STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	**IN THE COURT OF GENERAL SESSIONS** **Warrant Number:**
The State of South Carolina,	**2015A4021602633; 34**
	2015A402160023; 21
vs.	**MEMORANDUM IN SUPPORT OF MOTION TO REMOVE THE ELECTRONIC MONITORING CONDITION OF BOND AND TO DECLARE THE RICHLAND COUNTY ELECTRONIC MONITORING PROGRAM NULL AND VOID AND IN VIOLATION OF THE UNITED STATES AND SOUTH CAROLINA CONSTITUTIONS**
Deandre Basil Moye;	
Tajei Lewis **Defendant.**	

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RICHLAND COUNTY
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Defendants move this Court to remove the electronic monitoring condition of their bond and to declare that condition null and void as this condition arises from an Electronic Monitoring Program that was created without authority of law and in violation of the United States Constitution, the South Carolina Constitution, and State law.

Defendant Moye was arrested on November 14, 2015 and was charged with Possession of a Stolen Motor Vehicle, value $10,000 or more, and Possession of a Stolen Weapon. Municipal Court Judge Dana D. Turner set bond on November 15, 2015 in the amount of a $20,000 surety bond with the added condition of mandatory electronic monitoring pursuant to the Richland County Electronic Monitoring and Home Detention Program. Defendant Moye remains incarcerated at the Alvin S. Glenn Detention Center.

Defendant Lewis was arrested on January 30, 2015 and charged with Attempted Murder and Possession of a Weapon During a Violent Crime. At that time his bond was denied. On May 6,

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2015, Judge Tanya Gee set bond in the amount of a $50,000 surety bond with the added condition of electronic monitoring pursuant to the Richland County Electronic Monitoring and Home Detention Program (hereafter EMHDP). Defendant Lewis remains incarcerated at the Alvin S. Glenn Detention Center.

The facts surrounding the subject of this memo were previously included in the Notice of Motion filed on March 30, 2016. For the Court's convenience, these introductory facts will be repeated again here with the substance of the legal argument and new matter beginning on page three of this memo.

The Richland County Electronic Monitoring Program is operated by Offender Management Services, LLC (hereafter "OMS"), a private corporation housed within the walls of the Fifth Circuit Solicitor's Office working in conjunction with members of that office. The EMHDP was created by an administrative order signed on June 9, 2014 by Judge Robert Hood who at that time was the Chief Judge for Administrative Purposes for General Sessions in Richland County. Solicitor Dan Johnson has contracted with this private corporation to monitor defendants who have charges pending in his office and who are currently on bond where monitoring has been ordered by the court. OMS is a for profit, private corporation whose employees have been provided office space by the Solicitor's office rent free for at least the last 18 months.[1] By the terms and protocols of the program, this private corporation is exercising

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[1] On March 7, 2016, undersigned counsel sent an email to Emily Burn requesting the names of all of the employees working for OMS in Richland County and for information regarding where those employees' offices are located. Ms. Burn did not respond to the request for information but instead referred the request to recently retained counsel for OMS, Lake Summers. Mr. Summers emailed counsel on March 8, 2016 asking that she give him a call in regards to the email that had been sent to Ms. Burn. Counsel returned the call and spoke with Mr. Summers and reiterated the request for information regarding how many employees were working in Richland County and where. Mr. Summers indicated he would look into it and get back to counsel. As of the date of

unrestrained supervisory power over charged defendants who have not been convicted of any crime without any Constitutional protections being applied. This corporation, working hand in hand with the Solicitor's office, has the power to incarcerate a defendant without notice or a hearing in advance and the power to track at all times the real time location of a monitored defendant. Their power exceeds the power of a bonding company who wishes to re-commit a defendant. A bonding company may only re-commit without a prior hearing if the defendant poses an imminent threat. And even then the bonding company must immediately file affidavits with the court and a hearing is set. The power granted to OMS also exceeds the power of the Solicitor's office when that entity seeks to revoke a bond. In that instance, the assigned solicitor must file a motion and the judiciary must make that determination. Under the monitoring program, a lay person working in conjunction with the Solicitor can incarcerate a defendant without any judicial involvement. In other words, there are procedural safeguards in place to ensure compliance with statutory and Constitutional law in every other setting by which a defendant on bond is re-incarcerated other than when a defendant is sent back to jail under the EMHDP.

This arrangement further provides an unprecedented setting in which a prosecuting agency is not only able to track charged defendants, but they also have the unfettered authority by the exact terms of the monitoring contract that every defendant must sign, to search monitored defendants' homes, vehicles, or person without limitation at any time they so choose and for whatever reason they may choose. In determining whether or not to order electronic monitoring for a defendant, a judge in Richland County has no authority to make individual considerations regarding monitoring of a specific defendant before that judge. The judge is constrained by the

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this filing, neither Mr. Summers nor Ms. Burn has provided a response or answer to this inquiry. To the best of Counsels' knowledge OMS continues to operate out of the Solicitor's office.

June 9, 2014 administrative order creating the EMHDP. For instance, a judge cannot even consider addressing the issue of fees for an indigent defendant. By the terms of the contract, all of the fees for monitoring must be paid by the defendant. A judge cannot consider ability to pay and cannot place a defendant on a sliding scale. He or she must order the defendant to pay all of the fees. These fees amount to $259.00 a month and must be paid and current until the date upon which the Solicitor decides to call the monitored defendant's case to trial.

These issues have been raised by undersigned counsel to the Fifth Circuit Solicitor's office. A meeting was held with Dan Goldberg and Paulette Edwards on January 28, 2016. At the conclusion of that meeting Mr. Goldberg asked undersigned counsel to provide a letter memorializing some of the concerns raised so that they may be provided to the Solicitor. That letter was forwarded on February 19, 2016. On March 3, 2016 counsel received notice that the Solicitor had been informed of the concerns raised and that the Solicitor's office would not be able agree to make any changes to the monitoring program or attempt to resolve the issues raised by counsel.

