EFiled: Mar 14 2022 04:25PM EDT
Filing ID 67392885
Case Number 269,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAMMEYIN A. JOHNSON,	)	
	)	
Defendant Below-Appellant,	)	
	)	
v.	)	No. 269, 2021
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

Carolyn S. Hake (No. 3839)
Deputy Attorney General
Delaware Department of Justice
Carvel State Office Building
820 N. French St., 7th Floor
Wilmington, DE 19803
(302) 577-8500

Date: March 14, 2022

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Rules

Secondary Authorities

NATURE AND STAGE OF THE PROCEEDINGS

On November 7, 2016, a New Castle County grand jury indicted Dammeyin Johnson ("Johnson") for drug dealing cocaine in a tier 4 quantity, aggravated possession of cocaine in a tier 5 quantity, and operating a vehicle with improper tinting. (A1 at DI 1; A14-15).[1] On August 3, 2017, Johnson pled no contest to one count of drug dealing cocaine in a tier 4 quantity. (A4 at DI 25; A36-38; A43-48). The Superior Court followed the parties' sentence recommendation and immediately sentenced Johnson to fifteen years at Level V, suspended after four years for eighteen months at Level III. (A4 at DI 25-26; A48; A50-53). Johnson did not appeal his convictions or sentence.

In November 2017, Johnson filed two *pro se* motions to modify his sentence under Superior Court Criminal Rule 35(b), which the Superior Court denied. (A5 at DI 32-35; A54-66; A67; A68-82; A83). Johnson did not appeal.

In July 2018, Johnson filed a *pro se* motion for postconviction relief, which he later amended, and a motion to appoint counsel. (A6-7 at DI 41, 42, 52; A89-94; A95-101; A102-47; A176-82). Following expansion of the record to include trial counsel's affidavits (A7-8 at DI 54-55; A184-86; A187-93; A195-215), a Superior Court Commissioner recommended that Johnson's motions be denied.[2]

---

[1] "DI" refers to Superior Court docket entries in *State v. Johnson*, ID No. 1609014541 (A1-11).

[2] *State v. Johnson*, 2019 WL 549417 (Del. Super. Ct. Feb. 8, 2019).

(A148-49; A244-51). In May 2019, the Superior Court adopted the Commissioner's report and denied Johnson relief. (A9 at DI 66; A256-57).

Between April 2019 and July 2020, Johnson filed four additional motions to modify his sentence under Rule 35(b) (A9-10 at DI 65, 68, 71, 73; A252-55; A260-62; A271-75; A278-81), and a motion for credit for two days previously served on his drug dealing charge (A10 at DI 70; A267-70). The Superior Court denied Johnson's repetitive and untimely Rule 35 motions (A9-10 at DI 67, 69, 72, 74; A258-59; A263-66; A276-77), and granted Johnson's motion for time credited under Superior Court Criminal Rule 36.[3] (*See* A282; A283-86).

On May 26, 2021, after he began his eighteen-month term of Level III supervision, Johnson filed a *pro se* Rule 35 motion to modify his probation by removing the GPS tracking condition imposed by probation officers or, in the alternative, to reduce his eighteen months at Level III to nine months at Level II. (A288-293). The Superior Court denied Johnson's motion on August 10, 2021. (Exhibit A to Op. Br.). Johnson appealed and filed an opening brief. (A298-301). The State filed a motion to affirm. (A302-39). On January 7, 2022, this Court denied the State's motion to affirm and appointed counsel. (A340-41). On February 8, 2022, Johnson's appointed counsel filed an opening brief ("Opening Brief") and appendix. This is the State's Answering Brief.

[3] *State v. Johnson*, 2020 WL 4036586 (Del. Super. Ct. July 16, 2020).

SUMMARY OF THE ARGUMENT

I. DENIED. The Superior Court did not abuse its discretion in denying Johnson's Rule 35 motion to modify the probationary period of his sentence by removing the GPS tracking bracelet imposed by Probation and Parole ("P&P") as a condition of his probation. Johnson's sentence was not illegal, and the GPS tracking condition did not render his sentence illegal. Because Johnson is a Tier III sex offender being monitored at Level III, 11 *Del. C.* § 4121(u) requires him to wear a GPS locator ankle bracelet as a condition of his probation. Conditioning Johnson's probation in this way did not increase Johnson's punishment, illegally increase his sentence, or violate 11 *Del. C.* § 4121. Moreover, even if not mandated by section 4121(u), the imposition of GPS tracking as a condition of Johnson's probation constitutes a legitimate exercise of the broad discretionary powers conferred upon probation officers by the General Assembly under 11 *Del. C.* § 6502. Finally, to the extent Johnson sought relief under Rule 35(b), his motion was procedurally barred as a repetitive motion. Even if not repetitive, the Superior Court did not abuse its discretion by denying Johnson's motion under Rule 35(b). Under the plain language of section 4121(u), the court lacked authority to remove the GPS tracking condition imposed by P&P.

STATEMENT OF FACTS[4]

In 1998, a jury found Johnson guilty of second degree unlawful sexual intercourse (11 *Del. C.* § 774),[5] second degree unlawful imprisonment (11 *Del. C.* § 781), third degree unlawful sexual contact (11 *Del. C.* § 767), third degree assault (11 *Del. C.* § 611), and two counts of an aggravated act of intimidation (11 *Del. C.* § 3533(1)). (A344). Johnson was subsequently sentenced to eighteen years at Level V, suspended after twelve years for decreasing levels of supervision. (A362-67). Johnson was also ordered to register as a Tier III sex offender, as required by 11 *Del. C.* § 4120.[6] (A356; A368). Johnson was released from

[4] Because Johnson pled no contest in this case, the facts are taken from the affidavit of probable cause in support of the arrest warrant, authored by Officer Collins of the New Castle County Police Department (A13) and the transcript of the plea and sentencing hearing (A43-49).

