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State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

Robert Kardasz

Defendant-Appellant.

MSC No. 165008

COA Nos. 343545 & 358780

Macomb County Circuit Court
Case No. 17-2252 FC

Robert Kardasz's Reply
In Support of Application for Leave to Appeal

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Table of Contents

Index of Authorities 3

Reply 5

I. Like the North Carolina and Georgia Supreme Courts, the Massachusetts Supreme Judicial Court has also ruled that electronic monitoring constitutes an unreasonable search. 5

II. The cases relied upon by the State in support of LEM are distinguishable, and two, *Strudwick* and *Hilton*, mostly support Mr. Kardasz's position. *Hallak* is wrongly decided. 7

III. The State's Response ignores *Grady* and this Court should not be swayed by the State's attempt to distinguish *Park*. 13

IV. The State's attempts to characterize SORA and LEM as neither cruel nor unusual punishment are unpersuasive. 14

Conclusion and Relief Requested 16

RECEIVED by MSC 5/17/2023 9:54:01 AM

Index of Authorities

Cases

Belleau v Wall, 811 F3d 929 (CA 7, 2016) 8, 14

Carpenter v United States, 138 S Ct 2206 (2018) 5

Commonwealth v Feliz, 481 Mass 689 (2019) 4, 5, 8

McKune v Lile, 536 US 24 (2002) 10

Morrissey v Brewer, 408 US 471 (1972) 7

Park v State, 305 Ga 348 (2019) 4, 9, 12

People v Betts, 507 Mich 527 (2021) 10

People v Dipiazza, 286 Mich App 137 (2009) 13

People v Goldston, 470 Mich 523 (2004) 6

People v Hallak, 310 Mich App 555 (2015) 10, 14

People v Lymon, __ Mich App __ (Docket No. 327355), decided June 16, 2022; 2022 WL 2182165 13

People v McFarlin, 389 Mich 557 (1973) 13

People v Montgomery, 508 Mich 978 (2021) 6

Samson v California, 547 US 843 (2006) 6, 7

Sitz v Dep't of State Police, 443 Mich 744 (1993) 6

Smith v Doe, 538 US 84 (2003) 10

State v Grady, 372 NC 509 (2019) 4, 8

State v Hilton, 378 NC 692 (2021) 9, 10

State v Strudwick, 379 NC 94 (2021) 9

United States v Knights, 534 US 112 (2001) 7

Vernonia School Dist 47J v Acton, 515 US 646 (1995).....6, 7, 8

Constitutions, Statutes

US Const, Am IV.....5, 6, 8, 14

MCL 750.520n.....5, 8, 11

Other Authorities

NC Gen Stat Ann § 14-208.40-45 .....9, 10

RECEIVED by MSC 5/17/2023 9:54:01 AM

RECEIVED by MSC 5/17/2023 9:54:01 AM

Reply

I. Like the North Carolina and Georgia Supreme Courts, the Massachusetts Supreme Judicial Court has also ruled that electronic monitoring constitutes an unreasonable search.

In addition to the North Carolina Supreme Court's decision in *State v Grady*, 372 NC 509 (2019) and the Georgia Supreme Court's decision in *Park v State*, 305 Ga 348 (2019), this Court may also find the Massachusetts Supreme Judicial Court's decision in *Commonwealth v Feliz*, 481 Mass 689 (2019) instructive.

There, a Massachusetts' law mandated, with no individualized assessment, electronic monitoring as a probation condition for individuals convicted of most sex offenses.[1] *Feliz*, 481 Mass at 690. *Feliz* is distinguishable from Mr. Kardasz's case because Mr. Feliz had been convicted of a non-contact sex offense (child pornography possession and distribution) and asserted an as-applied challenge to electronic monitoring. *Id*. However, the principles underlying *Feliz* resonate with those espoused in *Grady* and *Park*, and are applicable to Mr. Kardasz's case.