I. There is no legal authority for the creation of the Electronic Monitoring and Home Detention Program operating in Richland County.

A. Formation of the Electronic Monitoring Program

The EMHDP was created without any legal authority to support such a program. The Richland County Electronic Monitoring and Home Detention Program first appears in an Administrative order signed by the Honorable Robert Hood on June 9, 2014. **Attachment A.** This administrative order was issued approximately nine months after Richland County entered into an agreement with OMS to be the sole provider for electronic monitoring in Richland County. On October 21, 2013, the County of Richland executed the contract with OMS to provide "Electronic Monitoring and Home Detention Services." **Attachment B** (October 21,

2013 contract between Richland County and OMS). In a "Notice to Proceed" letter sent from the County of Richland to OMS, dated October 24, 2014, the County refers to these services being provided by OMS for the "Electronic Monitoring and Home Detention Program." **Attachment C** (Notice to Proceed dated October 24, 2013). This contract states that OMS shall establish a company policy regarding the reporting of violations, as approved by the "Richland County Criminal Justice System" (RCCJS). The original contract with OMS was signed by an R. Caldwell on behalf of the County. William Bilton, an employee of Fifth Circuit Solicitor Dan Johnson and the Fifth Circuit Solicitor's Office, is noted in the Notice to Proceed as the "Contracting Officer Representative". This contract was renewed on October 21, 2014, with Fifth Circuit Solicitor Dan Johnson signing on behalf of Richland County, and Steve Page signing on behalf of OMS. **Attachment D** (Renewal Contract dated October 21, 2014). The renewal contract did not go through the procurement process with Richland County. Per the terms of this contract, the contract will renew automatically every year for the next five consecutive years.

The primary contact for Offender Management Services in Richland County is Emily Burn who is the "Operations Manager" for OMS in Richland County. Ms. Burn is a former employee of Mr. Dan Johnson who left employment at the Fifth Circuit Solicitor's office to be hired by OMS to run its Richland County office. Ms. Burn's office is located within the Fifth Circuit Solicitor's Office and she reports to and works in concert with Mr. Johnson's investigators within that office. By the terms of the contract, defendants are required to meet weekly with Ms. Burn and must report to her in the courthouse for these meetings. Ms. Burn told Fielding Pringle and Jennifer Davis during a meeting in November of 2014 that the purpose of these meetings is "to just see how they are doing" and "check in with them". Ms. Burn has

two additional employees whose offices are also located in the Richland County Courthouse within the Fifth Circuit Solicitor's Office. Additionally, a conference room within the Solicitor's Office is utilized by the OMS employees. On March 7, 2016, undersigned counsel sent an email to Emily Burn requesting the names of all of the employees working for OMS in Richland County at this time and the location of their offices in order to provide exact and accurate information to this Court. Ms. Burn did not respond to the request for information but instead referred the request to recently retained counsel for OMS, Lake Summers. Mr. Summers emailed counsel on March 8, 2016 asking that she give him a call in regards to the email that had been sent to Ms. Burn. Counsel returned the call and spoke with Mr. Summers and reiterated the request for information regarding how many employees were working in Richland County and where. Mr. Summers indicated he would look into it and get back to counsel. As of the date of this filing, neither Mr. Summers nor Ms. Burn has provided a response or answer to this inquiry.

B. **June 9, 2014 "Superseding Administrative Order"**

On June 9, 2014, a "Superseding Administrative Order" was issued in the Richland County Court of General Sessions by the Honorable Robert Hood governing electronic monitoring for defendants on bond captioned, "In re: Bail, Recognizances, and Electronic Monitoring." While the June 9th order is titled "Superseding", it is unclear what order it Supersedes. Inquiry has been made to Judge Hood's office requesting the "May __ 2014" order referenced in the June 9th order "Conditions of Bond", but his office was unable to locate any such order. A review of the administrative orders in the Clerk of Court's office did not reveal any order from May, 2014 dealing with this issue or any other order relating to this issue.

The June 9, 2014 order states that "Richland County has established an Electronic Monitoring and Home Detention Program in an effort to provide the judiciary with the option of

imposing Electronic Monitoring Supervision on certain individuals who would ordinarily be released on bond without supervision". Per the order, all court ordered electronic monitoring as a condition of bond must be procured through OMS exclusively. Each individual supervised through this program must execute an agreement with OMS that has been approved by the Chief Administrative Judge for the Fifth Circuit. The monitoring agreement approved by the court and attached to that order states that "an Electronic Monitoring Program has been established and is operated by the Richland County Criminal Justice System (RCCJS)". Counsel has been told that the RCCJS is comprised of the following members: Richland County Sheriff Leon Lott, Chief Richland County Magistrate Judge Donald Simons, Fifth Circuit Solicitor Dan Johnson, former interim City of Columbia Chief of Police Santiago, and Alvin S. Glenn Detention Center Director Ronaldo Myers. This information was provided by OMS employee Emily Burn. In a letter dated June 27, 2013 from Solicitor Dan Johnson to the Richland County Office of Procurement and Contracting, the final paragraph refers to "we the undersigned members of the Richland County Criminal Justice System" and concludes with the signatures of Solicitor Dan Johnson, Sheriff Leon Lott, Interim Chief Ruben Santiago, Judge Donald J. Simon, and ASGDC Director Ronaldo Myers. **Attachment E**.

