STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v. Case No. 165008

Robert James Kardasz,

Defendant./

AMICUS CURIAE BRIEF

Counsel for neither the Plaintiff nor Defendant have authored any portion of this brief or consulted or made any monetary contributions to the author for production of this brief. It is the sole production, without input from either party, of the undersigned.

Bryan Matthew Noonan
Amicus Curiae, In Pro Per
Parnall Correctional Facility
1780 E Parnall Rd.
Jackson, MI 49201

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STATEMENT OF BASIS FOR JURISDICTION

This Court has jurisdiction pursuant to MCR 7.303(B)(1). Following sentencing by the Macomb County Circuit Court (2017-002252-FC), and the Court of Appeals decision on 9/22/22 (COA: 358780), this Amicus Curiae Brief is filed within 14 days and by permission of this Court.

STATEMENT OF QUESTIONS INVOLVED

1. Does Lifetime Electronic Monitoring, when imposed without an individualized assessment of the defendant's recidivism risk and without providing a mechanism for removing the monitoring requirement, constitute Cruel or Unusual Punishment under Const. 1963, art 1 subsec. 16 or Cruel or Unusual Punishment under U.S. Const. Am VIII?

2. Does Lifetime Electronic Monitoring constitute an Unreasonable Search in violation of U.S. Const. Am IV or Const. 1963, art 1 subsec. 11?

STANDARD OF REVIEW AND PRESERVATION OF ISSUE

This Court reviews questions of constitutional law de novo.

People v Kennedy, 502 Mich 206, 213, 917 NW2d 355 (2018).

Whether the constitutionality of Lifetime Electronic Monitoring involves statutory construction, this is also reviewed de novo.

People v Osantowski, 481 Mich 103, 748 NW2d 799 (2008).

Because Defendant failed to raise these challenges below, this Court's review is limited to plain error affecting his substantial rights.

People v Bowling, 299 Mich App 552, 557, 830 NW2d 800 (2013).

ARGUMENT

I, A sentence of Lifetime Electronic Monitoring (LEM), in addition to a prison sentence, is both Cruel and Unusual under the U.S. Constitution and Cruel or Unusual under the Michigan Constitution when it is imposed without an individualized assessment of risk and when it does not provide a mechanism

for removal.

Cruel and/or Unusual Punishments

Cruel and/or Unusual Punishment claims are evaluated for whether a punishment is "grossly disproportionate" to the offense. The Court must consider four factors to determine if a sentence is so grossly disproportionate that it contravenes the Eighth Amendment: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; (3) the sentences imposed for commission of the same crime in other jurisdictions; and (4) whether the penalty imposed advances the goal of rehabilitation. See **People v Lymon, 2024 Mich LEXIS 1439 (2024); United States v Griffiths, 846 Fed. Appx 384 (2021); People v Bullock, 440 Mich 15, 33-34 (1992).** Typically, an appellate court's consideration turns on the first factor (**United States v Abdulmatallab, 739 F.3d 891, 906 (6th Cir. 2014)**, but the other three factors are instructive, especially given the subjective nature of determining proportionality and the changing nature of social views of justice.

The Eighth Amendment's prohibition of Cruel and Unusual Punishment "guarantees individuals the right not to be subjected to excessive sanctions." That right "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned to both the offender and the offense," **Miller v Alabama, 567 U.S. 460** (2012, internal citations omitted).

A. Gravity of the Offense and Harshness of the Penalty

Gravity of the Offense

There is no doubt that a criminal sexual conduct charge, whether against a victim under 13 years old or not, is an especially grave offense. Sentences

for these crimes, particularly for first-degree offenses, may include imprisonment for life or any term of years (**MCL 750.520b(2)(a)**), in addition to LEM under **MCL 750.520n.**

The prison sentence portion of criminal sexual conduct crimes is comparable to attempted murder, and some murder sentences, although these crimes do not impose an LEM punishment. Furthermore, the mandatory nature of some prison sentences (25 years or more for violations of **MCL 750.520b(2)(b)**) and of LEM on all CSC 1st degree and some CSC 2nd degree charges is not graduated and proportioned to either the offender or the offense (see **Miller**, supra). Murder is a graver offense, although in some cases its penalty is less harsh.

Harshness of the Penalty

As the United States Supreme Court noted in **Weems v United States, 217 U.S. 349** (1910), imprisonment sentences cannot be separated from the "accessory penalties" (cadena temporal), which notably in **Weems** included a sentence of "perpetual surveillance." The **Weems** Court's finding that "the physical and mental suffering inherent in the punishment of cadena temporal [particularly the perpetual surveillance]...was an obvious basis for the Court's decision...that the punishment was 'cruel and unusual,'" **Furman v Ga, 408 U.S. 238, 271** (1972). Michigan's LEM program goes even further than the perpetual surveillance Weems faced, tracking every movement of individuals until the time of their deaths.

