required by G.S. 14-208.40A or G.S. 14-208.40B unless the requirement that the person enroll in a satellite-based monitoring program is terminated pursuant to G.S. 14-208.43.

The Department shall have the authority to have contact with the offender at the offender's residence or to require the offender to appear at a specific location as needed for the purpose of enrollment, to receive monitoring equipment, to have equipment examined or maintained, and for any other purpose necessary to complete the requirements of the satellite-based monitoring program. The offender shall cooperate with the Department and the requirements of the satellite-based monitoring program until the offender has returned all monitoring equipment to the Department.

² "GPS tracking devices are a tool and nothing more. They can help trained probation and parole agents monitor offenders, but if they are not coupled with meaningful, court-ordered probation or parole, they are virtually useless. After all, 'eyes in the sky' GPS devices can locate a sex offender at a known address...but only 'eyes on the ground' can determine whether he is mowing the lawn or babysitting the neighbors' children." National Association to Protect Children, *California REAL Safety Coalition*, www.protect.org./California/realSafetyFAQ.

House Bill 29 did not evince a change in legislative intent, but merely a clumsy effort to rebrand probation. With no change worked in the nature of the restraint and supervision, mandatory "cooperation" was merely lifetime probation. Such could not alter the penal nature of the program, since the

Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised.

Cummings, 4 Wall. at 325 (quoted in *Weaver*, 450 U.S. at 31 n.15).

The penal nature of monitoring was also evident in the enacting and all subsequent versions of the statutes by its provision that an offender may "request to terminate the satellite-based monitoring requirement *and to terminate the accompanying requirement of unsupervised probation*" one year after completing the sentence "for the offense for which the satellite-based monitoring requirement was imposed...." §14-208.43(a) (emphasis added). The penal nature was evident as well in Section 16 of House Bill 1896 by its statement of purpose: "The system shall be for use as an intermediate sanction and to help supervise sex offenders who are placed on probation, parole, or post-release supervision." "Intermediate sanction" is a term of art in North Carolina that has historically been synonymous with "intermediate punishment". See §§15A-837(a)(5), 15A-1340.13(h), 15A-1340.13(g).

Just as the text of the statutes clearly evidenced the legislative intent to enact a criminal punishment scheme, the selection of the Department of Correction as the entity to establish, create guidelines, and administer the program evidenced this legislative intent. See §14-208.40(a). The Department of Correction is the governmental agency charged with the

responsibility for providing "the necessary custody, supervision, and treatment to control and rehabilitate criminal offenders." §143B-261. While the North Carolina Supreme Court considered the selection of the Department to merely reflect a desire for cost savings, *Bowditch*, 364 N.C. at 344, 700 S.E.2d at 7, and nonsensically pointed to rehabilitative programs operated by the Department as examples of its civil mission, *id.* at 343-344, 700 S.E.2d at 7, the selection of the Department of Correction stood in stark contrast to the legislative decision to entrust the civil sex offender registry to sheriff's departments, entities that perform both civil and criminal functions. *E.g.* N.C.R. Civ. P. 4(a) (sheriffs serve civil process).

The North Carolina General Assembly placed the SBM scheme within Title 14 of the General Statutes, which title contains Criminal Law. Such placement contrasted with placement of the Sexually Violent Predator Act this Court examined in *Hendricks*, which the Kansas Legislature placed in its Probate Code, described as a "civil commitment procedure," and assigned for administrative purposes to the Kansas Department of Health and Social and Rehabilitative Services. 521 U.S. at 361, 368.

Lastly, in 2008, the General Assembly was presented with the opportunity to expressly declare,

The satellite-based monitoring program is civil and not punitive in nature, and is primarily designed as a means of assuring, as much as possible, public protection.

Senate Bill 2063. The General Assembly declined to do so.

"A conclusion that the legislature intended to punish would satisfy an *ex post facto* challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the legislature has stated it." *Smith*, 538 U.S. at 92-93. The language,

structure, and history of SBM clearly indicate its penal nature. The North Carolina Supreme Court owed deference to the legislative classification and was compelled to conclude that it could not be applied to offenders whose offenses pre-dated the statute without running afoul of *ex post facto* guarantees.