It is unclear how this entity was formed. If there is documentation regarding the existence, formation, and operation of the RCCJS, counsel has been unable to obtain it though requests have been made to the Richland County Ombudsman, the Richland County Legal Department, South Carolina Court Administration, and the ASGDC. Corporate Richland County has informed counsel that it is not aware of a group that, subsequent to execution of the OMS contract, meets, votes or otherwise confers regarding the monitoring or recommitment of

offenders pursuant to the OMS contract and the Information Sharing Protocol[2] between the Fifth Circuit Solicitor's Office and OMS. OMS employees stated during a November 15, 2014 meeting attended by Fielding Pringle and Jennifer Davis that Solicitor Johnson is the chair of the RCCJS, and all violations of electronic monitoring that are referred to the RCCJS are in fact referred to Mr. Johnson's designee, an investigator in his office, for a determination on how to proceed with the handling of the violation.

To make matters more confusing, this entity is called different names in different documents relating to the EMHDP. In the "Condition of Bond" contract attached to the June 9, 2014 order, it is stated that "In accordance with the Administrative Order of the Court of General Sessions dated May ___, 2014 [sic][3], and [sic] an Electronic Monitoring Program has been established and is operated by the Richland County Criminal Justice System (RCCJS)." While the June 9th attached contract reflects the name of the Richland County Criminal Justice System or the RCCJS, the "Information Sharing Protocol" that was provided by the Solicitor's office to under signed counsel refers to what appears to be the same entity as the "Richland County Criminal Justice Committee". Whatever this entity is actually called is unknown to counsel at this time as no documentation of the formation of this entity has been found.

The June 9th order regarding electronic monitoring while on bond claims its authority under the general bond provision statute (SC Code § 17-15-10 et seq.) which states, "[the court]

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[2] This document is discussed at length below and can be found in **Attachment K.**

[3] While the June 9th order and contract that were signed and initialed by Judge Hood reference a "May ___, 2014" order, it appears that the actual orders being used and signed by the defendants have been modified to correct the "May ___, 2014" date to reflect "June 9, 2014" which would be accurate. The correct date of June 9, 2014 has been handwritten in over what appears to be the whited out incorrect date. Counsel is unaware whether this modification reflects a modification made by the Court or by OMS to the original order. Counsel has not been able to locate a modified order signed by Judge Hood reflecting this change.

may impose … any other conditions deemed reasonably necessary to assure appearance as required, including a condition that the person return to custody after specified hours." S.C. Code Ann. § 17-15-10 contains no provisions or sub sections providing any authority to create or establish an electronic monitoring program such as the EMHDP. It is not the Defendants' position that a court could not order GPS monitoring as a condition of bond pursuant to § 17-15-10. This is not the issue. The issue is the unlawful creation of the EMHDP specifically and the conditions attached to the EMHDP. The bond statute does not provide the requisite authority to create the EMHDP.

C. **June 30, 2014 "Superseding Administrative Order"**

On June 30, 2014, a second "Superseding Administrative Order" was issued in the Richland County Court of General Sessions by the Honorable Robert Hood captioned "Home Detention Program." **Attachment F.** (Superseding Administrative Order dated June 30, 2014). This order also had attached the same terms and conditions of the program as approved by the court in the June 9, 2014, administrative order. The June 30th order, however, states that the authority for this program is in SC Code § 24-13-1530 which is the Home Detention Act which states:

> "Notwithstanding any other provision of law which requires mandatory incarceration, electronic and nonelectronic home detention programs may be used as an alternative to incarceration for low risk, nonviolent adult and juvenile offenders as selected by the court if there is a home detention program available in the jurisdiction…"

The June 30th order would be, therefore, limited to only low risk, nonviolent adult and juvenile offenders on home detention. This order makes no reference to the RCCJS or to OMS. An email dated November 20, 2014 from Judge Hood's law clerk confirmed that the June 30th order regarding Home Detention is an order separate and apart from the June 9th order and that it

does not supersede the June 9th order. Thus, the June 9th order is the focus of this motion and argument as that is the order governing electronic monitoring while on bond.

D. There is no legal authority for creation of the EMHDP.

There is no legal authority for the creation of the EMHDP. The June 9, 2014 order refers to a county program that exists in name only and which seems to have appeared out of thin air. This program appears to have no etiology beyond the June 9th administrative order signed by Judge Hood. This is the first and only place this program appears. It was not enacted by County ordinance, State law, or order of the Supreme Court and appears for the first time in the June 9th administrative order.

Because there is no state law or ordinance supporting creation of this program, the question becomes whether a Chief Administrative Judge has the authority to create a program of this kind through the issuance of an Administrative Order. The answer is no.

Article V, § 1 of the South Carolina Constitution mandates a unified judicial system. Section 4 of Article V designates the Chief Justice of the South Carolina Supreme Court as the administrative head of the unified judicial system and directs that that Court issue rules governing the administration of all courts in this state. Order 2011-02-04-01issued by Chief Justice Toal of the South Carolina Supreme Court on February 4, 2011 lays out the scope of authority for administrative judges and specifically enumerates what a Chief Administrative Judge may and may not do.[4] **Attachment G.** A review of this order reveals that there was no authority vested in Judge Hood, that would permit him to create a program such as the EMHDP. In fact, the order specifically states that "no administrative rule affecting the operation of the

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[4] This was the order in effect at the time the June 9, 2014 order from Judge Hood was issued. No order modifying or amending Order 2011-02-04-01was found between February 2011 and June 2014.

courts shall be adopted without the prior approval of the Chief Justice." First of all, this order goes well beyond "an administrative order affecting the operation of the courts". Moreover, no such approval was sought or issued regarding the EMHDP. The South Carolina Supreme Court has also addressed the issue of the scope of duties of a chief administrative judge in the matter of *Spartanburg County Dep't of Social Services v. Padgett*, 370 S.E.2d 872 (1988) which noted that local administrative rules affecting operation of the courts must be submitted and/or approved by the Chief Justice. The Court went on to note in *Padgett*, that there is "no place in the unified judicial system for local rules which have the effect of varying the administrative and procedural practice from circuit to circuit and court to court." *Id.* 370 S.E.2d at 876; *See also State v. Duncan*, 264 S.E.2d 421 (1980) (the circuit court cannot promulgate its own rules governing practice and procedure). Whether a judge acts within a judicial or administrative capacity, his or her actions must be within the scope of their authority. A judge cannot in that capacity issue orders which ultimately divest other judges of their inherent discretionary authority to rule on issues affecting the rights and interests of defendants (or other litigants) in a specific case.