This "'panoptic gaze' of constant government surveillance is arguably the most dangerous threat to personhood and citizenship" in modern life (Daniel J. Solove, "Reconstructing Electronic Surveillance Law," **72 Geo. Wash. L. Rev. 1264, 1267** (2004)). In fact, Justice Brennan noted that

surveillance "makes the police omniscient" and police omnisciences "is one of the most effective tools of tyranny" (see **Lopez v United States, 373 U.S. 427, 466** (1966)). The harshness of perpetual surveillance is an attack on an individual's citizenship. Citizenship in the U.S. is "the right to have rights" and it is "not a license that expires upon misbehavior" (**Trop v Dulles, 356 U.S. 86, 92** (1958)).

Michigan mandates LEM as a punishment for certain CSC crimes, which the U.S. Supreme Court has ruled implicates a Fourth Amendment Search (**Grady v North Carolina, 575 U.S. 306** (2015)). Justice Stevens also points out, notably in the same year Michigan passed its LEM law, that the Court has never imposed "any searches as a punitive measure" (in dissent, **Sampson v California, 547 U.S. 843, 864** (2006)). That is no longer true.

The harshness of this penalty unreasonably burdens and restricts the movement of individuals sentenced to it. According to Michigan's "Lifetime Electronic Monitoring Program Participation Agreement" (CFJ-541), if an individual sentenced to LEM moves to another state, or even travels, vacations, or otherwise leaves Michigan for any reason, the State may call him back at any time "to have the electronic monitoring equipment inspected" (pg. 1). Yet, "the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land, uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement" (**Shapiro v Thompson, 394 U.S. 618, 629** (1969)). Either individuals sentenced to LEM are no longer "citizens" by this definition, or their freedom to travel is inhibited by the unreasonable harshness of Michigan's LEM penalty (i.e. through immediate recall to the state), contrary to constitutional concepts.

B. The Sentences Imposed on Other Criminals in the Same Jurisdiction

While sexual crimes are especially grave, other crimes are perhaps more so. Murder, for example, is subject to a sentence of life or any term of years. Some sentences for life are for parolable life.

Parolable life sentences may be imposed for MCL 750.83 (assault with intent to commit murder), 750.85 (torture), 750.89 (assault with intent to rob and steal; armed), 750.91 (attempt to murder), 750.317 (2nd degree murder), 750.157b (solicitation to commit murder), and 750.72 (1st degree arson), among others. A parolable life sentence is a lifetime punishment, for which the individual is eligible for parole after 15 years. Successful completion of all parole requirements, then, leads to an absolute discharge of the remainder of one's sentence, regardless of its lifetime nature. Notably, sentences for violations of MCL 750.520b and MCL 750.520c(1)(a) are not afforded the same right to absolute discharge. This is an arbitrarily severe punishment of a single class of crimes that, though grave, are not comparable to murder.

In addition to prison terms, these CSC convictions are subject to LEM under MCL 750.520n and MCL 791.285(1)(a).

MCL 791.285(1)(a) mandates tracking a person's movements and location "from the time the individual is released on parole or from prison until the time of the individual's death." Notably, the LEM program is established under Chapter 791, which governs the jurisdiction of the Department of Corrections (DOC).

MCL 791.242(1), also under Chapter 791, mandates that when a parolee has "faithfully performed all of the conditions and obligations of parole for the period of time fixed in the order of parole, and has obeyed all of the rules and regulations adopted by the parole board, THE PRISONER HAS SERVED

THE FULL SENTENCE REQUIRED" (emphasis mine). The prisoner then shall be issued a final order and certificate of discharge. Absolute discharge at the end of parole is more than release from parole, but is remission of the remaining portion of the person's sentence. **Ex parte Dawsett, 311 Mich 588**, (Mich 1945), cert denied, **329 U.S. 786** (U.S. 1946). It is also a discharge from custody and therefore the jurisdiction of the DOC (**Harper v Dep't of Corr., 215 Mich App 648** (Mich Ct App 1996)).

Under current practice, life sentences for all other crimes are absolutely discharged upon successful completion of parole, but lifetime sentences for violations of MCL 750.520b or MCL 750.520c(1)(a) are not. Only the imprisonment portion of these individual's sentences are discharged, although both imprisonment and LEM are a part of the person's sentence. This practice is contrary to MCL 791.242(1). This statute, then, conflicts with MCL 750.285(1)(a) in its construction as one mandates a lifetime sentence that provides no mechanism for release, while the other provides an unconditional release, an absolute discharge, from the REMAINDER OF THE SENTENCE.

