STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARYL WILLIAM MARTIN.

Defendant-Appellant.

Supreme Court No. 166339

Court of Appeals No. 358580

Presque Isle Circuit Court No. 20-093153-FC

THE PEOPLE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

STATEMENT OF JURISDICTION

Daryl William Martin was convicted in the Presque Isle County Circuit Court by jury trial. The Presque Isle County Circuit Court entered a judgment of sentence on September 13, 2021. Martin requested the appointment of appellate counsel on September 13, 2021, as authorized by MCR 6.425(F)(3). Martin, through counsel, filed a claim of appeal on September 20, 2021, in the Michigan Court of Appeals. On September 14, 2023, the Michigan Court of Appeals affirmed Martin's convictions and sentences. *People v Martin*, unpublished per curiam opinion of the Court of Appeals, issued September 14, 2023 (Docket No. 358580).

On November 9, 2023, Martin, through counsel, filed an application for leave to appeal in this Court pursuant to MCR 7.305(B)(3), (5)(a). On May 31, 2024, this Court entered an order considering the application, directing the Clerk to schedule oral argument on the application pursuant to MCR 7.305(H)(1), and ordering the parties to file supplemental briefs pursuant to MCR 7.312(E). *People v Martin*, 6 NW3d 413 (2024). This Court has jurisdiction over this matter as provided by Const 1963, art VI, § 4 and MCR 7.303(B)(1).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

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 Michigan's Constitution, Const 1963, art 1, § 16, or cruel and unusual punishment under the Eighth Amendment, US Const, Am VIII?

   The People's answer: No.

   Martin's answer: Yes.

   Court of Appeals' answer: No.

2. Does lifetime electronic monitoring constitute cruel and/or unusual punishment as applied to Martin?

   The People's answer: No.

   Martin's answer: Yes.

   Court of Appeals' answer: No.

3. Does lifetime electronic monitoring constitute an unreasonable search in violation of Michigan's Constitution, Const 1963, art 1, § 11, or the Fourth Amendment, US Const, Am IV, and should this Court overrule *People v Hallak*, 310 Mich App 555 (2015)?

   The People's answer: No, and no.

   Martin's answer: Yes, and yes.

   Court of Appeals' answer: No, and no.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Const 1963, art 1, § 11 states,

> The person, houses, papers, possessions, electronic data, and electronic communications of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things or to access electronic data or electronic communications shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state.

Const 1963, art 1, § 16 states,

> Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained.

The Fourth Amendment of the U.S. Constitution states,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Eighth Amendment of the U.S. Constitution states,

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

MCL 750.520n provides:

> (1) A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285.
>
> (2) A person who has been sentenced under this chapter to lifetime electronic monitoring under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285, who does any of the following is guilty of a

felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both:

(a) Intentionally removes, defaces, alters, destroys, or fails to maintain the electronic monitoring device in working order.

(b) Fails to notify the department of corrections that the electronic monitoring device is damaged.

(c) Fails to reimburse the department of corrections or its agent for the cost of the monitoring.

(3) This section does not prohibit an individual from being charged with, convicted of, or punished for any other violation of law that is committed by that individual while violating this section.

(4) A term of imprisonment imposed for a violation of this section may run consecutively to any term of imprisonment imposed for another violation arising from the same transaction.

MCL 791.285 provides:

(1) The lifetime electronic monitoring program is established in the department. The lifetime electronic monitoring program must implement a system of monitoring individuals released from parole, prison, or both parole and prison who are sentenced by the court to lifetime electronic monitoring. The lifetime electronic monitoring program must accomplish all of the following:

(a) By electronic means, track the movement and location of each individual from the time the individual is released on parole or from prison until the time of the individual's death.

(b) Develop methods by which the individual's movement and location may be determined, both in real time and recorded time, and recorded information retrieved upon request by the court or a law enforcement agency.

(2) An individual who is sentenced to lifetime electronic monitoring shall wear or otherwise carry an electronic monitoring device as determined by the department under the lifetime electronic monitoring program in the manner prescribed by that program and shall reimburse the department or its agent as provided under section 36a while the individual is still on parole, and at the rate of $60.00 per

month after the individual is discharged from parole but is still subject to electronic monitoring.

(3) As used in this section, “electronic monitoring” means a device by which, through global positioning system satellite or other means, an individual’s movement and location are tracked and recorded.

INTRODUCTION

In 2018, Daryl William Martin, who was a man in his mid-fifties, twice sexually assaulted his five-year-old step-granddaughter, K.E.[1] In one instance, he touched K.E.'s vagina with his hands or fingers. In another instance, he licked K.E.'s vagina. Martin was sentenced to lifetime electronic monitoring (LEM) pursuant to MCL 750.520n for his convictions of first-degree criminal sexual conduct (CSC-I) and second-degree criminal sexual conduct (CSC-II). This supplemental briefing addresses a multitude of issues, none of which entitle Martin to have his application for leave to appeal granted or other relief.

First, LEM under MCL 750.520n, when imposed without an individualized assessment of the defendant's recidivism risk and without providing a mechanism for removing the monitoring requirement, is not cruel *or* unusual punishment under Michigan's Constitution, Const 1963, art 1, § 16, or cruel *and* unusual punishment under the Eighth Amendment, US Const, Am VIII, on its face. Michigan courts use a four-part test to determine whether a punishment is cruel or unusual; application of the test to LEM demonstrates that LEM is not cruel or unusual. Moreover, this Court's cruel-or-unusual punishment jurisprudence has applied only to life sentences for young people, to standalone drug crimes with lengthy imprisonment, and as applied to sex offender registration for offenses without a sexual component. This Court ought not extend the protection to the imposition of LEM on offenders

[1] The People abbreviate the names of minors and sexual assault victims here to protect their privacy.

who commit the most egregious sexual assaults under the law—CSC-I, or CSC-II against a child under 13, MCL 750.520n(1)—where (1) sex offenders, as a group or class, do not share the attributes of youth, or any other distinct attributes entitling them to individualized recidivism risk assessments, (2) CSC-I and CSC-II against a child under 13 are crimes against a person and inherently violent crimes, like murder and unlike drug offenses, (3) LEM bares no comparison to actual imprisonment in a correctional institution, and (4) LEM is not an ill-fitting punishment for sex offenses. Further, LEM passes muster under the Michigan Constitution's cruel-or-unusual punishment provision, so it necessarily passes muster under the Eighth Amendment, which is less protective. On its face, MCL 750.520n is constitutional.

Second, as applied to Martin, LEM is not cruel or unusual punishment under Const 1963, art 1, § 16, or cruel and unusual punish under the Eighth Amendment. The same four-part test applies to Martin's as-applied challenge under Michigan's Constitution, as applies to Martin's facial challenge. All four parts support that LEM is not cruel or unusual as applied to Martin. Since LEM passes muster under Const 1963, art 1, § 16, it necessarily passes muster under the Eighth Amendment.

Third, LEM is not an unreasonable search and seizure. The intrusion of a search is minimal given the diminished expectation of privacy of defendants still serving their sentences, and LEM serves important public safety interests. And, *People v Hallak*, 310 Mich App 555 (2015) is correctly decided.

Therefore, this Court should deny Martin's application for leave to appeal.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The People incorporate by reference the "counter-statement of facts" and "proceedings below" in the People-Appellee's Brief filed in the Court of Appeals on February 21, 2023.[2] (App'x A, pp 4–13.) Additionally, the People state as follows.

For Martin's jury-based convictions for CSC-II, MCL 750.520c(1)(a) and MCL 750.520c(2)(b), and CSC-I, MCL 750.520b(1)(b) and MCL 750.520b(2)(b), the trial court sentenced Martin to concurrent sentences of 10 to 15 years' imprisonment and 25 to 40 years' imprisonment, respectively. (9/13/21 Sent Tr, p 12.) Additionally, the trial court sentenced Martin to LEM for both convictions pursuant to MCL 750.520n, if he were paroled. (*Id.*, p 12.)

On September 20, 2021, Martin, through appellate counsel, filed a claim of appeal in the Michigan Court of Appeals. Among other claims, Martin argued that his LEM sentences constituted cruel or unusual punishment in violation of Michigan's Constitution, Const 1963, art 1, § 16, cruel and unusual punishment in violation of the Eighth Amendment, US Const, Am VIII, and an unreasonable search and seizure in violation of the Fourth Amendment, US Const, Am IV. (Def's Appeal Br, pp 47–48.) On September 14, 2023, the Michigan Court of Appeals affirmed Martin's convictions and sentences. *People v Martin*, unpublished per curiam opinion of the Court of Appeals, issued September 14, 2023 (Docket No. 358580). The Court of Appeals relied on its prior decision in *People v Hallak*, 310 Mich App 555 (2015) to reject the foregoing claims, stating:

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[2] The People-Appellee's Brief is appended hereto as "App'x A."

> Martin continues to challenge the constitutionality of MCL 768.27a on appeal. This Court rejected these exact challenges in *People v Hallak*, 310 Mich App 555, 566-581; 873 NW2d 811 (2015), rev'd in part on other grounds *People v Hallak*, 499 Mich 879; 876 NW2d 523 (2016). *When the Supreme Court reversed this Court's decision in part in Hallak, it left untouched the LEM analysis. We are bound by this Court's prior published decision in this regard*. MCR 7.215(C)(2). [*Martin*, unpub op at 3, n 1.]

On November 9, 2023, Martin, through counsel, filed an application for leave to appeal in this Court pursuant to MCR 7.305(B)(3), (5)(a). On May 31, 2024, this Court entered an order considering the application, directing the Clerk to schedule oral argument on the application pursuant to MCR 7.305(H)(1), and ordering the parties to file supplemental briefs pursuant to MCR 7.312(E). *People v Martin*, 6 NW3d 413 (2024). On December 12, 2024, Martin filed a supplemental brief pursuant to this Court's May 31, 2024 order. The present brief is filed pursuant to this Court's May 31, 2024 order.