This order does just that. It establishes a program that allows for zero discretion in the hands of the individual circuit judge. The judge who is charged with considering what bond conditions to impose on an individual defendant cannot address the issue of costs and fees, specific terms and conditions, or even which monitoring company to use. The judge cannot take into account indigency and a defendant's ability to pay. Moreover, the judge and the court have no role in the determination made regarding re-incarceration in the event of violation. This is completely assigned to OMS in conjunction with the Solicitor's designee. There is zero ability for a judge to exercise his or her discretion in placing a defendant on electronic monitoring. If he or she is to do so, it must be within the confines and constraints of the June 9th order and the

ordered to electronic monitoring pay all fees associated with monitoring themselves. The contract which every defendant must sign specifically states as follows:

> "I agree to pay the monitoring fees to the Richland County Home Detention Program to cover the daily costs of my supervision while I am participating in the Richland County Home Detention Program. I agree to pay an installation fee and for fourteen (14) days of electronic monitoring in advance. I will pay weekly at a prearranged time until I complete the program and/or I am removed from the program for violating its terms and conditions. Such payments are in addition to any monies ordered to be paid by the Court." Condition No. 22.
>
> **Attachment A.**

The contract goes on to spell out the defendant's understanding that failure to pay will result in removal from the Richland County Home Detention: "Failure to pay the Richland County Home Detention Program fees and/or Court ordered payments **will result** in my removal from the Richland County Home Detention Program". (emphasis added) Condition No. 24. The agreement even dictates form of payment: "I agree to make all payments in the form of a credit/debit card, money order, or certified check. No personal checks will be accepted." Condition No. 23. The fees for electronic monitoring are exorbitant by any standard. In order to be released on the monitor a defendant must pay a $50 installment fee plus two weeks of monitoring at the daily rate of $9.25. Thus, to be released a defendant must pay an initial cost of $179.50. After his release, he must pay a daily rate of $9.25 due weekly in the amount of $64.75 a week or $259.00 a month.

As the order is written, there is no accommodation for indigent defendants included in this program. There is no sliding scale and no middle ground upon which a judge may rely in order to make electronic monitoring affordable for an indigent defendant. Interestingly, in a letter from Fifth Circuit Solicitor Dan Johnson to the Richland County Office of Procurement and Contracting dated June 27, 2013, Mr. Johnson writes to express the desire of the RCCJS for the

County to utilize the services of OMS in particular, in part due to the availability of various options for payment of fees with this corporation. Mr. Johnson writes, "[t]here can be specific predetermined fees to be paid by the offender or a **sliding scale based on income** can be used." He adds, **"[t]here is also a method that may be used in handling indigent cases.**" (Emphasis added.) And finally he notes that there is even a "lower rate agency pay option that can be utilized for cost savings in certain circumstances such as medical cases" meaning that even the jail could be eligible for a reduced rate in certain situations. **Attachment E.** Thus according to this letter, OMS was willing and able to address the issue of indigency. For reasons unknown, neither the original contract with OMS nor the five year renewal contract signed by Solicitor Johnson include any consideration of ability to pay or indigency. If the electronic monitoring condition is ordered as a condition of bond, an indigent defendant either pays all of the fees associated, remains incarcerated, or becomes re-incarcerated without a hearing as to willfulness for failure to pay per the specific terms of the contract.

B. Right to Bail

The South Carolina and the United States Constitutions prohibit the imposition of excessive bail. U.S. Const. Amend VIII; S.C Const. Art. 1, Section 22; The United States Supreme Court has held that "bail set at a figure higher than an amount reasonably calculated to fulfill the purpose of assuring the presence of defendant is 'excessive' under the Eighth Amendment." *Stack v. Boyle*, 342 U.S. 1, 5 (1951). In South Carolina, any person charged with a non-capital offense "shall, at his appearance before any such courts, be ordered released pending trial on his own recognizance without surety in an amount to be specified by the court, unless the court determines in its discretion that such a release will not reasonably assure the appearance of the person as required or unreasonable danger to the community will result." S.C.

Code Ann. § 17-15-10. Thus, the clear presumption in the state of South Carolina is for pre-trial release on one's own recognizance rather than the setting of a bond. A recognizance bond which includes the condition of electronic monitoring can be even more cost prohibitive than a surety bond due to the amount of money required of a defendant at the time of release in addition to the ongoing nature of the monitoring fees.

The primary purpose of bail is to assure a defendant's presence at trial. While bail will not be held unconstitutionally excessive "merely because a defendant is unable to pay it (*Hodgson v. United States*, 365 F.2d 679, 687 (8th Cir. 1966), '[i]t would be unconstitutional to fix excessive bail to assure that a defendant will not gain his freedom," and "in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release." *Bandy v. United States*, 81 S.Ct. 197, 198 (1960).

C. The EMHDP is operating in violation of the Equal Protection Clause.

The terms of the contract and resulting implementation of the EMHDP violate the Equal Protection Clause by treating similarly situated persons differently under the law. The Fourteenth Amendment to the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws". U.S. Const. Amend. XIV. The South Carolina Constitution provides that: "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws". S.C. Const. Art. 1, § 3.

