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 Reply Brief

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Reply

I. Evolving standards of decency demand that this Court find mandatory lifetime electronic monitoring to be unconstitutional punishment.

The State contends that because this Court has been "circumspect" in its application of our Constitution's protections against cruel or unusual punishments and that because mandatory lifetime electronic monitoring (LEM) "bares no comparison" to the three situations[1] where this Court has already extended such protections, mandatory LEM does not constitute cruel or unusual punishment. State's Resp at 7.

But just because this Court has yet to reach this question does not mean that mandatory LEM is constitutional or that this Court has been "circumspect" in extending the reach of Article 1 § 16. Indeed, the State's argument insinuates that if a constitutional challenge of first impression does not align perfectly with the circumstances under which this Court has granted relief in the past, then any time a petitioner asks this Court to find a punishment unconstitutional, the request should fail. As reflected in landmark decisions from *Brown v Board of Education of Topeka*, 347 US 483 (1954) to *Miller v Alabama*, 567 US 460 (2012) and *People v Parks*, 510 Mich 225 (2022), law, science, standards of decency, social mores, and constitutional interpretation are constantly evolving. See, e.g., *Parks*, 510 Mich at 241, quoting *People v Lorentzen*, 387 Mich 167, 179 (1972) (Michigan's cruel or unusual punishment "standard is informed by 'evolving standards of decency

[1] State Resp at 7 (listing mandatory LWOP for persons 18 and younger, long prison sentences for certain drug offenses, and mandatory sex offender registration for non-sexual offenses).

that mark the progress of a maturing society.' . . . [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.'"). This Court should resist the State's calls for stagnation.

Nor should this Court find the State's efforts to distinguish mandatory LEM from the three situations in which this Court has found a punishment to be cruel or unusual persuasive. Regardless of whether mandatory LEM is distinguishable from those situations or whether the reasoning underlying those decisions applies to mandatory LEM as Mr. Martin argues,[2] this Court will ultimately have to determine whether mandatory LEM is punishment under the four factors enumerated in *People v Bullock*, 440 Mich 15, 33-34 (1992). As detailed in Mr. Martin's Supplemental Brief, and as touched upon throughout various points of this Reply, it is.

II. Lifetime electronic monitoring as a punishment may not always be cruel or unusual. But mandatory lifetime electronic monitoring with no judicial discretion, individualized assessment, or ability to petition for cessation is.

In addressing the first *Bullock* factor (severity of the sentence relative to the gravity of the offense), the State points out that Michigan authorizes life imprisonment for adults who have been convicted of CSC1 (see MCL 750.520b(2)(a)) and mandates LWOP for adults convicted of CSC1 who have a prior conviction for CSC against a person

[2] Just as this Court reasoned in *Parks* that "an automatically harsh punishment without consideration of mitigating factors is unconstitutionally excessive and cruel," so too should this Court reach a similar conclusion here. *Parks*, 510 Mich at 259-260.

under the age of 13 (see MCL 750.520b(2)(c)). State Resp at 15-16. The State then asks: "how could LEM – with the relative freedom to live, work, and travel – be unconstitutional, but a life term of imprisonment not be?" *Id*. at 16.

The State misunderstands Mr. Martin's constitutional challenge. Mr. Martin does not argue that LEM alone, as a form of punishment, is unconstitutional. There may be situations where LEM is a constitutional punishment for a sex offense. Rather, as detailed in Mr. Martin's Supplemental Brief, it is MCL 750.520n's *blanket, mandatory* application of *lifetime* electronic monitoring – with no judicial discretion, individualized assessment, or ability to petition for cessation – that makes the statute unconstitutional. This distinction is critical to Mr. Martin's core argument. Michigan's authorization of life imprisonment for adults convicted of CSC1 is discretionary. MCL 750.520b(2)(a) (felony punishable by imprisonment for life or for any term of years). Michigan's mandate of LWOP under MCL 750.520b(2)(c) is strictly limited to a very narrow set of people – those who have committed CSC1 and have a prior conviction for CSC against a young child. Thus, the paradox the State suggests is nonexistent.

