COURT OF APPEALS
STATE OF NEW YORK

The People of The State of New York *Ex. Rel.* PETER A. BARTA, on Behalf of SHYHEID GIBSON,

Defendant-Appellant,

-against-

APL-2024-00060

LOUIS MOLINA, Commissioner, New York City Department of Correction

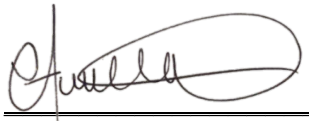
Respondent.

NOTICE OF MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE*

PLEASE TAKE NOTICE, that pursuant to the attached Affirmation of Arielle Reid, Esq., and the proposed *amicus curiae* brief, dated April 9, 2025, The Legal Aid Society will move this Court at 20 Eagle Street, Albany, New York, 12207, on April 21, 2025 for an order granting this motion for leave, pursuant to this Court's Rule of Practice § 500.23(a)(1), to appear as *amicus curiae* in the above captioned case, to file the proposed *amicus curiae* brief in support of the Defendant-Appellant.

Dated: April 9, 2025
New York, New York

Respectfully submitted,



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APL-2024-00060

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Respondent.

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE*

ARIELLE REID, an attorney admitted to practice law in the courts of New York, affirms the following to be true under penalty of perjury:

1. I am an attorney for The Legal Aid Society ("Legal Aid") and counsel for the proposed *amicus curiae* in this matter.
2. Pursuant to this Court's Rule of Practice 500.23(a)(1), Legal Aid requests permission to appear as *amicus curiae* in the above captioned case.
3. This case asks whether electronic monitoring is a "just and reasonable" condition that may be imposed upon a person entitled to release pursuant to C.P.L. § 30.30(2)(a). This Court's ruling will affect every case in which the prosecution fails to meet its speedy trial obligation, including cases in which

Legal Aid is likely to represent the accused.

Statement of Interest of Proposed *Amici Curiae*

4. Legal Aid has provided free legal services to low-income people in New York City since 1876. Legal Aid's Criminal Practice is committed to defending the constitutional and statutory rights of all people accused of crimes. As the primary provider of indigent criminal defense services in New York City, Legal Aid represents thousands of accused individuals throughout the adjudication of their criminal cases. In addition to this routine representation, Legal Aid's Decarceration Project conducts targeted advocacy on behalf of individuals whose pretrial freedom is restricted by physical detention or electronic monitoring. As a result, Legal Aid attorneys are aware of the tremendous adverse effects of electronic monitoring on clients subjected to it in the pretrial context.

Proposed Brief of *Amicus Curiae*

5. *Amicus* respectfully seek leave to file the proposed brief of *amicus curiae,* a copy of which is included with this submission as Exhibit A.
6. In the proposed brief, *amicus* argues that electronic monitoring is not a "just and reasonable" condition to impose upon an individual who is entitled to release from custody upon the state's failure to timely prosecute in accordance with C.P.L. § 30.30(2)(a).

7. In support of its position, *amicus* relies on an ever-growing body of research and first-hand accounts detailing the harms of electronic monitoring on individuals subjected to it. While electronic monitoring was intended to be an alternative *to* incarceration, it is widely experienced as an alternative *form of* incarceration by those on whom it is imposed, particularly where, as in the case before this Court, it requires home confinement.

8. *Amicus* further argues that the Legislature's understanding of this reality is reflected in the many statutory limitations imposed on electronic monitoring. Like monetary bail and remand, electronic monitoring's availability is tightly constrained to a list of eligible offenses. There are also heightened procedural mechanisms that must be adhered to prior to the imposition of an electronic monitoring order, as well as in the event of its alleged violation. This statutory scheme confirms that electronic monitoring is not comparable to the generic non-monetary conditions promulgated in the criminal procedure law.

9. It is these generic non-monetary conditions that *amicus* contends were contemplated as potentially reasonable options for the court to impose when granting release pursuant to C.P.L. § 30.30(2)(a). At the time of that statute's enactment in the 1970s, electronic monitoring had not yet been introduced into the criminal legal system. And even as it began to proliferate in the post-conviction context, New York did not permit its use pretrial until 2020. Fifty

years ago, the Legislature could not have anticipated the state's capacity to confine people in digital cages after ordering their release from prolonged detention in a physical one.