The *Feliz* Court reasoned that "when the government seeks to conduct a search that is more than minimally invasive, [the Constitution] requires an individualized determination of reasonableness," and concluded that electronic monitoring is "not a minimally invasive search." *Id*. at 695-696, 699-700 (observing that electronic monitoring devices issue frequent alerts owing to bad connections and battery issues, requiring the monitored individual to communicate with a probation employee each time or risk arrest); *id*. (finding that Mr. Feliz had experienced at least 31 alerts in 10 months owing to battery and signal connectivity issues, requiring him to spend on average 30 minutes to six hours resolving the problem); *id*. at 704

[1] Undersigned counsel is not aware of any law in Massachusetts mandating LEM for CSC offenders after probation or parole.

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(noting that to regain connectivity, "probation employees have instructed the defendant to walk around outside at various times of day or evening . . . requiring the defendant to leave his job . . . during work hours," and forcing the defendant to ask coworkers to cover his job duties, thus "risking potential economic consequences, including loss of employment.").

In holding that "[m]andatory, blanket imposition of [electronic] monitoring on probationers, absent individualized determinations of reasonableness, is unconstitutional," the *Feliz* Court, notwithstanding Mr. Feliz's probationer status, explained that "the government does not have an 'unlimited' ability to infringe upon a probationer's still-existing, albeit diminished, expectations of privacy." *Id*. at 700, 703 (finding that electronic "monitoring results in a far greater intrusion on the defendant's liberty than that associated with traditional probation monitoring") (internal quotations and citation omitted). "[T]he fact of 'diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely.'" *Id*. at 701, quoting *Carpenter v United States*, 138 S Ct 2206 (2018).

The same is true here. In fact, the unreasonableness of the LEM search at issue in Mr. Kardasz's case is even more pronounced than the unreasonableness of the search at issue in *Feliz*. Unlike the search in *Feliz*, which only applied to probationers and was still determined to be unreasonable, the search here continues for life – beyond the cessation of probation or parole, when privacy expectations are even higher.

All in the last few years, the highest courts in North Carolina, Georgia, and Massachusetts, have weighed in on the constitutionality of their respective electronic monitoring statutes. As the highest court sitting in one of the few states whose legislature has enacted a law (MCL 750.520n) mandating LEM for many of its residents – amounting to an ongoing, indefinite, warrantless search – this Court should review its constitutionality. The Application for Leave to Appeal should be granted.

RECEIVED by MSC 5/17/2023 9:54:01 AM

II. The cases relied upon by the State in support of LEM are distinguishable, and two, *Strudwick* and *Hilton*, mostly support Mr. Kardasz's position. *Hallak* is wrongly decided.

Turning to the State's Response, the State relies on a series of distinguishable cases in support of its position that LEM constitutes a reasonable search that meets the demands of Michigan's Constitution. This Court should not be persuaded.

The State relies on two United States Supreme Court cases – *Samson v California*, 547 US 843 (2006) (suspicionless search of parolee was reasonable) and *Vernonia School Dist 47J v Acton*, 515 US 646 (1995) (random drug testing of student athletes was reasonable) – but those cases involved determinations of whether the searches ran afoul of the 4th Amendment of the United States Constitution. It is well established that the Michigan Constitution affords Michiganders broader protections than the United States Constitution, and for that reason alone *Samson* and *Vernonia* have limited value.[2] But, that is not the only reason the State's reliance on *Samson* and *Vernonia* is misplaced.

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[2] "In interpreting [the Michigan] Constitution, [Michigan courts] are not bound by the United States Supreme Court's interpretation of the United States Constitution, even where the language is identical." *People v Goldston,* 470 Mich 523, 534 (2004). Michigan "courts are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so. We are obligated to interpret our own organic instrument of government." *Sitz v Dep't of State Police,* 443 Mich 744, 763 (1993). See also *People v Montgomery*, 508 Mich 978 (2021), citing *Sitz*, 443 Mich at 763 (discussing the 4th Amendment and noting that "*Samson* may very well constitute this sort of major contraction of citizen protections that Michigan need not necessarily follow when interpreting and applying our own Constitution.").

