State of Michigan

In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

Daryl William Martin

Defendant-Appellant.

MSC No. 166339

COA No. 358580

Presque Isle Circuit Court

Case No. 20-093153-FC

Daryl William Martin's Supplemental Brief

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First Question

Does the requirement that Mr. Martin submit to lifetime electronic monitoring without an individualized assessment of risk and no means of petitioning for cessation constitute cruel or unusual punishment in violation of the Michigan Constitution?

Mr. Martin answers: Yes.

The Court of Appeals answered: No.

The trial court answered: No.

Second Question

Does the requirement that Mr. Martin submit to lifetime electronic monitoring without an individualized assessment of risk and no means of petitioning for cessation constitute cruel and unusual punishment in violation of the Federal Constitution?

Mr. Martin answers: Yes.

The Court of Appeals answered: No.

The trial court answered: No.

Third Question

Does the mandate that Mr. Martin submit to lifetime electronic monitoring, without an individualized assessment of risk or opportunity to petition for cessation, constitute an unreasonable search in violation of the Michigan and United States Constitutions?

Mr. Martin answers: Yes.

The Court of Appeals answered: No.

The trial court answered: No.

Statement of Facts

Following a three-day jury trial, Daryl Martin was convicted of criminal sexual conduct in the first degree (CSC1) and criminal sexual conduct in the second degree (CSC2) for alleged acts against the daughter of his stepson's girlfriend. T II 34-35; T III 105.[1] The trial court sentenced him to concurrent prison terms of 25-40 years for CSC1 and 10-15 years for CSC2. S 12. The trial court also imposed lifetime electronic monitoring upon Mr. Martin. S 12.

Mr. Martin requested appellate counsel and the trial court appointed the State Appellate Defender Office to perfect an appeal and/or pursue post-conviction remedies. Mr. Martin filed a motion for new trial/evidentiary hearing challenging the constitutionality of lifetime electronic monitoring, which the trial court denied.

Mr. Martin appealed his convictions and sentences to the Court of Appeals, challenging the constitutionality of lifetime electronic monitoring. The Court affirmed his convictions and sentences in an unpublished per curiam opinion. See Appendix A, COA 9/14/23 Opinion. Mr. Martin filed an application for leave to appeal in this Court.

On May 31, 2024, this Court considered Mr. Martin's application and scheduled oral argument on the application. This Court instructed the parties to file supplemental briefs addressing whether: (1) lifetime electronic monitoring, when imposed without an individualized assessment of the defendant's recidivism risk and without providing a

[1] Mr. Martin's trial will be cited by T, the volume number, and the page number(s), for example, T II 34. His sentencing will be cited by S and the page number(s), for example, S 10.

mechanism for removing the monitoring requirement, constitutes cruel and unusual punishment under US Const, Am VIII or cruel or unusual punishment under Const 1963, art 1, § 16; (2) lifetime electronic monitoring constitutes cruel and/or unusual punishment as applied in this case; and (3) lifetime electronic monitoring constitutes an unreasonable search in violation of US Const, Am IV or Const 1963, art 1, § 11.

Accordingly, Mr. Martin submits this supplemental brief for this Court's consideration.

Arguments

I. Requiring Mr. Martin to submit to lifetime electronic monitoring without an individualized assessment of risk and no means of petitioning for cessation is cruel or unusual punishment in violation of the Michigan Constitution.

Issue Preservation & Standard of Review

Counsel preserved challenges to Mr. Martin's sentence by timely filing a motion to correct invalid sentence. The issue is preserved. MCR 6.429(C); MCR 7.211(C)(1).

Questions of constitutional law are reviewed de novo. *People v Parks*, 510 Mich 225, 245 (2022). This Court alone is "the ultimate authority with regard to the meaning and application of Michigan law." *Id.*, quoting *People v Bullock*, 440 Mich 15, 27 (1992).

Discussion

This Court has already acknowledged that lifetime electronic monitoring (LEM) is punishment. *People v Cole*, 491 Mich 325, 336 (2012). This Court should hold that this particular punishment is cruel or unusual under the Michigan constitution.

Michigan's cruel or unusual punishment "standard is informed by 'evolving standards of decency that mark the progress of a maturing society.'" *Parks*, 510 Mich at 241, quoting *People v Lorentzen*, 387 Mich 167, 179 (1972). "[T]his standard is 'progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes

enlightened by a human justice.'" *Id.*, quoting *Lorentzen*, 387 Mich at 178.

Sentences in Michigan must be proportional. *Parks*, 510 Mich at 241. To determine if a sentence is proportional under the cruel or unusual punishment clause, four factors are considered "(1) the severity of the sentence relative to the gravity of the offense; (2) sentences imposed in the same jurisdiction for other offenses; (3) sentences imposed in other jurisdictions for the same offense; and (4) the goal of rehabilitation, which is a criterion specifically 'rooted in Michigan's legal traditions . . . .'" *Id.* at 242, quoting *Bullock*, 440 Mich at 33-34.

A. Attaching an electronic monitor to a person's ankle for the rest of their life is an excessively harsh penalty.

Mr. Martin does not dispute the gravity of his offense. However, a growing body of research has shown that "the dangerousness of sex offenders has been historically overblown." *People v Betts*, 507 Mich 527, 560 (2021). Nonetheless, the number of registrants subject to LEM has continued to grow astronomically over the last decade. In 2015, on average, only 94 Michiganders were subject to LEM each month. See MDOC Report to the Legislature (March 2016) at Table 8.[2] However, by 2023, the number of Michiganders subject to LEM each month had increased almost ten-fold to 895. See MDOC Report to the Legislature

[2] Available at https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Legislative-Reports/2016/Electronic-Monitoring-Program.pdf?rev=426e4fadd65248778151d56d6a8c971f&hash=87176C85B4D537FD318E19970BFBB05C (accessed November 8, 2024).

(March 2024) at Table 8.[3] Because a person could pose no future risk of committing another sex offense, but the LEM statute does not permit courts to assess risk of recidivism before imposing a sentence or to cease monitoring at a later point, LEM is a disproportionately harsh punishment.

No court has or will assess Mr. Martin's risk of future dangerousness, even though there are scientifically reliable ways to do so.[4] Even considering the facts of the offense, monitoring Mr. Martin through an ankle bracelet will have minimal to no impact on public safety. From a practical standpoint, had Mr. Martin been wearing an ankle monitor at the time of his offense, it would not necessarily have prevented a crime from occurring nor corroborated the occurrence of a crime; the monitor likely would have shown that Mr. Martin was at his stepson's home—something that was a regular occurrence for him.