STANDARD OF REVIEW

Questions regarding the interpretation or constitutionality of a statute are reviewed de novo. *People v McKinley*, 496 Mich 410, 414–415 (2014). Statutes are presumed to be constitutional, and to the extent permitted by the language of a statute, they should be construed in a manner that comports with the constitution. *People v Sell*, 310 Mich 305, 314–315 (1945) (citations omitted). "[I]n case of doubt every possible presumption not clearly inconsistent with the language and the subject matter is to be made in favor of the constitutionality of legislation." *Cady v Detroit*, 289 Mich 499, 505 (1939). "[A] statute comes clothed in a presumption of constitutionality" because this Court presumes that "the Legislature does not intentionally pass an unconstitutional act." *Cruz v Chevrolet Grey Iron Div of Gen Motors Corp*, 398 Mich 117, 127 (1976). The party challenging the constitutionality of a statute carries the burden of proving it, *People v Rapp*, 492 Mich 67, 72 (2012).

"A constitutional challenge to the validity of a statute can be brought in one of two ways: by either a facial challenge or an as-applied challenge." *In re Forfeiture of 2000 GMC Denali & Contents*, 316 Mich App 562, 569 (2016). A "facial challenge involves a claim that a legislative enactment is unconstitutional on its face, in that there is no set of circumstances under which the enactment is constitutionally valid." *People v Wilder*, 307 Mich App 546, 556 (2014). The defendant is required to establish that there are no possible circumstances under which the statute would be valid. *Council of Orgs & Others for Ed About Parochaid, Inc v Governor*, 455 Mich 557, 568–569 (1997) (citation omitted). This is an "extremely rigorous" standard. *Bonner v City of Brighton*, 495 Mich 209, 223 (2014). "[T]he fact that the . . .

[statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it invalid." *Id.* (quotation marks and footnote omitted). "[I]f any state of facts reasonably can be conceived that would sustain [the statute], the existence of the state of facts at the time the law was enacted must be assumed" and the law upheld. *Id.* (quotation marks and footnote omitted).

By contrast, "[a]n as-applied challenge . . . alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution of government action." *Bonner*, 495 Mich at 223 n 27 (quotation marks and citation omitted). An as-applied challenge to a statute requires a court to analyze whether the statute led to a denial of a specific right in light of the facts developed in the defendant's particular case. *Wilder*, 307 Mich App at 556.

ARGUMENT

I. 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, is not cruel or unusual punishment under Michigan's Constitution, Const 1963, art 1, § 16, or cruel and unusual punishment under the Eighth Amendment, US Const, Am VIII.

MCL 750.520n, the law that requires lifetime electronic monitoring for dangerous crimes committed by offenders like Daryl Martin, is neither cruel nor unusual under the Michigan Constitution, and it does not violate the Eighth Amendment. The statute is facially valid, and Martin has failed to overcome the law's presumption of constitutionality.

A. LEM is not cruel *or* unusual punishment; on its face, MCL 750.520n does not violate the Michigan Constitution, Const 1963, art 1, § 16.

As an initial observation, this Court has been circumspect in its application of Article 1, § 16, finding only a handful of sentences to constitute cruel or unusual punishment. This Court's modern cruel-or-unusual punishment cases fall into three categories: (1) life imprisonment for juveniles, (2) extremely long imprisonment for certain drug crimes, and (3) as applied to sex offender registration for offenses without a sexual component. LEM imposed for egregious sex offenses, such as CSC-I and CSC-II committed by a nearly 60-year-old defendant against a five-year-old child, bares no comparison to these categories, as explained below. Furthermore, Michigan courts use a four-part test to determine whether a punishment is cruel or unusual, and the application of that test to LEM under MCL 750.520n compels the conclusion that LEM is not cruel or unusual.

1. Michigan's constitutional prohibition against cruel or unusual punishment

The Michigan Constitution provides that "cruel or unusual punishment shall not be inflicted." Const 1963, art 1, § 16. As this Court has described this protection, the Constitution protects against "unusually excessive imprisonment." *People v Stovall*, 510 Mich 301, 313 (2022). This provision is distinct from the federal constitution's protection against the imposition of "cruel *and* unusual punishments[,]" which is discussed below. US Const, Am VIII (emphasis added).

The People do not contest that LEM constitutes punishment under Const 1963, art 1, § 16. See *People v Cole*, 491 Mich 325, 336 (2012); see also *People v Hallak*, 310 Mich App 555, 569–571 (2015) (finding that in *Cole*, this Court "clearly concluded that lifetime electronic monitoring under this same statutory provision was intended by the Legislature to be a punishment").

Michigan courts apply the four-part test announced in *People v Lorentzen*, 387 Mich 167 (1972) (*Bullock* factors), as reaffirmed in *People v Bullock*, 440 Mich 15 (1992) to determine whether a punishment is disproportionate and thus, cruel or unusual. *People v Parks*, 510 Mich 225, 254 (2022). The *Bullock* factors require courts to consider:

> (1) "the severity" of the penalty imposed as compared to "the gravity of the offense,"
>
> (2) the penalty imposed as compared to penalties imposed "in the same jurisdiction," i.e., Michigan, "for other offenses,"
>
> (3) the penalty imposed as compared to penalties imposed "in other jurisdictions for the same offense," and

> (4) whether the penalty imposed advances the penological "goal of rehabilitation," which is a criterion specifically "rooted in Michigan's legal traditions . . . ."

Id. at 254–255, citing *Bullock*, 440 Mich at 33–34, in turn citing *Lorentzen*, 387 Mich at 179–181; see also *Stovall*, 510 Mich at 314. However, the "dominant test" is the proportionality question, which is "whether the punishment is so excessive that it is completely unsuitable to the crime." *People v Coles*, 417 Mich 523, 530 (1983), holding mod by *People v Milbourn*, 435 Mich 630 (1990), citing *Lorentzen,* 387 Mich at 181 (holding that a mandatory minimum prison sentence of 20 years for the nonviolent crime of selling marijuana with no individualized consideration was cruel or unusual).

Before evaluating the four *Bullock* factors as they apply to MCL 750.520n and MCL 791.285, however, the People will recount the narrow circumstances in which this Court has found a sentence to violate the State's protection against cruel or unusual punishment.

2. This Court's cruel or unusual punishment jurisprudence has applied only to a few limited circumstances, generally life sentences for young people, lengthy imprisonment for standalone drug crimes, and sex offender registration for offenses without a sexual component.

The Court has been circumspect in its application of Article 1, § 16, finding only a handful of sentences to constitute cruel or unusual punishment. This Court's modern cruel-or-unusual punishment cases generally fall into three categories: (1) life imprisonment for juveniles, (2) extremely long imprisonment for certain drug

crimes, and (3) as applied to sex offender registration for offenses without a sexual component.

A series of cases bar automatic life imprisonment for juveniles and 18-year-olds for murder. In 2012, observing that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes," the U.S. Supreme Court held that mandatory life-without-parole sentences were prohibited by the federal constitution. *Miller v Alabama*, 567 US 460, 472 (2012); *id.* at 489 ("[A] judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.").

Relying on our state constitution, this Court found that similar considerations rendered life sentences for 18-year-olds unconstitutional absent specific findings. *Parks*, 510 Mich at 255 ("[M]andatorily subjecting 18-year-old defendants to life in prison, without first considering the attributes of youth, is unusually excessive imprisonment and thus a disproportionate sentence that constitutes 'cruel or unusual punishment.' "). And in *People v Stovall*, the Court found it was cruel or unusual to sentence a juvenile convicted of second-degree murder to life imprisonment. 510 Mich 301, 307–308 (2022). Each of these cases hinged on the distinct attributes of youth as essential to the calculus of whether these severe punishments were authorized by our Constitution. *Parks*, 510 Mich at 244; *Stovall*, 510 Mich at 314–315.

Each challenged punishment, of course, is evaluated on a case-by-case basis. But it is highly instructive that, for this line of cases, only the most severe punishment (mandatory life imprisonment) coupled with the "diminished culpability" and "greater prospects for reform" that attend youth, *Parks*, 510 Mich at 235, have yielded constitutional infirmity.

The second general area in which this Court has found punishments to be cruel or unusual is lengthy imprisonment for drug crimes. In the flagship case for Michigan's Article 1, § 16` jurisprudence, *People v Lorentzen*, 387 Mich 167 (1972), this Court announced the governing standard and laid the groundwork for the four-part test set forth above. At the time, Michigan law mandated a 20-year minimum sentence (or about ten and a half with good behavior, *id.* at 181) for the sale of *any amount of marijuana*. *Id.* at 176. Upon surveying other crimes and their related sentences, this Court held that a 20-year minimum for the sale of marijuana "clearly fails to meet the test of proportionality." *Id.* at 178. The Court also found that such a severe punishment for that crime failed the "evolving standards of . . . decency test," as only one other state had as severe a sentence as Michigan, and a majority of states had either no mandatory minimum or a one-year minimum for the same crime. *Id.* at 179. Finally, it was "dubious" that a person convicted of selling marijuana would be any better a member of society after serving a lengthy prison sentence. *Id.* at 181.

Similarly, this Court held in *People v Bullock* that life-without-parole for the mere possession of 650 grams of cocaine constituted cruel or unusual punishment.