It bears repeating that there are mandatory lifetime sentences in Michigan that, until this Court determines otherwise, comport with our Constitution (e.g., mandatory LWOP for adults convicted of murder). But, as argued in the Supplemental Brief (see Martin's Supp Br at Section I.B) and discussed *infra*, LEM is the *only mandatory post-incarceration* punishment in Michigan that lasts for a person's entire life. There are no monitoring or reporting responsibilities after parole, even for individuals paroled for murder. And the only other provisions in Michigan that allow for any electronic tracking are tied to pretrial

release and probation, which have limited tracking time periods. See MCL 771.3f.

In continuing its analysis of *Bullock*'s first factor, the State also provides a series of statistics relating to the long-term mental health harms that CSCs have on victims and associated economic costs. State's Resp at 16-19. Mr. Martin does not dispute the gravity of his offense or similar offenses, or the possible long-term harms that such offenses may inflict. But many of these harms and economic costs attend survivors of other highly aggravated offenses too – such as torture, kidnapping, assault with intent to do murder, or assault with intent to do great bodily harm – and none of those offenses mandate lifetime sentences, especially post-incarceration. MCL 750.520n's imposition of *mandatory* LEM – an indefinite punishment that uniquely continues post-incarceration – makes the statute an outlier that is unconstitutional cruel or unusual punishment.

III. The State fails to adequately address *Bullock*'s second and third factors because it cannot meet those factors.

Bullock's second factor directs this Court to compare the sentence (mandatory LEM) with other sentences in the same jurisdiction (Michigan). The State's analysis of this factor does not point to any other sentence in Michigan that imposes mandatory LEM or any kind of lifetime punishment that continues post-incarceration. State's Resp at 20-21. The State's silence here should come as no surprise given that LEM is the only mandatory post-incarceration punishment in Michigan that lasts for a person's entire life. See Martin's Supp Br at Section I.B.

Rather than simply acknowledge that MCL 750.520n's punishment is unique, the State instead argues that LEM "is consistent with [the]

compelling state interest of protecting citizens from dangerous sex offenders" and touts the "freedom[s]" that LEM affords in comparison to a brick-and-mortar prison. State's Resp at 20-21, 36. This argument is irrelevant to this Court's consideration of this factor. The appropriate, and only, inquiry here is how the sentence of mandatory LEM compares with other sentences in Michigan. There are no mandatory lifetime post-incarceration sentences to compare it to. MCL 750.520n's punishment is unique and this factor weighs in Mr. Martin's favor.

With respect to the third *Bullock* factor, which requires this Court to consider sentences imposed in other jurisdictions for the same offense, the State similarly glosses over Michigan's status as a minority and baldly asserts that Michigan "is certainly not an 'unusual' outlier" in mandatorily imposing LEM for CSC without an individualized assessment or ability to petition for cessation. State's Resp at 21.

As detailed in Mr. Martin's Supplemental Brief at Section I.C, approximately 11 states including Michigan allow lifetime electronic monitoring. Of those 11 states, the imposition of LEM is mandatory in 10, but is often only mandated for *very specific* CSC offenses. In contrast, Michigan mandatorily imposes LEM for *all* first-degree criminal sexual conduct, not just for specific offenses.[3] Only four other states impose LEM for similarly broad categories of CSC offenses.[4] Furthermore, of

[3] 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).

[4] California (CAL. PENAL CODE §3004(b), CAL. PENAL CODE §290(c)), Maryland (MD. CODE ANN., CRIM. LAW § 3-303, 3-304, 3-307, 3-309, 3-310, 3-602), Missouri (MO. ANN. STAT. § 566.030, 566.032, 566.060, 566.062, 566.067, 566.068, 566.069, 566.083, 566.100, 566.151, 568.020,

the 11 states that permit LEM, four provide opportunities for the cessation of LEM, whereas Michigan does not. And Michigan is one of only four states that impose LEM as part of a sentence, instead of as a condition of parole.

The State's claim that Michigan is not "unusual," which is defined as uncommon,[5] is controverted by the facts.

IV. The State ignores the serious physical and psychological harms caused by lifetime electronic monitoring, and instead focuses exclusively on its interest in preventing further injury to society by relying upon a single outdated research brief. This is not the proper inquiry.