"Just as there can be no dispute that [Mr. Martin's] crime was serious, there can also be no dispute that his sentence is severe." *Parks*, 510 Mich at 257. Living under constant government surveillance in the form of a device physically affixed to your body for the rest of your life inflicts serious physical and psychological trauma. See Section I.D *infra*. And LEM is the only punishment in Michigan that lasts the life of the offender after probation or parole. See Section I.B *infra*. Nor is this

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[3] Available at https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Legislative-Reports/2024/Electronic-Monitoring-Program.pdf?rev=4f52e87913e34f77b4985a503a2a08d9&hash=E2C86D3CB1740080BF88FAC9CD644878 (accessed November 8, 2024).

[4] Common assessments used in the MDOC are the VASOR and Static-99.

severe sentence reserved exclusively for those convicted of CSC1 offenses involving children, as mandatory LEM applies to any CSC1 conviction. See *People v Brantley*, 296 Mich App 546, 558-559 (2012), abrogated on other grounds by *People v Comer*, 500 Mich 278 (2017); see also MCL 750.520b(2)(d).[5]

In the absence of any indication that Mr. Martin poses a future danger to children and in the absence of any opportunity for Mr. Martin to petition for cessation, LEM represents an overly harsh punishment that has minimal to no impact on public safety.

B. Lifetime electronic monitoring is a disproportionate sentence in Michigan.

The second prong compares the sentence with other sentences in the same jurisdiction. *Parks*, 510 Mich at 242.

LEM is the *only* mandatory post-incarceration punishment in Michigan that lasts for a person's entire life.[6] There is no longer any

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[5] Mandatory LEM also applies to those convicted of CSC2 under MCL 750.520c where the defendant is 17 or older and the victim is 13 or younger. *Brantley*, 296 Mich App at 558-559; see also MCL 750.520c(2)(b); MCL 750.520n(1).

[6] For aggravated stalking convictions, the length of a probation term for stalking can be for any number of years over 5 years. MCL 750.411i(4). However, it appears the length of a probation term is subject to proportionality review. See Appendix D, *People v Drallette*, unpublished per curiam opinion of the Court of Appeals (Docket No. 184591), issued March 25, 1997, citing *People v Milbourn*, 435 Mich 630 (1990). If a person is found guilty but mentally ill, there is a mandatory minimum term of probation of 5 years, but the person can move to discontinue probation. MCL 768.36(4).

provision in Michigan law for lifetime probation or parole.[7] Even in cases of commutation, where a life-in-prison sentence has been commuted, the person on parole serves a four-year term of parole (in contrast with the more typical parole term of two years). MCL 791.234(8)(d); Michigan Department of Corrections Policy Directive 06.05.104.HH.[8] Additionally, for the person who paroled off of a life sentence, there are no other attendant responsibilities for reporting or otherwise being monitored by law enforcement, except for those imposed at the discretion of the Parole Board and the parole agent, which would only last the length of the parole term. This can include parole for murder. State monitoring for life is a unique punishment in Michigan.

In addition to being particularly disproportionate in operating as the only penalty that tracks a person until they die, the only other provisions in Michigan that allow for any electronic tracking are tied to pretrial release and probation, and have limited tracking time periods. See MCL 771.3f. Furthermore, this tracking is usually in exchange for something to benefit the person, namely in exchange for incarceration.

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[7] Lifetime probation for drug offenses was eliminated in 2002 PA 666. See House Fiscal Agency, *Drug Sentencing Revisions Enrolled Analysis* <http://www.legislature.mi.gov/documents/2001-2002/billanalysis/House/pdf/2002-HFA-5394-x5.pdf> (accessed December 9, 2024).

[8] Available at <https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Policy-Directives/PDs-06-Field-Operations/PD-06-05-Parole-Evaluation-Eligibility/06-05-104-Parole-Process-effective-10-04-21.pdf?rev=dd142faad2684d5ebd079d2282ede7e3> (accessed November 25, 2024).

LEM without any individualized assessment of risk or opportunity to petition for cessation is uniquely unusual and a disproportionate sentence when compared to other sentences in Michigan.

C. Lifetime electronic monitoring is a disproportionate sentence compared to other jurisdictions.

The third prong compares the sentence with the sentences for the same crime in other jurisdictions. Here, this Court must determine whether there are other jurisdictions like Michigan that impose LEM for criminal sexual conduct without an individualized assessment or ability to petition for cessation.

While most states have some form of monitoring for people convicted of criminal sexual conduct, only approximately 11 states including Michigan allow *lifetime* electronic monitoring.[9] Of those 11 states, LEM is often only mandated for very specific CSC offenses, and the imposition of LEM in Maryland[10] is discretionary in all cases. Furthermore, four of those 11 states provide opportunities for the cessation of LEM.[11]

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[9] California (CAL. PENAL CODE §3004(b), (c)), Florida (FLA. STAT. § 948.012(4)), Kansas (KAN. STAT. ANN. § 22-3717(v)), Louisiana (LA. STAT. ANN. § 15:560.3(A)(3)), Maryland (MD. CODE ANN., CRIM. PROC. § 11-723(d)(3)), Missouri (MO. REV. STAT. § 217.735(4); MO. ANN. STAT. § 559.106), Oregon (OR. REV. STAT. ANN. § 144.103; OR. REV. STAT. §§ 137.765), Rhode Island (11 R.I. GEN. LAWS § 11-37-8.2.1), South Carolina (S.C. Code Ann. § 23-3-540(H)), and Wisconsin (WIS. STAT. ANN. § 301.48).

[10] MD. CODE ANN., CRIM. PROC. § 11-723(d)(3).

[11] Maryland (MD. CODE ANN., CRIM. PROC. § 11-723(d)(4)), Missouri (MO. ANN. STAT. § 217.735(5)), South Carolina (2012 S.C. Acts. 255 (H.B. 3667)), and Wisconsin (WIS. STAT. ANN. § 301.48(6)-(7)).

In contrast, Michigan's LEM statutory scheme is one of the most restrictive among the 11 states that allow for LEM. Michigan is one of only four states that impose LEM as part of a sentence, instead of a condition of parole.[12] Additionally, Michigan imposes LEM for *all* first-degree criminal sexual conduct,[13] not just for specific offenses. Finally, Michigan does not provide an opportunity for cessation or mechanism for removal.

As such, LEM without any individualized assessment of risk or opportunity to petition for cessation in Michigan is a disproportionate sentence when compared to sentences in other states for criminal sexual conduct.

But, even if every state imposed LEM exactly like Michigan, this factor would not be dispositive. This Court said in *Parks* (where 17 states and the federal government allowed for mandatory life without parole for people convicted of first-degree murder) that even if "Michigan is not as overwhelming of a national outlier in this case as it was in *Bullock*," the fact remains that our Constitution does not allow for excessively harsh punishment. *Parks*, 510 Mich at 263-264 (internal citations omitted).

