

FIRST DIVISION
September 21, 2015

No. 1-13-0540

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 6925
)	
ANTOINE YOUNGER,)	Honorable
)	Carol M. Howard,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The statutory imposition of mandatory electronic monitoring as a condition of defendant's mandatory supervised release, based on his conviction of predatory criminal sexual assault of a child, did not violate constitutional procedural due process.

¶ 2 After a bench trial, defendant Antoine Younger was convicted of committing predatory criminal sexual assault of a child (720 ILCS 5/11-1.40 (West 2008)) against his 11-year-old grandniece, A.G. The trial court sentenced defendant to a term of eight years in prison and three years to life of mandatory supervised release (MSR), based on the nature of his particular offense. Defendant is subject to mandatory electronic monitoring during his MSR term. On appeal, defendant contends the imposition of mandatory electronic monitoring as a condition of

MSR is unconstitutional because it violates procedural due process. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 In March of 2009, defendant was arrested based on A.G.'s allegations that he had sexually assaulted her. Prior to the trial, defendant provided a signed statement to the police in which he admitted that he had fondled A.G.'s breasts on multiple occasions and, on one occasion, inserted his finger into her vagina.

¶ 5 At trial, A.G. testified about the course of events in which defendant had touched her in March of 2009. At the time of the incidents, A.G. was 11 years old and lived in a one-bedroom apartment with her great great-grandmother, Cassidy Frost. A.G. shared a bedroom with Frost. Defendant, then 49 years old, was A.G.'s great-uncle and also lived at the apartment. He slept on a couch in the living room. On March 14, 2009, while A.G. was sitting on the living room couch and watching television, defendant sat down next to her and started rubbing her thigh with his hands. Defendant continued to do this for "five or ten minutes" and later also "grabbed" and "squeezed" A.G.'s breast, and put "[t]wo or three" of his fingers "in [her] vagina." A.G. testified that she did not tell Frost about the incident because she feared that defendant "was going to do something" to her. Two days later, while A.G. was in the living room watching television, defendant again sat next to her and started touching her. When A.G. attempted to stand up, defendant pulled her to the floor and moved on top of her. He then pulled down her pants and inserted his finger into her vagina. A.G. pushed defendant off of her, and went into the kitchen. She then grabbed a knife and told defendant that if he "did it again," she was "going to kill him." Defendant "walked off" and A.G. went into the bedroom. According to A.G., defendant again started touching her the next night, as A.G. was watching television in the living room. He sat

down next to her, put his hand under her shirt, and squeezed her breast. A.G. fled to her bedroom. The following day, on March 18, while she was at school, A.G. was called into a meeting with the assistant principal to discuss her conduct at school. The assistant principal asked A.G. if anything was going on at home, and A.G. told her about defendant's actions. Afterwards, the police were called and A.G. was taken to the hospital. A.G. also testified that prior to these incidents, she had enjoyed a good relationship with defendant. She stated that she never permitted defendant to touch her, and she thought it was her fault that the abuse occurred.

¶ 6 Mark DiMeo, a detective with the Chicago Police Department, testified that on March 18, 2009, he and his partner were assigned to investigate the sexual assault complaint. Detective DiMeo and his partner went to the apartment where A.G. lived in order to set up a safety plan for her. At the apartment, they encountered Frost. Later, when defendant arrived at the apartment, the detectives arrested him and took him to the police station, where they interviewed him. Detective DiMeo testified that defendant admitted that he had sexually assaulted A.G. An assistant State's Attorney (ASA) subsequently participated in the interview and took down defendant's statement. After the ASA typed defendant's statement, she asked defendant to read the entire statement out loud and had him make any necessary corrections. Defendant then signed the bottom of each page of the five-page statement. Detective DiMeo identified the typewritten statement which was then admitted into evidence and published.

¶ 7 According to the signed statement,¹ defendant admitted that he lived with his grandmother, Cassidy Frost, and his nephew's 11-year-old daughter, A.G. All three of them had been living together for two years. Purportedly, A.G. would call defendant names and dance around in front of him when he came home after drinking and "getting high." He told A.G. to

¹ Defendant filed a pre-trial motion to suppress his statement, alleging that it was made involuntarily as a result of physical, psychological, and mental coercion. After a hearing, the court denied the motion.

