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STATEMENT OF ISSUE ON APPEAL

Whether the electronic monitoring provision under South Carolina Code Ann. § 23-3-540 was inherently unconstitutional to the extent that it violated the Eighth Amendment prohibition against cruel and unusual punishment and disproportionate sentencing.

STATEMENT OF THE CASE

Appellant Andrew James Harrelson pled guilty to first degree criminal sexual conduct, lewd act on a minor, third degree criminal sexual conduct and assault, and battery of a high and aggravated nature during the February 2009 term of the McCormick County General Sessions Court before the Honorable William P. Keesley, Judge. Appellant was sentenced to commitment within the South Carolina Department of Corrections Youthful Offender Division for an indeterminate period not to exceed six years and placement upon electronic monitoring per South Carolina Code Ann. §23-3-540.

Appellant appealed. This brief follows.

ARGUMENT

Whether the electronic monitoring provision under South Carolina Code Ann. § 23-3-540 was inherently unconstitutional to the extent that it violated the Eighth Amendment prohibition against cruel and unusual punishment and disproportionate sentencing.

At sentencing, defense counsel objected to the "electronic monitoring portion of the sentence" as it violated the prohibition against cruel and unusual punishment. R p. 51, line 13 – 24. Counsel contended that appellant was 16 years old at the time of the commission of the crimes and 18 years old at sentencing, and thus took exception to the in effect indefinite life time monitoring as cruel and unusual punishment.

The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment and does not allow the duration of a sentence to be grossly disproportionate to the severity of the crime. State v. Williams, 380 S.C. 336, 669 S.E.2d 6440 (2008). In Thompson v. Oklahoma, 487 U.S. 815 (1988), the United States Supreme Court held that the two principles in determining whether a punishment is cruel and unusual are the evolving standards of decency and the proportionality between the punishment and the offense, and that in order to establish evolving standards of decency, the defendant must show that our culture and laws would reject a particular sentence. See also State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007); cert denied 128 S.Ct. 1872 (2008), and State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002). The Thompson v. Oklahoma Court held that the "imposition of a death sentence on one who committed a crime at the age of fifteen would not serve the goals of deterrence or retribution inasmuch as a juvenile is less culpable, has more capacity for growth and is not likely to have performed a cost beneath analysis as to the consequences of his conduct.

Here, the placement of an electronic monitoring device in effect indefinitely on appellant, who was a mere is eighteen years old at sentencing, was clearly a sentence that was disproportionate to the crime and cruel and unusual punishment for a youth who had not matured fully nor proved to be hard core and worthy of such harsh punishment at this young age. Appellant received sufficient punishment via confinement and subjection to the sexual registry and sexual predator requirements.

Also, the nature of appellant's case was worthy of mention as well. For example, appellant's case was not a drug case nor a recidivist statute case (LWOP). It has been held that LWOP sentences for drug violations do not offend evolving standards of decency so as to constitute cruel and unusual punishment. State v. Brown, 303 S.C. 169, 399 S.E.2d 593 (1991); State v. Williams, 380 S.C. 336, 669 S.E.2d 640 (2008). Also, it has been held that LWOP sentencing in and of itself has been held not to be cruel and unusual punishment. State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2000). Additionally, our courts have held that LWOP sentencing for juveniles do not violate contemporary standards of decency so as to constitute cruel and unusual punishment, even if the enhanced sentences were based on a prior most serious conviction committed while the defendant was a juvenile. State v. Standard, 351 S.C. 199, 569 S.E.2d 325 (2002). And, note that the Court's ruling that a thirty-year sentence for twelve-year old did not violate the Eighth Amendment was based on the fact that the defendant committed a double murder with an elaborate and sophisticated cover-up. This type of sophistication was not present in the instant case. Here, it was clear that appellant, who was an eighteen year old, has still many years to grow and develop and should not be stifled from rehabilitation nor similarly situated at sentencing to the average

developed adult for whom such a sentence (electronic monitoring) is geared in an effort to achieve deterrence or retribution.

Furthermore, in analyzing the question of whether the sentence was disproportionate, one must analyze the gravity of the offense and harshness of the penalty imposed, the sentences imposed on other criminals within the same jurisdiction, and the sentence imposed for committing the same crime in other jurisdiction. State v. Brannon, 341 S.C. 271, 533 S.E.2d 345 (2000); State v. Kiser, 288 S.C. 441, 343 S.E.2d 292 (1986); Harmelin v. Michigan, 501 U.S. 957 (1991). This in effect indefinite electronic monitoring beginning at age eighteen was punishment so severe that it offered no real opportunity for rehabilitation, and when juxtaposed against the crimes committed (albeit sex crimes) there was no compelling justification for such a sentence in light of appellant's young age in that the commission of the crimes (age 16) occurred at a time when appellant lacked judgment and had not developed socially or intellectually, which in summary clearly establishes that this penalty was cruel and unusual, disproportionate to the crimes, and thus contrary to the Eighth Amendment.

CONCLUSION

Based on the following argument, appellant's case should be remanded for resentencing.

Respectfully submitted,

____
Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT.

November 23, 2009

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

November 23, 2009

____
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from McCormick County

William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANDREW JAMES HARRELSON, JR.,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATE OF SOUTH CAROLINA

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Appeal from McCormick County

William P. Keesley, Circuit Court Judge

THE STATE,

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V.

ANDREW JAMES HARRELSON, JR.,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Norman Mark Rapoport, Esquire, Senior Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 23rd day of November, 2009.

____
Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 23rd day of November, 2009.

______________________________(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2018 .

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October 12, 2010

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Re: The State v. Andrew James Harrelson, Jr.

Dear Mark:

Enclosed are two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/mwl

Enclosure