RECEIVED by MSC 5/17/2023 9:54:01 AM

Samson is distinguishable because the basis for the Court's decision was the notion that parolees have a diminished expectation of privacy. *Samson*, 547 US at 848-849, citing *United States v Knights*, 534 US 112, 118-119 (2001) (looking to its decision in *Knights* for guidance and explaining that "[i]n evaluating the degree of intrusion into Knights' privacy, we found Knights' probationary status salient . . . . observ[ing] that, by virtue of their status alone, probationers do not enjoy the absolute liberty to which every citizen is entitled . . . justifying the impos[ition] [of] reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens") (internal citations and quotations omitted). The Court even concluded that "parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation" given that "[t]he essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Id.* at 850, quoting *Morrissey v Brewer*, 408 US 471, 477 (1972). In contrast, the LEM statute that Mr. Kardasz challenges applies to registrants indefinitely – after they have completed parole or probation, and when they have a greater expectation of privacy.

Vernonia is similarly distinguishable because the basis for the Court's decision was informed by the temporary nature and limited scope of the search. First, the parties subject to search in *Vernonia* were "unemancipated minors" and thus "lack[ed] some of the most fundamental rights of self-determination – including even the right of liberty in its narrow sense, i.e., the right to come and go at will." *Vernonia*, 515 US at 654-655 ("They are subject, even as to their physical freedom, to the control of their parents or guardians," and "[w]hen parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them."). Mr. Kardasz's case challenges the search of adults. Second, the school athletes in *Vernonia* had a "reduced expectation of privacy" because they chose to "go out for the team" and thus "voluntarily subject[ed] themselves to a degree of regulation even higher than that imposed on students generally." *Id.* at 657 ("Somewhat

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like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."). Mr. Kardasz and those subject to MCL 750.520n have no choice in being monitored. And third, the search at issue in *Vernonia* was random urinary drug testing, a search which occurred sporadically, in minutes, and provided the regulator a snapshot in time. As pointed out by the *Grady* Court, ankle monitors, in contrast, constitute "in essence, a feature of human anatomy" that invades the offender's privacy "in his every movement every day for the rest of his life." *Grady*, 372 NC at 529-530; see also *Feliz*, 481 Mass at 704 ("The experience of accommodating a device that remains attached to the body for a prolonged period of time differs materially from the one-time, minimal physical intrusion occasioned by a properly conducted DNA test.").

The State also relies on *Belleau v Wall*, 811 F3d 929 (CA7 2016), but this Court should reject that decision for the same reasons that the Georgia Supreme Court rejected it:

> We reject the reasoning in *Belleau v. Wall* . . . . [I]ndividuals classified as sexually dangerous predators who have served the entirety of their criminal sentences do *not* have a diminished expectation of privacy with respect to Fourth Amendment searches. See *H.R. v. N.J. State Parole Bd.*, 457 N.J. Super. 250, 199 A.3d 297 (2018) (". . . Judge Posner's view that the loss of privacy suffered under GPS monitoring is slight . . . is at odds with our [New Jersey] Supreme Court's assessment . . . that GPS monitoring substantially diminishes individual privacy."). See also *United States v Jones*, 565 U.S. 400, 415-416 (2012) (Sotomayor, J., concurring) ["GPS monitoring . . . may alter the relationship between citizen and government in a way that is inimical to democratic society"]. We also are not persuaded that an opportunity to be removed from GPS monitoring requirements through reclassification

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> after twenty years would make reasonable a search of an individual who has no diminished expectation of privacy after having served his or her entire sentence.

Park, 305 Ga at 360 n7. Furthermore, *Belleau* is distinguishable because, like *Samson*, the defendant was on parole.