"stop picking at him" on several occasions, but she would not stop. He stated that A.G. had "provoked" defendant by "slapping him and dancing suggestively in front of him," and that A.G. "got into his head." At one point, defendant began thinking of her sexually. He admitted that, on one occasion, he "pushed her down by her hands and he fondled her breasts." In response, A.G. kicked defendant and then ran into Frost's room. He also admitted having fondled her breasts on a "couple of occasions." Defendant stated that he had "crossed the line" by "touching [A.G.'s] vagina" under her clothes and putting his fingers into her vagina.

¶ 8 Defendant testified in his own defense at trial. He denied fondling A.G.'s breasts, touching her vagina, or having any other sexual contact with her. He also denied that A.G. had threatened him with a knife. According to defendant, he did have an argument with A.G. once, during which she kicked and slapped him before running to Frost's room. Defendant testified that on March 18, 2009, Detective DiMeo and two other police officers were at the apartment when he arrived home. The officers arrested him and took him to the police station, where Detective DiMeo slapped him "real hard" and hit him in the stomach. Detective DiMeo then threatened to tell the apartment building manager that defendant was selling drugs. Finally, defendant explained that he had signed the typewritten statement because he was scared, but he had not read the entire statement before signing it because his reading ability was "not that good."

¶ 9 The trial court found defendant guilty of predatory criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, and criminal sexual abuse, and merged the convictions into his conviction for predatory criminal sexual assault. At sentencing, the court heard arguments in mitigation and aggravation. The State submitted a victim impact statement from A.G., and defendant presented testimony from Vanessa Bennett and Tina Lewis Younger.

¶ 10 After considering all of the arguments in mitigation and aggravation, the trial court sentenced defendant to a term of eight years in prison and a MSR term of three years to natural life. The trial court also explained that, because of the nature of defendant's offense, the term of defendant's MSR was indefinite.

¶ 11 Defendant filed his notice of appeal on January 17, 2013. We have jurisdiction pursuant to Illinois Supreme Court Rules 603 (eff. Feb. 6, 2013) and 606 (eff. Feb. 6, 2013).

¶ 12 ANALYSIS

¶ 13 Defendant's sole contention on appeal is that section 3-3-7(a)(7.7) of the Unified Code of Corrections (Code) (730 ILCS 5/3-3-7(a)(7.7) (West 2008)), the provision that imposes mandatory electronic monitoring during the entirety of the MSR term, is unconstitutional. Specifically, defendant argues that the mandatory electronic monitoring requirement violates procedural due process, because it: places an onerous burden on a supervisee's liberty and privacy; deprives the supervisee of liberty based only on the charge he was convicted of, without any neutral authority determining whether monitoring is warranted for a particular case; is not justified by any legitimate penological interest. Defendant additionally argues that the requirement of electronic monitoring violates procedural due process because it also imposes an "unmeetable" condition of supervision for indigent supervisees who are eligible to begin their MSR, but as a practical matter are precluded from release because of a policy practiced by the corrections department known as "violating at the door," which we will discuss further below.

¶ 14 A. The Statute

¶ 15 Section 3-3-7(a)(7.7) of the Code requires that a person who is convicted of an offense that qualifies him as a "sexual predator" pursuant to the Sex Offender Registration Act (Registration Act) (see 730 ILCS 150/1 *et seq.* (West 2008)), on or after January 1, 2007, must

"wear an approved electronic monitoring device *** for the duration of the person's parole, mandatory supervised release term, or extended mandatory supervised release term[.]" 730 ILCS 5/3-3-7(a)(7.7) (West 2008). A term of MSR is a required component of any sentence that involves incarceration for a felony offense and must be served by a convicted felon following his release from prison. See 730 ILCS 5/5-8-1 (West 2008) (providing that, except where a natural life imprisonment sentence has been imposed, "every sentence shall include as though written therein a term in addition to the term of imprisonment"). Accordingly, "the MSR term is not a negotiated release or a privilege but, rather, a mandatory part of defendant's sentence." *People v. Hunter*, 2011 IL App (1st) 093023, ¶ 23; see also *People v. McChriston*, 2014 IL 115310, ¶ 23 (finding that the plain language of section 5-8-1(d) of the Code "was unambiguous and provided that the MSR term be automatically included as part of defendant's sentence"). The purpose of MSR "is not to punish offenders but to extend the Department of Corrections' 'control over the conduct of persons who repeatedly are denied parole and who when released have only minimal incentives to conform to society's standards.'" *Hadley v. Montes*, 379 Ill. App. 3d 405, 411 (4th Dist. 2008) (quoting *Faheem-El v. Klinecar*, 123 Ill. 2d 291, 301 (1988)).