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[12] The other states are Florida (Fla. Stat. § 948.012(4)), Oregon (Or. Rev. Stat. Ann. § 137.765(2)), and Wisconsin (Wis. Stat. Ann. § 301.48 (2)).

[13] Michigan also imposes LEM for CSC2 convictions where the defendant is 17 or older and the victim is 13 or younger. MCL 750.520c(2)(b). Mr. Martin is subject to LEM due to both his CSC1 and CSC2 convictions.

D. Lifetime electronic monitoring does not advance the penological goal of rehabilitation.

Subjecting people like Mr. Martin to a lifetime of electronic monitoring takes a severe toll on their health. The American Civil Liberties Union reported the stigma, social isolation, and stress that results from being monitored exacerbates depression and anxiety for wearers.[14]

A national survey of immigrants found that people "who are forced to wear electronic ankle monitors suffer from an emotional, mental and physical toll, which includes trouble sleeping, mental health problems, problems at work and thoughts of suicide."[15] 90% of the people surveyed experienced harm to their physical health due to their ankle monitor, ranging from discomfort to life-threatening situations.[16] People reported

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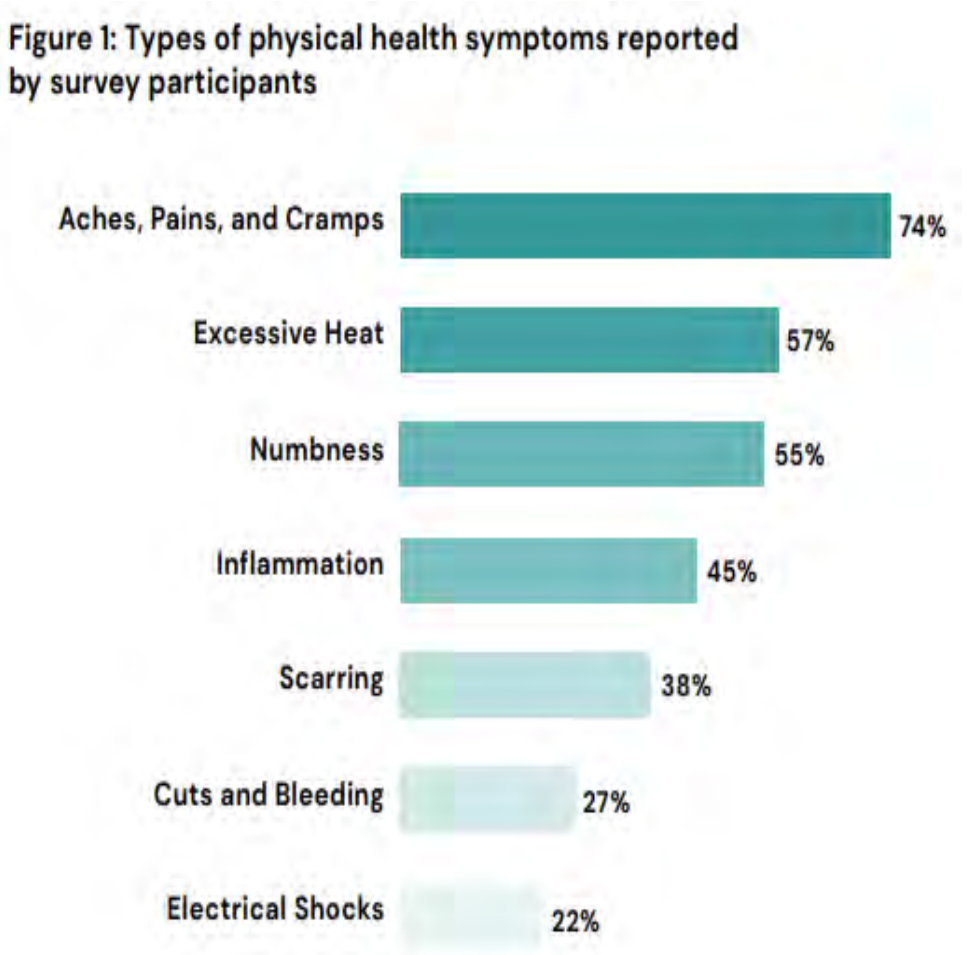
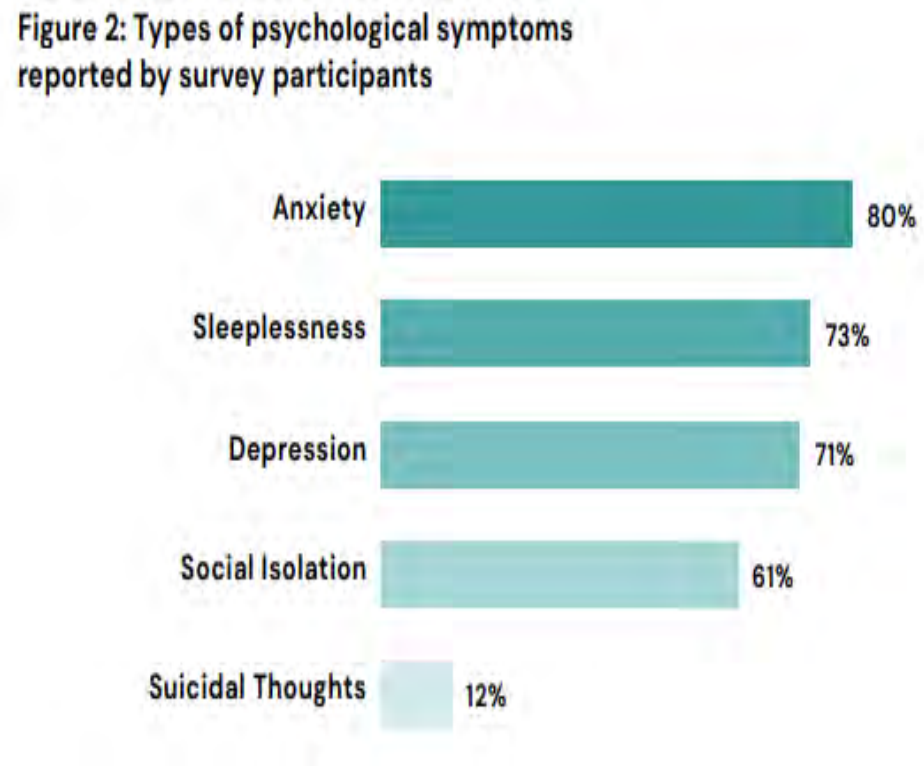
[14] Ayomikun Idowu, et al, Three People Share How Ankle Monitoring Devices Fail, Harm, and Stigmatize, ACLU Florida (September 29, 2022), https://www.aclufl.org/en/news/three-people-share-how-ankle-monitoring-devices-fail-harm-and-stigmatize.