10. Little attention is paid in the parties' briefs to the realities of life on electronic monitoring, how it harms its wearers and their communities. However, that is necessary context in a case with such far-reaching implications. Thus, the proposed brief satisfies the criteria of this Court's Rule of Practice 500.23(a)(4) because it "identif[ies] . . . arguments that might otherwise escape the Court's consideration" and because it "would be of assistance to the Court."

Disclosure Statement

11. Pursuant to this Court's Rule of Practice 500.1(f), Legal Aid discloses that it is a non-profit 501(c)(3) organization and does not have parents, subsidiaries, or affiliates.
12. No party's counsel contributed content to the proposed brief or participated in the preparation of the proposed brief in any other manner.
13. No party or party's counsel contributed money that was intended to fund the preparation or submission of the proposed brief.
14. No other person or entity contributed money that was intended to fund the preparation or submission of the proposed brief.

Service

15. Service of this motion, affirmation, and proposed brief were made by facsimile transmission on Respondent and on Appellant on April 9, 2025. The Affidavit of Service is attached to this Affirmation as Exhibit B.

Dated: April 9, 2025
New York, New York

Respectfully submitted,

/s/ Arielle Reid

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Respondent.

BRIEF OF *AMICUS CURIAE* THE LEGAL AID SOCIETY IN SUPPORT OF DEFENDANT-APPELLANT

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DISCLOSURE STATEMENT

Pursuant to 22 N.Y.C.R.R. Part 500.1(f), The Legal Aid Society discloses that it is a nonprofit organization and does not have any corporate parents, subsidiaries, or affiliates.

INTEREST OF *AMICUS CURIAE*

The Legal Aid Society is the nation's oldest and largest private non-profit legal services agency, dedicated since 1876 to providing quality legal representation to low-income New Yorkers. It has served as the primary public defender in New York City since 1965 and, each year, represents tens of thousands of people who are arrested and unable to afford private counsel.

Housed within the Legal Aid Society is a first-of-its-kind pretrial detention specialty unit: The Decarceration Project. The project litigates on behalf of clients who have been detained in violation of the constitutional prohibition against excessive bail and the procedural mandates of New York's pretrial detention statutes. In addition to its litigation docket, the Project conducts state-wide trainings on New York's bail reform laws, consults on issues related to pretrial detention at both the local and national level, and works to shape pretrial detention policy in collaboration with critical stakeholders.

PRELIMINARY STATEMENT

The Legal Aid Society's Decarceration Project submits this amicus brief in support of New Yorkers entitled to release pursuant to C.P.L. § 30.30(2)(a). *Amicus* urges this Court to reverse the Second Department's decision below, which authorizes electronic monitoring as a "just and reasonable" condition of release upon the prosecution's failure to timely prosecute. This expansive reading of the speedy trial release mandate suggests a misapprehension of the true nature of electronic monitoring and subverts the legislative intent in permitting its use pretrial. Should the Second Department's decision stand, New Yorkers who have for decades been released on their own recognizance following protracted prosecutorial delay will instead face the continued degradation of electronic monitoring.

The appeal of electronic monitoring has grown exponentially in the wake of the 2020 bail reform legislation, which made the technology available for pretrial use for the first time in New York's history.[1] No longer able to set cash bail on certain offenses, courts were given the authority to impose electronic monitoring as an alternative form of carceral control.[2] As in many jurisdictions that have enacted

[1] *See* Ben Chapman, *New York City Uses Ankle Bracelets Instead of Jail Amid Coronavirus Pandemic*, WALL ST. J. (May 28, 2020), https://www.wsj.com/articles/new-york-city-uses-ankle-bracelets-instead-of-jail-amid-coronavirus-pandemic-11590689961.

[2] *See id*.; *see also* Ava Koffman, *Digital Jail: How Electronic Monitoring Drives Defendants Into Debt*, PROPUBLICA (Jul. 3, 2019) (As the movement to overhaul cash bail has challenged the constitutionality of jailing these defendants, judges and sheriffs have turned to monitors as an appealing substitute), https://www.propublica.org/article/digital-jail-how-electronic-monitoring-drives-defendants-into-debt.

some type of bail reform, courts accepted the invitation to impose electronic monitoring enthusiastically, doing so even where—prior to reform—an individual would have been released without that heavy restriction.[3] Mr. Gibson, petitioner in this appeal, is one such individual.