The fourth *Bullock* factor requires this Court to consider the penological goal of rehabilitation. Mr. Martin informed this Court of the serious physical and psychological harms caused by LEM, as supported by various studies, articles, reports, and MDOC data. See Martin's Supp Br at Section I.D. The State never addresses any of these harms and instead focuses its attention exclusively on its interest in preventing further injury to society. State's Resp at 21-25. This is not the proper inquiry.

The focus of *Bullock's* fourth prong is exclusively on the goal of rehabilitation. See *Bullock*, 440 Mich at 34 (no mention of any other

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566.210, 566.211, 573.200, 573.205), Oregon (OR. REV. STAT. ANN. § 137.765(2); OR. REV. STAT. § 144.103).

It should be noted that while Maryland is on this short list of states with broader capture provisions, the imposition of LEM in Maryland is discretionary in all cases. MD. CODE ANN., CRIM. PROC. § 11-723(d)(3).

[5] "Unusual." Merriam-Webster.com (last visited February 17, 2025).

considerations when discussing *Lorentzen*'s fourth criterion). While the State goes back to *Lorentzen* and cites broader language from the portion of the opinion discussing the fourth prong (State's Resp at 39; *Lorentzen*, 387 Mich at 180-181), when the test was applied, even the *Lorentzen* Court focused exclusively on the goal of rehabilitation.

In any event, even if this Court was required under *Bullock's* fourth prong to balance the goal of rehabilitation against the need to prevent further injury to society, this factor still weighs in Mr. Martin's favor. The State cannot escape the very real harms that people experience when subject to LEM by attempting to focus this Court's attention exclusively on the possible prevention of future sex offenses. Some countries with more draconian justice systems amputate the hands of people who have stolen. While such a punishment may be effective in preventing future thefts, either owing to fear of further punishment or inability to do so without heightened risk of being caught, the harm of the punishment to the person is nonetheless substantial and must also be considered.

While sex offenses are considered some of the most heinous, everyone is deserving of humane treatment, even when being punished. Just as this Court does not condone the inhumane treatment of incarcerated people (e.g., torture, food deprivation, or assault by prison officials), this Court should not condone mandatorily subjecting people to a lifetime of electric shocks, scarring, bleeds, inflammation, swelling, and

numbness.[6] But that is precisely what having an ankle monitor affixed to your person for life entails. See Martin's Supp Br at 18-19.

Nor should this Court be persuaded by the State's reliance on a single outdated research brief. Throughout its Response, the State relies heavily upon a 10-year-old research brief concerning recidivism in adult sex offenders.[7] But that research brief relied exclusively on studies dating back to the 90's and early 00's. See, e.g., SMART Research Br at 2 (discussing the Prentky study that was published in 1997, which had a study period of 1959 to 1985). In contrast, Mr. Martin's Supplemental Brief directs this Court to current research showing that recidivism

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[6] Throughout its Response, the State characterizes LEM as "a substantially reduced punishment" that affords the person being monitored with a whole host of "freedom[s]", such as the ability to "live, work, and travel." State's Resp at 20-21, 36. While LEM 24/7 via ankle bracelet is not as confining of an experience as prison, its attendant harms (electric shocks, bleeds, etc.) and permanent anatomical intrusion are nonetheless substantial in their own right. LEM – which risks the return to prison if GPS signal is lost while traveling, working, or entering a building – is simply not the vacation the State makes it out to be, but a different form of incarceration. See, e.g., James Kilgore, *We Need a New Paradigm Halt the Unprecedented Growth of Electronic Monitoring*, Truthout (October 24, 2022); 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).

[7] US Department of Justice Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), *Chapter 5: Adult Sex Offender Recidivism* https://smart.ojp.gov/somapi/chapter-5-adult-sex-offender-recidivism (last visited February 15, 2025). Hereinafter, the "SMART Research Br".

rates decrease significantly with age and time since last offense.[8] See Martin's Supp Br at 21, 34 n 25.

The State cannot escape this Court's acknowledgement just a few years ago in *People v Betts*, 507 Mich 527, 560 (2021) that a growing body of research has shown that "the dangerousness of sex offenders has been historically overblown," by relying upon a single research brief that in turn relies upon data that is 25 to 65 years old. Mr. Martin asks this Court to make decision informed by current science. LEM does not advance the penological goal of rehabilitation.