[15] Sarah Betancourt, *'Traumatizing and Abusive': Immigrants Reveal Personal Toll of Ankle Monitors*, The Guardian (July 12, 2021), https://www.theguardian.com/us-news/2021/jul/12/immigrants-report-physical-emotional-harms-electronic-ankle-monitors#:~:text=Immigrants%20in%20the%20US%20who,suicide%2C%20a%20new%20report%20reveals (accessed November 25, 2024).

[16] Benjamin N. Cardozo School of Law Kathryn O. Greenberg Immigration Justice Clinic, et al., Immigration Cyber Prisons: Ending the Use of Electronic Ankle Shackles, 11-28 (July 2021), https://static1.squarespace.com/static/5a33042eb078691c386e7bce/t/60ec661ec578326ec3032d52/1626105377079/Immigration+Cyber+Prisons+report.pdf (accessed November 8, 2024).

numbness, swelling, inflammation, electric shocks, and bleeding cuts owing to chaffing caused by the plastic-to-skin contact. *Id.* at 13. 34% of people reported *permanent* negative effects on their physical health from ankle monitors, with some people reporting *permanent* skin scarring. *Id.* at 13.





88% of survey participants reported that the ankle monitor negatively impacted their mental health, and 12% had even considered suicide because of being monitored. *Id*. at 14-15.

Most people reported technical difficulties with their ankle monitor too. *Id*. at 16. These malfunctions caused anxiety and fears of being contacted by law enforcement, despite their efforts to comply. *Id*. People reported difficulty with sleeping while charging the device affixed to their ankle, because of battery-related sounds, lights, and vibrations. As summarized by the Guardian article:

> Nearly all participants felt social isolation as a result of the monitor, with one interviewee calling it "a modern day scarlet letter". More than two-thirds of participants reported their families had experienced financial hardship

> because they had lost or had difficulty obtaining work as a result of their electronic ankle shackle.[17]

Similarly, M.M., a student and law-firm employee on parole for more than three years, wrote about his experiences with electronic monitoring. M.M. shared his constant state of fear and pain living with an ankle monitor – causing him to bleed, experience numbness in his feet, interfering with his ability to sleep, requiring that he wake up early to charge so he wouldn't be arrested, his fear that someone at work would notice the bulge on his leg, and restricting his ability to wear shorts, dress pants, or visit the beach.[18]

Registrants subject to LEM in Michigan are no different. They remain tethered to a wall at least two hours every single day to charge their monitoring device, interfering with camping trips or travel to locations without reliable electricity. See Appendix B, MDOC LEM Program Participant Agreement at 2.[19] They also risk getting into trouble and being sent back to prison if they lose GPS signal while traveling, working, or moving in and out of buildings. "Electronic monitoring . . . can create challenges for landscaping, construction, or delivery jobs. Some buildings, such as warehouses, interfere with GPS

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[17] Betancourt article, *supra*.

[18] M.M., *Living With an Ankle Bracelet*, The Marshall Project (July 16, 2015), https://www.themarshallproject.org/2015/07/16/living-with-an-ankle-bracelet (accessed November 25, 2024).

[19] Available at https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/LG/Lifetime_GPS_Agreement_Form_050911_353535_7.pdf?rev=fa0dac4a61474f66aa09201c893d4183&hash=F99A619A58719BF93B3479D4F15EAA11. (accessed November 22, 2024).

signals, so people may need to leave work to pick up signal . . . ."[20] Consequently, people subject to LEM must be prepared at all times to drop whatever they are doing, including their responsibilities to their employer, and make themselves "immediately available" to MDOC staff to the extent their monitoring device loses a signal in a building with thick walls, warehouse, or a parking garage. MDOC LEM Program Participant Agreement at 2 and Attachment A.

Poor-signal alerts and false alarms are common. MDOC reports that over the last year (August 2023 through August 2024), their software received 11,990 LEM alerts. See Appendix C, 9/10/24 MDOC Response to FOIA Request. But only 267 – comprising of strap tampering alerts lasting longer than 10 minutes or battery failure alerts lasting longer than 24 hours – were reported to the Michigan State Police. *Id.* The remaining alerts were "handled internally" by MDOC staff. *Id.* That means that only 2% of the alerts were serious enough to report to police. But even for the remaining 98% non-serious[21] alerts, Michiganders subject to LEM still have to immediately stop what they are doing and respond to them. MDOC LEM Program Participant Agreement at 2 and Attachment A. LEM technology is faulty to the point that it not only causes permanent physical and mental harm to registrants, but also it generates numerous non-serious alerts that keep people living in a constant state of fear.

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[20] Electronic Frontier Foundation, *Electronic Monitoring*, https://sls.eff.org/technologies/electronic-monitoring (accessed November 22, 2024).

[21] That is, alerts that do not warrant involvement from Michigan State Police.

Worsening health, psychological, and financial problems caused by a state of constant government surveillance do not promote rehabilitation. LEM is just a different form of incarceration. James Kilgore, *We Need a New Paradigm Halt the Unprecedented Growth of Electronic Monitoring*, Truthout (October 24, 2022)[22]; see also Kate Weisburd, Punitive Surveillance, 108 Va. L. Rev. 148, 152 (2022) (the use of EM creates a "carceral experience [that] is no longer defined by physical walls and prison bars," and instead extends the walls of the prison to homes, workplaces, and neighborhoods); Ben A. McJunkin & J.J. Prescott, *Fourth Amendment Constraints on the Technological Monitoring of Convicted Sex Offenders*, 21 New Crim. L. Rev. 379, 399-400 (2018) (describing ankle monitors as literal "ball and chain[s]" that the wearer could never be free of and with "no lull in the intrusion"). That is particularly so where research has shown that recidivism rates decrease significantly with age and time since last offense. See, e.g., Blumstein & Nakamura, *"Redemption" in an Era of Widespread Criminal Background Checks*, US Dep't of Just, Nat'l Institute of Just J, No 263, at 11-13 (2009); Heilbrun, *Sexual Offending: Linking Assessment, Intervention, and Decision Making*, 4 Psychol Pub Pol'y & L 138, 139-43, 151 (1998); Zimring & Leon, *A Cite-Checker's Guide to Sexual Dangerousness*, 13 Berkeley J Crim L 65, 69-74 (2008).

Monitoring someone for the rest of their life without any individualized determination that they pose a risk of committing

[22] Available at https://truthout.org/articles/we-need-a-new-paradigm-to-halt-the-unprecedented-growth-of-electronic-monitoring/ (accessed November 8, 2024).

another sex offense is cruel or unusual punishment in violation of the Michigan Constitution.

II. Requiring Mr. Martin to submit to lifetime electronic monitoring without an individualized assessment of risk and no means of petitioning for cessation constitutes cruel and unusual punishment in violation of the Federal Constitution.