The due process and equal protection principles of the Fourteenth Amendment prohibit "punishing a person for his poverty". *Bearden v. Georgia*, 461 U.S. 660, 671 (1983). In *Bearden*, the Court held that indigent probationers cannot be incarcerated for failure to pay a fine because,

"to do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id.* at 672-673. The Supreme Court has also held that a state cannot convert an unpaid fine for a fine only offense to incarceration because that would subject him to imprisonment "solely because of his indigency". *Tate v. Short*, 401 U.S. 395, 398 (1971). More recently the Supreme Court held that a court violates due process when it finds a parent in civil contempt and incarcerates the parent without inquiring into the parent's ability to pay. *Turner v. Rogers*, (2011). Thus, state courts must at a minimum inquire into a person's ability to pay prior to imposing incarceration for nonpayment. Courts have the affirmative duty to conduct this inquiry. *Bearden*, 461 U.S. at 671. Thus, any defendant faced with incarceration for inability to pay should be provided notice and a meaningful opportunity to be heard on the issue of ability to pay.

The Department of Justice has recently issued guidelines to state and local courts regarding the issue of indigent defendants and the payment of fines and fees in the criminal justice system. In a letter dated March 14, 2016, the head of the Civil Rights Division, Vanita Gupta, issued a nine page letter addressing these issues and outlining the standards and law that should be applied in various scenarios but specifically with respect to indigent defendants who are incarcerated for failure to pay fines and fees. That letter is attached to this motion as **Attachment I**. This letter also directly addresses the issue of private, for profit corporations supervising defendants on behalf of the government in the context of probation. The DOJ notes that the appointment of a private company with a pecuniary interest in the outcome of its cases raises fundamental concerns about fairness and due process. The Department of Justice also filed a Statement of Interest on behalf of the United States in the matter of *Christy Dawn Varden, et al.*

v. The City of Clanton, Case No. 2:15-cv-34-MHT-WC in the U.S. District Court for the Middle District of Alabama Northern Division. This filing was made to state very clearly the United States government's position that "[i]ncarcerating individuals solely because of their inability to pay for their release, whether through the payment of fines, fees, or a cash bond violates the Equal Protection Clause of the Fourteenth Amendment". This Statement of Interest is attached to this motion as **Attachment J**. In that case, the issue related to cash bonds being set in fixed amounts. However, the principle is the same and applies in the context of the fees associated with the EMHDP.

The electronic monitoring program implicitly creates two classes of defendants – those who are able to pay for the electronic monitor and bond out, and those who cannot afford the monitor and thus must remain in jail awaiting trial as a result whether because he cannot pay to get out or he cannot pay to stay out. This classification results in invidious discrimination based on wealth, which, in turn, impinges on liberty and the right to a fair trial, both fundamental interests. Under the EMHDP, a person with wealth is able to participate in the electronic monitoring program and secure his release, whereas the indigent defendant is forced to languish in jail pending trial of his case because he cannot afford the cost of the EMHDP. The purpose of equal protection is to ensure that all persons similarly situated shall be treated alike. Because the fundamental rights of liberty and the right to a fair trial are at stake, the EMHDP should be evaluated under a strict scrutiny standard. *See Bibco Corp. v. City of Sumter*, 332 S.C. 45 (1998); *Skinner v. Oklahoma*, 361 U.S 535 (1942). To pass strict scrutiny, the law or governmental program established must further a compelling government interest and must be narrowly tailored to achieve that interest. The law or program created must be the least restrictive means for achieving that interest and there cannot be a less restrictive way to achieve the

compelling government interest.

The government interest at stake in the context of bail is to ensure the appearance of the defendant for trial and to prevent any unreasonable danger to the community that a defendant may pose. Even if the government's interest is compelling, which arguably it is, the EMHDP was not tailored to achieve those goals or interests in the least restrictive way possible. The fees associated with the program are laid entirely on the shoulders of the defendant, whether the defendant is wealthy or indigent, without regard to any consideration for ability to pay. A system which accounts for the indigent defendant would provide for a procedure by which the fees could be waived for indigents and/or paid in whole or in part by the government that seeks to protect its interest. It does not appear that this was ever even considered. A program which treats the rich and the poor exactly the same, to the detriment of the indigent, such that the indigent's fundamental rights to liberty and a fair trial are impacted, is a program that cannot survive strict scrutiny.

The United States Supreme Court has recognized the application of the equal protection clause in the context of indigency. In *Griffin v. Illinois*, the Court held that the denial to indigents in non-capital cases of a free trial transcript, which was necessary in order to obtain full review, was a denial of the equal protection of the laws because only non-indigents could buy a transcript and obtain full appellate review. *Griffin v. Illinois*, 351 U.S. 12 (1956). The Court expanded on this application of equal protection in the area of indigency in *Smith v. Bennett* in 1961 in which it held that requiring a filing fee from an indigent defendant seeking post-conviction relief was violative of the equal protection clause. *Smith v. Bennett*, 365 U.S. 708 (1961). The Court stated the "Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each". *Id.* at 714.