¶ 16 The length of a defendant's MSR term is dictated by section 5-8-1(d) of the Code. For an offender who is convicted of predatory criminal sexual assault of a child, as defendant was in this case, the MSR term "shall range from a minimum of 3 years to a maximum of the natural life of the defendant." 730 ILCS 5/5-8-1(d)(4) (West 2008). The definition of a "sexual predator" under the Registration Act includes any person who is convicted of predatory criminal sexual assault of a child. 730 ILCS 150/2(E)(1) (West 2008). In the case at bar, defendant is a "sexual predator" as defined under the Registration Act and, therefore, must wear an approved electronic monitoring device for the duration of his MSR term, which is three years to life.

¶ 17 However, the State contends that defendant has failed to present a "justiciable matter" in his appeal and we should not consider his claims. Therefore, we will first consider whether the issues defendant has presented are justiciable.

¶ 18 B. Justiciability

¶ 19 Whether a cause of action should be dismissed based on a lack of justiciability is a question of law, which is reviewed *de novo*. *Ferguson v. Patton*, 2013 IL 112488, ¶ 22. The Illinois constitution does not define "justiciable matters." However, our supreme court has held that the doctrine of justiciability requires:

"a showing that the underlying facts and issues of the case are not moot or premature, so as to require the court to pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal advice as to future events. [Citations.] The case must, therefore, present a concrete dispute admitting of an immediate and definitive determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof. [Citations.]" (Internal quotation marks omitted.) *Ferguson*, 2013 IL 112488, ¶ 23 (quoting *National Marine, Inc. v. Illinois Environmental Protection Agency*, 159 Ill. 2d 381, 390 (1994)).

¶ 20 The State argues that as a threshold matter, this appeal lacks justiciability because the issues raised by defendant are not ripe for review. The State points out that defendant has not begun to serve his MSR term and, therefore, is not currently subjected to electronic monitoring. In response, defendant contends that his claims are ripe because he "will be subject to [mandatory electronic monitoring] *** [and] [t]he fact that electronic monitoring will be

imposed on [him], with no judicial review at any point as to whether it is justified, is apparent from the statutory scheme."

¶ 21 Considering the statutory scheme he is subject to, it is certain that defendant will be required to be electronically monitored for the duration of his MSR term, as the monitoring requirement is not discretionary. As such, the application of the mandatory electronic monitoring condition for release is not an "abstract" possibility. Moreover, as defendant observed in his brief, Illinois courts have previously considered similar conditions of convictions on direct appeal. See, *e.g.*, *People v. Rinehart*, 2012 IL 111719 (concluding that an indeterminate MSR term for certain sex offenses was proper); *People v. Johnson*, 225 Ill. 2d 573 (2007) (determining whether the Registration Act (730 ILCS 150/1 *et seq.* (West 1996)) was constitutional as applied to the defendant); *In re J.W.*, 204 Ill. 2d 50 (2003) (considering the constitutionality of two conditions of a juvenile's probation). We have no reason, based on the record before us, to believe that the mandatory electronic monitoring requirements for defendant will change or that his status as a convicted sex offender who is subject to compulsory electronic monitoring during the term of his MSR will change by the time he becomes eligible for release. Therefore, we reject the State's contention that defendant's appeal is neither ripe nor justiciable. We find that defendant's claim on appeal—that the mandatory electronic monitoring he will be subjected to upon his release, pursuant section 3-3-7(a)(7.7) of the Code, is unconstitutional—is both ripe and justiciable, and we will consider his challenge to the statutory requirement.