The remaining two cases relied upon by the State do not push the needle any further for the State, and mostly support Mr. Kardasz's position. In *State v Strudwick*, 379 NC 94 (2021), after the defendant pled guilty to various sex crimes, the State by law was required to petition the trial court to impose LEM, and the court made 27 findings of fact and 11 conclusions of law before doing so. 379 NC at 96, 98 (conducting an evidentiary hearing where the State was required to provide the trial court with a Static-99 for the defendant, which evaluated his risk of committing another sex offense); see NC Gen Stat Ann § 14-208.40A(c)-(e)[3] (requiring North Carolina courts to conduct a "risk assessment" for certain kinds of aggravated offenders to determine whether said offender requires electronic monitoring and, if so, the appropriate amount of time for such monitoring). The same thing happened in *State v Hilton*, 378 NC 692, 694-696 (2021), where the trial court conducted a two-day evidentiary hearing to determine whether the defendant – who, unlike Mr. Kardasz, reoffended after serving a 12-year prison sentence for sexually assaulting two minors – should be subject to electronic monitoring. By law, the North Carolinian defendant, notwithstanding the imposition of "lifetime" monitoring, could petition for termination one year after completing his sentence, probation, or parole. *Hilton*, 378 NC at 706, citing NC Gen Stat Ann § 14-208.43. That

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[3] Prior to 2021, if an offender fell into certain categories (e.g., recidivist or aggravated), North Carolina law mandated that the court impose LEM. SL 2017-186, § 2(u), eff Dec 1, 2017. However, in 2021, North Carolina's legislature abolished the lifetime mandate, requiring a risk assessment to be conducted in contemplation of a term of years. SL 2021-138, § 18(d), eff Dec 1, 2021.

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is the kind of process Mr. Kardasz asks for here – a process where the imposition of electronic monitoring is made after an individualized determination of recidivism risk and the person can petition for termination. The absence of this process is what makes mandatory LEM in Michigan unconstitutional. Thus, contrary to the State's assertion, Michigan is not "on par with . . . North Carolina." State Resp at 28. While Michigan, like North Carolina, has access to the Static-99, as well as the VASOR-2, and has the tools to assess a person's likelihood of reoffending, Michigan law does not provide for an individualized assessment before the imposition of LEM. Nor does Michigan law provide for an opportunity to petition for termination. Such a statutory scheme amounts to an unreasonable search.

Lastly, the State relies on *People v Hallak*, 310 Mich App 555 (2015), but *Hallak* is wrongly decided. *Hallak* relies on *Samson* and the notion that parolees and probationers have a lower expectation of privacy. However, as argued *supra*, *Samson* is distinguishable and LEM extends to those who are no longer on parole or probation and thus have a greater privacy expectation. Furthermore, *Hallak* relies on outdated studies and court opinions reflecting concerns that the "risk of recidivism posed by sex offenders is frightening and high[er]" than "any other type of offender." *Id*. at 573-574, citing *Smith v Doe*, 538 US 84, 103 (2003), quoting *McKune v Lile*, 536 US 24, 33 (2002). But this Court has acknowledged that a "growing body of research supports the[ ] proposition[ ]" that "the dangerousness of sex offenders has been historically overblown." See *People v Betts*, 507 Mich 527, 560-561 (2021) (citing studies from 2021, including one conducted by the United States Department of Justice).

To be clear, Mr. Kardasz's position is not that LEM is unconstitutional. Rather, his position is that *mandatory* LEM, *without any individualized assessment or opportunity to petition for termination*, is unconstitutional. While this Court is free to direct Michigan's Legislature to NC Gen Stat Ann § 14-208.40-45 as an example of a model

that approaches constitutional muster, MCL 750.520n in its current form cannot stand.

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III. The State's Response ignores *Grady* and this Court should not be swayed by the State's attempt to distinguish *Park*.

Despite the fact that Mr. Kardasz devoted an entire section of his Application (see Leave App Section IV.A) to applying *Grady*, the State's Response never mentions or addresses the decision. State Resp at 21 (only discussing the limited US Supreme Court holding that electronic monitoring is a search). As such, it is Mr. Kardasz's position that the State concedes *Grady*'s application to his case.