Unfortunately for Mr. Gibson and others similarly situated, because electronic monitoring is neither wealth-based nor dependent on a physical cage, its imposition is generally deemed fair and reasonable. Reality, however, is far more nuanced. The inconvenient truth about electronic monitoring is this: erecting cages out of people's homes and communities causes harm second only to jail-based detention. It limits economic opportunity and social connection, the very things humans need to live law-abiding lives.

No other "non-monetary condition" is as harmful in its effect, and for that reason, no other condition—non-monetary or otherwise—is as tightly regulated by New York's bail statutes. It is clear that the Legislature intended electronic shackles to be a non-monetary condition of last resort, imposed in a final effort to spare the accused the horrors of physical jail. The central question raised by this appeal is:

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[3] *See e.g.* Prithika Balakrishnan, *Mass Surveillance as Racialized Control*, 71 UCLA L. REV. 428, 490 (2024) ("There is evidence that bail reform might counterintuitively work to increase the number of defendants under some form of pretrial restraint," as it may "'lead to people being released under more restrictive conditions than they would have prior to the policy change.'"); Jess Zhang, Jacob Kang-Brown, and Ari Kotler, VERA INST. JUST., *People on Electronic Monitoring*, at 7 (Jan. 2024), https://vera-institute.files.svdcdn.com/production/downloads/publications/Vera-People-on-Electronic-Monitoring.pdf

what happens when an individual who has *not* been spared the horrors of physical jail—whom the prosecution has let languish behind bars for months or even years without a trial—is entitled to release because of the state's failure? In those specific circumstances, may the court simply swap a metal cage for a digital one?

The only just and reasonable answer is no.

ARGUMENT

I. ELECTRONIC MONITORING IS NOT A JUST AND REASONABLE CONDITION OF RELEASE PURSUANT TO C.P.L. § 30.30(2)(A).

A. "Living with an ankle monitor is far from freedom, even if it's presented as an alternative to a traditional cage."[4]

Not all cages have visible walls. For some people, imprisonment takes the shape of a black box strapped around an ankle. It sounds like the steady beep of a low battery, or a warning that the wearer is outside the permissible range of movement. It feels like fear and shame, marginalization and isolation, a lack of privacy. It is a digital prison for the digital age, coined "e-carceration" by experts.[5]

[4] Reina Sultan, *5 People Describe the Emotional and Financial Tolls of House Arrest*, VICE (May 11, 2021), https://www.vice.com/en/article/the-emotional-and-financial-tolls-of-house-arrest.

[5] *See eg*. Chaz Arnett, *From Decarceration to E-carceration*, 41 CARDOZO L. REV. 641, 645 (2019) ("The concept of e-carceration seeks to encapsulate the outsourcing of aspects of prison into communities"); Sara Zampierin, *Mass E-Carceration: Electronic Monitoring as a Bail Condition*, 2023 Utah L. Rev. 589 (2023); Julie Pittman, Note, *Released into Shackles: The Rise of Immigrant E-Carceration*, 108 CAL. L. REV. 587 (2020).

Electronic monitoring is the paradigmatic form of e-carceration. Participants are required to maintain a battery-powered transmitting device around their ankle, affixed like a high-tech shackle. The device—secured through tamper-resistant straps—utilizes Global Position Satellite, Wi-Fi and/or cellular data to track its wearer's comings and goings 24 hours a day, seven days a week.[6] This locational data is monitored by law enforcement officers, who are empowered to arrest the wearer when the shackle signals that a restriction has been violated.

For the wearers, the restrictions associated with their shackles are severe and plentiful. At base, wearers must ensure that the device maintains a sufficient charge. But because the shackle cannot be removed, this often entails tethering the wearer to an electrical outlet for multiple hours each day.[7] Wearers must also avoid submerging the shackle in water—rendering a warm bath, a lap in the pool, or a dip in the ocean out of reach.[8]

Similarly out of reach is any place outside of the wearer's locality, keeping them in the jurisdiction of the administering law enforcement agencies. In New York City, for instance, the electronic monitoring program is administered by the New

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[6] *See* Chapman, *supra* note 1; *see also* Lauren Kilgour, *The Ethics of Aesthetics: Stigma, Information, and The Politics of Electronic Ankle Monitor Design*, 36 INFO. SOC'Y 131, 134-135 (2020).
[7] *See, eg.,* Patrice James et al., SHRIVER CTR. ON POVERTY L., *Cages Without Bars: Pretrial Electronic Monitoring Across the United States,* at 35 (September 2022), https://www.povertylaw.org/wp-content/uploads/2022/09/cages-without-bars-final-rev1.pdf
[8] *See* Koffman, *supra* note 2.