440 Mich 15, 41–42 (1992). While recognizing the commonality of "violent and other crimes in connection with illegal drugs," the Court emphasized that conviction of mere possession of cocaine required no "proof that the defendant committed, aided, intended, or even contemplated any loss of life or other violent crime, or even any crime against property." *Id.* at 39. Of primary importance was the individual culpability of the defendant's conduct. *Id.* at 39. And Michigan, again, stood as an outlier for the severity of punishment for this drug crime—"no other state in the nation imposes a penalty even remotely as severe as Michigan's for mere possession of 650 grams or more of cocaine." *Id.* at 40, citing *Harmelin v Michigan*, 501 US 957, 1026 (1991) (WHITE, J., dissenting). Of note, the Court limited the remedy: "ameliorate the no-parole feature of the [life-without-parole] penalty." *Id.* at 42.[3]

Finally, the third category in which this Court has found punishments to be cruel or unusual is sex offender registration for offenses without a sexual component. In *People v Lymon*, this Court held that registration under the Sex Offenders Registration Act (SORA), for offenses without a sexual component violated the Michigan Constitution's prohibition of cruel or unusual punishment.

[3] This Court has also held that mandatory life-with-parole for the *delivery* of over 650 grams of cocaine *did not* violate Article 1, § 16. In the wake of *Bullock*, this Court reversed the Court of Appeals application of *Bullock* to the mandatory life-without-parole imprisonment for delivery of more than 650 grams of cocaine, stating, "we did not hold in *Bullock* that the mandatory nonparolable life sentence for delivering over 650 grams of cocaine was cruel or unusual punishment under Const 1963, art 1, § 16. For the reasons explained in *Bullock* and reflected in the Legislature's enactment of separate sections governing possession and delivery, we conclude that delivery is a significantly more serious offense than mere possession." *People v Fluker*, 442 Mich 891, 892 (1993).

People v Lymon, ___ Mich ___; ___ NW3d ___ (2024) (Docket No. 164685); slip op at 37–38. Under the SORA, convictions for unlawful imprisonment of a minor, kidnapping of a minor, or child enticement required registration. MCL 28.722(r)(iii); (v)(ii); (v)(iii). The defendant, Lymon, was subjected to SORA's registration requirements based on his conviction for unlawful imprisonment of a minor, which Lymon committed while committing the other crimes of torture, felonious assault, and possession of a firearm during the commission of a felony. *Id.* at ___; slip op at 4–6. Neither the unlawful imprisonment of a minor, or the other offenses committed by Lymon, included a sexual component. *Id.* This Court reasoned that although the Legislature intended SORA to be a civil regulatory scheme, it constituted punishment as applied to offenses without a sexual component, and SORA's registration obligations were cruel or unusual punishment for unlawful imprisonment without a sexual component. *Id.* at ___; slip op at 10–38.

The *Lymon* court made the following findings under the *Bullock* factors. First, being subject to the sex-offender registry for an offense without a sexual component, was too severe in comparison to the gravity of the offense committed and was imposed in addition to the defendant's prison sentence for the other crimes. This factor weighed in favor of a finding of gross disproportionality. *Id.* at ___; slip op at 31–32. Second, the comparison of the defendant's non-sexual offenses to more-severe sexual offenses that resulted in similar duties under the SORA supported a conclusion that SORA as applied to a non-sexual offender was grossly disproportionate. *Id.* at ___; slip op at 32–34. Third, because Michigan is in the

majority of jurisdictions insofar as it includes certain non-sexual offenses within its sex-offender-registry law, this supported a determination that the defendant's duties were *not* grossly disproportionate. *Id.* at ___; slip op at 34–37. Fourth, and finally, application of SORA to non-sexual offenders did not support the goal of rehabilitation, which lead to a determination that the duties of the SORA were grossly disproportionate for non-sex offenders. *Id.* at ___; slip op at 37.

Further, the palpably ill-fit between Lymon's crimes, which did not include a sexual component, and the duty to comply with the SORA that is expressly designed to provide accurate, factual information to the public about sexual offenders, appears to underly the *Lymon* decision. For instance, the *Lymon* court stated,

> [a]lthough defendant's offense was undoubtedly severe, that offense contained no sexual element and no indication that defendant poses a risk of committing sexual crimes in the future. Nonetheless, for 15 years beyond the imprisonment served for his crimes, defendant is subject to the onerous requirements of a registry designed to "prevent[] and protect[] against the commission of future criminal sexual acts . . . ." MCL 28.721a. SORA, by identifying defendant as a sex offender, has subjected defendant to the same societal stigma and punishment as if defendant had committed a sexual offense. This is inconsistent with the principle that, "[t]o be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt." Defendant is not personally or morally responsible for having committed a sex offense, and yet SORA treats him as if he is. [*Id.* at ___; slip op at 32 (citations omitted).]

Alluding to the discussion below, no such ill-fit exists in this case where LEM applies only to certain sex offenders, see MCL 750.520n(1), and unlike Lymon, Martin is a sex offender.

Essentially, this Court has generally limited the protections against cruel or unusual punishment to circumstances related to life imprisonment for young

people, prolonged imprisonment for certain drug crimes, and sex offender registration as applied to offenses without a sexual component. This Court ought not extend the protection to the imposition of LEM on offenders who commit the most egregious sexual assaults under the law—CSC-I, or CSC-II against a small child, MCL 750.520n(1)—where (1) sex offenders, as a group or class, do not share the attributes of youth, or any other distinct attributes entitling them to individualized recidivism risk assessments as do juveniles, (2) CSC-I and CSC-II against a child under 13 are crimes against a person and inherently violent crimes like murder and unlike drug offenses, see MCL 777.16y and MCL 777.16p, (3) LEM bares no comparison to actual imprisonment in a correctional institution, as discussed below, and (4) the imposition of LEM is not ill-fitted or unsuitable for sex offenses, as discussed below.

3. Applying the *Bullock* factors, LEM is not cruel or unusual punishment.

Applying the *Bullock* factors, LEM is not cruel or unusual punishment under Michigan's Constitution, Const 1963, art 1, § 16.

First, the Court looks to the severity of the penalty imposed compared to the gravity of the offense. *Parks*, 510 Mich at 255, quoting *Bullock*, 440 Mich at 33–34, in turn citing *Lorentzen*, 387 Mich at 179–181. A conviction for CSC-I subjects the perpetrator to LEM. MCL 750.520n(1). For comparison, Michigan authorizes the imposition of *life imprisonment* for non-juvenile defendants who have committed CSC-I, MCL 750.520b(2)(a). And Michigan law *requires* a life-without-parole

imprisonment for the commission of a CSC-I where an adult has previously committed CSC against a child under 13, MCL 750.520b(2)(c). This presents the question: how could LEM—with the relative freedom to live, work, and travel—be unconstitutional, but a life term of imprisonment not be? No Michigan court has found lengthy term-of-years sentences for severe sexual assaults, like those committed by Martin, to be cruel or unusual punishment, so it would be puzzling for this Court to find that LEM for those crimes is cruel or unusual.

Regarding the relative freedom to live, work, and travel that LEM confers, the LEM requirements do not allow the government to exercise direct control over an offender's movements. Under LEM, an offender must wear the device. But by the terms of Michigan's statutory scheme and LEM agreement, offenders can go where they want, so long as he keeps the device charged and tracking. See (Def's Appeal Br, App'x B); MCL 750.520n; MCL 791.285. An offender can charge on any standard outlet he or she wants. And he or she can do it while sleeping, watching television, or eating breakfast. True, the device's connectivity requirement might keep an offender from going to areas without electricity for extended periods of time, but that kind of restraint on movement is incidental rather than direct.

Moreover, the onerousness of LEM on convicted sex offenders, who are sentenced to LEM because of their willing crimes and actions, pales in comparison to the short-term, long-term, and lifelong consequences that sexual assault survivors typically endure. For instance, "[s]exual violence can have long-term effects on victims," "[t]he likelihood that a person suffers suicidal or depressive

thoughts increases after sexual violence," "[p]eople who have been sexually assaulted are more likely to use drugs than the general public," "[s]exual violence [ ] affects victims' relationships with their family, friends, and co-workers," and sexual assault "[v]ictims are at risk of pregnancy and sexually transmitted infections (STIs)."[4] Statistically:

- 94 percent of women who have been sexually assaulted experience symptoms of post-traumatic stress disorder (PTSD) during the two weeks following the rape.
- 30 percent of women who have been sexually assaulted report symptoms of PTSD nine months after the encounter.
- 33 percent of women who have been sexually assaulted contemplate suicide.
- 13 percent of women who have been sexually assaulted attempt suicide.
- Approximately 70 percent of people who have been sexually assaulted experience moderate to severe distress, a larger percentage than for any other violent crime.
- 38 percent of people who have been sexually assaulted experience work or school problems, which can include significant problems with a boss, coworker, or peer.
- 37 percent of people who have been sexually assaulted experience family/friend problems, including getting into arguments more frequently than before, not feeling able to trust their family/friends, or not feeling as close to them as before the crime.
- 84 percent of people who have been sexually assaulted by an intimate partner experience professional or emotional issues, including moderate to severe distress, or increased problems at work or school.

[4] Rape, Abuse & Incest National Network (RAINN), *Victims of Sexual Violence: Statistics*, <https://rainn.org/statistics/victims-sexual-violence> (accessed January 13, 2025).

- 79 percent of people who have been sexually assaulted by a family member, close friend or acquaintance experience professional or emotional issues, including moderate to severe distress, or increased problems at work or school.