In addition, this Court should not be swayed by the State's attempt to distinguish *Park*. The State argues that *Park* is limited to "the specific context of the Georgia statute at play" (State Resp at 29), but the reasoning behind the portion of *Park* that the State quotes is also applicable here. For example, the conclusion by the *Park* Court that its LEM statute was harsher, and thus unconstitutional, in comparison to North Carolina's statute was based on the distinction that North Carolina permitted people to petition for termination of monitoring – a distinction that applies here too. See State Resp at 28-29, citing *Park*, 305 Ga at 358-360.

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IV. The State's attempts to characterize SORA and LEM as neither cruel nor unusual punishment are unpersuasive.

The State claims that Mr. Kardasz "relies on *People v Dipiazza*, 286 Mich App 137 (2009), to support his contention that lifetime registration is too harsh a penalty," but that case is never cited in Mr. Kardasz's Application. State Resp at 9. While the State is correct that Michigan has some other laws with statutorily mandated penalties, none are lifetime penalties (except for first-degree murder) and none (including first-degree murder) indefinitely continue the punishment after the person has served their prison sentence and their time on probation or parole. State Resp at 11. And, while "the statutory maximum in Michigan for CSC-I is imprisonment for life," an individualized assessment is conducted at sentencing by the trial court beforehand. State Resp at 20. None is performed here.

The State also contends that 2021 SORA is "far less restrictive" (State Resp at 16) than 2011 SORA, but the Court of Appeals held in *Lymon* that "[s]ome changes in the 2021 SORA were ameliorative, but others were *more* restrictive." Appendix 1, *People v Lymon*, __ Mich App __ (Docket No. 327355), decided June 16, 2022; 2022 WL 2182165, at *6 (emphasis added).[4] In addition, with respect to rehabilitation, the question is not simply whether "the registry may [ ] have a deterrent effect on [Mr. Kardasz's][5] behavior." State Resp at 13. If the punishment for reoffending was losing an appendage, that too would have a deterrent effect but would surely not be considered rehabilitative. There must be a balance, and when there is no individualized assessment, there is no opportunity "to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential." *People v McFarlin*, 389 Mich 557, 574 (1973).

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[4] This Court has granted leave to appeal in *Lymon*.

[5] The State's brief refers to Mr. Kardasz as "her" throughout. Mr. Kardasz is male.

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Lastly, as with its Fourth Amendment argument, the State relies upon *Hallak* to combat Mr. Kardasz's argument that LEM is cruel or unusual. State Resp at 20-21. However, as argued *supra* (see Section II), the science has changed and *Hallak* relies on outdated studies. Moreover, the decisions offered by the *Belleau* and *Hallak* courts are out of touch with the realities of living with an ankle monitor. This Court should not be misled into believing that ankle monitors permit wearers "to travel, work, or otherwise move about the community" unburdened. State Resp at 20; *Hallak*, 310 Mich App at 581 (same). Consistent with the defendant's experience in *Feliz*, overseas travel (for work or pleasure) is prohibitively complicated for wearers, as an electrical outlet needs to be readily available and, owing to frequent lapses in connectivity, wearers need to be able to call their probation agent (which may be difficult with overseas connectivity and airline policies against in-flight phone calls) or risk arrest. But a much heavier price is paid than an indefinite ban on the luxury of overseas travel. As explained in greater detail in Section III.D of Mr. Kardasz's Application, wearers are subjected to constant physical and psychological trauma – including swelling, numbness, bleeds, sleeplessness, social ostracization, and suicidal ideation. This is more than "a bother, an inconvenience, [or] an annoyance," as characterized by the *Belleau* court. 811 F3d at 937.

A minority of states require both lifetime registration and electronic monitoring, and even of that minority, some permit the person to petition for cessation. Michigan should not remain in the most restrictive minority. The Application should be granted, and this Court should find the LEM statute to be an unconstitutional search, and should find both the LEM statute and 2021 SORA to be unconstitutional, cruel or unusual punishment.

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Conclusion and Relief Requested

For the reasons stated above, Robert Kardasz respectfully requests that this Honorable Court grant leave to appeal or grant any other peremptory relief the Court deems just and appropriate.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that this document contains 3,154 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 18-point line spacing and 12 points of spacing between paragraphs.

Respectfully submitted,

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