York City Sheriff's Office.[9] As a result, all wearers are forbidden from venturing beyond the five boroughs.

While these standard limitations are produced by the shackle itself, additional restrictions on the wearer's movement can be imposed by the issuing court or administering agency. They range from temporal to geographical. Conditions like curfews limit when the wearers can leave their homes and for how long. Other conditions relate to where they may go when they leave their homes—*if* they are allowed to leave at all.[10] These restrictions lead "[i]ndividuals on all forms of electronic monitoring [to] report that they are experiencing a form of prison."[11]

Like its brick-and-mortar cousin, e-carceration via electronic monitoring significantly undermines the dignity, autonomy and well-being of the individuals subjected to it.[12] But because it is not its brick-and-mortar cousin, the harm e-carceration causes—physically, socially, financially, and psychologically—frequently escapes true consideration.[13] An accounting of that harm is set forth below.

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[9] *See* Chapman, *supra* note 1.
[10] *See* Kate Weisburd et al., *Electronic Prisons: The Operation of Ankle Monitoring in the Criminal Legal System*, GWU Legal Studies Research Paper No, 2021-41, at 6-8 (2021).
[11] Zampierin, *supra* note 5, at 592.
[12] *Id.* at 618 ("Individuals reported physical and psychological harm, stigma, isolation, restricted movement, and economic hardship similar to those reported by people in detention.") (citation omitted).
[13] *See* Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1323, 1322 (2008) ("Across legal doctrines, courts erroneously treat physical deprivations as the archetypal 'paradigm of restraint,' and thus largely overlook the significant threat to liberty posed by technological measures.");

i. Physical Harm

Despite technological advances that have made smart devices lighter and more compact than ever, ankle monitors remain clunky and physically burdensome.[14] In a 2021 survey of people subjected to electronic monitoring, 90% experienced physical pain and discomfort because of the device.[15] A panoply of injuries were reported: swelling, bruising, blistering, sores, numbness, and even electric shocks.[16] One journalist described in vivid detail the damage he witnessed when meeting a 19-year-old woman subjected to pretrial monitoring. "The machine clinging to Malea's ankle is rubbing her skin raw," he wrote.[17] "Dark purple scars and peeling flesh are visible when she lifts her jean cuff and pulls back her sock."[18]

Electronic shackles not only cause physical injury in the most immediate sense, they also negatively impact their wearer's health and access to care in myriad

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Zampierin, *supra* note 5, at 592 ("[W]hile electronic monitoring is offered as a more humane alternative to detention, decisionmakers fail to appreciate the burden that electronic monitors place on individuals on bail.") (citation omitted).

[14] *See, eg.* Scott Morris, *Lawsuit Alleges Ankle Monitoring Practices Are Akin to Extortion*, EAST BAY EXPRESS (Aug. 8, 2018), https://eastbayexpress.com/lawsuit-alleges-ankle-monitoring-practices-are-akin-to-extortion-2-1; Koffman, *supra* note 2.

[15] Zhang et. al., *supra* note 3 at 8.

[16] *See, e.g.,* Nazish Dholakia, VERA INST. OF JUST.*, Electronic Monitoring Is an Extension of Mass Incarceration* (Jan. 30 2024), https://www.vera.org/news/electronic-monitoring-is-an-extension-of-mass-incarceration#:~:text=Perhaps%20most%20significantly%2C%20electronic%20monitoring,by%20a%20decrease%20in%20incarceration; James et al., *supra* note 7, at 30; Pittman, *supra* note 5, at 601.