Just as the indigent in *Griffin* was denied access to appellate review, the accused indigent is denied access to bail when he cannot afford the ongoing, high costs of electronic monitoring. The inability to secure release further impacts the indigent defendant's right to a fair trial. The wealthy defendant who maintains his innocence can bond out of jail and pay the costs of electronic monitoring indefinitely until his case is called for trial or dismissed. The indigent defendant does not have this luxury. He has two options. He can languish in jail until the government decides to call his case to trial. Or if he manages to bond out and pay the initial cost of monitoring, he can stay on the monitor as long as he can afford it and then either plead guilty to secure removal of the monitor or be returned to jail for failure to pay his fees where he must wait until the government calls his case for trial. Accordingly, the government holds all the cards. They decide when a case proceeds to trial and they have decided that all defendants, indigent and wealthy alike, must pay to remain out of jail until the government decides to call the case. Due to the back log of trials in the Fifth Circuit, it is likely that a defendant could remain incarcerated for many months, or even years, if he wishes to exercise his right to a trial. A wealthy defendant is not faced with this dilemma. The wealthy defendant can pay the costs of electronic monitoring, secure his release on bond, and await his trial date while able to go about his daily life enjoying the presumption of innocence afforded by the law. The inability of poor defendants to pay the costs of electronic monitoring results in a practice and culture of delay on behalf of the government. The longer a defendant remains in jail, the more likely he is to plead guilty simply to get out of jail. This is the reality for the indigent defendant who has been ordered on electronic monitoring as a condition of bond who cannot pay either the initial cost for release or the ongoing fees to remain on the monitor indefinitely. There is no incentive on behalf of the government to move a case where the defendant is incarcerated and so the defendant is

stuck until the case is called or he pleads guilty. This practice and procedure result in the violation of the right to Equal Protection of the laws under state and federal law because the wealthy defendant does not face the same dilemma and the Sixth Amendment right to a fair trial.

The inequality of this system is exacerbated in the context of the summary court defendant. A defendant in summary court could be charged with an offense that ultimately carries a fine of $1,200. Before the end of five months on electronic monitoring, the defendant has paid the cost of the fine in monitoring fees. The incentive then becomes overwhelming for a defendant struggling to pay for the monitor to simply plead guilty or no contest to stop the bleeding of his bank account.

Defendants ask this Court to remove the electronic monitoring condition of their bond due to the unconstitutional provision of the EMHDP that he pay all fees associated with this condition of bond. Defendants further ask this Court to find the EMHDP program, as it is currently operating pursuant to the June 9, 2014 Administrative Order, in violation of the Equal Protection Clause under the Fourteenth Amendment to the United States Constitution and the equal protection of laws under Article I, § 3 of the South Carolina Constitution due to the lack of a discretionary fee structure that takes into consideration indigent defendants. Furthermore the Defendants ask this Court to find the EMHDP in violation of their right to a fair trial and due process pursuant to the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, § 3 of the South Carolina Constitution.

III. The EMHDP is operating in violation of the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution due to its mandatory requirement that Defendants forego their right to be free from warrantless searches absent a finding of probable cause.

A. Terms of the Contract.

The contract that a Defendant must sign to participate in the EMHDP requires the defendant to agree to "submit my person, vehicle, or place of residence to search at any time of day or night". Condition No. 16. This condition is not optional and must be signed and agreed to by the defendant to be allowed into the program. This restriction on the Constitutional rights of a pre-trial detainee who has not been convicted of any crime would be in violation of the Fourth Amendment and the South Carolina Constitution on the face of this condition alone. However, in the context of how the EMHDP is actually operating in Richland County, the program strikes at the very heart of the Fourth Amendment by creating a personally invasive system that requires pre-trial defendants, who have not been convicted of any crime, to relinquish their Fourth Amendment right to privacy and security from unreasonable searches and seizures quite literally to the very entity currently prosecuting them. In order to understand the unique conflict presented in Richland County, it is necessary to lay out the actual structure of operation of the EMHDP.

B. Structure and Operation of the EMHDP in Richland County

Emily Burn was hired out of the Fifth Circuit Solicitor's Office to run OMS in Richland County when OMS first began operating out of Richland County. Her physical office space with OMS is now, and since the program's inception, located within the Fifth Circuit Solicitor's Office. Ms. Burn meets with defendants every week in office space provided to her by the Fifth Circuit Solicitor's office. Ms. Burn reportedly has two additional employees who work for OMS. These employees are also being housed by the Fifth Circuit Solicitor's Office. Additionally, a conference room has been made available to OMS for interviewing defendants who are making their weekly report. Per the Solicitor's Office, all of this space is being provided to OMS rent

free despite the dearth of available space in the Richland County Court House.[5] Thus, a theoretically private and independent corporation is operating out of a County courthouse which is already short on space to the degree that county agencies are being forced to seek space and funding outside of the courthouse at the cost of taxpayer dollars. OMS is enjoying a total windfall requiring defendants to pay all of the fees involved with monitoring while receiving free office space in the Courthouse. Counsel asks this Court for a hearing to present testimony of the various stakeholders to develop the facts and accuracy of this information given that access to this information has been somewhat complicated. *See* footnote 1.

In the fall of 2014, counsel requested a copy of the OMS protocols in effect in Richland County from Emily Burn. Ms. Burn indicated that counsel would have to request these protocols from the Fifth Circuit Solicitor's Office. After multiple requests to William Bilton within that office, the protocols were eventually produced by Joanna McDuffie who hand delivered them to counsel. The document produced is titled: "The Information Sharing Protocol Fifth Circuit Solicitor's Office and Offender Management Services." **Attachment K**. These protocols lay out the extent of the information sharing between the Solicitor and OMS. In sum, there are no limits placed on the information sharing between OMS and the Richland County Solicitor's Office in these protocols. In fact, the protocols specifically state that "OMS will provide full access to real time tracking data of all of the offenders enrolled in the Electronic Monitoring Program and the Home Detention Program. OMS will also provide daily summaries of the status of all offenders enrolled in the Electronic Monitoring Program and the Home Detention Program". In light of

[5] The Richland County Public Defender has been requesting office space for attorneys and employees of that office to no avail for the past year. The entire courthouse is currently full and occupied per the Clerk of Court Jeanette McBride. The RCPD currently has a $50,000 budget request for office space rental outside of the courthouse due to the shortage of space within the courthouse.

these protocols and in light of the information sharing and office space sharing between OMS and the Solicitor's office, the Richland County Solicitor's Office currently has the ability to track and monitor any defendants being prosecuted by that office that are enrolled in the EMHDP. Moreover, the Solicitor's office in conjunction with OMS, could execute searches on a pre-trial detainee's home, vehicle, or person any time they wish and the defendant would be powerless to stop it due to the signing of the contract and waiver. Thus, the Solicitor's office has the ability to track and monitor pre-trial detainees at will. This extraordinarily invasive program strikes at the very heart of the Fourth Amendment.