[5] Former 11 *Del. C.* § 774 was repealed and replaced by 11 *Del. C.* § 772 (Rape in the Second Degree). *See Huffman v. State*, 2015 WL 4094234 n.17 (Del. July 6, 2015).

[6] 11 *Del. C.* § 4120; *see* 11 *Del. C.* § 4121(c)(1) (enumerating the crimes triggering Tier III designation, including Rape in the First Degree, Rape in the Second Degree, Unlawful Sexual Contact in the First Degree, Unlawful Sexual Intercourse in the First or Second Degree, Unlawful Sexual Penetration in the First Degree or Second Degree, Unlawful Sexual Contact in the First Degree, Continuous Sexual Abuse of a Child, and Sexual Exploitation of a Child). "A sex offender designated to Risk Assessment Tier III is required to comply with the registration provisions of § 4120 for the remainder of his or her life and will therefore always be subject to the community notification requirements of the statute." *Helman v. State*, 784 A.2d 1058, 1067 (Del. 2001). In contrast to offenders in other tiers who are required to register annually, Tier III offenders must register every 90 days. 11 *Del. C.* § 4120(g)(1). The only relief afforded a Level III sex offender is the opportunity to petition for a reduction to Level II after the passage of 25 years

probation in December 2011. (A361).

On September 20, 2016, Officer Collins of the New Castle County Police stopped Johnson's car in the area of Nilson Court and Vane Court because the vehicle had tint on the front driver's and passenger side windows. (A13). Upon approaching the car, Officer Collins immediately detected a "strong odor" of marijuana. (*Id.*). Johnson admitted that he knew that his windows were tinted and that he did not have a waiver. (*Id.*). When asked about the odor, Johnson told Officer Collins that he recently smoked marijuana in the vehicle. (*Id.*). Officer Collins then conducted a search of the car and eventually located a large amount of cocaine (497 grams, a Tier 5 quantity), multiple cellular phones, and $4,662 in cash. (*Id.*; A45).

In August 2017, Johnson pled guilty to drug dealing cocaine in a tier 4 quantity (A36-38; A43-48) and was immediately sentenced, consistent with the parties' agreement, to fifteen years at Level V, suspended after four years for eighteen months at Level III. (A48; A50-53). Johnson's probationary term for his drug offense began on January 7, 2021. (B-2). Because Johnson is a Tier III registered sex offender, P&P implemented GPS monitoring under 11 *Del. C.* § 4121(u) as a condition of his probation. (*See* A289-90).

---

from the last day of any Level IV or V sentence imposed at the time of original conviction, or from the date of sentencing if no Level IV or V sentence was imposed, as long as the offender has not been convicted of any crime (other than a motor vehicle offense) during such time. *See* 11 *Del. C.* § 4121(e)(2).

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING JOHNSON'S RULE 35 MOTION.

Question Presented

Whether the Superior Court abused its discretion in denying Johnson's motion to modify the probationary period of his sentence by removing GPS monitoring that was imposed by P&P because he is a Tier III sex offender.

Scope and Standard of Review

Generally, this Court reviews the Superior Court's denial of a motion under Superior Court Criminal Rule 35 for abuse of discretion.[7] Questions of law are reviewed *de novo.*[8] However, if a defendant fails to fairly present a claim in the trial court, it is waived on appeal absent a finding of plain error.[9] "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[10] It is "limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly

---

[7] *Dickinson v. State*, 2022 WL 120997, at *1-2 (Del. Jan. 12, 2022) (citing *Fountain v. State*, 2014 WL 4102069, at *1 (Del. Aug. 19, 2014); *Benge v. State*, 101 A.3d 973, 976-77 (Del. Sept. 22, 2014).

[8] *Dickinson*, 2022 WL 120997, at *2.

[9] *Id.* at *3; Supr. Ct. R. 8.

[10] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

deprive an accused of a substantial right, or which clearly show manifest injustice."[11]

Merits

Following his 1999 convictions for second degree unlawful sexual intercourse and second degree unlawful sexual contact, Johnson was ordered to register as a Tier III sex offender, as required by 11 *Del. C.* § 4120. After serving his sentence for the sexual offenses, Johnson was subsequently convicted in August 2017 of a drug offense. In January 2021, Johnson's probationary term for his drug offense began. (B-2). Because Johnson was still a Tier III registered sex offender, P&P imposed GPS monitoring under 11 *Del. C.* § 4121(u) as a condition of his probation.

Enacted in 2007, 11 *Del. C.* § 4121(u) mandates that Tier III sex offenders on probation or parole are required to be supervised through GPS surveillance:

> (u) Notwithstanding any provision of this section or title to the contrary, *any Tier III sex offender being monitored at Level IV, III, II or I, shall as a condition of their probation, wear a GPS locator ankle bracelet paid for by the probationer*. The obligation to pay for the GPS locator ankle bracelet shall not apply to any juvenile who is adjudicated delinquent and designated a Tier III sex offender pursuant to this title.[12]

In May 2021, after Johnson began his eighteen-month term of Level III

---

[11] *Id.*

[12] 11 *Del. C.* § 4121(u) (emphasis provided).

supervision, he filed a *pro se* motion to modify the probationary period of his sentence. (A288-93). In his motion, Johnson challenged the addition of the GPS tracking condition by P&P, which was not part of the court's sentencing order in this case. (*Id.*). Claiming that the addition of GPS monitoring to his Level III probation by P&P constituted enhanced sentencing in violation of the Double Jeopardy and *Ex Post Facto* Clauses, Johnson requested that his sentence be modified to remove the GPS tracking component or that his Level III sentence be reduced to nine months at Level II. (*Id.*).