- 67 percent of people who have been sexually assaulted by a stranger experience professional or emotional issues, including moderate to severe distress, or increased problems at work or school.[5]

Additionally, sexual assault survivors are more likely to use drugs than the general public, specifically, they are 3.4 times more likely to use marijuana, six times more likely to use cocaine, and 10 times more likely to use other major drugs.[6]

Furthermore, the economic burden of "rape," defined as "any lifetime completed or attempted forced penetration or alcohol- or drug-facilitated penetration" is far-reaching, extending beyond the individual survivors to society.[7] The results of a 2016 study revealed that the estimated lifetime cost of rape was $122,461 per survivor, or a population economic burden of nearly $3.1 trillion (2014 U.S. dollars) over survivors' lifetimes, based on data indicating that greater than 25 million U.S. adults have been raped.[8] This estimate included $1.2 trillion (39 percent of total) in medical costs; $1.6 trillion (52 percent) in lost work productivity among victims and perpetrators; $234 billion (8 percent) in criminal justice activities; and $36 billion (1 percent) in other costs, including victim property loss or

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[5] *Id.*

[6] *Id.*

[7] Peterson, Cora et al, *Lifetime Economic Burden of Rape Among U.S. Adults*, American Journal of Preventive Medicine, Volume 52, Issue 6, 691–701, available at <https://www.ajpmonline.org/article/S0749-3797(16)30615-8/fulltext> (accessed January 13, 2025.)

[8] *Id.*

damage; government sources pay an estimated $1 trillion (32 percent) of the lifetime economic burden.[9]

Finally, the punishment of LEM is not ill-fitted or unsuitable for sex offenders like the duties of the sex offender registry as applied to non-sexual offenders, as determined by this Court in *Lymon*. *Lymon* ___ Mich at ___; slip op at 31–32.[10] Under MCL 750.520n, LEM only applies to persons convicted of first-degree criminal sexual conduct or second-degree criminal sexual conduct, when the victim is 13 years old or less and the defendant is 17 years old or older. MCL 750.520n. By contrast, as this Court observed in *Lymon*, the duties of sex offender registration under SORA applies primarily to sexual offenses, and the imposition of SORA registration on non-sexual offenders is rare. *Lymon* ___ Mich at ___; slip op at 31–33.

Moreover, unlike sex offender registration as applied to offenses with no sexual component, which carries "the same societal stigma and punishment as if

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[9] *Id.*

[10] In *Kardasz*, a companion case, the parties were ordered to address whether "requiring the defendant to register as a sex offender under the Sex Offenders Registration Act (SORA), MCL 28.721 et seq., as amended by 2020 PA 295, effective March 24, 2021 (the 2021 SORA), for the rest of his life constitutes cruel or unusual punishment under Const 1963, art 1, § 16 or cruel and unusual punishment under US Const, Am VIII[.]" *People v Kardasz*, 513 Mich 1118 (2024). In so far as SORA is being called into question as applied to sex offenders in *Kardasz*, the People adopt the position that the 2021 SORA and lifetime registration pursuant to it is *not* punishment as applied to sex offenders. The Legislature did not intend the 2021 SORA as a criminal punishment, and on balance applying the factors set forth in *Kennedy v Mendoza-Martinez*, 372 US 144, 168–169 (1963), the 2021 SORA is not punishment.

[the] defendant had committed a sexual offense[,]" the same is not true of LEM. *Id.* at ___; slip op at 32. Electronic monitoring, particularly the wearing of a tether or electronic monitoring device, is different from the public sex offender registry in that Michigan law permits the placement of electronic monitoring devices on a broad range of offenders, including felons on work release or house arrest, school release, probation, parole, and post-release supervision or post-conviction bond, as well as defendants on pretrial release, irrespective of any particular offense category. See MCL 771.3e; MCL 771.3f; MCL 765.6b(6).

Essentially, LEM is not unduly harsh as compared to the gravity of CSC-I and CSC-II against individuals less than 13 years of age. LEM is less severe than life imprisonment without parole or lengthy term-of-years prison sentences, which Michigan law permits for certain sex offenders, LEM is proportionate to the long-term, if not lifelong, negative impact which such sex offenses cause to survivors and society, and LEM is not an ill-fitting or unsuitable punishment for sex offenses.

Second, the Court evaluates the penalty imposed for the offense compared to penalties imposed on other offenders in Michigan. *Parks*, 510 Mich at 255, quoting *Bullock*, 440 Mich at 33–34, in turn citing *Lorentzen*, 387 Mich at 179–181. While LEM is specific to certain egregious criminal sexual conduct offenses, that targeted provision is consistent with compelling state interest of protecting citizens from dangerous sex offenders. *People v Betts*, 507 Mich 527, 558 (2021) ("The protection of citizens from potentially dangerous sex offenders is a compelling state interest in furtherance of the state's police powers.") (cleaned up).

Moreover, one cannot properly view the monitoring component in a vacuum. The Legislature's imposition of LEM for this narrow subset of serious crimes is presumably offset by the Legislature's imposition of shorter prison sentences. See *Hallak*, 310 Mich App at 581. The imposition of LEM is a substantially reduced punishment as compared to imprisonment within a correctional institution—it "does not prohibit defendant from traveling, working, or otherwise enjoying the ability to legally move about as he wishes." *Id.* at 582.

Third, the Court reviews the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states. *Parks*, 510 Mich at 255, quoting *Bullock*, 440 Mich at 33–34, in turn citing *Lorentzen*, 387 Mich at 179–181. "[N]early every state uses [GPS monitoring] to some degree." *Grady*, 372 NC at 514. According to the North Carolina Supreme Court, eleven states now authorize lifetime monitoring. *Id.* While Michigan is in the minority concerning *lifetime* monitoring, it is certainly not an "unusual" outlier. Unlike in *Bullock*, it is far from true that "no other state in the nation imposes a penalty even remotely as severe as Michigan's." *Bullock*, 440 Mich at 40; see also *Lorentzen*, 387 Mich 167 (only one other state had as severe a sentence as Michigan's 20-year penalty for the sale of any amount of marijuana).

Fourth, and finally, courts ask whether the penalty imposed advances the penological goal of rehabilitation, as well as "the need to prevent the individual offender from causing further injury to society." *Lorentzen*, 387 Mich at 180. Electronic monitoring helps guard against re-offense, see *Doe v Bredesen*, 507 F3d

998, 1007 (CA 6, 2007), but with significantly more freedom for the offender than imprisonment.[11] Passive GPS data may place a sex offender at the scene of a crime, allowing an agency to identify potential suspects or witnesses. A sex offender's alibi may be supported or discredited using such GPS data. The goal of rehabilitation dovetails with the goal of protecting society; both aim to stop the offender from perpetrating new offenses. Electronic monitoring serves these goals by discouraging offenders from engaging in criminal sexual behavior knowing that their location would be available to law enforcement, and that the evidence would be admissible to prove guilt.

It merits emphasis, too, that the possibility of re-offense is particularly concerning for offenders who have committed such damaging crimes like CSC-I or CSC-II against children under 13. While there is limited data related to re-offense rates because sex-based crimes are rarely reported, and even when they are reported, rarely result in conviction, reconviction data illustrates the relatively high levels of reconviction.[12] In "[p]erhaps the largest single study of sex offender

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[11] Of course, one cannot evaluate the rehabilitative potential in a vacuum—removing lifetime electronic monitoring from Michigan law would likely yield longer prisoner sentences, so the question is whether LEM better advances the goal of rehabilitation.

[12] As the Eastern District of Michigan observed in *Does v Whitmer*, opinion of the United States District Court for the Eastern District of Michigan, issued September 27, 2024 (Case no. 22-CV-102092), p 32:

> [D]etermining who is offense-free is a fraught undertaking, given the severe problem of underreporting of sex offenses. As Rachel Lovell, director of the Criminology Research Center at Cleveland State University, stated in her declaration: "[s]exual recidivism research based on official, court/administrative records from criminal justice

recidivism," "3.5 percent were reconvicted for a sex crime and about one-quarter (24 percent) were reconvicted for an offense of any kind during the [three-year] follow-up period."[13] Importantly, over longer periods of time—which is particularly relevant for the kind of long-term electronic monitoring challenged here—studies show that sexual recidivism increases *significantly*: in one study, "sexual recidivism rates increased from 14 percent after five years of follow-up to 24 percent after 15 years of follow-up;" in another, "sexual recidivism rates for treated offenders increased from 11.1 percent after three years of follow-up to 21.8 percent after 10 years of follow-up."[14] Long-term monitoring thus focuses on a cohort of offenders that have demonstrated a willingness to commit serious crimes and generally have a decided risk of committing such harmful crimes again over the long term. With electronic monitoring, offenders are permitted to reintegrate into the community,

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agencies provides biased and unrepresentative estimates of repeat sexual offending." Lovell Decl. ¶ 6 (Dkt. 128-19). According to Lovell, sexual assault "is the most underreported violent crime" in the country. Id. Only about a third of such offenses are reported to law enforcement and five percent or less result in a conviction. Id. Thus "sexual recidivism cannot be used interchangeably with repeat sexual offending." Id. ¶ 4. Lovell opines that one meta-analysis of 808 empirical studies reported sexual recidivism rates that varied from 0 to 68%. Id. ¶ 7. Lovell asserts that sexual recidivism estimates cannot be reliably used to determine if sexual offenders live offense-free. Id. at ¶ 9.

[13] U.S. 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#recr_find> (last accessed January 9, 2025).

[14] *Id.*

but with locational supervision that aids in protecting the public from offenders committing additional grievous and consequence-laden offenses.[15]

The goal of protecting society is also served through electronic monitoring, as it can help avoid the long-term negative affects suffered by victims. It should come as no surprise that victims of sexual assaults often suffer severely. See, e.g., *People v Bolden*, unpublished per curiam opinion of the Court of Appeals, issued March 21, 2024 (Docket No 362124), slip op at 12 ("[I]t is reasonable to assume, given the immense trauma that defendant's offense created, that the victim has also been sentenced to years of mental suffering and hardship, from which she may never fully recover. The only difference between the two parties in this case is that the victim, unlike defendant, did nothing to merit her lifetime sentence."). This common sense is augmented by research.