[17] Aaron Cantú, *When Innocent Until Proven Guilty Costs $400 a Month—and Your Freedom*, VICE (May 28, 2020), https://www.vice.com/en/article/when-innocent-until-proven-guilty-costs-dollar400-a-monthand-your-freedom**.**

[18] *Id*.

other ways. Exercise—a key component to a healthy life—may be restricted or even prohibited because of electronic monitoring. Activities like a trip to the gym, a pick-up basketball game in the park, or even a brisk walk around the neighborhood are all off limits to individuals bound to their homes. And wearers who are granted more freedom of movement may nevertheless be constrained by curfews, time limits, and preauthorization requirements, all of which make it difficult to squeeze in a gym session on top of other necessary errands.

Movement restrictions can also impede the wearer's access to timely care of their choice. Where preauthorization to leave the home is required, same-day or next-day doctor appointments are out of reach.[19] So too are doctors outside of the jurisdiction. The ability to see a specialist in a neighboring city, for instance, would be entirely within the discretion of the official who set the initial terms of the monitoring order.[20] Although the right to make healthcare decisions on behalf of oneself is generally deemed fundamental and sacrosanct,[21] electronic monitoring

[19] James Kilgore, *IL EM Hearing: First in the U.S.*, Challenging E-Carceration (Mar. 2019), https://perma.cc/6SQK-YQZY (mother describes being unable to get timely approval to take her son, who had been shot, to the doctor).

[20] This requirement would disproportionally affect individuals who live in so-called "health care deserts," a moniker that includes many counties in New York state. *See* Mark Goshgarian, *Several Counties in New York Identified as Health Care Deserts*, SPECTRUM NEWS 1 (March 18, 2022), https://spectrumlocalnews.com/nys/central-ny/news/2022/03/18/several-counties-in-new-york-identified-as-health-care-deserts.

[21] *See Rivers v. Katz*, 67 N.Y.2d 485, 492 (1986) ("It is a firmly established principle of the common law of New York that every individual of adult years and sound mind has a right to determine what shall be done with his own body and to control the course of his medical treatment") (internal quotation marks and citations omitted).

strips this power from those subjected to it. Instead, judges and law enforcement authorities are privileged to decide what care is necessary and, concomitantly, when, where, and by whom it can be provided.[22]

In some cases, electronic monitoring can frustrate urgent and potentially life-saving diagnostics. Because of their interference with the machinery, electronic shackles cannot be worn during imaging procedures like X-rays, CT scans, or MRIs.[23] Thus, accessing these procedures requires not only pre-authorization, but also coordination with the administering agency to have the shackle temporarily removed and re-fitted. The bureaucratic coordination required can add days to weeks of delay, unnecessarily stalling diagnosis and subsequent treatment.[24]

ii. Social Harm

Of the wounds inflicted by the electronic shackles, most go beyond skin deep. They infiltrate the very fabric of their wearer's lives, unraveling the threads that tie them to their family, their friends, and their communities. It is a perverse outcome.

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[22] *See* James et al., *supra* note 7, at 30 (a person on electronic monitoring with a history of seizures was denied permission to go to the pharmacy to get her prescription filled. She recounted: "They told me to call 911 if I have a medical issue. I don't need 911, I need to go to Walgreens and get my medicine.")

[23] *See* Sandra Susan Smith & Cierra Robson, *Between a Rock and a Hard Place: The Social Costs of Pretrial Electronic Monitoring in San Francisco*, Harvard Kennedy School Faculty Research Working Paper Series, at 7 (Sept. 2022).

[24] *See* Lee V. Gaines, *Why Even Illinois's Department of Corrections Wants to Fix the Way the State Does Electronic Monitor*, NPR ILL. (Feb. 26, 2019) (recounting a woman's testimony about her uncle with Stage 4 cancer, who missed many of his medical appointments because of a nonresponsive parole officer), https://www.nprillinois.org/equity-justice/2019-02-26/why-even-illinoiss-department-of-corrections-wants-to-fix-the-way-the-state-does-electronic-monitor.