MCL 791.242(3), added by the legislature at the same time it enacted MCL 750.520n and MCL 791.285 (Pub Acts 2006, No. 170172, effective May 30, 2006), provides the only exception or carve out, to absolute discharge of an individual's sentence.

> (3) Parole shall only be granted for life for a prisoner sentenced under section 520b(2)(b) of the Michigan penal code, 1931 PA 328, MCL 750.520b.

Such an addition appears to have contemplated the conflict between LEM and absolute discharge from parole.

In all other cases where LEM is a portion of the individual's sentence, that, too, should be discharged upon successful completion of parole,

according to MCL 791.242(1). To do otherwise would be particularly harsh, and therefore cruel and/or unusual in comparison to other lifetime sentences imposed in Michigan.

MCL 750.2 requires that provisions of the Michigan Penal Code must be construed according to the fair import of their terms, in order to promote justice and to effect the objects of the law. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." **Marbury v Madison, 5 U.S. 137, 177** (1803). Here, MCL 791.242(1) clearly provides for an absolute discharge of an individual's sentence, part of which may include LEM, while MCL 791.285(1)(a) requires that sentence to continue "until the time of the individual's death." The fair import of terms for each statute results in a conflict of outcomes.

"The primary goal of statutory interpretation is to give effect to the intent of the Legislature." **Briggs Tax Serv, LLC v Detroit Public Schools, 485 Mich 69, 76** (2010). The Court also "certainly has both the authority and the duty to construe the meaning of the statute in the first instance, informed by the ordinary principles of statutory construction and by reference to the plain language of the statute itself." **Knight Capital Partners Corp v Henkel AG & Co., 290 F. Supp 3d 681, 689** (2017 E. Dist., Mich).

"If two statutes conflict, then the specific prevails as an exception to the general," **In re Forfeiture of Chevrolet Blazer, 183 Mich App 182,** 184 (2001). "However, if two statutes lend themselves to a construction which harmonizes their meanings and avoids conflict, that construction should control," Id. Here, it is unclear which statute is the specific and which one the general.

Where penal statutes are ambiguous in their application, they are to be construed in favor of a defendant. **People v Groff, 204 Mich App 727** (1994). Furthermore, the rule of lenity provides that courts should mitigate punishment when the punishment in a criminal statute is unclear. **People v Denio, 454 Mich 691** (1997). At the very least, this Court should treat lifetime sentences imposed upon individuals who commit criminal sexual conduct crimes the same way lifetime sentences are treated for other crimes. Upon successful completion of parole (which may accomplish an "individualized assessment"), the lifetime portion of the individual's sentence, LEM in these cases, should be absolutely discharged with the rest of his sentence. This proper interpretation and application of MCL 791.242(1) would provide a mechanism for removal of the LEM portion of the sentence.

Alternately, the DOC already conducts individualized assessments of people convicted of sexually based offenses. This scientifically based risk assessment (STATIC-99R) is conducted by a trained psychologist on all CSC cases within two years of the person's eligibility of parole in order to determine if the person shall complete therapeutic programming prior to or after release from prison. Although this assessment may determine an offender is a low risk for reoffense, this conclusion bears no weight on the imposition of a lifetime penalty of perpetual surveillance. No other category of crime is individually assessed in as much detail, yet lifetime punishments for these other crimes are absolutely discharged after successful completion of parole.

In practice, since the passage of Michigan's LEM statute, the DOC has treated the sentence of imprisonment and the sentence of LEM as separate penalties, discharging one upon successful completion of parole while maintaining the other, contrary to the decision in **Weems**, and contrary to

the statutory construction of MCL 791.242(1). This is cruel and/or unusual.

C. Sentences Imposed for Commission of the Same Crime in Other Jurisdictions

While other U.S. jurisdictions impose LEM for some sexually based crimes, a growing body of states' Supreme Courts have found it unconstitutional to impose this penalty without an individualized determination of risk and/or a mechanism for removal.

Although Michigan's LEM statute is a direct penalty, a part of the sentence, when imposed, and in other states it is a collateral consequence or indirect penalty, the arguments and conclusions of these other states' courts are persuasive.

North Carolina, perhaps the "gold standard" in evaluating the constitutionality of LEM, found its categorical requirement unreasonable without an individualized determination of risk. **State v Grady, 372 NC 509** (509). Michigan makes no individual determination of risk.