¶ 22 We will not, however, consider defendant's remaining contention that that the electronic monitoring requirement "creates an unmeetable condition of supervised release for indigent supervisees." Specifically, defendant claims that his indigency will prevent him from finding

suitable housing and he will therefore be subject to a policy that is referred to as "violating an offender at the door:"

"Violating an offender at the door is a legal fiction wherein it is imagined that the offender is released from custody, placed on MSR, but when he leaves the institution he is in violation of his supervision terms and he is immediately placed back in custody. In reality, the offender simply remains incarcerated until a MSR prerequisite is satisfied. This can continue until either (1) the term of MSR expires, or (2) the prerequisite is satisfied. For more discussion on this predicament, see *Neville v. Ryker*, No. 08 C 4458, 2009 WL 230524 (N.D. Ill. Jan. 30, 2009)." *Armato v. Grounds*, 944 F.Supp.2d 627, 631 n.3 (C.D. Ill. May 1, 2013).

As a result of this policy, defendant argues, he will not be entitled to MSR when the time comes because he is indigent and will not be able to find a residence that meets the MSR conditions.

¶ 23 Our review of the record reveals nothing, at this time, to suggest that defendant will be found ineligible for MSR based on an inability to meet the electronic monitoring condition of suitable housing. Defendant has not yet been placed on MSR and he has not given us a reason to find that there will be a "violation-at-the-door" when he becomes eligible for MSR. The record contains no clear evidence from which we can conclude that defendant will be deprived of his opportunity to have MSR because of the possibility that he will not be able to secure appropriate housing. While defendant claims that the record contains "unquestioned findings of indigency," we cannot assume that defendant's prior history of intermittent indigency, in and of itself, would prevent him from finding or obtaining housing to satisfy the monitoring requirements. See

Cordrey v. Prisoner Review Board, 2014 IL 117155 (2014) (observing that it appeared from the "the Field Services unit's response to [the defendant's] grievance that the Department of Corrections was unable to find placement for [the defendant] due to his status as a sex offender, rather than his status as an indigent"). It is undisputed that, previously, during a two-year period, he was able to find living arrangements with his grandmother. Additionally, the record shows that two of defendant's relatives presented testimony as mitigation witnesses at defendant's sentencing hearing; both of them indicated at that time that defendant had never been perceived to be a threat to them or their children. Certainly, these family members, who were willing to testify to the lack of threat presented by defendant, could potentially be resources for defendant when he begins to seek suitable housing arrangements prior to his release. Therefore, we find that on the limited record before us, without actually knowing whether defendant will be released on MSR or violated at the door, the issue of whether this policy violates procedural due process is neither ripe nor justiciable, and we decline to address it.

¶ 24 C. Procedural Due Process

¶ 25 We turn now to the substance of the defendant's appeal. As we previously stated, defendant's sole contention on appeal is that section 3-3-7(a)(7.7) of the Code is unconstitutional; more specifically, he argues that requiring electronic monitoring for the duration of his indeterminate MSR term violates procedural due process because it: places an onerous burden on a supervisee's liberty and privacy; deprives the supervisee of liberty based only on the charge he was convicted of, without any neutral authority determining whether monitoring is warranted for a particular case; is not justified by any legitimate penological interest.

¶ 26 All statutes are presumed to be constitutional, and the party challenging a statute can only overcome this presumption by clearly showing that it violates the constitution. *People v. Sharpe*,

216 Ill. 2d 481, 486-87 (2005). "The due process clauses of the federal and Illinois Constitutions protect against the deprivation of liberty or property without due process of law." *Hill v. Walker*, 241 Ill. 2d 479, 485 (2011) (citing U.S. Const., amend. XIV; Ill. Const. 1970, art. 1, § 2). A procedural due process claim challenges the constitutionality of the specific procedures used to deny a person's life, liberty, or property. *People v. Cardona*, 2013 IL 114076, ¶ 15. The fundamental requirements of procedural due process are (1) notice of the proceeding and (2) an opportunity to object. *Id.* "Due process is a flexible concept, and not all situations calling for procedural safeguards call for the same kind of procedure. [Citation.]" (Internal quotation marks omitted). *Id.* Procedural due process claims present a legal question and are therefore subject to *de novo* review. *Id.*

¶ 27 In evaluating a procedural due process claim, courts consider the following factors:

"First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (Internal quotation marks omitted.) *Id.* (quoting *Lyon v. Department of Children & Family Services*, 209 Ill. 2d 264, 277 (2004) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976))).