Issue Preservation & Standard of Review

Counsel preserved challenges to Mr. Martin's sentence by filing a timely motion to correct invalid sentence. The issue is preserved. MCR 6.429(C); MCR 7.211(C)(1).

Questions of constitutional law are reviewed de novo. *People v Parks*, 510 Mich 225, 245 (2022). This Court alone is "the ultimate authority with regard to the meaning and application of Michigan law." *Id.*, quoting *People v Bullock*, 440 Mich 15, 27 (1992).

Discussion

Under the federal constitution, the United States Supreme Court frequently employs an "as applied" analysis because the Eighth Amendment embodies a theory of proportionality. The "right not to be subject to excessive sanctions" necessarily "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Roper v Simmons,* 543 US 551, 560 (2005).

Certain punishments may not violate the Eighth Amendment per se but are found to be a violation when applied to a certain class of people or when applied in a mandatory fashion. See, e.g., *Kennedy v Louisiana,* 554 US 407 (2008) and *Atkins v Virginia,* 536 US 304 (2002) (the death penalty is not cruel and unusual punishment per se, but is when applied

to individuals who have committed non-homicide crimes or to intellectually challenged people); *Roper, supra* (Eighth Amendment bars the death penalty when applied to children); *Woodson v North Carolina,* 428 US 280 (1976) (plurality opinion) and *Lockett v Ohio,* 438 US 586 (1978) (Eighth Amendment bars mandatory imposition of the death penalty); *Graham v Florida*, 560 US 48 (2010) (life without possibility of parole is not cruel and unusual per se, but is when applied to children who have committed non-homicide offenses); *Miller v Alabama*, 567 US 460 (2012) (life without possibility of parole violates the Eighth Amendment when mandatorily applied to children).

At its heart, the Eighth Amendment prohibition against cruel and unusual punishment is proportionality. *Weems v United* States, 217 US 349, 367 (1910). "[T]he Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive" and employs a test that has the same first three factors as Michigan's test. *Graham*, 560 US at 59-60. As such, Mr. Martin's sentence is "grossly disproportionate" and unconstitutional under the Eighth Amendment. See Sections I.A-C, *supra*.

Lifetime electronic monitoring is categorically unconstitutional under the Eighth Amendment. In addressing categorical bars, the Court follows a two-part test and considers:

> "[O]bjective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the

> Eighth Amendment's text, history, meaning, and purpose," the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution. [*Graham*, 560 US at 59-60, quoting *Roper*, 543 US at 572 and *Kennedy*, 554 US at 421 (internal citations omitted)].

A reviewing court "must look beyond historical conceptions 'to the evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 58, quoting *Estelle v Gamble*, 429 US 97, 102 (1976). Determining cruelty "embodies a moral judgment," and while "[t]he standard itself remains the same . . . its applicability must change as the basic mores of society change." *Kennedy*, 554 US at 419.

Our "basic mores of society" pertaining to a person's privacy interests in their electronic data and the monitoring of their location have developed significantly within the past few years. As discussed in Section III, *infra*, as technology and its applications to the legal system has developed, so has the law surrounding it. The United States Supreme Court has identified the privacy interests at stake in government access to a person's electronic data and location. See *Carpenter v United States*, 585 US 296, 297 (2018) (cell phone location data provides "near perfect surveillance" of the person carrying it, which raises grave privacy concerns); *United States v Jones*, 565 US 400 (2012) (Sotomayor, J., concurring) (monitoring a person's location necessarily discloses a "wealth of detail about her familial, political, professional, religious, and sexual associations" – all providing an intimate picture of that person's life). Government access to such intimate information for the rest of Mr. Martin's life based purely on his underlying offense does not comport with our society's growing interests in the privacy of

electronic data. See, e.g., McClain et al., *How Americans View Data Privacy*, Pew Research Center (October 18, 2023), available at https://www.pewresearch.org/internet/2023/10/18/how-americans-view-data-privacy/ (identifying the growing concerns of Americans regarding the government's access to their electronic data).

The United States Supreme Court has also refused to uphold punitive measures that limit a person's access to society based on the nature of their conviction after they have served their sentence. In *Packingham v North Carolina*, 582 US 98 (2017), the Court rejected the constitutionality of a state law prohibiting people with convictions for sex offenses from accessing *any* social media. The Court explained how "unsettling" it would be to allow for states to prohibit people from accessing a principle source of connection and association, which serves as the "modern public square." *Id.* at 107. While *Packingham* did not deal with electronic monitoring or an Eighth Amendment challenge, the decision is instructive here because it shows that as technology develops and society changes, so must our ideas surrounding punishment and crime prevention. See also Section I.D, *supra* (discussing the significant limitations, tangible harms, and burdens imposed by LEM).

The requirement that Mr. Martin be subject to LEM following the completion of his incarceration is cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution. US Const, Am VIII.

III. Mandating that Mr. Martin submit to lifetime electronic monitoring, without an individualized assessment of risk or opportunity to petition for cessation, constitutes an unreasonable search in violation of the Michigan and United States Constitutions.

Issue Preservation & Standard of Review

Counsel preserved challenges to Mr. Martin's sentence by filing a timely motion to correct invalid sentence. The issue is preserved. MCR 6.429(C); MCR 7.211(C)(1).

Questions of constitutional law are reviewed de novo. *Parks*, 510 Mich at 245. This Court alone is "the ultimate authority with regard to the meaning and application of Michigan law." *Id.*, quoting *Bullock*, 440 Mich at 27.

Discussion

Tracking Mr. Martin's location by the government for the rest of his life, purely because he committed a specific type of offense, is an unreasonable and unconstitutional search. Constant, incredibly-accurate, government tracking of a person's location raises grave constitutional and privacy concerns. See *Carpenter*, 585 US at 297. This is especially true when a person is monitored for the rest of their life based solely on the underlying offense – without any individualized assessment of risk or way to petition for cessation. This lifetime tracking is an unreasonable search.

A. Affixing an electronic monitoring device to a person's body to track their movements is a search under the United States and Michigan Constitutions.

People have the right to be secure in their persons from unreasonable searches. US Const, Am IV; Const 1963, Art I, §11. As the United States Supreme Court has determined, electronic monitoring is a search within the meaning of the Fourth Amendment. *Grady v North Carolina*, 575 US 306, 310 (2015).

While it is clear that both the United States Constitution and the Michigan Constitution, prior to its recent amendment, protect electronic devices and their data from unreasonable search and seizure, see, e.g., *Jones*, 565 US 400; *People v Huges*, 506 Mich 512 (2020); *Riley v California*, 573 US 373 (2014), the recent amendment to our State Constitution cements those privacy interests even further. Const 1963, Art I, § 11 (amendment in effect as of December 2020). There can be no question that searches of electronic data and electronic communications must be closely scrutinized. The imposition of LEM without any individualized assessment of risk or opportunity to petition for cessation constitutes an unreasonable search both on its face and as applied to Mr. Martin.