The Superior Court denied Johnson's motion under Rule 35, finding that, while the court may reduce the terms or conditions of partial confinement or probation at any time under Rule 35(b), the GPS tracking condition of Johnson's Level III probation is lawful and does not implicate the *Ex Post Facto* or Double Jeopardy Clauses because such monitoring was designed to protect public safety and was not punitive, and Johnson failed to establish good cause to justify modification of the length of the Level III portion of his probation sentence. (Exhibit A to Op. Br.). The court noted that "[p]ursuant to 11 *Del. C.* § 4121(u), 'any Tier III sex offender being monitored at Level IV, III, II, or I, shall as a condition of their probation, wear a GPS locator ankle bracelet paid for by the probationer.'" (*Id.*). According to the court:

> [A] plain reading of the statute does not limit GPS Tracking only to probation sentences served as part of an underlying qualifying sex

> offense. The GPS Tracking condition applies to *any* Tier III sex offender being monitored on a probationary sentence.

(*Id.*). In denying Johnson's motion, the court concluded that "[b]ecause [Johnson is] a registered Tier III sex offender, the GPS Tracking condition of [his] Level III probation is lawful." (*Id.*).

On appeal, Johnson does not specifically address the Superior Court's ruling in the context of Rule 35's narrow scope. While he argued below that the GPS tracking condition constituted enhanced sentencing in violation of the Double Jeopardy and *Ex Post Facto* Clauses, Johnson apparently now claims that his sentence is "illegal" because, under the plain language of 11 *Del. C.* § 4121(u), the mandatory GPS requirement does *not* apply to a subsequent sentence after a Tier III sex offender has completed the probation for the underlying sex offense. (Op. Br. at 12-15). Specifically, he argues that the Superior Court erred in interpreting section 4121(u) as requiring GPS tracking for *any* Tier III sex offender being monitored on a probationary sentence and thus denying his motion to remove the GPS requirement in this case on that basis. (*Id.*). According to Johnson, under 11 *Del. C.* § 4121(u)'s "unambiguous" language, the GPS requirement applies only to the probation being served for the underlying sex offense. (*Id.*). Although Johnson submits that section 4121(u) is unambiguous, he alternatively contends that if this Court finds the statutory language to be ambiguous, its intended meaning – as determined by statutory construction principles – also requires that

the GPS monitoring requirement only applies to a Tier III sex offender's probation from the original qualifying sex offense. (*Id.* at 15-18). To the extent that he is raising a new claim not raised below, Rule 8 bars its consideration.[13] Even if Johnson's claim is not waived, it is unavailing under Rule 35. The Superior Court reasonably interpreted the law and did not abuse its discretion under Rule 35. Johnson has also waived his remaining claims he raised below because he failed to brief the issues in the Opening Brief.[14]

A. The Superior Court did not abuse its discretion in denying Johnson's motion for modification of sentence under Rule 35(a).

"Rule 35(a) permits the Superior Court to correct an illegal sentence 'at any time.'"[15] The "narrow function of Rule 35 is to permit correction of an illegal sentence."[16] Relief under Rule 35(a) is only available when the sentence imposed exceeds the statutorily authorized limits, violates the Double Jeopardy Clause, is ambiguous with respect to the time and manner in which it is to be served, is internally contradictory, omits a term required to be imposed by statute, is uncertain as to the substance of the sentence, or is a sentence which the judgment

[13] Supr. Ct. R. 8.

[14] Supr. Ct. R. 14(b)(vi)(A)(3).

[15] *Brittingham v. State*, 705 A.2d 577, 578 (Del. 1998) (quoting Super. Ct. Crim. R. 35(a)).

[16] *Id.*

of conviction did not authorize.[17]

Johnson asserts none of the above criteria,[18] and the Superior Court did not abuse its discretion when it determined that the GPS tracking condition that P&P imposed as a condition of Johnson's probation for his drug offense did not render his sentence in this case illegal. The sentence does not exceed the statutorily-authorized limits, nor does it violate double jeopardy principles. There is nothing ambiguous regarding the terms of the sentence, and Johnson's sentence is not internally contradictory or uncertain and does not omit any required terms. Nor does P&P's condition that Johnson, a Tier III sex offender, wear a GPS ankle monitoring bracelet while he is on probation for his drug offense render his drug sentence illegal. Conditioning Johnson's probation in this way did not increase Johnson's punishment,[19] illegally increase his sentence,[20] or violate 11 *Del. C.*

---

[17] *Id.*

[18] Although Johnson argued below that the GPS tracking condition violates the *Ex Post Facto* or Double Jeopardy Clauses, he has waived any right to this Court's review of those claims because he failed to brief the issues in the Opening Brief. *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993); Supr. Ct. R. 14(b)(vi)(A)(3).

[19] *Phlipot v. State*, 2019 WL 125674, at *2 (Del. Jan. 7, 2019) (holding that Superior Court's modification of Tier II sex offender's probation to impose GPS monitoring as condition of probation did not increase offender's punishment, illegally increase his sentence, or violate 11 *Del. C.* § 4121) (citing *Hassett v. State*, 2011 WL 446561 (Del. Feb. 8, 2011) (holding that GPS monitoring required under 11 *Del. C.* § 4121(u) does not implicate the *ex post facto* clause because the statute is intended for public safety and is not punitive in nature)).

[20] *Phlipot*, 2019 WL 125674, at *2.