V. LEM's status as a punishment that is part of the sentence does not strip those to whom it applies of their privacy interests. A blanket uncontestable and interminable intrusion upon those privacy interests, for a population that will have successfully completed a lengthy prison sentence and parole or probation, is unreasonable.

On the question of whether mandatory LEM constitutes an unreasonable, unconstitutional search, the State tries to distinguish the decisions of other state supreme courts that support Mr. Martin's position. The State argues that because LEM in Michigan is a

[8] The State argues that sex offenses are underreported and thus reliance on a person's subsequent criminal history understates the true level of recidivism. State's Resp at 31. While it is true that sex offenses can be underreported, see *Betts*, 507 Mich at 582-582 (Viviano, J., concurring in part and dissenting in part), both offenses by SORA registrants (every person subject to LEM must also register under SORA) and by non-registrants are underreported, meaning the fact of underreporting does not change the overall scientific research establishing that recidivism rates are low.

punishment that is part of the sentence itself, those subject to LEM have a permanently reduced expectation of privacy. State's Resp at 45, 47.

But those who live under sentence are not stripped of the protections our Constitutions afford against unreasonable searches. This Court should still find the reasoning underlying *State v Grady*, 372 NC 509 (2019) and *Park v State*, 305 Ga 348 (2019) persuasive, even if LEM was not part of the sentence in those states. See, e.g., *Grady*, 372 NC at 545 ("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."). That those subject to LEM in Michigan have not fully served their sentence does nothing to cure the unreasonableness of the State's search where such a search is imposed upon a population that has successfully completed a prison sentence and parole or probation.

The State argues that the United States Supreme Court has envisioned a sliding scale of privacy interests, with those incarcerated in a correctional facility having no expectation of privacy, parolees having a greater (but still diminished) expectation of privacy,[9] and probationers having an even greater expectation of privacy.[10] State's Resp at 46. The State's argument here actually supports Mr. Martin's position. In looking at this "'continuum' of punishments" (*id.*), people

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[9] State citing *Samson v California*, 547 US 843, 846 (2006) (law enforcement may conduct a suspicionless search of a parolee's home).

[10] State citing *United States v Knights*, 534 US 112, 121 (2001) (reasonable suspicion required to conduct a search of a probationer's home).

subject to LEM in Michigan – because they will necessarily have completed a prison sentence and parole or probation – should fall on the right most side of the continuum. The invasion of privacy should reduce over time, not increase. In other words, a person's expectation of privacy is *greater* after they have served a prison sentence and parole or probation, not less.

Nor is LEM's intrusion minimal, despite the State's efforts to characterize it as such. State's Resp at 48. LEM places substantial limitations on a person's pursuit of life, liberty, and happiness. See Martin's Supp Br at Section I.D. People who have completed their prison sentence and parole or probation have earned back many of their freedoms and Constitutional privileges. Nonetheless, LEM's privacy invasion is more intrusive than parole or probation, both of which are finite and do not always involve corporeal intrusion from the government for purposes of tracking an individual's movements every second of every day.[11]

As the United States Supreme Court recently cautioned, the ability of the government to track an individual's whereabouts "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.' " *Carpenter v United States*, 585 US 296, 311 (2018). The concerns expressed by the Supreme Court apply with even greater force here where, unlike the less precise cell-site

[11] This Court should note that, notwithstanding the State's argument that LEM will deter Mr. Martin and those like him from engaging in future CSCs (State's Resp at 39-40), Mr. Martin perpetrated his offense at home. Electronic monitoring does nothing to assist law enforcement when such data would merely show that the person was home.

location data that the *Carpenter* Court considered to be "near perfect surveillance," pursuant to LEM, the State tracks in live time a device permanently affixed to a person's *body for life*. 585 US at 297; see also *id*. at 311 (likening a cell phone, which is not affixed to the body like an ankle monitor, to a "feature of human anatomy" because it "tracks nearly exactly the movements of its owner").

The State's Response does not address the Supreme Court's concerns about this level of surveillance. In fact, the State's Response never mentions *Carpenter* or *United States v Jones*, 565 US 400 (2012). This Court should heed the concerns of our nation's highest court and find such an invasion of privacy to be unconstitutional under the Michigan Constitution.

Conclusion and Relief Requested

For the reasons stated above and in his Supplemental Brief, 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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