For example, a 2022 study found that the relationship between sexual violence and suicide created an approximately ten times higher rate of suicide attempt for victims of these kinds of crimes. See Health Science Reports ("Of the participants exposed to penetrating sexual violence, 49% stated that they had or had been diagnosed with depression, compared with 16% in the group not exposed to sexual violence. Similar findings were found for anxiety: 45% versus 12%; fatigue

[15] While elements of the Sex Offender Registration Act, MCL 28.721, will typically apply to those like Martin who have committed egregious sexual assaults, those requirements are separate and distinct from lifetime electronic monitoring.

syndrome 28% versus 9%; post-traumatic stress disorder 30% versus <0.1% and suicide attempts, *29% versus 3%.*") (Emphasis added.)[16]

In sum, the *Bullock* factors strongly support the conclusion that LEM under MCL 750.520n is not cruel or unusual punishment under Michigan's Constitution, Const 1963, art 1, § 16. This Court should deny Martin relief and leave to appeal on this basis.

B. LEM is not cruel *and* unusual punishment; on its face, MCL 750.520n does not violate the Eighth Amendment, US Const, Am VIII.

LEM is not cruel and unusual punishment; on its face, MCL 750.520n does not violate the Eighth Amendment, US Const, Am VIII. Article 1, § 16 of Michigan's Constitution is more restrictive and provides greater protections to the defendants than the Eighth Amendment based on its wording, i.e., the provision's use of "or" rather than "and," as is used in the Eighth Amendment. If a sentence is neither cruel *nor* unusual as prohibited by Michigan's Constitution, then it necessarily is not cruel *and* unusual as prohibited by the Eighth Amendment. For the reasons expressed above, LEM is not cruel or unusual punishment, therefore it necessarily is not cruel and unusual punishment in violation the Eighth Amendment.

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[16] Carlsson, Owen, and Rajan, *Sexual violence, mental health, and suicidality—Results from a survey in cooperation with idea-driven organizations and their social media platform followers*, Health Science Reports (2022 Dec 2; 6(1):e973), available at <https://onlinelibrary.wiley.com/doi/epdf/10.1002/hsr2.973> (accessed January 13, 2025.)

1. The Eighth Amendment's prohibition against cruel and unusual punishment

The Eighth Amendment of the U.S. Constitution provides: "Excessive bail shall not be required . . . nor cruel and unusual punishments inflicted." US Const, Am VIII. The provision is applicable to the States through the Fourteenth Amendment. *Furman v Georgia,* 408 US 238, 239 (1972); *Robinson v California,* 370 US 660, 666–667 (1962); *Louisiana ex rel Francis v Resweber,* 329 US 459, 463 (1947).

"The Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.' " *Miller v Alabama*, 567 US 460, 469 (2012), quoting *Roper v Simmons*, 543 US 551, 560 (2005). "The right flows from the basic " 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' " *Roper*, 543 US at 560, quoting *Atkins v Virginia*, 536 US 304, 311 (2002), in turn quoting *Weems v United States,* 217 US 349, 367 (1910). The U.S. Supreme Court has repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment. See *Harmelin,* 501 US at 997–998 (KENNEDY, J., concurring in part and concurring in judgment); see also *id.,* at 1009–1011 (WHITE, J., dissenting).

Nonetheless, the federal constitution does not require strict proportionality between a crime and its punishment because there is no constitutional right to individualized sentencing. *Harmelin*, 501 US at 965, 995; *United States v Marks*, 209 F3d 577, 583 (CA 6, 2000). Rather, the federal constitution forbids criminal sentences that are *grossly disproportionate* to the underlying offense. *United States*

v Polk, 546 F3d 74, 76 (CA 1, 2008); *United States v Gross,* 437 F3d 691, 692–693 (CA 7, 2006). "Consequently, only an extreme disparity between crime and sentence offends the Eighth Amendment." *Marks*, 209 F3d at 583; see also *Lockyer v Andrade*, 538 US 63, 77 (2003) (gross disproportionality principle applies only in the extraordinary case); *Ewing v California*, 538 US 11, 36 (2003) (principle applies only in " 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality'") (quoting *Rummel v Estelle*, 445 US 263, 285 (1980)).

The Eighth Amendment " 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' " *Atkins*, 536 US at 311–312, quoting *Trop v Dulles,* 356 US 86, 100–101 (1958). Punishment may not be "barbarous[,]" nor may it contravene society's "evolving standards of decency." *Rhodes v Chapman*, 452 US 337, 345–346 (1981). Proportionality review under those evolving standards should be informed by " 'objective factors to the maximum possible extent,' " see *Harmelin,* 501 US at 1000 (quoting *Rummel v Estelle,* 445 US 263, 274–275 (1980)).

In *Solem v Helm,* 463 US 277, 290–292 (1983), the Supreme Court identified three relevant criteria in reviewing a claim that a sentence is disproportionate and cruel and unusual under the federal constitution:

(1) the nature of the crime and the punishment imposed,

(2) the punishment for other offenses in this jurisdiction, and

(3) the punishment for similar offenses in other jurisdictions.

Id. The three factors that courts consider in this examination are identical to the first three *Bullock* factors under the Michigan test.[17] *Bullock*, 440 Mich at 33–34; see also *Parks*, 510 Mich at 255.

2. LEM is not cruel and unusual punishment.

LEM is not cruel and unusual punishment under the Eighth Amendment. Const 1963, art 1, § 16, provides broader protection than the Eighth Amendment. *People v Bowling*, 299 Mich App 552, 557, n 3 (2013). Therefore, if a sentence "passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *Id.* (quotation marks and citations omitted); see also *People v Tucker*, 312 Mich App 645, 655 (2015), quoting *People v Nunez*, 242 Mich App 610, 618 n 2, (2000). LEM passes muster under the Michigan Constitution, for the reasons expressed above. Therefore, it necessarily passes muster under the Eighth Amendment. See *Bowling*, 299 Mich App at 557, n 3. And even if Martin's federal claim were not essentially subsumed within the stricter state constitutional provision, the People's analysis reveals that lifetime electronic

[17] In *Harmelin,* which was a plurality opinion, five justices rejected the full three-part test above. See *Harmelin,* 501 US at 964–990, 997–1005. However, seven justices in *Harmelin* supported a continued "proportionality analysis" for alleged cruel and unusual punishment. *Id.* at 997–1005, 1018–1028. Accordingly, federal courts have interpreted *Solem* and *Harmelin,* read together, to mean that a threshold inquiry must be made to determine if a sentence is grossly disproportionate to an offense, and only if this threshold question is answered in the affirmative do the remaining two *Solem* factors need to be considered. See *McGruder v Puckett,* 954 F2d 313, 315–316 (CA 5, 1992), *Smallwood v Johnson*, 73 F3d 1343, 1347 (CA 5, 1996), and *United States v Wiley*, 132 Fed Appx 635, 643 (CA 6, 2005).

monitoring is not an "extreme sentence[ ]" that is "grossly disproportionate to the crime." *Graham,* 560 US at 60 (quotation marks and citation omitted).

In sum, LEM under MCL 750.520n is not cruel and unusual punishment under the Eighth Amendment. This Court should deny Martin relief and leave to appeal on this basis.

C. The lack of individualized assessment of a defendant's recidivism risk or a mechanism for removing the monitoring requirement does not render LEM cruel and/or unusual punishment.

The lack of individualized assessment of a defendant's recidivism risk prior to the imposition of LEM and the lack a mechanism for removing the monitoring requirement do not render LEM cruel and/or unusual punishment under Const 1963, art 1, § 16 or the Eighth Amendment.

1. The lack of individualized assessment of a defendant's recidivism risk does not render LEM cruel and/or unusual punishment.

LEM is not cruel and/or unusual punishment merely because there is no individualized assessment of the defendant's recidivism risk prior its imposition.

As an initial observation, the Michigan Legislature has rejected such individualized assessments as applied to sex offenders. MCL 28.721a states:

> *The [L]egislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state.* The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and

> effective means to monitor those persons who pose such a potential danger.

(Emphasis added.) MCL 28.721a is part of the Sex Offenders Registration Act (SORA); the statute's language makes it clear that the Legislature enacted SORA to prevent further crime by persons "who have engaged in sexually predatory conduct and who, by virtue of relatively high recidivism rates among such offenders, are recognized to be resistant to reformation and deemed to pose potential danger of repeat misconduct . . . ." *People v Pennington*, 240 Mich App 188, 195 (2000) (quotation marks and citation omitted; alteration in original). At no point has the Michigan Legislature evinced an intent to impose individualized assessments of the recidivism risk for sex offenders. The Sixth Circuit recently found that individualized review is not required for SORA registration under the Due Process Clause. *Does v Whitmer*, opinion of the United States District Court for the Eastern District of Michigan, issued September 27, 2024 (Case no. 22-CV-102092), p 23.

Second, individualized assessments are unnecessary precisely because sex offenders, as a group or class, have a relatively high rate of re-offense and recidivism. "Perhaps the largest single study of sex offender recidivism to date" found that 5.3 percent of the entire sample of sex offenders were rearrested for a sex offense during the three-year follow-up period; the violent and overall arrest rates for the entire sample of sex offenders were much higher: 17.1 percent of sex offenders were rearrested for a violent crime and 43 percent were rearrested for a

crime of any kind during the three-year follow-up period.[18] Further, the same study found that 3.5 percent were reconvicted for a sex crime and about one-quarter (24 percent) were reconvicted for an offense of any kind during the three-year follow-up period.[19]

Furthermore, the 2023 list of sexual offenders in Michigan has a reconviction rate for a second registrable sexual offense of approximately 10 percent.[20] The fact that approximately 10 percent of Michigan's listed sexual offenders committed a new offense merits some further consideration, because it demonstrates that the figure of *re-offense* as against *reconviction* is far higher than 10 percent. It is an undisputed fact that victims of sexual violence radically underreport their crimes, and thus relying on an offender's subsequent criminal history of either arrest or conviction *understates* the true level of re-offending:

> Researchers have long acknowledged that recidivism rates based on criminal justice data underestimate actual rates of reoffending. [Criminal Justice Review, Georgia State University, *Sex Offender Recidivism: Some Lessons Learned From Over 70 Years of Research*, p 15.][21]

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[18] U.S. 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#recr_find> (accessed January 13, 2025).