¶ 28 Defendant contends that an offender who is serving his term of MSR (a supervisee) has a protectable interest in both his privacy and liberty. We first note that a supervisee has only a

limited interest in his privacy as compared to an ordinary citizen because he is a criminal offender. *People v. Moss*, 217 Ill. 2d 511, 531 (2005). In addition, the liberty interest of a supervisee is similarly limited. See *Morrissey v. Brewer*, 408 U.S. 471 (1972) (finding that an offender whose parole may be revoked has a protected liberty interest subject to minimal due process requirements); *Moss*, 217 Ill. 2d at 532 (recognizing that "a person subject to MSR has a lesser expectation of freedom from government intrusion than a probationer does"); *Holly v. Montes*, 231 Ill. 2d 153, 166-67 (2008) (concluding that the defendant, who challenged the constitutionality of electronic home monitoring during his term of MSR, was "not yet entitled to full freedom" because, while serving his MSR term, he was still in the custody of the Illinois Department of Corrections and still under sentence); *People v. Martin-Trigona*, 111 Ill. 2d 295, 299-300 (1986) (holding that offenders serving their MSR terms are entitled to file petitions under the Post Conviction Hearing Act because they are deprived of their liberty "in some meaningful way"). Nonetheless, we find that the imposition of mandatory electronic monitoring satisfies all the requirements of procedural due process.

¶ 29 Defendant claims that mandatory electronic monitoring violates due process because it "imposes a heavy burden on a supervisee's liberty without an exercise of individual assessment as to whether the burden is warranted." He also appears to be challenging the constitutionality of section 3-3-7(a)(7.7) of the Code, the statutory section which imposes the electronic monitoring, both on its face and as applied to him.

¶ 30 "A facial challenge to a statute contends that the statute is incapable of constitutional application in any context." *People v. Garvin*, 2013 IL App (1st) 113095, ¶ 16 (citing *In re C.E.*, 161 Ill. 2d 200, 210-11 (1994)). Therefore, a defendant who raises a facial challenge to a statute must show that there is no set of circumstances under which that law would be valid. *Id.* In

contrast, a defendant raising an as-applied challenge must establish that the statute is unconstitutional as applied in his particular set of circumstances. *Id.* ¶ 17. "Facts surrounding the defendant's particular circumstances are only relevant to an as-applied challenge." *Id.* We will first consider defendant's as-applied challenge to the constitutionality of section 3-3-7(a)(7.7).

¶ 31 An MSR term is a mandatory part of a convicted felon's sentence. *Hunter*, 2011 IL App (1st) 093023, ¶ 23. When considering a challenge to a sentencing scheme, courts generally defer to the legislature "because the legislature is institutionally better equipped to gauge the seriousness of various offenses and to fashion sentences accordingly." *Sharpe*, 216 Ill. 2d at 487. As a result, the legislature is afforded broad discretion in setting criminal penalties, and their determinations on sentencing will not be overturned by the courts unless the challenged law "is clearly in excess of the general constitutional limitations on this authority." *Id.* With this in mind, we find that, as applied to defendant, section 3-3-7(a)(7.7) meets all the requirements of procedural due process.

¶ 32 Section 3-3-7(a) of the Code provides that the conditions of MSR "shall be such as the Prisoner Review Board deems necessary to assist the subject in leading a law-abiding life." 730 ILCS 5/3-3-7(a) (West 2008). We recognize that section 3-3-7(a)(7.7), which specifically imposes mandatory electronic monitoring on certain offenders who qualify as sexual predators under the Registration Act, does not extend discretion to the Prisoner Review Board (Board) to determine whether these sexual predators should be subject to electronic monitoring. This does not mean, however, that defendant, who falls under the category of offenders whose movements and whereabouts our legislature—in its efforts to protect the public from perpetrators who have committed sex crimes against children—has deemed necessary to monitor, is necessarily at risk of an "erroneous deprivation" of his interests.