§ 4121.[21] As this Court has held, application of the provisions of the sex offender registration statute, including the GPS tracking probation condition, does not violate the *Ex Post Facto* or Double Jeopardy Clauses because the provisions are predicated on community safety and are not punitive in nature.[22]

Johnson nevertheless claims that this Court should reverse the Superior Court's denial of Johnson's Rule 35 motion because the court erred in interpreting section 4121(u) to find that the GPS tracking requirement applies to his drug-related sentence. (Op. Br. at 11-15). Johnson submits that the Superior Court properly found that 11 *Del. C.* § 4121(u) is unambiguous. (*Id.*). He claims, however, that the court erred in finding that, under the statute's plain language, the GPS tracking condition applies to any Tier III sex offender being monitored on a probationary sentence. (*Id.*). According to Johnson, the statute's plain language limits GPS tracking to probation sentences served as part of an underlying

---

[21] *Id.*

[22] *Hassett*, 2011 WL 446561, at *1; *Smith v. State*, 919 A.2d 539, 541 (Del. 2006) (holding that retroactive application of the sex offender registration statute did not violate the *Ex Post Facto* Clause); *State v. Floyd*, 2014 WL 6670204, at *2 (Del. Super. Ct. Oct. 30, 2014) (finding defendant's claim that P&P's requirement for him to wear ankle monitoring bracelet renders his sentence illegal meritless); *Helman*, 784 A.2d 1058 (holding that sex offender notification scheme not punitive in nature); *see also Doe v. Coupe*, 143 A.3d 1266 (Del. Ch. Aug. 12, 2016), *aff'd*, 2017 WL 837689 (Del. Mar. 3, 2017) (upholding section 4121(u)'s requirement that all convicted sex offenders wear GPS monitor as condition of probation or parole; statute is "relatively efficacious in advancing the Delaware government's legitimate interest in reducing sex offender recidivism").

qualifying sex offense and, thus, does not apply to his current probation sentence for his drug offense even though he is a Tier III sex offender. (*Id.*). Johnson posits that "[a]lthough inelegantly worded, the phrase 'their probation' clearly refers to the probation for the offense that resulted in the registry requirement" when reviewing the statute as a whole. (*Id.* at 13). If this Court nevertheless finds the phrase "their probation" within section 4121(u) to be ambiguous, Johnson argues, in the alternative, that its intended meaning – as determined by statutory construction principles – also requires that the GPS monitoring requirement only applies to a Tier III sex offender's probation from the original qualifying sex offense. (*Id.* at 15-18). While Johnson is correct that the words of section 4121(u) are unambiguous, the Superior Court's reading of the plain language of the statute is the only reasonable one. Therefore, the court did not abuse its discretion in denying Johnson's Rule 35 motion.

When construing a statute, this Court first examines its text to determine if it is ambiguous.[23] A statute is ambiguous if: (i) it is reasonably susceptible of different conclusions or interpretations; or (ii) a literal interpretation of its words would lead to "a result so unreasonable or absurd it could not have been intended

[23] *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem. Hosp., Inc*., 36 A.3d 336, 342 (Del. 2012); *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998).

by the legislature."[24] A statute is not rendered ambiguous, however, simply because the parties disagree about the meaning of the statutory language.[25]

When the intent of the legislature is clearly reflected by unambiguous language in the statute, there is no need for statutory interpretation, and the plain meaning of the words of the statute controls.[26] If the statute is ambiguous, this Court seeks to resolve the ambiguity by ascertaining the legislative intent.[27] In such case, "rules of statutory construction are applied, [and] … the statute must be viewed as a whole, and literal or perceived interpretations which yield mischievous or absurd results are to be avoided."[28] "In interpreting a statute, the fundamental rule is to ascertain and to give effect to the intent of the legislature."[29] "'The legislature body is presumed to have inserted every provision for some useful purpose and construction, and when different terms are used in various parts of a

---

[24] *Snyder*, 708 A.2d at 241.

[25] *Ross v. State*, 990 A.2d 424, 429 (Del. 2010).

[26] *See Levan v. Independence Mall, Inc.*, 940 A.2d 929, 932-33 (Del. 2007); *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000); *Spielberg v. State*, 558 A.2d 291, 293 (Del. 1989).

[27] *Snyder*, 708 A.2d at 241.

[28] *Spielberg*, 558 A.2d at 293; *see Clark v. State*, 2018 WL 1956298, at *2 (Del. Apr. 24, 2018) (quoting *Eliason v. Englehart*, 733 A.2d 944, 946 (Del. 1999)).

[29] *State v. Ford*, 1996 WL 190783, at *2 (Del. Super. Ct. Mar. 26, 1996) (citing *Coastal Barge Corp. v. Coastal Zone Indus. Control. Bd.*, 492 A.2d 1242, 1246 (Del. 1985)).

statute it is reasonable to assume that a distinction between the terms was intended.'"[30]

a. The words of the statute are clear and unambiguous.

As the Superior Court found, and Johnson concedes, 11 *Del. C.* § 4121(u) is not ambiguous.[31] Because it is unambiguous, there is no need for judicial interpretation and the plain meaning rule applies. Applying the plain meaning rule of statutory interpretation, the Superior Court correctly concluded that Johnson was subject to mandatory GPS monitoring under section 4121(u) during his probationary period because he is undisputedly a Tier III sex offender and is being monitored at Level III.

b. The Superior Court did not err in its interpretation of 11 *Del. C.* § 4121(u).