By ignoring the first part of an *ex post facto* analysis, the North Carolina Supreme Court jumped straight into determining whether the scheme was so punitive in purpose and effect as to override what it deemed a legislative intent to enact a civil regulatory scheme. Employing the analysis set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the Court erroneously concluded that it did not. Each *Kennedy* factor, however, evidenced the penal nature of the scheme.

First, SBM involves affirmative restraints. In its hardware alone, SBM "burdens liberty in two ways: by its permanent physical attachment to the offender, and by its continuous surveillance of the offender's activities." *Cory*, 454 Mass. at 570, 911 N.E.2d at 196.

There is no context other than punishment in which the State physically attaches an item to a person, without consent and also without consideration of individual circumstances, that must remain attached for a period of years and may not be tampered with or removed on penalty of imprisonment. Such an imposition is a serious, affirmative restraint.

Id. Unlike offenders required to enroll in sex offender registries, offenders ordered to enroll in SBM are not "free to...live and work as other citizens, with no supervision." *Smith*, 538 U.S. at 100. Monitoring affects every aspect of the offender's life, including employment, leisure activities, medical care, and modes of transportation. The offender must respond to every message sent to him by the monitoring equipment or supervising agent or face

criminal liability. "GPS is the highest form of monitoring available short of incarceration," Jack Wagner, Pennsylvania Department of the Auditor General Bureau of Special Performance Audits, *Using GPS technology to track sex offenders: Should Pennsylvania do more?*, p. 7 (July 2008). Enrollment in satellite monitoring deprives "an offender of a significant liberty interest" by its affirmative restraints and disabilities. *State v. Stines*, __ N.C. App. __, __, 683 S.E.2d 411, 414 (2009).

Second, the General Assembly selected "a means deemed punitive in our tradition, so that the public will recognize it as such." *Smith*, 538 U.S. at 97. Daily supervision by the State, restriction of movement akin to electronic house arrest, shame and humiliation of wearing a readily identifiable device in public, and the choice of banishment have all historically been considered punishments. *See Smith*, 538 U.S. at 99 (forcing "an offender to appear in public with some visible badge of past criminality" has historically been viewed as punishment); *Kennedy*, 372 U.S. at 168 n.2 (banishment and exile have historically been used as punishments); *Commonwealth v. Renderos*, 440 Mass. 422, 799 N.E.2d 97 (2003) (daily supervision after completion of imprisonment has historically been viewed as punishment).

Third, a requirement of scienter exists, as offenders are subjected to SBM only upon conviction of criminal offenses that require proof of mental state. Where conviction of a criminal offense is a prerequisite to eligibility, the scienter requirement is met. *State v. Beckham*, 148 N.C. App. 282, 286, 558 S.E.2d 255, 258 (2002).

Fourth, SBM promotes deterrence and retribution, two of the traditional aims of punishment. The Department of Correction turned to SBM precisely because "it is an effective tool to deter criminal behavior and encourage offender compliance." North

Carolina Department of Correction Division of Community Correction *Annual Report 2002/2003*, p. 3. Satellite monitoring "promotes retribution because participants in the Act must acquiesce to new requirements that severely limit their rights and liberty throughout their life." Frank Lee, *Note: Severing the Leash: A Challenge to Tennessee's Sex Offender Monitoring Act in Doe v. Bredesen*, 44 U.C. Davis L. Rev. 683, 708 (2010).

SBM satisfies the fifth *Kennedy* factor as it is administered "in response to criminal conduct." *Cory*, 454 Mass. at 569, 911 N.E.2d at 195. It applies to every person convicted of certain crimes with no determination made as to actual future risk.

Sixth, while SBM bears some rational connection to protection of the public, since past locations can be retrieved in the course of criminal investigations to determine if an offender was or was not present at the scene of a crime, SBM cannot prevent offenders from frequenting places they are not allowed to visit, "prevent a crime from occurring or show exactly what the offender is doing...." *Wagner, supra*, p. 8.