"The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady*, 575 US at 310. Assessing reasonableness under the totality of the circumstances requires "a balancing of individual privacy interests and legitimate state interests to determine the

reasonableness of the category of warrantless search that is at issue." *Birchfield v North Dakota*, 579 US 438 (2016).

In determining whether a search is unreasonable, courts analyze: (1) whether the searches involved may be reasonable under the Fourth Amendment due to the individuals being searched having a diminished expectation of privacy, and (2) whether the warrantless searches authorized by the statute may be permissible based on "special needs." *Grady*, 575 US at 310.

B. Lifetime electronic monitoring constitutes an unreasonable search under *Jones*, *Carpenter*, and this Court's jurisprudence.

Constantly monitoring a person's location by physically intruding on their body, without probable cause to believe that person is committing a crime, is an invasion of privacy that our Constitutions are designed to protect against. The fact that an individual previously committed a specific type of offense does not completely negate their privacy interests,[23] and Mr. Martin's underlying offenses do not nullify his Fourth Amendment protections. "[T]here is no precedent for the

[23] That is particularly so given the research showing that recidivism rates decrease significantly with age and time since last offense, making a mandatory lifetime search even more unreasonable. See, e.g., Blumstein & Nakamura, *"Redemption" in an Era of Widespread Criminal Background Checks*, US Dep't of Just, Nat'l Institute of Just J, No 263, at 11-13 (2009); Heilbrun, *Sexual Offending: Linking Assessment, Intervention, and Decision Making*, 4 Psychol Pub Pol'y & L 138, 139-43, 151 (1998); Zimring & Leon, *A Cite-Checker's Guide to Sexual Dangerousness*, 13 Berkeley J Crim L 65, 69-74 (2008).

proposition that whether a search has occurred depends on the nature of the crime being investigated." *Jones*, 565 US at 412.

1. Lifetime electronic monitoring is an unreasonable search under Federal jurisprudence.

In *Jones*, the Supreme Court held that the attachment of a GPS tracking device to Mr. Jones's car constituted a search. 565 US at 404. Five Justices agreed that the constant GPS tracking of an individual raised privacy concerns in addition to those raised by the physical intrusion. *Id*. at 404-05, 426, 428, 430. The Court in *Grady* later drew a connection between *Jones* and electronic monitoring, where it emphasized that the physical attachment of the monitoring device implicates additional privacy concerns by trespassing onto the body of the person being monitored. *Grady*, 575 US at 307-10. But *Jones* was also instrumental in paving the way for the Court's decision in *Carpenter*.

In *Carpenter*, the Court held that the police's acquisition of cell-site location data was a search that required a warrant. 585 US at 316. The Court discussed the reasonable expectation of privacy that individuals have in the whole of their physical movements – both in private and in public. *Id.* at 310; see also *Jones*, 565 US at 430. *Carpenter* raised concerns with the all-encompassing data accumulated by cell-site location records: "the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual

associations.' " *Id.* at 311.[24] Accessing this data is also relatively easy: it takes "just a click of a button, [and] the Government can access each carrier's deep repository of historical location information at practically no expense." *Id.* The Court held that the government invaded Mr. Carpenter's reasonable expectation of privacy "in the whole of his physical movements." *Id.* at 313. The concerns raised in *Carpenter* regarding cell-site location data are also present in the use of electronic monitoring – except this time, the government can track a device permanently affixed to a person's *body* (i.e., actual human anatomy) *for life.*

The Fourth Amendment prohibits *unreasonable* searches, and the reasonableness of the search depends on the totality of the circumstances. *Grady*, 575 US at 310. That an individual was previously convicted of a certain sex offense does not somehow make reasonable a constant, interminable search – particularly when there are scientific tools available to assess a person's risk of committing another sex offense. As the *Carpenter* Court cautioned, the ability of the government to track an individual's whereabouts is an invasion of privacy. Electronic monitoring creates an intimate reproduction of a person's life. The mere prospect that an individual could commit a future sex offense is not enough to override their constitutional rights and intrude upon their reasonable expectation of privacy. See *Grady*, 575 US at 310. Where additional reasonable protections exist (e.g., individualized assessments or the ability to petition for cessation), they should be observed before

[24] The Court also likened a cell phone to a "feature of human anatomy" because it "tracks nearly exactly the movements of its owner." *Carpenter*, 585 US at 311.

stripping an individual of a constitutional right and subjecting them to live under a state of permanent surveillance.

2. *Lifetime electronic monitoring is an unreasonable search under the Michigan Constitution. The Court of Appeals decision in Hallack is wrongly decided.*

This Court has defined the breadth of our State Constitution's protections again unreasonable searches involving electronic data. For instance, a search of digital cell-phone data pursuant to a warrant "must be reasonably directed at obtaining evidence relevant to the criminal activity alleged in that warrant." *People v Hughes*, 506 Mich 521, 516-17 (2020). Even where other criminal activity has authorized police to search the contents of a cell phone, any search of the cell phone data *must* be related to the criminal activity which supported the warrant. *Id.* at 529. In *Hughes*, this Court declined "to adopt a rule that it is always reasonable for an officer to review the entirety of the digital data seized pursuant to a warrant on the basis of the *mere possibility that evidence may conceivably be found*." *Id.* at 541 (emphasis added). When an individual is subject to mandatory LEM, however, that is *exactly* what happens. Their location is tracked or monitored 24/7 simply because there is a *mere possibility* that evidence of a future crime – specifically a sex offense – could be collected.

The Court of Appeals' recent decision in *Chandler* identified similar privacy interests to those at stake in cases involving LEM: the diminished privacy interest of individuals on probation or parole. *People v Chandler*, __ Mich App __ (2024) (Docket No 368736). There, the court correctly identified that a person's status as a probationer does not mean

they "forgo their Fourth Amendment rights in full." *Chandler*, slip op at 4. Instead, a warrantless search of a probationer's property still requires reasonable suspicion or express waiver of their Fourth Amendment protections. *Id.* at 4-5. This Court should reach a similar holding here: a person convicted of a sex offense does not automatically and irrevocably forgo their Fourth Amendment rights in full. That is especially so given that LEM applies long after an individual has successfully completed the terms of their probation or parole and lasts until they die.