In arguing that 11 *Del. C.* §4121(u) requires GPS monitoring for Tier III sex offenders only during the term of their qualifying sentence, Johnson urges this Court to adopt an unreasonably restrictive interpretation found nowhere in the statute's plain language. Specifically, Johnson claims that when subsection 4121(u) is read in the context of subsections 4121(a)(4), 4121(b), 4121(c), and 4121(e)(2)(a), it is clear that "the GPS requirement for Tier III offenders applies

[30] *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982) (quoting *C&T Assocs. v. Gov't of New Castle*, 408 A.2d 27, 29 (Del. Ch. 1979)).

[31] *See Doroshow*, 36 A.3d at 342 (noting that a statute is not ambiguous if it is subject to only one reasonable interpretation).

only during "'their probation' – that is to say, the probation for their qualifying sex offenses." (Op. Br. at 13-15). According to Johnson, "[t]he entire statute imposes requirements on the offender *for the sex offense* and not for anything else." (*Id.*). He further contends that "the statute elsewhere never imposes on those Tier III offenders who subsequently commit non-qualifying offenses any other sanction, other than a delay of when they can apply for tier reduction." (*Id.*). Johnson's claims are unavailing.

Although this Court has not considered whether section 4121(u) applies to sex offenders who have completed their original sentences and are serving a probationary sentence for a subsequent unrelated offense, the plain, unambiguous language of the statute itself and decisions from other courts interpreting similar laws mandating electronic monitoring of released sex offenders to apply to sentences for subsequent offenses are instructive.

The starting point in statutory interpretation is the language of the statute itself.[32] Section 4121(u) provides that "*any* Tier III sex offender being monitored at Level IV, III, II or I, shall as a condition of their probation, wear a GPS locator ankle bracelet."[33] The sex offender registration statute defines "sex offender" to

[32] *Fuller v. State*, 104 A.3d 817, 821 (Del. 2014).

[33] 11 *Del. C.* § 4121(u) (emphasis added); *see Floyd*, 2014 WL 6670204, at *2 ("Pursuant to 11 *Del. C.* § 4121(u), the Legislature mandated that all Tier III sex offenders must wear a GPS locator ankle bracelet as a condition of their probation.").

include "any person who is, or has been … convicted of any of the offenses specified in §§ 765 through 780."[34] Although the statute does not define "probation," it is defined in 11 *Del. C.* § 4302(14) as "the sentencing without imprisonment of an offender by judgment of the court following establishment of guilt, subject to the conditions imposed by the court, including the supervision and guidance of the Department [of Correction]'s field services."[35] "Any" and "their" are ordinary terms, which are defined by Merriam Webster Dictionary to mean, "every" and "his or her," respectively.[36] A plain reading of these four terms indicates that mandatory GPS monitoring encompasses *every* Tier III sex offender being monitored on a probationary sentence. Tellingly, the General Assembly did not include any language in this statute that plainly limits GPS monitoring to "sex offenders" who are on probation for the sexual offense that resulted in the registry requirement.

Johnson's argued-for-reading is not based on the "peculiar and appropriate meaning"[37] of the statutory terms and the "common and approved usage" of

[34] 11 *Del. C.* § 4121(a)(4).

[35] 11 *Del. C.* § 4302(14).

[36] MERRIAM–WEBSTER, https://www.merriam-webster.com/dictionary/any (last visited Mar. 11, 2022); MERRIAM–WEBSTER, https://www.merriam-webster.com/dictionary/their (last visited Mar. 11, 2022).

[37] *See* 1 *Del. C.* § 303.

ordinary terms[38] and, if adopted, would materially alter section 4121(u)'s meaning. That construction cannot qualify as a "plain" reading of the statute.[39]

Furthermore, Johnson's reliance on subsections 4121(a), 4121(b), 4121(c), and 4121(e)(2)(a) to insert an "original qualifying sex offense" restriction on the plain language of section 4121(u) is misplaced. Section 4121(a) defines "sex offenders" to include "any person who is, or has been … convicted of any of the offenses specified in §§ 765 through 780."[40] Section 4121(b) provides that once an individual is convicted or adjudicated delinquent of any sex offense, "the court shall inform the person that the person shall be designated as a sex offender and that a Risk Assessment Tier will be assigned to that person by the court."[41] Section 4121(c) addresses the procedure for assigning a "sex offender" to the applicable risk assessment tier when the person pleads guilty to an offense included in the originally charged offense or when the person violates the terms of "that person's own probation or parole" if no tier level had been assigned at the time of original

[38] *See id.*

[39] *See Lawson v. State*, 91 A.3d 544, 551 (Del. Apr. 23, 2014) (holding that construction not based on the "peculiar and appropriate meaning" of statutory terms cannot qualify as a "plain" reading of the statute).

[40] 11 *Del. C.* § 4121(a).

[41] 11 *Del. C.* § 4121(b). The tier assignment is based on the seriousness of the offense committed, with Tier III being the most restrictive. *Id.* § 4121(d).

sentence.[42] Section 4121(e)(2)(a) provides that Tier III offenders can apply to reduce their risk assessment tier if 25 years have passed without the offender having had any additional convictions or findings of violation.[43] These provisions provide no basis for the Court to re-write the statute in a way that disregards the General Assembly's intent.

Johnson is also mistaken that section 4121(e)(2)(a) "makes clear that the only penalty imposed on Tier III offenders who subsequently commit unrelated offenses is that it restarts the clock on their ability to petition for a tier reduction." (*See* Op. Br. at 15). According to Johnson, this provision "would have been the place for the General Assembly to include language that the provisions of § 4121(u) apply to any subsequent unrelated offenses," which it did not do. (*Id.*). Johnson's argument is unavailing. As this Court has held, the GPS tracking probation condition is predicated on community safety and is not punitive in

[42] *See* 11 *Del. C.* § 4121(c); *Drake v. Board of Parole*, 2011 WL 5299666, at *3 (Del. Super. Ct. Oct. 25, 2011). 11 *Del. C.* § 4121(c) pertains to persons defined as sex offenders under paragraph (a)(4)e, which states in pertinent part: a sex offender is defined as any person who is, or has been "[c]harged by complaint, petition, information or indictment with any of the offenses set forth in paragraph (a)(4)a., (a)(4)b., (a)(4)c. or (a)(4)d. of this section, and who thereafter pleads guilty to any offense included in the originally charged offense, as provided in § 206 of this title, if the person is thereafter designated as a sex offender by the sentencing judge pursuant to subsection (c) of this section."