C. The Fourth Amendment and the Richland County EMHDP

The Fourth Amendment of the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV. Article I, § 10 of the South Carolina Constitution provides even greater protection: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures ***and unreasonable invasions of privacy*** shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, the person or thing to be seized, and the information to be obtained" (emphasis added). The addition of the express right to privacy included in the South Carolina Constitution sets it apart from the United States Constitution's Fourth Amendment and guarantees its citizens a heightened level of protection beyond that covered in the Fourth Amendment. *See State v. Forrester*, 541 S.E.2d 837, 841 (2001) ("[t]he South Carolina Constitution, with an express right

to privacy provision included in the article prohibiting unreasonable searches and seizures, favors an interpretation offering a higher level of privacy protection than the Fourth Amendment.)" *See also State v. Weaver*, 649 S.E.2d 837 (2007) (noting that the South Carolina Constitution affords a higher level of privacy protection than the Fourth Amendment).

Fourth Amendment reasonableness requires that searches and seizures be supported by probable cause. Law enforcement officers generally must obtain a search warrant from a neutral, detached magistrate before entering and searching a person or his or her house, papers, or effects. *Carroll v. United States*, 267 U.S. 132, 156, 45 S. Ct. 280, 69 L. Ed. 543, T.D. 3686 (1925); U.S. Const. Amend. IV. "Warrantless searches inside a person's home are presumptively unreasonable."

The crux of the Fourth Amendment and of Article I, § 10 centers on the reasonableness of the search. All Fourth Amendment searches are governed by reasonableness. *Riley v. California,* 134 S.Ct. 2473, 2482 (2014) (the ultimate touchstone of the Fourth Amendment is reasonableness). "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady v. North Carolina*, 135 S.Ct. 1368, 1371, 191 L. Ed. 2d 459 (2015). The test of reasonableness involves balancing the need for a particular search against the invasion of personal rights that the search entails. Reasonableness is judged in light of the scope of the intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. The only governmental need in the context of pre-trial defendants on bond is to ensure that charged defendants show up for court and/or that they do not pose a threat of danger to the community. It is difficult, albeit impossible, to articulate any reason

how the blanket search waiver outlined in the EMHDP furthers these two goals. It simply doesn't.

There are, however, a few exceptions to the warrant requirement. One exception is consent. *See State v. Brown*, 736 S.E.2d 263, 266 (2012) (recognizing the following exceptions to the warrant requirement: (1) search incident to a lawful arrest, (2) hot pursuit, (3) stop and frisk, (4) automobile exception, (5) the plain view doctrine, (6) consent, and (7) abandonment). A district court must "determine whether the consent was voluntary under the totality of the circumstances." To be voluntary, the consent must not be coerced by explicit or implicit means or by implied threat or covert force." The government cannot coerce "the waiver of a constitutional right either by conditioning the exercise of one conditional right on the waiver of another . . . or by attaching conditions that penalize the exercise of a constitutional right". *United States v.* Ryan, 810 F.2d 650, 665 (7th Cir. 1987) (citing *Simmons v. United* States, 390 U.S. 377, 394 (1968). To require a defendant to choose between remaining incarcerated if he is not willing to consent to a total waiver of his Fourth Amendment rights is necessarily coercive. If a defendant has the ability to make bond, the choice of whether to waive becomes hardly a choice at all. He must give up this right in order to get out of jail. An individual cannot be coerced into this Hobson's choice between his right to bail and his right to be free from search and seizure.

The requirement of consent to search at any time of day or night deprives the pre-trial detainee of his rights under the Fourth Amendment and the greater protections of the South Carolina Constitution. The status of a pre-trial detainee is not akin to the status of a probationer who is similarly required by state law to consent to a search of his home, person, or vehicle. The pre-trial detainee enjoys the presumption of innocence while the probationer has either pled guilty to his charge or been convicted of his charge and is on probation. While state law requires

a probationer to agree to submit to a search of his person, home, or vehicle at any time, even the probationer who has been convicted of his crime has a greater expectation of privacy than does a pre-trial detainee in the EMHDP. Pursuant to S.C. Code Ann. § 24-21-430, probation conditions imposed by a court must include the requirement that the "probationer . . . permit the search or seizure, without a search warrant, based on reasonable suspicions, of the probationer's person, any vehicle the probationer owns or is driving, and any of the probationer's possessions by . . . [a] law enforcement officer." The United States Supreme Court has held that the consent to search condition placed on a probationer is consistent with the Fourth Amendment where the search is premised upon reasonable suspicion. *See United States v. Knights*, 534 U.S. 112 (2001) (A warrantless search of a probationer's house based on reasonable suspicion does not violate his Fourth Amendment rights). Thus, even a probationer who has been convicted and sentenced of his crime is entitled at a minimum to a finding of reasonable suspicion before any warrantless search would be permitted. It cannot be that a pre-trial defendant who is merely charged with a crime has lesser rights than a probationer.