¶ 33 Defendant was found guilty of predatory sexual assault of a child and, under the sentencing provisions for such an offense, is subject to mandatory electronic monitoring for the duration of his MSR term. See 730 ILCS 5/3-3-7(a)(7.7) (West 2008); 730 ILCS 150/2(E)(1) (West 2008). Prior to his conviction, defendant was afforded all the constitutionally required procedural safeguards in adult criminal prosecutions. The record shows that defendant received notice of the charges against him, voluntarily waived his right to a jury trial, had legal representation during his bench trial, had the opportunity to cross-examine the witnesses against him, and was permitted to testify on his own behalf. He was ultimately found guilty beyond a reasonable doubt after being afforded all of these procedural safeguards necessary to ensure his constitutional rights during the criminal proceeding. See *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 201-02 (2009) (highlighting the many procedural safeguards a juvenile received before being adjudicated delinquent and register pursuant to the Registration Act, including "the right to notice, the right to counsel, the right to confront witnesses, the privilege against self incrimination, and the standard of proof beyond a reasonable doubt").

¶ 34 In addition, defendant will be entitled to further procedural safeguards when he begins serving his MSR term. Section 3-3-8(b) of the Code provides that the Board has discretion to discharge a supervisee from MSR when it determines that the supervisee "is likely to remain at liberty without committing another offense." 730 ILCS 5/3-3-8(b) (West 2008). To ensure that the supervisee is given such an opportunity, the Code requires the supervising officer to prepare timely progress reports every 180 days after a supervisee's release date through the term of the supervisee's MSR; this report must include details concerning the supervisee's "adjustment and compliance with the conditions of [MSR]" and copies are to be submitted to the Board. 730 ICLS 5/3-14-2.5(b) (West 2008). Furthermore, a supervisee who is serving an extended term

"may request discharge from supervision as provided by [section 3-3-8(b) of the Code]," supported by a recommendation from his supervising officer. 730 ICLS 5/3-14-2.5(d) (West 2008). Although the initial imposition of the electronic monitoring is mandated for defendant because of the nature of his offense, defendant will have the statutory right to be evaluated, heard, and possibly considered for discharge from MSR and mandatory electronic monitoring. For these reasons, we find that defendant will not be deprived of his procedural due process rights when he begins serving his MSR term.

¶ 35 Defendant nonetheless contends that electronic monitoring should be discretionary and imposed on a case-by-case basis. He argues, for example, that as specifically applied to him, "the justifications for mandatory electronic monitoring are especially thin" because "nothing" in his history "suggests a special risk of recidivism." This argument fails. The statutory scheme does not apply differently to him than to any other person who has been convicted of an offense that qualifies him as a sexual predator under the Registration Act. Our legislature has determined that any person classified as sexual predators under the statute has committed a sufficiently serious crime to warrant mandatory electronic monitoring of his movements and whereabouts as a condition of supervised release from incarceration. 730 ILCS 5/3-3-7(a)(7.7) (West 2008). The State has a legitimate interest in imposing strict conditions on the MSR term of a sexual predator for public safety. "The risk of recidivism posed by sex offenders is 'frightening and high.' " *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)); see also *id.*, at 33 ("When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault" (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997))).

¶ 36 As we addressed above, defendant was afforded the full constitutional procedural process due to every adult criminal prior to his conviction for predatory criminal sexual assault. Once he is released on MSR, defendant will be entitled to seek the Board's review and consideration of his progress. Defendant will also have the right to petition the Board for discharge from MSR along with all of its conditions, including electronic monitoring, with the support of his supervising officer. After considering the full panoply of procedural safeguards available to defendant and the State's interest in protecting the public from sexual predators who have committed sex crimes against children, we believe that section 3-3-7(a)(7.7) of the Code did not violate defendant's constitutional right to procedural due process. Defendant has not presented a compelling argument in favor of a statutory scheme that would require the Board to determine whether electronic monitoring should be imposed on a case-by-case basis for supervisees under MSR. Because we have found that defendant's constitutional challenge to 3-3-7(a)(7.7) fails as applied to him, it necessarily follows that his facial challenge to the statute also fails. See *Garvin*, 2013 IL App (1st) 113095, ¶ 16 (a defendant who challenges a statute on its face must show that there is no set of circumstances under which that law would be valid).