[43] 11 *Del. C.* § 4121(e)(2)(a).

nature.[44] Furthermore, given that section 4121(u)'s language requiring GPS tracking for any Tier III sex offenders being monitored at Level IV, III, II, or I as a condition of their probation, it would have served no purpose for the General Assembly to include superfluous language in section 4121(e)(2)(a) providing that section 4121(u) applies to any subsequent unrelated offenses.[45]

Finally, nothing in section 4121(e)(2)(a) indicates that the General Assembly intended to limit GPS tracking only to probation sentences served for the original qualifying sex offense. The General Assembly could have narrowed section 4121(u) to mandate GPS monitoring only for the original qualifying sex offense. But it did not, and the Court must apply the unambiguous language of the statute as written.[46] The plain language of section 4121(u) mandates that "any Tier III sex offender being monitored at Level IV, III, II or I, shall, as a condition of their probation, wear a GPS locator ankle bracelet paid for by the probationer."[47] Accordingly, the Superior Court correctly found that a plain reading of section

---

[44] *See Hassett*, 2011 WL 446561, at *1; *see also Floyd*, 2014 WL 6670204, at *2 (finding defendant's claim that P&P's requirement for him to wear ankle monitoring bracelet renders his sentence illegal meritless).

[45] *See Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (stating the fundamental principle of statutory interpretation that courts must "give effect, if possible, to every clause and word of a statute"); *Doroshow*, 36 A.3d at 343-44.

[46] *See Arnold v. State*, 49 A.3d 1180, 1184 (Del. 2012) (holding that the Court must apply the unambiguous plain language of a statute as written where the General Assembly did not include language narrowing the statute).

[47] 11 *Del. C.* § 4121(u).

4121(u) does not limit GPS monitoring to a Level IV, III, II, or I sentence that is part of the underlying conviction that triggered the sex offender registration.

Courts interpreting Florida's statute mandating electronic monitoring of certain released sex offenders, which is similar to Delaware's statute,[48] have reached the same conclusion as the Superior Court, and their decisions are instructive in interpreting Delaware's statute.[49] For example, in *State v. Lacayo,* Florida's District Court of Appeal held that the plain language of Florida's

---

[48] *See* Eric M. Dante, Tracking the Constitution – the Proliferation and Legality of Sex-Offender GPS-Tracking Statutes, 42 Seton Hall L. Rev. 1169, 1176 (2012). In enacting section 4121(u) in 2007, Delaware adopted the Florida model, requiring electronic monitoring when an offender who committed an enumerated crime is on probation after incarceration. *Id.* The Florida and Delaware models, which require electronic monitoring during the probation period based not upon the individual's threat of reoffending but on the crime committed, are modeled after the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16981 (2006) (eff. Oct. 1, 2006), a federal law providing state grants for sex-offender electronic monitoring programs that meet minimum requirements. *See id.* at 1176, 1191-92.

[49] *See State v. Flynn*, 2012 WL 3329213, at *1-2 (Fla. Dist. Ct. App. Aug. 15, 2012) (holding that Florida statute's plain language prohibited trial court from granting defendant's motion to modify the terms of his probation for his offense of failing to register as a sex offender by deleting mandatory electronic monitoring based on his prior conviction of a sex crime); *Hitt v. State*, 2010 WL 624162, at *1 (Fla. Dist. Ct. App. Feb. 24, 2010); *State v. Lacayo*, 8 So.3d 385, 387 (Fla. Dist. Ct. App. 2009) (subjecting sexual predator to mandatory electronic monitoring after violating parole by fleeing police officer and holding that Fla. Stat. § 948.30(3), requiring a probationer who is designated a sexual predator to be subjected to electronic monitoring, was not limited to probation imposed for sexual offenses); *Brown v. State*, 2009 WL 2765784 (Fla. Dist. Ct. App. Sept. 2, 2009); *Fields v. State*, 968 So.2d 1032, 1033-34 (Fla. Dist. Ct. App. 2007) (holding GPS tracking mandatory for sex offender who violated probation for subsequent offense of driving with suspended license).

mandatory electronic monitoring statutory provision also applied to sex offenders who have completed their original sentences and are serving a probationary sentence for a subsequent offense.[50] The defendant in that case had been previously designated a "sexual predator" in 1999 following his convictions for lewd and lascivious assault on a child and for sexual battery on another victim.[51] After serving his sentence for the sexual offenses, the defendant was subsequently convicted in 2007 for fleeing and attempting to elude a police officer.[52] Based upon the defendant's prior designation as a "sexual predator," the state filed a motion to modify the defendant's probation for his subsequent offense pursuant to Fla. Stat. § 948.30(3), which provides for "mandatory electronic monitoring as a condition of the probation or community control supervision" of a "probationer … whose crime was committed on or after September 1, 2005" and who "[i]s designated as a 'sexual predator pursuant to s. 775.21.'"[53] The trial court denied the state's motion, concluding that mandatory electronic monitoring was limited to

---

[50] *Lacayo*, 8 So.3d at 386-87.