The Court of Appeals' decision in *Hallak* does not align with our Constitution's protections against unreasonable searches when it comes to electronic data. "The applicable test in determining the reasonableness of an intrusion is to balance the need to search, in the public interest, for evidence of criminal activity against invasion of the individual's privacy." *People v Chowdhury*, 285 Mich App 509, 516 (2009). In *Hallak*, the Court of Appeals found that the public interest to both "punish and deter convicted child sex offenders and to protect society from a group known well for a high recidivism rate" significantly outweighed the "lower expectation of privacy" held by parolees and probationers. *People v Hallak*, 310 Mich App 555, 580-81 (2015), rev'd in part on other grounds 499 Mich 879 (2016); but see *Chandler*, slip op at 4. The court found (incorrectly) that the invasion of the monitored individual's privacy is not so significant, because "[t]he monitoring does not prohibit defendant from traveling, working, or otherwise enjoying the ability to legally move about as he wishes." *Hallak*, 310 Mich App at 581; but see Section I.D *supra* (discussing the serious barriers LEM erects to travel, work, health, family, friendships, and more).

The court's analysis in *Hallak* is wrong in regard to *both* prongs of the applicable test. First, the public interest in conducting a constant

search of an individual's location is not as the Court of Appeals thought. The recidivism rate of people convicted of criminal sexual conduct is actually *lower* than those convicted of other crimes and has historically been overblown.[25] The mere prospect of a crime, specifically a sex offense, being committed does not create a substantial enough public interest to override the privacy interests that belong to *everyone* under our Constitution.

Second, the privacy interest cannot so easily be outweighed by the alleged need to prevent future sex offenses. LEM was designed to track a person's movements, day in and day out, *both in real and recorded time*, until their death – and the information is retrievable at any time. MCL § 791.285(1). See also *Carpenter*, 585 US at 311, citing *Jones*, 565 US at 415 (Sotomayor, J., concurring) (recognizing the intrusiveness of this "near perfect" surveillance). The LEM statute gives the government unfettered power to intrude upon a person's life, owing to a conviction that supposedly makes them more dangerous than other people. Yet without an individualized assessment of their "dangerousness" or risk of recidivism, this invasion of privacy is overbroad, uninformed, and unreasonable.

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[25] "In reality, the most current research indicates that sex offenders, as a group, reoffend less than other criminal offenders as confirmed by federal, state, and academic studies." Tennen, *Risky Policies: How Effective Are Restrictions on Sex Offenders in Reducing Reoffending?*, 58 Boston Bar J 25, 27 (2014) (collecting sources); see also Elmann, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Constitutional Commentary 495, 497-498 (2015) (tracing how an unsubstantiated claim in *Smith v Doe* about the high rate of recidivism of people who have committed a sex offense has been debunked by current scientific research).

This Court should not adopt *Hallack's* characterization of the privacy invasion as insignificant. Electronic monitoring systems place substantial limitations on a person's pursuit of life, liberty, and happiness. See Section I.D *supra* (discussing the never ending emotional, mental, and physical toll associated with a state of constant government surveillance).[26]

In sum, LEM embodies the beginnings of an Orwellian nightmare. Indeed, if this Court rules that LEM is constitutional, then it should be prepared to hold the same when the technology inevitably develops to the point that the government can track an individual's locations using a surgically implanted microchip. While this may seem like a farfetched idea from a James Bond movie, given the market developing around pet-based GPS and current microchipping efforts to identify lost dogs, it is not hard to imagine more discrete forms of surveillance being applied to humans.

In an opinion addressing the constitutionality of LEM under its search and seizure doctrine, the Georgia Supreme Court correctly

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[26] Research has also revealed a new generation of smartphone-based electronic monitoring systems, which expand the intrusive reach of electronic monitoring by incorporating face and voice recognition technologies. There is an ongoing shift nationwide from ankle monitors to cellphone-based apps for electronic monitoring. While this transition may eliminate the visual stigma of a plastic shackle, it opens the door to a whole host of other privacy concerns associated with unlimited access to data on an individual's phone. See Kilgore, *We Need a New Paradigm to Half the Unprecedented Growth of Electronic Monitoring*, Truthout, https://truthout.org/articles/we-need-a-new-paradigm-to-halt-the-unprecedented-growth-of-electronic-monitoring/ (accessed November 21, 2024).

concluded: "the permanent application of a monitoring device and the collection of data by the State about an individual's whereabouts twenty-four hours a day, seven days a week, through warrantless GPS monitoring for the rest of that individual's life, even after that person has served the entirety of his or her criminal sentence, constitutes a significant intrusion upon the privacy of the individual being monitored." *Park v State*, 305 Ga 348, 355 (2019), citing *Jones*, 565 US at 407; see also Section III.C.2 *infra*.

This Court should overturn *Hallak* and hold that LEM is an unconstitutional search in violation of the Federal and State Constitutions, especially where there is no individualized assessment or ability to petition for cessation.

C. Several other state supreme courts have ruled that lifetime electronic monitoring constitutes an unreasonable search.

This Court should join other state supreme courts and hold that LEM is an unconstitutional, unreasonable search.

1. North Carolina

The Supreme Court of North Carolina held that the state's LEM program for recidivist sex offenders "constitute[d] a substantial intrusion into [their] privacy interests. . . ." that violated their right to be free from unreasonable searches under the Fourth Amendment. *State v Grady*, 372 NC 509, 544-45 (2019). There, Mr. Grady, whose status as a recidivist made LEM mandatory for him without any individualized determination to the reasonableness of the search, challenged the constitutionality of North Carolina's statute. *Id.*

at 511. Like the studies relied upon by this Court in *Betts*, 507 Mich at 560, and identified in this brief (see fn 25 *supra*),[27] Mr. Grady pointed to studies showing that people who commit sex offenses are less likely to reoffend than other categories of people convicted of felonies and that the vast majority of sex offenses are committed against victims who already know the offender. *Id*. at 517-518.

In ruling in Mr. Grady's favor, the Court pointed out that even if a person's expectation of privacy is "greatly diminished" or "drastically reduced," his expectation of privacy is not completely eliminated. *Id*. at 533-534. The state could not meet its burden in explaining how a person convicted of a sex offense has a reduced "expectation of privacy in his body and in his every movement every day for the rest of his life" where ankle monitors constitute "in essence, a feature of human anatomy." *Id*. at 529-530. The Court observed that "there is no precedent for the proposition that persons such as defendant, who have served their sentences and whose legal rights have been restored to them . . . nevertheless have a diminished expectation of privacy in their persons and in their physical locations at any and all times of the day or night for the rest of their lives." *Id*. at 533-534. The Court also held that the "special needs," doctrine did not apply to LEM because the state was unable to proffer any concerns beyond crime detection. *Id*. at 526-527.