¶ 37 The cases on which defendant relies for his constitutional challenge are distinguishable. See *In re M.A.*, 2014 IL App (1st) 132540; *State v. Dykes*, 744 S.E.2d 505 (S.C. 2013). *M.A.* involved a juvenile who was adjudicated as a violent offender against youth under the Illinois Murderer and Violent Offender Against Youth Registration Act (Violent Offender Act) (730 ILCS 154/1 *et seq.* (West 2012)). *M.A.*, 2014 IL App (1st) 132540, ¶¶ 1, 18. The Violent Offender Act automatically required a juvenile who was adjudicated delinquent for certain offenses to register as a "violent offender against youth" for a minimum of 10 years following adjudication and then to register again as an adult after reaching the age of 17. *Id.* ¶ 1; 730 ILCS

154/5(a)(2), (b) (West 2012); 730 ILCS 5/154/4(a), 10(a) (West 2012). Additionally, the statute lacked any procedure that would allow the offender an opportunity to petition for removal from the registry prior to the expiration of the 10-year period or that would excuse the requirement to register as an adult. *M.A.*, 2014 IL App (1st) 132540, ¶ 19. Upon review of the juvenile's argument that the statute violated both substantive and procedural due process rights, the *M.A.* court observed that consideration of the unique characteristics of juveniles "compels the conclusion that the [Violent Offender] Act, with its mandated registry for 10 years and its requirement that juvenile offenders automatically register as adults upon turning 17, denies minors procedural due process." *Id.* ¶ 53. Because juveniles had no right to a jury trial prior to adjudication, they would be subjected to a statute that required them to register as a violent offender against youth later as an adult without the procedural safeguards afforded to adult offenders; consequently, the Act "affords minors *less* procedural protection than their adult counterparts" because "adult registration may occur several years after the delinquency adjudication and is required without any opportunity for further hearing." *Id.* ¶ 53. The *M.A.* court's determination was largely based on its concern that the Violent Offender Act effectively deprived juveniles of the procedural due process rights that adults prosecuted under the same statute would have in a criminal proceeding. The situation presented in *M.A.* is distinguishable from the instant case. Here, defendant was afforded full procedural process prior to his conviction; he had the right to be tried by his peers, to have legal representation, to confront witnesses, and to testify on his own behalf. Furthermore, he will be entitled to regular evaluations and progress reports from his supervising officer upon his release to MSR, after which he can petition the Board for a discharge from MSR.

¶ 38 *Dykes* is also inapposite. In *Dykes*, the defendant pled guilty to the South Carolina offense of lewd act on a minor, which required her to register as a sex offender for life, and was sentenced to fifteen years in prison, "suspended upon the service of three years and five years' probation." 744 S.E.2d at 507. Upon her release, the defendant violated the terms of her probation. *Id.* As a result, the prosecutor recommended a two-year partial revocation of her probation and mandatory lifetime satellite monitoring. *Id.* at 507-08. At the time, the South Carolina statute mandated that a person convicted of committing either (1) criminal sexual contact with a minor in the first degree or (2) lewd act on a minor must be placed on satellite monitoring, and must remain on such monitoring for the duration of the period in which the person is also registered as a sex offender. *Id.* at 508. In contrast, with respect to a person convicted of any offense other than the two offenses enumerated above, the court had discretion to determine whether the individual should be placed on electronic monitoring and the individual could petition the court to have the monitoring removed upon a showing that certain conditions were met. *Id.*

¶ 39 Before the Supreme Court of South Carolina, the defendant argued that "the imposition of mandatory, lifetime satellite monitoring without consideration of her likelihood of re-offending violate[d] her due process rights." *Id.* The court first rejected the defendant's contention that she had a fundamental right to be "let alone." *Id.* at 509. However, the court found that "lifetime imposition of satellite monitoring implicates a protected liberty interest to be free from permanent, unwarranted governmental interference" and therefore the defendant's mandatory enrollment in the satellite monitoring program invoked minimal due process protection. *Id.* at 509. The court next noted that the purpose of the state's sex offender registration and electronic monitoring provisions was to protect the public from sex offenders

and to aid law enforcement. *Id.* at 510. In light of this purpose, the court found that there was a basis for the initial mandatory imposition of satellite monitoring for certain child sex crimes and that, therefore, requiring individuals convicted of the enumerated crimes to submit to electronic monitoring upon their release from incarceration or violation of their parole was constitutional. *Id.* at 510.