Even if this Court finds that a pre-trial detainee can waive his or her right to be free from warrantless searches, the blanket waiver that must be signed by defendants enrolled in the EMHDP potentially allows for body cavity searches, searches of the person's phone or computer, searches of shared living space, and/or repeated searches day after day. There is simply no limit placed on the waiver in the contract a defendant must sign. The contract read in conjunction with the protocols issued by the Solicitor's office suggest that the Solicitor could and would receive any and all information obtained via such a search. Thus, even if the Court finds that such a condition is permissible, which the Defendants do not concede, the nature of the expansive waiver in the context of the nexus between the Solicitor's office and OMS makes this condition

untenable and violative of their rights under the Fourth Amendment of the United States Constitution and Article I, § 10 of the South Carolina Constitution.

IV. Defendants alleged to have violated conditions of the EMHDP are deprived of their liberty by state action without due process, and in violation of SC Code § 17-15-55, which provides a right to a hearing prior to re-arrest for bond violations.

The right to bail is specifically provided for in the South Carolina Constitution, which provides that "[a]ll persons shall, before conviction, be bailable by sufficient sureties, but bail may be denied to persons charged with capital offenses or offenses punishable by life imprisonment, giving due weight to the evidence and to the nature and circumstances of the event. . . ." South Carolina Const. art. I, § 15. This right, however, is subject to forfeiture for alleged violations of the conditions of the bond set. S.C. Code Ann. § 17-15-55. Whenever the government seeks to deprive an individual of a constitutionally protected liberty or property interest, due process concerns are implicated. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-78 (1972). "The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." *Id.* (quoting *Fuentes v. Shevin*, 407 U.S. 67 (1972). "[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Jones v. United States*, 463 U.S. 354, 361 (1983). "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'" *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951)). The sudden deprivation of liberty due to rearrest for bond violations has a number of significant consequences to an individual. These include, but are not limited to the loss of income, the loss of employment altogether, the loss of

to arrest for alleged bond violations. The superseding administrative order dated June 9, 2014 states:

> "In the event any defendant enrolled in the Electronic Monitoring Program violates the terms and conditions of the program, any law enforcement officer of this State, upon notification, shall be authorized to immediately take into custody the defendant. Furthermore, the defendant will be held in custody, without bond, pending a violation hearing by the Circuit Court. A violation hearing is to be scheduled within a reasonable time from the date of detention."

Requests were made to OMS for clarity on their internal policies for handling violations, and OMS referred such requests for information to the 5th Circuit Solicitor's Office. The "Solicitor's Office Intelligence Distribution Center" forwarded an information sharing protocol that explained their policy on handling alleged violations. According to this protocol, notice of violations is forwarded to the "Richland County Criminal Justice Committee" (RCCJC). The RCCJC then decides whether the defendant should be returned to custody. If the RCCJC determines that the defendant should be returned to the detention center, they then notify the OMS supervision officer, who executes an "Affidavit of Non-Compliance." Law enforcement is then notified to arrest the defendant. **Attachment K.**

While OMS is ostensibly a private entity, the United States Supreme Court has discussed a number of situations where the actions of private entities have constituted state action in a Fourteenth Amendment analysis: when the State provides a private actor "significant encouragement, either overt or covert," to conduct an act, *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); when a private actor is a "willful participant in joint activity with the State or its agents," *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (U.S. 1982); when a private entities are controlled by an agency of the State, *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230, 231, (1957); when the government is "pervasively entwined" within

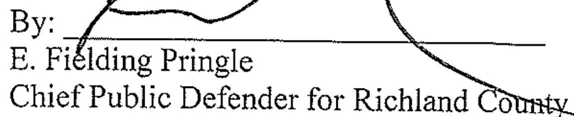
the leadership of the private entity, *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 298 (2001).

Under several of these scenarios, the actions of OMS to deprive a defendant of his liberty for alleged violations of his bond would constitute state action. As previously discussed, the decision to recommit an individual in the program to jail is made by the RCCJS. The RCCJS is comprised entirely of state officials. According to conversations with OMS employees, the Fifth Circuit Solicitor or his designee specifically makes the decision to arrest an individual based on allegations of bond violations. OMS employees therefore act at the direction of the RCCJS in bond violation matters, and are willful participants with the State in arresting the individual.

V. Prayer for relief.

WHEREFORE, Defendants pray that the Court issue an order removing the electronic monitoring condition from their bond. Defendants further ask this Court to declare the EMHDP as established in the June 9, 2014 Chief Administrative Order null and void.

Respectfully submitted,



By: ______________________
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This 11th day of April, 2016

STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND)	Warrant Numbers:

The State of South Carolina,)
)
)
vs.)
)
)
RICHLAND COUNTY)
)
)
)
Deandre Basil Moye;)
)
Tajei Lewis)
Defendant.)

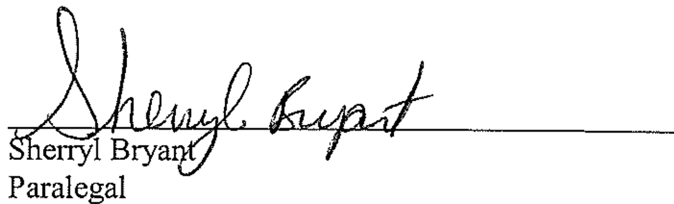
2015A4021602633; 34

2015A402160023; 21

CERTIFICATE OF SERVICE

2016 APR 11 PM 1:15
JEANETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED

I certify that on this date I served the Memorandum in Support of Motion to Remove the Electronic Monitoring Condition of Bond and to Declare the Richland County Electronic Monitoring Program Null and Void and in Violation of the United States and South Carolina Constitutions in this case on The State of South Carolina by delivering a copy of this motion to the State's attorney of record by delivering said copy to his office located at The Office of the Solicitor, Fifth Judicial Circuit, Richland County Judicial Center, Third Floor, 1701 Main Street, Columbia, South Carolina 29201, and leaving it with his clerk or other person of authority at said office.



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Columbia, South Carolina
This 11th day of April, 2016