[19] *Id.*

[20] See *People v Johnson* (Docket No. 165814 (entry no. 57)), MSP Amicus Brief, filed Aug 11, 2023, Ex H, Affidavit of Sharon Jegla, February 7, 2023 (stating, "of the approximately 44,000 registrants, more than 10% or 5,268, had a subsequent registrable offense.").

[21] Available at <https://journals.sagepub.com/doi/full/10.1177/07340168231157385> (accessed January 31, 2025).

Additionally, according to the 2018 National Crime Victimization Survey (NCVS), only 40 percent of rapes and sexual assaults were reported to police in 2017, and only about 25 percent were reported to police in 2018.[22]

Essentially, sex offender reconviction and rearrest data do not account for the vast number of sexual assaults that are unreported, which is most sexual assaults. To reiterate, only 25 percent of the crimes result in a report to the police, and then a smaller group results in arrests, which works out to single digits of arrests resulting from all sexual crimes. And the number of convictions is even smaller than that. Thus, in short, the actual percentage of sexual *re-offenses* for Michigan's registrants is *far higher* than 10 percent.

Third, the mandatory nature of LEM pursuant to MCL 750.520n, which is punishment and part of the sentence itself, see *Cole*, 491 Mich at 327, is indistinguishable from other statutorily mandated punishments. In Michigan, outside of the context of mandatory life without parole as applied to juveniles and 18-year-olds, no other legislatively determined sentence allows for an individualized assessment of an offender's risk for recidivism; it follows that such an assessment is not required in the case of LEM, which is also a legislatively determined punishment and sentence.

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[22] Morgan, R., & Oudekerk, B., *Criminal victimization, 2018*, U.S. Department of Justice, Bureau of Justice Statistics, available at <https://www.nsvrc.org/sites/default/files/2021-04/cv18.pdf> (accessed January 30, 2025).

Put differently, in Michigan, if a crime has a mandatory determinate penalty or a mandatory penalty of life imprisonment, courts are required to impose that penalty. MCL 769.34(5). The sentencing guidelines are inapplicable to mandatory sentences. *Id.* For instance, certain homicide and nonhomicide crimes are generally punishable under Michigan law by mandatory life imprisonment without the possibility of parole (except as applied to juveniles and 18-year-olds). See MCL 791.234(6)(a)–(f). See generally *Miller*, 567 US at 489, *Graham v Florida*, 560 US 48, 82 (2010), and *Parks*, 510 Mich at 266. In fact, "[m]andatory life without parole is the *most* severe sentence available in Michigan . . . [and] other than the death penalty, it is the most severe sentence still available in the whole country." *Parks*, 510 Mich at 257 (emphasis in original). This presents the question: how could LEM violate Const 1963, art 1, § 16 and the Eighth Amendment based solely on the lack of individualized recidivism risk assessments, but other mandatory penalties, including life without parole, the *most* severe penalty in Michigan, which *also* do not allow for such assessments, be constitutional? The answer is clear: LEM is not unconstitutional on this basis.

Finally, as noted above, serious sex offenders do not share the attributes of youth, or any other distinct attributes entitling them to individualized recidivism risk assessments. Further, CSC-I and CSC-II against a child under 13 are as crimes against a person and inherently violent crimes like murder and unlike drug offenses, see MCL 777.16y and MCL 777.16p. Further, LEM is not an ill-fitting

punishment for sex offenders, as this Court found SORA registration to be as applied to non-sexual offenders. See *Lymon* ___ Mich at ___; slip op at 32.

Overall, LEM is not cruel and/or unusual punishment under Const 1963, art 1, § 16 or the Eighth Amendment merely because there is no individualized assessment of the defendant's recidivism risk prior to its imposition.

2. LEM is not cruel and/or unusual punishment merely because there is no mechanism for removing the monitoring requirement.

LEM is not cruel and/or unusual punishment merely because there is no mechanism for removing the monitoring requirement.

Again, in Michigan, LEM constitutes "punishment" that "is part of the sentence itself." *Cole*, 491 Mich at 327. Under ordinary circumstances, or really any other circumstance, criminal defendants cannot simply remove their punishments or sentences. At most, a defendant sentenced to a prison term may become eligible for parole, which comes with its own set of restrictions, and defendants sentenced to mandatory life without parole never have such an outlet. It follows that a removal mechanism is not necessary for LEM to be constitutional.

LEM is not cruel and/or unusual punishment under Const 1963, art 1, § 16 or the Eighth Amendment merely because there is no mechanism for removing the monitoring requirement. This Court should deny Martin relief and leave to appeal on this basis.

II. As applied to Martin, who twice sexually assaulted his five-year-old step-granddaughter as an adult man in his mid-fifties, LEM is not cruel and/or unusual punishment.

LEM is also not unconstitutional as applied to Martin under either the Michigan Constitution or the federal Constitution, given the gravity and deeply injurious nature of the harms he imposed on his young step-granddaughter. These are crimes of the gravest nature, worthy of some of the most serious penalties under Michigan law.

A. As applied to Martin, LEM is not cruel *or* unusual punishment.

As applied to Martin, who twice sexually assaulted his five-year-old step-granddaughter as an adult man in his mid-fifties, LEM is not cruel or unusual punishment under Michigan's Constitution, Const 1963, art 1, § 16.

As discussed above, to determine whether a punishment is cruel or unusual, courts assess whether it is "unjustifiably disproportionate" to the offense committed by considering the *Bullock* factors: (1) the harshness of the penalty compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed for other offenses in Michigan, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the goal of rehabilitation. *Bullock*, 440 Mich at 30, 33–34, citing *Lorentzen*, 387 Mich at 179–181; see also *Parks*, 510 Mich at 255.

First, the harshness of the penalty, LEM, is proportionate to the gravity of Martin's offenses. See *id.* As an initial observation, Martin does not challenge his

prison sentences, and he may serve up to 40 years for CSC-I. Maxing out would put him in his late nineties, an advanced age. This presents the question: how could LEM—with the relative freedom to live, work, and travel—be unconstitutional, but his effective life term of imprisonment not be? No Michigan court has found lengthy term-of-years sentences for severe sexual assaults, like those committed by Martin, to be cruel or unusual punishment, so it would be puzzling for this Court to find that LEM for those crimes is cruel or unusual.

Next, the circumstances of Martin's offense support a finding that LEM is not an unduly harsh penalty. Martin's convictions stem from his relationship with the victim, K.E., who was just five years old at the time of the assaults; Martin was approximately 55 years old. (8/4/21 Trial Tr, p 66.) Martin was K.E.'s step-grandfather, and K.E. referred to Martin as her "grandpa." (*Id.*, pp 35, 53.) Martin cultivated a relationship with K.E. by visiting her home, where she lived with her parents, Jasmine and Christopher, at least two or three times per week, and by, essentially, befriending K.E. (*Id.*, pp 34–36, 39, 54.) During visits, Martin played with K.E. in her bedroom, the bathroom and outside; they would play "jail" and "shopping" or "store," and Martin read to K.E. (*Id.*, pp 36, 39, 54.) K.E.'s parents apparently trusted, or came to trust, Martin, as there were times when K.E.'s parents permitted Martin to play with K.E. alone and out of their sight. (*Id.*, pp 37, 45–46, 55.) After building a relationship with K.E., and gaining her parents' trust, Martin twice sexually assaulted her. During one instance, K.E. was laying on her bed in her bedroom and Martin pulled off her clothing. (*Id.*, pp 66–67.) Martin then

touched K.E.'s vagina with his hand or fingers. (*Id.*, p 67.) In a second instance, Martin put his tongue on K.E.'s vagina while she was laying down in the bathtub at home. (*Id.*, p 68.) K.E.'s behavioral therapist, Megan Koss, testified at trial that K.E. suffered from nightmares and was afraid that Martin would escape from jail and assault her again. K.E. reported nighttime fears that her stuffed animals would perpetrate sexual acts against her. (*Id.*, pp 125–126.) When asked, Koss testified that K.E. told her that Martin "performed oral sex to her while she was made to watch pornography." (*Id.*, p 129.) Koss further testified that K.E. suffered symptoms consistent with post-traumatic stress disorder (PTSD), including nightmares, difficulty concentrating, difficulty following directions, hypervigilance, and jumpiness. (*Id.*, pp 130–131.)

On these facts, LEM is not unduly harsh considering the gravity of Martin's sexual crimes against K.E., who was a small child at the time. In general, sexual offenses involving children under 13 years of age are some of the gravest offenses that occur in Michigan. Sexual assault of not just a minor, but a child under the age of 13, is a horrific crime that will likely scar a young victim emotionally and psychologically for the long-term, if not a lifetime. See Argument I.B.1.c. (discussing statistics). Here, K.E. already began to suffer her probable lifetime of emotional and psychological damage by the point of trial, three years after the sexual assaults, as evidenced by nightmares, fears, and various symptoms of PTSD. (8/4/21 Trial Tr, pp 125–131.)