Georgia found that GPS monitoring for life is unconstitutional, primarily due to violation of the "excessive fines" clause of the U.S. Constitution. **Park v State, 305 Ga 348, 360** (2019). Michigan, likewise, charges offenders a monthly fee, currently $60, in perpetuity for LEM. Failure to pay this fee can result in incarceration.

South Carolina found that the court must make a reasonableness determination before imposing mandatory monitoring. **South Carolina v Ross, 423 SC 504** (2018). Massachusetts found that GPS monitoring is overinclusive for some offenders, and therefore unreasonable. **Commonwealth v Feliz, 481 Mass 689** (2019). Likewise, New Jersey found that a special needs determination applies to LEM, implicating an individualized determination. **H.R. v New Jersey State Parole Bd., 242 NJ 271** (2020). Notably, Michigan makes no reasonableness

or special needs determination.

Vermont found GPS monitoring okay in some circumstances, but did not rule on a broad case determination. **State v Kane, 2017 VT 36** (2017).

Because each of these other jurisdictions impose an LEM penalty as a collateral consequence, their evaluation of individualized assessments and mechanisms for removal are slightly different than Michigan's. As argued above, Michigan DOES provide a mechanism for removal under MCL 791.242(1) but does not allow the use of that mechanism because of the language of MCL 791.285(1). Michigan also already uses a scientifically based individualized assessment (STATIC-99R) of recidivism risk to determine an individual's need to take sex offender therapy prior to leaving prison. However, this assessment is not used to determine the need for LEM as that is a part of the individual's sentence. Therefore, the evaluation of the constitutionality of Michigan's LEM law is subject to the same constitutionally rigorous arguments used by these other states.

Imposition of LEM, whether as a direct or collateral consequence is unconstitutional without an individualized determination of reasonableness and risk of reoffense, and without a mechanism for removal that can actually lead to removal. It is overly broad and unreasonable in its application without individualized special needs assessments for risk, making it cruel and/or unusual.

D. Whether the Penalty Imposed Advances the Goal of Rehabilitation

Rehabilitation is only one penological goal; however, it is an important measure when considering whether a punishment is cruel and/or unusual.

A growing body of research has found that there is "no empirical evidence that broadly applied electronic surveillance corresponds to public safety,

increased rehabilitation, or lower recidivism rates (see Kathryn Saltmarsh, ILL. "Sentencing Policy Advisory Council, Research Briefing: State Use of Electronic Monitoring" 6-8 (2019)). As one researcher points out, electronic monitoring lacks the scientific measure of outcome evidence efficacy (see James Kilgore, "E.M.: A Survey of the Research for Decarceration Activists," Challenging E-Carceration (July 3, 2018), https://perma.cc/8A8K-NV63).

Electronic monitoring does not address underlying causes of behavior, provides no evidence that it leads to greater public safety, and may actually worsen outcomes. Ibid. (See also, Michael P. Jacobson, et. al., Harvard Kennedy School, "Less is More: How Reducing Probation for Populations Can Improve Outcomes," https://perma.cc/MP7J-7V6D, and **Doe v Snyder, 834 F.3d 696, 705** (6th Cir. 2016) citing that "laws such as SORA actually increase the risk of recidivism" because it exacerbates risk factors making it harder for reintegration into society. This argument could easily apply to LEM as well since it is more cumbersome than SORA). Instead, LEM unduly restricts inviolable constitutional rights, such as the freedom to travel and the right to privacy. "Conditions that unquestionably restrict otherwise inviolable constitutional rights may properly be subject to special scrutiny to determine whether the limitation does in fact serve the dual objectives of rehabilitation and public safety" (**United States v Consuelo-Gonzalez, 521 F.2 259, 265** (9th Cir. 1975).

Without scientific evidence of its efficacy on rehabilitation or public safety, what appears to be driving the expansion of electronic surveillance is not deliberate policymaking based on rational penological concerns, but on the profit potential for the private industries driving these reforms. (See Kate Weisburd, "Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring," **98 N.C.L. Rev. 717, 725** (2020)).

Without a rehabilitative goal, along with the other factors argued here, LEM is cruel and/or unusual in its harshness as a perpetual penalty, its denial of human dignity, its infliction of severe mental pain of perpetual shame, and its denial of basic rights of citizenship (such as a perpetual limitation to one's liberty), even after discharge from one's prison sentence.

II. Lifetime Electronic Monitoring constitutes an Unreasonable Search in violation of U.S. Const. Am IV or Const. 1963, art. 1, subsec 11.

In Grady v North Carolina, supra, the United States Supreme Court found that LEM does implicate a Fourth Amendment search, but they did not rule on the reasonableness of such searches, leaving that open for determination by the state courts (375 U.S. 306, 310).