[51] *Id.*

[52] *Id.*

[53] *Id.* (citing Fla. Stat. § 948.30(3)). Section 948.30(3) provides, in pertinent part:

> Effective for a probationer or community controllee whose crime was committed on or after September 1, 2005, and who … (b) Is designated a sexual predator pursuant to s. 775.21 … the court must order, in addition to any other provision of this section, mandatory electronic monitoring as a condition of the probation or community control supervision.

sexual offense cases and that, because defendant was convicted for fleeing and attempting to elude a police officer, it could thus not impose mandatory electronic monitoring on the defendant.[54]

On appeal, Florida's District Court of Appeal reversed, finding that the trial court incorrectly concluded that mandatory electronic monitoring was limited to sexual offense cases.[55] In its decision, the court found that section 948.30(3)(b)'s provisions were clear and unambiguous.[56] Though the defendant argued that the statutory phrase "whose crime was committed" only refers to defendants who commit sexual offenses, the court rejected that argument.[57] It found that the defendant's position was inconsistent with the plain and unambiguous language of the statute, given that the term "crime," as referenced in the statute, is defined to mean a felony or misdemeanor.[58] Noting that the defendant satisfied the clear and unambiguous requirements of the statute by virtue of his current felony conviction and sexual predator status, the court concluded that "[b]y the plain language of § 948.30(3)(b) as applied to defendant, the trial court should have granted the State's motion to modify defendant[']s probation to include mandatory electronic

[54] *Lacayo*, 8 So.3d at 386-87.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* (citing Fla. Stat. § 775.08(4)).

monitoring."[59]

Similarly, in *State v. Flynn*, the Florida District Court of Appeal reversed the trial court's grant of the defendant's motion to modify the terms of his probation to remove mandatory electronic monitoring imposed by the probation office under Fla. Stat. § 948.30(3) based on his prior conviction for a lewd and lascivious act.[60] The defendant, who had pled guilty to failing to register as a sex offender and had been sentenced to probation, argued that he did not meet the criteria for the mandatory imposition of electronic monitoring under the statute.[61] In reversing the trial court's modification deleting the mandatory electronic monitoring, the Florida District Court of Appeal held that the plain language of section 948.30(3) prohibited the trial court from granting the motion.[62]

Because section 4121(u) is clear and unambiguous, its plain language controls. As the Superior Court found, a plain reading of the statute does not limit GPS tracking only to probation services served as part of an underlying qualifying sex offense. Rather, *any* Tier III sex offender being monitored at Level IV, III, II or I, is required, as a condition of their probation, to wear a GPS locator ankle

[59] *Id.*

[60] *Flynn*, 2012 WL 3329213, at *1-2.

[61] *Id.*

[62] *Id.*

bracelet.[63] Johnson meets the definition of "sex offender" for purposes of the statute because of his 1999 convictions for second degree unlawful sexual intercourse and second degree unlawful sexual contact. He is also classified as a Tier III sex offender and is currently being monitored at Level III probation. As such, the Superior Court did not err in finding that P&P's imposition of GPS tracking as a condition of Johnson's probation under section 4121(u) was lawful.

Even if this Court were to find any ambiguity in the language of section 4121(u), the result is the same. Although Johnson claims that if this Court finds section 4121(u) ambiguous, it should be interpreted to only mean the probation for the qualifying sex offense because interpreting it to apply to any subsequent probation as well would yield unreasonable or absurd results that were unintended by the General Assembly, he is mistaken. (*See* Op. Br. at 5, 16-17).

As this Court has recognized, "'[t]he role of this Court when construing a statute is to give effect to the policy intended by the General Assembly.'"[64] Where necessary the Court can and should consider a statute's history.[65] Official legislative history is one proper source. For instance, the Court can consider "the

[63] *See* 11 *Del. C.* § 4121(u).

[64] *Arnold*, 49 A.3d at 1184 (quoting *State v. Fletcher*, 974 A.2d 188, 196-97 (Del. 2009)).

[65] *Rubick v. Security Instrument Corp.*, 766 A.2d 15, 18 (Del. 2000).

synopsis of a bill … [a]s a proper source from which to glean legislative intent."[66]

Here, the synopsis to the original bill provides guidance about the "intent" of the General Assembly when it enacted section 4121(u).[67] The synopsis states, in its entirety: "This bill provides for GPS tracking for Tier III sex offenders while they are on probation being supervised by the Department of Correction." (A370). The synopsis contains no conditional language. Specifically, the synopsis did not limit the statute's application to a sex offender's original sentence for the qualifying sexual offense.[68]

Similarly, nothing in the legislative history of section 4121(u) indicates that the General Assembly intended to limit GPS monitoring only to the underlying sex offense when it enacted the statute. The General Assembly, both in the express language of the statute, and in the synopsis summarizing the statute's intent, made it clear that the GPS tracking condition applies to any Tier III sex offender being monitored on a probationary sentence.

Johnson is also wrong that the Superior Court's interpretation of section 4121(u) to apply to any subsequent probation yields unreasonable or absurd

---

[66] *Carper v. New Castle County Bd. of Ed.*, 432 A.2d 1202, 1205 (Del. June 22, 1981).

[67] *See Arnold*, 49 A.3d at 1184 (noting that bill's synopsis provides guidance about the "intent" of the General Assembly when it enacted statute).