Like many ankle monitors, the monitor in *Grady* required the user to charge it for two hours per day by plugging it into a wall and remaining tethered by the charging cord, as failure to charge the

[27] Mr. Martin also directs the Court to Sections II.C and II.D.5 of the supplemental briefing filed in *People v Kardasz*, as well as briefing that he anticipates will be submitted by amici.

monitor or loss of signal would result in a violation. *Id*. at 518. After taking a careful look at the realities of living with an ankle monitor, the Court held that mandatory LEM "works a deep, if not unique, intrusion" upon a person's Fourth Amendment rights. *Id*. at 538. Such an intrusion could not give way to the state's legitimate interest in protecting the public where the State provided no concrete evidence showing that electronic monitoring is effective in preventing recidivism. *Id*. at 543-544, citing *Ferguson v City of Charleston*, 532 US 67, 86 (2001). The *Grady* Court concluded its opinion with the following explanation, which is instructive here:

> The generalized notions of the dangers of recidivism of sex offenders, for which the State provided no evidentiary support, cannot justify so intrusive and so sweeping a mode of surveillance upon individuals, like defendant, who have fully served their sentences and who have had their constitutional rights restored. The unsupported assumption – that if a crime is committed at some unspecified point in the future, the ankle monitor worn during all of the intervening years by one of these individuals, who may or may not pose a risk, may potentially aid in inculpating or exonerating that individual – does not advance the State's interest in a manner that outweighs the intrusiveness of mandatory lifetime [electronic monitoring] upon that individual's legitimate expectations of privacy.

Id. at 545.

2. Georgia

The Supreme Court of Georgia found that Georgia's sex offender statute, which required people classified as "sexually dangerous predator[s]" – but who were no longer in state custody or on parole – to submit to LEM, authorized on its face "a patently unreasonable search that [ran] afoul of the protections afforded by the Fourth Amendment." *Park*, 305 Ga at 348. The *Park* Court was not persuaded by the state's argument that people designated as "sexually dangerous predators" have a diminished expectation of privacy, as all of the cases cited by the state in support of its position concerned individuals who were still serving a criminal sentence, either on probation or on parole. *Id.* at 354 ("It cannot be said that an individual who has completed the entirety of his or her criminal sentence, including his or her parole and/or probation requirements, would have the same diminished privacy expectations as an individual who is *still* serving his or her sentence.") (emphasis in original).

With respect to the question of whether LEM constituted a "special needs" search, the *Parks* Court explained that because the GPS device used in implementing LEM is designed to obtain evidence of criminal conduct, the interest of preventing potential future crime is not "divorced from the State's general interest in law enforcement." *Id.* at 357. Therefore, the fact that the GPS monitoring device is designed to obtain evidence of criminal conduct that would be turned over to the police and admissible in a subsequent criminal investigation made the "special needs" exception to the Fourth Amendment warrant requirement inapplicable. *Id.*

Because the Georgia statute "simply allow[ed] for warrantless searches of individuals," that the people being searched had to pay for, "to find evidence of possible criminality for the rest of their lives, despite the fact that they have completed serving their entire sentences and have had their privacy rights restored," the Supreme Court of Georgia struck it down as a "patently" unconstitutional search. *Id.* at 360.

3. Massachusetts

The Massachusetts Supreme Court concluded that mandatory electronic monitoring of a person convicted of a sex offense was an unreasonable search. *Commonwealth v Feliz*, 481 Mass 689, 690 (2019). The relevant statute, MA ST 265 § 47, was unconstitutional and overinclusive without a requirement that an individualized assessment be completed for each person that could be subject to GPS monitoring as a condition of probation. *Id.*

The court acknowledged the significant invasion of a person's privacy that GPS monitoring required, and the burdens it imposed. *Id.* at 704-705. For example, if a person received an alert on their monitoring device, much like in Michigan, they needed to communicate with someone in the probation department to resolve the issue without risking a subsequent arrest. *Id.* at 695. Mr. Feliz had experienced at least 31 alerts within his first 10 months of being on electronic monitoring and "[a] number of these alerts involved power disconnection and the failure of the defendant's GPS device to maintain a satellite connection." *Id.* at 695-696.

The court balanced the government's "strong interests" in protecting the public from "sexual predators" and in rehabilitating people convicted

of sex offenses with a person's privacy concerns. *Id.* at 699. It held that GPS monitoring was "not a minimally invasive search." *Id.* at 700. And while a probationer has a diminished expectation of privacy, that does not give the government an unlimited ability to infringe upon their expectation of privacy. *Id.* at 700-701.

The court identified that the particularity requirement in Fourth Amendment searches required the government to provide a particularized reason as to why GPS monitoring furthered its interests "in protecting the public from sex offenders." *Id.* at 705. The prosecution had justified the "imposition of GPS monitoring on this defendant based on the *potential use* of GPS data as a tool to investigate commission of sex crimes should they occur." *Id.* (emphasis added). Yet the court found that this generalized reasoning – the possibility of investigating a future crime – was not "evidence sufficient to indicate that this defendant poses a threat of reoffending, or otherwise of violating the terms of his probation." *Id.* at 705-706. Therefore, as applied to Mr. Feliz, electronic monitoring was an unreasonable search. *Id.* at 706, 709 ("The absence of evidence demonstrating a risk of recidivism anchored in facts related to this particular defendant tilts the balance against concluding that GPS monitoring is a reasonable search.").

This Court should reach the same conclusions as its sister Supreme Courts in North Carolina, Georgia, and Massachusetts. It is an unreasonable search to monitor hundreds of Michiganders without any individualized assessment as to whether there is a concrete benefit in doing so – whether doing so actually protects the public based on readily

available scientific tools like VASOR or Static-99.[28] Michiganders subject to LEM have no less of an expectation to privacy than the people contemplated by the courts in *Grady*, *Park*, and *Feliz*. Generalized concerns of recidivism and the overblown gravity of the threat of a person convicted of a sex offense committing another sex offense cannot justify the permanent deprivation of constitutional rights to Michiganders no longer in government custody, on probation, or on parole. Nor can the government demonstrate a special need for the warrantless search beyond solving crimes and its general interest in law enforcement.

This Court should hold that LEM constitutes an unreasonable search in violation of the United States and Michigan Constitutions.

[28] Michigan's LEM requirement is even more unreasonable than the electronic monitoring requirement in *Grady* because there is no opportunity to petition for cessation, whereas the North Carolina statute permitted a petition for cessation after one year. And even there, the *Grady* Court held that such a process "does little to remedy what is absent at the front end of this warrantless search—that is, 'the detached scrutiny of a' judicial officer 'ensur[ing] an objective determination whether an intrusion is justified in any given case.'" *Grady*, 372 NC at 534 quoting *Skinner v Ry Labor Execs' Ass'n*, 489 US 602, 622 (1989).

Conclusion and Relief Requested

For the reasons stated above, Daryl Martin respectfully requests that this Honorable Court find mandatory lifetime electronic monitoring to be unconstitutional, remand for resentencing, and grant whatever other relief it deems necessary and just.

Respectfully submitted,

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