¶ 40 However, the court also concluded that the portion of the statute that precluded judicial review for persons convicted of the enumerated offenses was unconstitutional. The court stated that the "complete absence of any opportunity for judicial review to assess a risk of re-offending, *** is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending." *Id.* Ultimately, the court only invalidated the statute to the extent that it required "non-reviewable lifetime monitoring" and concluded that the defendant "and others similarly situated must comply with the monitoring requirement mandated" by the statute. *Id.*

¶ 41 First, we note that " '[a]lthough it is helpful to look to other jurisdictions for guidance, we are not bound by those decisions and must decide the case in a manner consistent with Illinois law.'" *People v. Sito*, 2013 IL App (1st) 110707, ¶ 21 (quoting *Independent Trust Corp. v. Kansas Surety Co.*, 2011 IL App (1st) 093294, ¶ 24). In addition, the court in *Dykes* did not consider whether the challenged statute violated procedural due process; its focus was on the substantive due process challenge. Most importantly, *Dykes* does not bolster defendant's argument. The *Dykes* court specifically found that the mandatory monitoring requirement for certain sex offenders was constitutional; what was unconstitutional was the lack of any opportunity for future judicial review as to whether electronic monitoring was still appropriate. *Dykes*, 744 S.E.2d at 510. That concern does not exist here. Under our Illinois law, section 14-

2.5(d) provides that a supervisee who is subject to mandatory electronic monitoring during MSR may petition the Board to terminate the monitoring and to request discharge from MSR. 730 ILCS 5/3-14-2.5(d) (West 2008). In contrast to the South Carolina statute at issue in *Dykes*, the monitoring requirement for sex offenses under section 5-8-1(d)(4) of the Code is not mandatory for life without the possibility of review. Accordingly, *Dykes* does not apply here.

¶ 42 Defendant also relies on federal cases which held that the imposition of mandatory electronic monitoring and curfew during *pretrial* release on defendants charged with certain crimes violated the procedural due process clause of the Fifth Amendment. See *United States v. Polouizzi*, 697 F.Supp.2d 381 (E.D.N.Y. 2010); *United States v. Torres*, 566 F.Supp.2d 591 (W.D. Tex. 2008). However, a defendant who is only charged, and has not yet been convicted of an offense, retains a greater liberty and privacy interest than a defendant who has been found guilty of a crime beyond a reasonable doubt. See *United States v. Smedley*, 611 F.Supp.2d 971, 975 (E.D. Missouri 2009) (noting that an individual's liberty pending trial is a significant private interest). As the court noted in *Polouizzi*, "A basic rule of our system is that a defendant is presumed innocent until proven guilty." *Polouizzi*, 697 F.Supp.2d at 394. Defendant here has already had a full bench trial and was found guilty of predatory criminal sexual assault beyond a reasonable doubt. Any federal cases determining the constitutionality of mandatory electronic monitoring during pretrial release are therefore inapplicable.

¶ 43 The remaining out-of-state cases which defendant has cited are also distinguishable. See *State v. Stines*, 683 S.E.2d 411 (N.C. Ct. App. 2009) (holding that enrollment in a satellite based monitoring program deprives an offender of a significant liberty interest and that, in that case, the state failed to provide the defendant with proper notice of the hearing to determine whether he would be required to enroll in the program); *Commonwealth v. Cory*, 911 N.E.2d 187 (Mass.

2009) (finding that a statute mandating that defendants convicted of certain sex crimes wear a global positioning system (GPS) device for the duration of their probation, which was passed after the defendant was convicted of one such sex crime, was impermissible as applied to that defendant pursuant to the *ex post facto* provisions of the United States and Massachusetts constitutions).

¶ 44

CONCLUSION

¶ 45 We hold that section 3-3-7(a)(7.7) of the Code, which imposes mandatory electronic monitoring as a condition of mandatory supervised release for convicted felons who fall within the defined category of a sexual predator under the Sex Offender Registration Act, does not violate the constitutional requirements of procedural due process either on its face or as applied to defendant. Therefore, we affirm the judgment of the trial court.

¶ 46 Affirmed.