[68] *See id.* (holding that literal interpretation of statute does not lead to unreasonable or absurd result that was unintended by General Assembly where bill's synopsis did not limit the statute's application).

results. According to Johnson, such an interpretation would result in Tier III offenders who are no longer being tracked following the end of their probation period being suddenly considered more dangerous as a sex offender if they are later convicted of any non-sex offense and placed on Level I, II, or III probation for the non-sex offense and require GPS tracking. (Op. Br. at 16-17). Johnson overlooks, however, that Delaware's GPS monitoring program for convicted sex offenders is also a means to deter any additional criminal behavior – whether such subsequent crime is designated a sex offense or not.[69]

c. Even if it was not mandatory under 11 *Del. C.* § 4121(u), P&P's imposition of GPS monitoring as a condition of Johnson's probation for the drug offense is permissible.

Even if this Court were to find that 11 *Del. C.* § 4121(u) does not mandate that Tier III sex offenders being monitored at Level IV, III, II, or I wear a GPS locator ankle bracelet as a condition of their probation where they are serving probation on a subsequent non-qualifying offense, Johnson's argument overlooks that P&P was permitted to impose GPS monitoring as a condition of Johnson's probation. Specifically, probation officials have the statutory authority to impose special conditions of probation on a probationer.[70] Here, the authority to require Johnson to wear a GPS locator is derived from two statutory sources – 11 *Del. C.*

[69] *See Doe*, 143 A.3d at 1275-79 & n.87; A377; B-1.

[70] 11 *Del. C.* § 6502.

§ 4121(u), which requires that Tier III sex offenders wear a GPS locator during the period of their court-imposed probation *and* 11 *Del. C.* § 6502, which confers broad authority on the Department of Correction and P&P to impose conditions in connection with supervision of offenders released to the community.[71] Thus, even if this Court were to find that probation officials lacked statutory authority to impose GPS tracking on Johnson as a condition of his probation under section 4121(u), probation officials had separate statutory authority under section 6502 to impose GPS monitoring on Johnson as a condition of his probation in this case. Accordingly, P&P's requirement that Johnson, a Tier III sex offender, wear a GPS ankle monitoring bracelet while he is on probation for his drug offense does not render his sentence illegal.[72]

B. The Superior Court did not abuse its discretion in denying Johnson's motion for modification of sentence under Rule 35(b).

Rule 35(b) provides, in relevant part, that the Superior Court may reduce a sentence within 90 days after the sentence is imposed and can only consider an

[71] *See id.*; 11 *Del. C.* § 4121(u).

[72] *See Phlipot*, 2019 WL 125674, at *2 (recognizing that although 11 *Del. C.* § 4121(u) does not mandate GPS monitoring for Tier II sex offenders as it does for Tier III offenders, the statute does not prohibit a court from imposing GPS monitoring as a condition of probation when sentencing a Tier II offender); *Dordell v. State*, 2004 WL 1277160, at *1-2 (Del. Apr. 1, 2004) (holding that probation officer had statutory authority under 11 *Del. C.* § 6502 to impose special conditions of probation); *see also Phoenix v. State*, 2003 WL 21991655 (Del. Aug. 19, 2003) (recognizing that the Superior Court has authority to impose wide range of specific conditions of probation).

untimely application in "extraordinary circumstances" or pursuant to 11 *Del. C.* § 4217.[73] It also permits the Superior Court to "reduce the … term or conditions of partial confinement or probation, at any time."[74] Rule 35(b) further provides that "[t]he court will not consider repetitive requests for reduction of sentence."[75] Where the Superior Court has discretion to modify a sentence under Rule 35(b), the standard of review is "highly deferential" to that court.[76]

To the extent that Johnson claims that the Superior Court erred under Rule 35(b) in denying his request to remove his GPS monitoring condition of probation, he is mistaken. Although Rule 35(b)'s limitations period did not apply to Johnson's motion to modify his probation condition, his request is nevertheless procedurally barred under Rule 35(b) because his motion, having been his seventh request for modification of sentence, is repetitive, and Johnson provided insufficient information to merit a sentence modification.[77] The Superior Court did not deny Johnson's motion on these grounds, but its decision may nonetheless be affirmed on this basis.[78] Unlike the 90-day jurisdictional limit, Rule 35(b)'s bar to

[73] Super. Ct. Crim. R. 35(b).

[74] *Id.*

[75] *Id.*

[76] *State v. Lewis*, 797 A.2d 1198, 1202 (Del. 2002).

[77] *Teat v. State*, 2011 WL 4839042, at *1 (Del. Oct. 12, 2011).

[78] *Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995).

repetitive motions has no exception. Instead, this bar is absolute and flatly prohibits repetitive requests for reduction of sentence.[79]

Even if Johnson's motion was not repetitive, it would nonetheless be meritless. Johnson's present argument turns on his contention that the Superior Court erred in finding that a plain reading of 11 *Del. C.* § 4121(u) does not limit the GPS tracking only to the underlying sex offense. As discussed above, the Superior Court did not abuse its discretion in its statutory interpretation. Under the plain language of section 4121(u), the court lacked authority to remove the GPS tracking condition imposed by P&P. Furthermore, even if not required under section 4121(u), P&P's addition of the GPS tracking condition is not unlawful under 11 *Del. C.* § 6502.[80] Accordingly, the Superior Court did not abuse its discretion in denying Johnson's request for his sentence to be modified to remove the GPS tracking condition.

[79] *Barrall v. State*, 2019 WL 1787310, at *1 (Del. Apr. 23, 2019) (affirming denial of repetitive 35(b) motion).

[80] *See supra*.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

/s/ Carolyn S. Hake
Carolyn S. Hake (#3839)
Deputy Attorney General
Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 577-8500

Dated: March 14, 2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAMMEYIN A. JOHNSON,	)	
	)	
Defendant Below-Appellant,	)	
	)	
v.	)	No. 269, 2021
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 7,574 words, which were counted by Microsoft Word.

Dated: March 14, 2022 /s/ *Carolyn S. Hake*