Notably, the North Carolina Supreme Court later found that North Carolina's lifetime satellite-based monitoring (SBM) statute violated offenders' Fourth Amendment right to unreasonable searches and seizures (State v. Grady, supra at 545). The Court made this determination based on the unreasonableness of North Carolina's statute. It determined that the statute was unreasonable because when individuals in the same offense category as Grady "are required to submit to a mandatory, continuous, nonconsensual search by lifetime satellite-based monitoring, [it] violates the Fourth Amendment of the United States Constitution" (ibid). It further found that "the intrusion of mandatory lifetime SBM on legitimate Fourth Amendment interests outweighs the promotion of legitimate government interests" (ibid., internal citation omitted).

At least two other states' Supreme Courts, Georgia's and South Carolina's, have come to the same conclusion. Park v. Georgia, supra; and South Carolina v. Ross, supra.

In Michigan the Court of Appeals ruled that Michigan's LEM statute was reasonable based on the "application test" of balancing the government's "need to search, in the public interest, for evidence of criminal activity against invasion of the individual's privacy" (People v Hallak, 310 Mich App 555, 579 (2015)). The Court's decision in Hallak was a narrow one,

limiting its ruling to offenders over 17 who committed a sexually based crime against a child under 13 years old. It also based its ruling on outdated and overblown fears of "high recidivism rates" of sexually based offenders, without scientific backing.

Regardless, the United States Supreme Court already ruled on what constitutes an unreasonable search, and Michigan's current LEM statute is a prime example of unreasonableness.

In Scheckloth v Bustamonte, 412 U.S. 218, 248-249 (1973), the Court held that "when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." Clearly, Michigan offenders sentenced to LEM do not give their consent, express or implied, for lifetime searches by the State. The State might argue that by taking a plea deal that offenders imply consent; however, the Court requires that consent be voluntary and not be the result of duress or coercion.

To determine if consent was voluntary, the Court looks at all the circumstances. "Voluntariness is a question of fact to be determined from all the circumstances, and while subjects' knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing voluntary consent" ibid. Clearly, offenders who face up to life in prison are under duress to agree to LEM to avoid a lifetime in prison. However, some offenders have not even agreed to LEM. The courts have imposed this sanction after plea proceedings and sentencing have concluded.

The Sixth Circuit has also clarified voluntariness for us. To be voluntary, it says, "[c]onsent must be...unequivocal, specific, and

intelligently given, uncontaminated by any duress and coercion," United States v Butler, 223 F.3d 368, 375 (2000). Faced with threats of lifetime prison sentences or even sentences of decades behind bars, offenders often accept lower sentences and the punishment of LEM, a clear and convincing example of duress and coercion.

The Sixth Circuit applied this logic in United States v Lambus, 251 F. Supp 3d 470 (2017) (rev'd by the Court of Appeals, 897 F. 3d 368 (2018)). They found that Lambus signed the GPS consent form under duress and coercion, meaning his consent was not meaningfully valid. "The court finds that this extensive consent was not voluntarily given. Lambus signed the acknowledgement form only upon threat of incarceration," ibid, at 483.

The Court of Appeals reversed because Lambus was trying to avoid incarceration for a parole violation, and therefore his expectation of privacy as a parolee was diminished. His consent was reasonable. However, Michigan also requires those sentenced to LEM to sign an LEM "participation agreement" prior to their release on parole. Failure to sign this form could result in withdrawal of an offender's parole. If an offender has maxed out his prison sentence and is discharged from his prison sentence, failure to sign this form and agree to the LEM terms would result in additional charges and another prison sentence (see MCL 750.520n). Such penalties for refusing to participate in the LEM program demonstrate the coercive nature of this "consent." Reasonableness cannot attach.

The U.S. Supreme Court has ruled warrantless searches of parolees may be reasonable due to reduced expectations of privacy, and because of the government's belief that there is a high probability of criminal conduct occurring (United States v Knights, 534 U.S. 112 (2001)). Parolees are not "ordinary citizens" with normal rights to privacy. But individuals released

reasonableness or ongoing risk, no mechanism for offenders to be discharged from this punishment, and they mandate unreasonable searches under the Fourth Amendment.

Alternatively, if this Court should find LEM searches still reasonable, it should also find that Michigan's parole statute, MCL 791.242, does provide a mechanism for removal of the LEM penalty and that parole itself fulfills the necessity of an individualized determination of reasonableness and risk for each offender. This Court, then, should direct the Department of Corrections to discharge the LEM portion of offender's sentences upon successful completion of parole, as other lifetime sentences are currently discharged.