Furthermore, Martin's sexual penetration of K.E., as her step-grandfather, is not far removed from what the Court of Appeals has deemed the most egregious form of sexual assault: CSC-I committed by a parent against the parent's own child. See *People v Sabin (On Second Remand),* 242 Mich App 656, 662–663 (2000) (holding that a "defendant's rape of his own minor child represents one of the most egregious forms of the crime of first-degree criminal sexual conduct because of the helplessness and harm to the victim when so abused by a parent.") K.E. was similarly helpless during the instances when her parents entrusted her to Martin's exclusive immediate presence and supervision, instances which gave Martin opportunity to perpetrate his sexual assaults. LEM, which confers Martin the relative freedom to live, work, and travel, is not disproportionate to the seriousness of his offenses, which conferred a probable lifetime of suffering on K.E. See *Parks*, 510 Mich at 255, quoting *Bullock*, 440 Mich at 33–34, in turn citing *Lorentzen*, 387 Mich at 179–181.

Second, the penalty imposed, LEM, is a substantially reduced punishment as compared to penalties imposed for other offenses in Michigan. See *Parks*, 510 Mich at 255, quoting *Bullock*, 440 Mich at 33–34, in turn citing *Lorentzen*, 387 Mich at 179–181. This is a patently objective consideration not particular to Martin, so the People rely on their above argument. See Argument section I.B.1.c. (discussing Martin's facial challenge to MCL 750.520n, applying the *Bullock* factors to Martin's claim that LEM is cruel or unusual punishment, and arguing that the imposition of

LEM is a substantially reduced punishment as compared to imprisonment within a correctional institution, a penalty imposed for other felony offenses in Michigan).

Third, LEM is not an unusual penalty as compared to the penalty imposed for the same offense in other states. See *Parks*, 510 Mich at 255, quoting *Bullock*, 440 Mich at 33–34, in turn citing *Lorentzen*, 387 Mich at 179–181. This too is a patently objective consideration not particular to Martin, so the People rely on their above argument. See Argument section I.B.1.c. (discussing Martin's facial challenge to MCL 750.520n, applying the *Bullock* factors to Martin's claim that LEM is cruel or unusual punishment, and arguing that while Michigan is in the minority concerning LEM, it is not an unusual outlier).

Fourth, the penalty imposed advances the penological goal of Martin's rehabilitation, as well as the need to prevent Martin from causing further injury to society. See *Lorentzen*, 387 Mich at 180. Based on the evidence admitted at trial, Martin has a long history, or exhibited an ongoing pattern, of sexually assaulting minors, which evinces the need to prevent Martin from causing further injury to society and to rehabilitate Martin. Not only was it proven beyond a reasonable doubt that Martin sexually assaulted his five-year-old step-granddaughter, K.E., in 2018, but multiple other acts witnesses testified about being sexually assaulted by Martin, including Martin's niece through marriage, J.H., Martin's daughter J.M., and another one of Martin's step-granddaughters, M.M. Briefly, J.H. testified that in 1994, Martin, who was a father-figure to her, digitally penetrated her vagina with his fingers while she was sleeping over at his home; the assault lasted for 10 to

25 minutes, and then 14-year-old J.H. lied there, paralyzed in fear. (8/4/21 Trial Tr, pp 71–79.) J.M. testified that Martin routinely touched her underneath her pants without penetration from the time she was eight years old in 2003,[23] to the time she was age 12, 13, or 15, that Martin made lewd comments toward her and smacked her butt from the time she was eight years old until 2013, when she was in high school, and Martin forced her to watch him receive oral sex from her stepmother on one occasion. (*Id.*, pp 80–84.) Finally, M.M. testified that in 2001, when she was five or six years old and visiting Martin's home, Martin put his mouth and hands on her vagina and digitally penetrated her vagina. (*Id.*, pp 91–94; 1/11/21 Hr'g Tr, p 7.) LEM will help deter Martin from engaging in criminal sexual behavior, a necessary component of his rehabilitation, as well as help protect society from Martin because Martin's location will be available to law enforcement, the location evidence would be admissible to prove Martin's guilt if he were tried for another offense, and Martin will know his location is being tracked when deciding whether to re-offend.

Additionally, Martin's circumstances as an offender evince the need to protect society from Martin and to rehabilitate Martin. According to the presentence investigation report (PSIR) prepared by the Michigan Department of Corrections (MDOC) in relation to Martin's convictions,[24] Martin was on felony probation when

[23] J.M. was age 26 at the time of trial in 2021; she would have been eight years old in 2003.

[24] The People file separately a copy of Martin's presentence investigation report, or PSIR, in connection to the sentencing offenses as confidential material.

he committed the instant offenses. (PSIR, CFJ-284, p 1.) Martin had his bond revoked because he had contact with an underage female. (PSIR, CFJ-284, p 2.) On his COMPAS[25] assessment, Martin scored "probable" for having a criminal personality. (PSIR, CFJ-284, p 1.) Finally, Martin did not express any remorse for his actions when given the opportunity at sentencing or in his statement (description of the offense) in his PSIR, despite his convictions. (9/3/21 Sent Tr, p 9.); (PSIR, CFJ-284, p 4.).

In sum, the application of the *Bullock* factors shows that LEM is not cruel or unusual punishment as applied to Martin. Further, as discussed above, the Court has been circumspect in its application of Article 1, § 16, finding only a handful of sentences to constitute cruel or unusual punishment. See Argument section I.B.1.b. This Court's modern cruel-or-unusual punishment cases primarily fall into three categories: (1) life imprisonment for juveniles, (2) extremely long imprisonment for certain drug crimes, and (3) the sex offender registry as applied to non-sexual offenses. See *id.* The imposition of LEM on Martin for twice sexually assaulting his

[25] The COMPAS software tool creates a risk assessment intended to measure the "likelihood of future Violent or Non-Violent Felony Offenses." MDOC, Field Operations Administration, *Administration and Use of COMPAS in the Presentence Investigation Report* (March 2017), p 10, available at <https://www.michbar.org/file/news/releases/archives17/COMPAS-at-PSI-Manual-2-27-17-Combined.pdf> (accessed January 13, 2025). This assessment is created through a proprietary algorithm that takes data inputs including criminal history, age, employment status, education level, community ties, substance abuse, and more. The algorithm's output is an assessment that purports to represent the probability a defendant will engage in future criminal conduct. See generally *Administration and Use of COMPAS*; see also *State v Loomis*, 371 Wis 2d 235, 245 (2016).

five-year-old step-granddaughter as an adult man in his mid-fifties does not fall into either category. This Court should deny Martin relief and leave to appeal on this basis.

B. As applied to Martin, LEM is not cruel *and* unusual punishment

As applied to Martin, LEM is not cruel and unusual punishment in violation of the Eighth Amendment.

Courts considering an as-applied challenge to a punishment under the United States Constitution examine all the circumstances of a defendant's case to determine if the punishment is "grossly disproportionate" to the offense. *Graham v Florida*, 560 US 48, 60 (2010). The three factors that courts consider in this examination are identical to the first three factors under the Michigan test. *Bullock*, 440 Mich at 33–34; see also *Solem,* 463 US at 290–292.

As indicated above, because the Michigan Constitution's protection from cruel *or* unusual punishment is broader than the United States Constitution's protection from cruel *and* unusual punishment, "if a particular punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *Tucker*, 312 Mich App at 654 n 5 (quotation marks and citation omitted); see Argument section I.B.2. And even if Martin's federal claim were not essentially subsumed within the stricter state constitutional provision, the People's analysis reveals that lifetime electronic monitoring is not an "extreme

sentence[ ]" that is "grossly disproportionate to the crime." *Graham,* 560 US at 60 (quotation marks and citation omitted).

Therefore, as applied to Martin, LEM is not cruel and unusual punishment in violation of the Eighth Amendment. This Court should deny Martin relief and leave to appeal on this basis.

III. Lifetime electronic monitoring is not an unreasonable search in violation of Michigan's Constitution, Const 1963, art 1, § 11, or the Fourth Amendment, US Const, Am IV.

Lifetime electronic monitoring is not an unreasonable search in violation of Michigan's Constitution, Const 1963, art 1, § 11, or the Fourth Amendment, US Const, Am IV.

In Michigan, lifetime electronic monitoring constitutes "punishment" that "is part of the sentence itself." *Cole*, 491 Mich at 327. In other words, unlike in sister states, when Martin is released from his prison term, he is not an otherwise free man who has served his debt to society. Rather, while subject to monitoring, he would be serving his sentence, and therefore possesses a reduced privacy interest.

And his reduced privacy is counterweighted by the overwhelming state interest of protecting Michiganders—largely women and young children—from grievous sexual assault. As discussed above, social science shows that the likelihood of sexual re-offense increases over time. As time advances, sexual offenders become more and more likely to commit sex-based offenses. Thus, indefinite monitoring targets that danger by extending it over the course of the offender's life, but it does not intrude on offenders' privacy as compared to

imprisonment, probation, or parole. Instead, monitoring permits offenders to largely live, work, and play without restriction, but with the vital assurance to the State that an offenders' crimes will be easier to uncover and prove.

Consistent with this analysis, this Court should not overrule the prior decision of the Court of Appeals in *People v Hallak*, 310 Mich App 555 (2015), which rejected a similar claim to the one pressed here.

A. Whether a search is unreasonable depends on the individual's privacy interest balanced against the government's interest in conducting it.

In *Grady v North Carolina*, the U.S. Supreme Court held that "nonconsensual satellite-based monitoring" constitutes a search under the Fourth Amendment. 575 US 306, 308 (2015). Looking to its precedent, the Court determined that whether this kind of monitoring is civil or criminal in nature was not dispositive; rather, it held, "a State . . . conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." *Id.* at 309. Because Michigan's challenged monitoring program does that very thing, it is a "search" under *Grady*.

But that is only the beginning of the inquiry. The unanswered question is whether LEM constitutes an *unreasonable* search. *Id.* at 310 ("The Fourth Amendment prohibits only *unreasonable* searches.") (emphasis in original). A search's reasonableness "is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Samson*

v California, 547 US 843, 848 (2006), quoting *United States v Knights,* 534 US 112, 118–119 (2001). See also *Vernonia Sch Dist 47J v Acton*, 515 US 646, 652–653 (1995) (describing it as a "balancing" inquiry). As applied to criminal defendants in Michigan, LEM does not constitute an unreasonable search in violation of Const 1963, art 1, § 11 or the Fourth Amendment, as explained below.