Seventh, SBM is excessive in relation to its alternative purpose.

If the past conduct which is made the test of the right to engage in some activity in the future is not the kind of conduct which indicates unfitness to participate in the activity, it will be assumed, as it must, that the purpose of the statute is to impose an additional penalty for the past conduct.

Cases v. United States, 131 F.2d 916, 921 (1st Cir. 1942). An offender's prior sexual conduct has no bearing on the offender's future right to board an airplane, be secure in his home from unreasonable searches and seizures, swim, sleep through the night uninterrupted by commands to go outside to reestablish contact with a satellite, or be gainfully employed. SBM does not even reduce the rate of recidivism. The Tennessee pilot SBM program revealed that offenders who did not actually require the level of supervision that SBM

entails "re-offend[ed] more frequently and ha[d] overall higher recidivism rates than similar offenders supervised at lower risk levels." Tennessee Board of Probation and Parole, *Monitoring Tennessee's Sex Offenders Using Global Positioning Systems: A Project Evaluation*, p. 63 (2009).

Twenty-four states have thus far adopted satellite-based monitoring of sex offenders.³ Only North Carolina made its scheme explicitly retroactive. Letting the decision of the North Carolina Supreme Court stand could send the wrong message to twenty-three states, resulting in amendment of their statutes to pull in offenders who constitutionally cannot be further punished for conduct committed before the adoption of satellite-based monitoring. Similarly, any state currently contemplating adopting satellite monitoring could be encouraged by this opinion to make any new scheme retroactive.

Given the clear constitutional prohibition against increasing punishment for past conduct, and the loss of liberty, privacy, and basic dignity suffered by those ordered to enroll in satellite-based monitoring, this is not a matter that should await further development of the law. To date, only three decisions have been issued dealing with SBM. In *Doe v. Bredesen*, 507 F.3d 689 (6th Cir. 2007), *rehearing denied, rehearing denied en banc*, 521 F.3d 680 (6th Cir. 2008), a fractured Sixth Circuit held that Tennessee's pilot SBM program did not violate *ex post facto* guarantees. In *Cory, supra*, the Massachusetts Supreme Court held that SBM was so punitive in purpose and effect as to constitute criminal punishment and therefore violated *ex post facto*. In the instant case, with one justice dissenting, North Carolina held that SBM neither constituted punishment nor was so punitive in purpose and

³ SBM is utilized in some form in Arizona, California, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Michigan, Missouri, Montana, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Texas, Virginia, West Virginia, and Wisconsin.

effect as to negate the legislative intent to enact a civil regulatory scheme. Each of these decisions addressed significant constitutional issues in the area of privacy, search and seizure, due process, and right to travel that warrant review by this Court.

Every criminal defendant is guaranteed fair treatment by the United States Constitution. "That is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life in which he occupies." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). When Mr. Vogt committed his second sexual act, he expected to receive a finite punishment and, upon completion of that punishment, be restored to the rights of citizenship. Due to enactment of a new punishment, Mr. Vogt will instead remain under the close supervision of the State for the rest of his natural life. The "*Ex Post Facto* Clause protects liberty by preventing governments from enacting statutes with 'manifestly *unjust and oppressive*' retroactive effects." *Stogner v. California*, 539 U.S. 607, 611 (2003) (quoting *Calder v. Bull*, 3 U.S. 386, 3 Dallas 386, 1 L. Ed. 648 (1798)) (emphasis in original). The North Carolina Supreme Court's flawed analysis has stripped Mr. Vogt, and all persons ever convicted in North Carolina of designated sex offenses, of constitutional protections and should be reversed.

CONCLUSION

For the reasons stated above, Robert Peter Vogt, Jr., the Petitioner herein, respectfully requests that a writ of certiorari issue to review the decision and orders of the Supreme Court of North Carolina.

Respectfully submitted, this the 31st day of January, 2011.

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