B. Unlike in Georgia and North Carolina, this Court has made clear that electronic monitoring in Michigan is "punishment" that is "part of the sentence itself," which reduces an offenders' expectation of privacy.

Michigan law differs from North Carolina and Georgia law in an important and dispositive respect: while North Carolina mandated that certain "individuals *who have completed their sentences*" be subject to lifetime monitoring, *Grady*, 372 NC at 514 (emphasis added), and Georgia imposed it "after that person has *served the entirety of his or her criminal sentence*," *Park v State*, 305 Ga 348, 355 (2019) (emphasis added), Michigan's monitoring requirement "is *part of the sentence itself*," *Cole*, 491 Mich at 327 (emphasis added). In other words, electronic monitoring is a direct and automatic consequence of a conviction. *Id.* at 338. As this Court has made clear, electronic monitoring is both part of the sentence and constitutes punishment. *Cole*, 491 Mich at 336.

A long line of Supreme Court precedent establishes that a defendant who is subject to criminal punishment has a reduced Fourth Amendment privacy interest. See *Samson*, 547 US at 848–849. Although distinct from probation or parole, Michigan law recognizes that electronic monitoring *is* punishment and thus exists

"on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service." *Griffin v Wisconsin*, 483 US 868, 874 (1987). Because, in Michigan, electronic monitoring is "a form of criminal sanction imposed by a court upon an offender after verdict, finding, or plea of guilty," *id.*, individuals subject to monitoring do not enjoy the same full Fourth Amendment protections that are due the public at large.

The Supreme Court has envisioned a sliding scale of an individual's privacy interests depending on the nature of the punishment imposed. Unsurprisingly, those imprisoned in a correctional facility have no expectation of privacy in their cells. *Hudson v Palmer*, 468 US 517, 526 (1984). Parolees have a greater degree of Fourth Amendment protection than prisoners, though law enforcement may conduct a suspicionless search of a parolee's home, *Samson*, 547 US at 846, and probationers receive even more Fourth Amendment protection, see *United States v Knights*, 534 US 112, 121 (2001) (requiring only a "reasonable suspicion" to conduct a search of a probationer's house). Electronic monitoring sits on this "continuum" of punishments for which the level of Fourth Amendment protection is reduced. See *Griffin*, 483 US at 874.

Michigan's treatment of monitoring as a criminal punishment is not a small distinction to be disregarded or papered over. In *Park v State*, the Georgia Supreme Court repeatedly reiterated that its holding that lifetime electronic monitoring constituted an unreasonable search hinged on the fact that monitoring was imposed on individuals "who are *still serving a criminal sentence*." 305 Ga at 354 (emphasis

in original). The Court's ruling was, in fact, limited to finding an unreasonable search "with respect to individuals who have completed their criminal sentences." *Id.* at 353. This is consistent with U.S. Supreme Court precedent holding that individuals who have completed their criminal sentence typically have no diminished expectation of privacy—a person "who has completed the entirety of his or her criminal sentence" does not "have the same diminished privacy expectations as an individual who is *still* serving his or her sentence." See *id.* at 354 (emphasis in original).

The gravity of this distinction—comparing a person's privacy interest who has served their criminal sentence and who has not—played a major role in the Georgia Supreme Court's analysis. Indeed, in surveying other States' electronic monitoring laws, the Georgia Supreme Court went out of its way to distinguish Michigan law. *Id.* at 358. Recognizing that Michigan's statutes have passed constitutional muster, the Court found Georgia's scheme was distinct because it "does not include the GPS monitoring of sexually dangerous predators *as part of the offenders' actual sentences*." *Id.* (emphasis added), citing *People v Hallak*, 310 Mich App 555 (2015); see also *Cole*, 491 Mich at 336. The North Carolina Supreme Court similarly emphasized that a person who has "served his sentence, paid his debt to society, and had his rights restored," does not "automatically and forever" have a "significantly diminished" expectation of privacy. 372 NC at 534. The Court squarely rejected the State's argument that individuals "who have served their sentences . . . nevertheless have a diminished expectation of privacy." *Id.* at 533.

In short, individuals in Michigan subject to electronic monitoring as part of their punishment have a reduced expectation of privacy. Now, that reduced expectation must be balanced with the level of governmental intrusion as well as the search's service of governmental interests. See, e.g., *Vernonia Sch Dist 47J v Acton*, 515 US 646, 652–653 (1995) (reasonableness is viewed by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests").

C. The intrusion of the search is minimal in comparison to the diminished expectation of privacy, and it serves important public safety interests.

While electronic monitoring is a search, compared to other forms of punishment, it is not nearly as invasive and provides substantially less information than other forms of punishment.

Electronic monitoring does involve an intrusion on a person's privacy in that it monitors that person's movements, but it "just identifies locations; it doesn't reveal what the wearer of the device is doing at any of the locations." *Belleau v Wall*, 811 F3d 929, 936 (CA 7, 2016). The information obtained via monitoring may be substantial in volume, but it is narrow in the content gleaned from the search—it is functionally limited to the individual's placement on a map. Michigan's electronic monitoring program "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. And the U.S. Supreme Court held in *Smith v Doe* that a system allowing individuals "free[dom] to move where they wish and to live and work as

other citizens, with no supervision," is distinct from probation or supervised release. 538 US 84, 101 (2003). As the D.C. Circuit has recognized, "because the inquiry of the [GPS] data can be and is selectively limited" to location monitoring, the monitoring operates "*without* unnecessarily intruding into the offender's other activities at all." *United States v Jackson*, 214 A3d 464, 480 (DC, 2019) (emphasis in original).

It is of monumental importance to public safety to protect the citizenry from dangerous sexual assaults, the bulk of victims being women and children. *Betts*, 507 Mich at 558 ("The protection of citizens from potentially dangerous sex offenders is a compelling state interest in furtherance of the state's police powers.") (cleaned up). LEM applies only to perpetrators of the most egregious sexual assaults under the law: first-degree criminal sexual conduct, or second-degree sexual conduct against a child under 13. MCL 750.520n(1). This series of crimes includes sexual penetration against our youngest children, see MCL 750.520b(1)(a), such as Martin's penetration of K.E., and penetration achieved through the wielding of a weapon, MCL 750.520b(e), among other circumstances.

Through monitoring, the statute seeks to address the concern of recidivism among this cohort—a group that is made up exclusively of individuals who have committed among the gravest sex-based crimes under the law. "[T]he Fourth Amendment does not render the States powerless to address these concerns *effectively*." *Samson*, 547 US at 854 (emphasis in original). The U.S. Supreme Court "has repeatedly acknowledged" that States have a strong interest "in

reducing recidivism and thereby promoting reintegration and positive citizenship among probationers and parolees," that interest "warrant[s] privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." *Id.* at 853. And the monitoring links up tightly with the state interest: "GPS tracking is a uniquely valuable and effective tool for detecting whether a high-risk offender is committing crimes," among other things. *Jackson*, 214 A3d at 480. With rates of sexual re-offense increasing over longer and longer periods of time—studies show sexual re-offense increases from about five percent after three years to about 24 percent after 15 years[26]—the value of lifetime electronic monitoring becomes more and more apparent.

Given the reduced expectation of privacy, the targeted nature of the search, and the immense state interest in mitigating recidivism among those convicted of serious sexual assault, LEM does not subject criminal defendants convicted of serious sexual assault to an unreasonable search.

D. *Hallak* is correctly decided and should not be overruled.

[26] U.S. 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#recr_find> (accessed January 13, 2025).

Hallak should not be overruled.[27] Like here, the Court of Appeals reviewed whether lifetime electronic monitoring constituted cruel or unusual punishment or an unreasonable search. 310 Mich App at 566–581. The *Hallak* analysis largely tracks that of this briefing. As an initial point, the court determined that, under *Cole*, electronic monitoring is punishment that is part of the sentence itself. *Id.* at 569–571. But, as the People have demonstrated above, the *Hallak* Court recognized that electronic monitoring "addresses the significant concerns of rehabilitation and recidivism," and "ensure[s] that certain sex offenders will not again be in a position to exploit their potential victims," including "children, some of the most vulnerable individuals in our society." *Id.* at 573, 575. *Hallak* also noted the existence of at least ten similar monitoring regimes in other states. *Id.* at 575–577.

The *Hallak* Court also turned away the Fourth Amendment challenge. Post-*Grady*, the *Hallak* Court readily honored the U.S. Supreme Court's holding that satellite-based monitoring was a search, but rightly held that it was not an unreasonable one. 310 Mich App at 578–579. The Court first noted the Legislature's decision to impose electronic monitoring was to punish those convicted of serious sex-based offenses, deter them from re-offending, and protect "some of the most vulnerable in our society against some of the worst crimes known." *Id.* at 580. The Court balanced this significant state interest against Hallak's privacy interest. Hallak's protected privacy interest was reduced as compared to the average law-

[27] This Court reversed *Hallak* in part on other grounds, due to the development of the law concerning Michigan's sentencing guidelines. *People v Hallak*, 499 Mich 879 (2016), remanding for consideration of *People v Lockridge,* 498 Mich 358 (2015).

abiding citizen, and monitoring did "not prohibit defendant from traveling, working, or otherwise enjoying the ability to legally move about as he wishes." *Id.* at 581.

Because *Hallak* reached the right result and did so for the right reasons, this Court should deny Martin's application for leave to appeal.

CONCLUSION

For these reasons, the People respectfully request that this Court deny Daryl William Martin's application for leave to appeal.

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