Although robust social support is key to crime reduction,[25] 97% of people in a recent study on electronic monitoring reported experiencing social isolation because of the shackles.[26]

By controlling where the wearer can go, electronic monitoring necessarily limits who the wearer can see. For individuals with the most severe movement restriction—house arrest—home becomes a makeshift prison, with contact limited only to those willing and/or able to travel for a visit.[27] Preauthorization is required to step foot outside and is generally only granted where the excursion is deemed essential by the judge or officer tasked with making the determination.[28] Activities like walking one's kids to school,[29] attending a parent-teacher conference,[30] or visiting a loved one on their death bed,[31] while extraordinarily meaningful to the

[25] *See generally* Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, JUST. Q., 28:2, 382-410 (2011), https://www.bethhuebner.com/wp-content/uploads/2020/07/Reentry-and-the-Ties-that-Bind-An-Examination-of-Social-Ties-Employment-and-Recidivism.pdf.
[26] *See* Tosca Giustini et al., *Immigration Cyber Prisons: Ending the Use of Electronic Ankle Shackles,* CARDOZO SCH. L. ONLINE PUBL'NS, at 17 (July 2021), https://larc.cardozo.yu.edu/faculty-online-pubs/3/.
[27] *See* Maya Schenwar, *Your Home Is Your Prison,* TRUTHDIG (Jan. 19, 2015), https://www.truthdig.com/articles/your-home-is-your-prison.
[28] *See* James et al., *supra* note 7, at 25.
[29] *See* Maya Schenwar & Victoria Law, Prison By Any Other Name: The Harmful Consequences of Popular Reforms 25 (2020) (a mother of 2 describes being unable to drop her children off at school: "You're basically held hostage in your own home").
[30] *See* Giustini et al., *supra* note 26, at 20; American Civil Liberties Union (ACLU), *Rethinking Electronic Monitoring: A Harm Reduction Guide* at 10 (Sept. 2022), https://www.aclu.org/publications/rethinking-electronic-monitoring-harm-reduction-guide.
[31] *Id.* at 32 (a person on electronic monitoring was denied permission to visit the death bed of the woman who raised them because she was not a blood relative).

monitored individual, are not necessarily so to the decisionmaker. As one person on electronic monitoring explained: "I had so many plans for when I got out, and I am not able to do anything that I really want to."[32]

Of course life happens, and often times without advance notice. In these circumstances, individuals with electronic shackles are faced with an impossible choice: attend to the emergency and risk violating their release conditions or stay put and risk whatever consequences flow from that inaction. The birth of a child is a common source of this tension. One new father subjected to pretrial electronic monitoring lamented "I had the birth of a child… and literally wasn't allowed to be there because I didn't have prior authorization to go."[33]Another recounted being able to attend the birth but with a strict midnight curfew.[34] He ultimately chose to let his monitor die so he could spend more time with his girlfriend and new baby at the hospital.[35]

Forcing wearers to forego—or risk arrest to avoid foregoing—pivotal life moments is but one of the ways electronic monitoring strains the relationships of those subjected to it. Restrictions on where participants can travel, when, and for how long also burden other members of the household, who are then forced to

[32] Sultan, *supra* note 4.
[33] James et al., *supra* note 7, at 32.
[34] *See* Koffman, *supra* note 2.
[35] *See id*.

assume the responsibilities and obligations no longer able to be performed by their shackled family member.[36] But where that family member is the head of household or primary caretaker, there may not be anyone else who can perform these day-to-day tasks. Help then comes at a premium: "I had to pay someone to get me toilet tissue," one person recalled.[37]

Even where individuals are not subjected to house arrest, curfews, and the like, electronic monitoring nevertheless weakens their bonds with family and friends. Municipal boundaries act as invisible fences, separating individuals subjected to electronic monitoring from their loved ones in other jurisdictions.[38] Family vacations, trips with friends, graduations, weddings, and funerals are all off limits if they occur outside of city limits. As one individual explained: "Family reunions come up and everybody wants to know if I can come[.] I say, 'You know, I can't'[…] I don't even think about those things because I'm not allowed to participate."[39]

[36] *See* Smith & Robson, *supra* note 23, at 10.
[37] James et al., *supra* note 7, at 28.
[38] *See* Ayomikun Idowu, Allison Frankel, and Yazmine Nichols, ACLU, *Three People Share How Ankle Monitoring Devices Fail, Harm, and Stigmatize* (Sept. 29, 2022) (an individual on electronic monitoring describes being unable to see his elderly parents because they lived in a different location and could not physically travel to him), https://www.aclu.org/news/criminal-law-reform/ankle-monitoring-devices-fail-harm-and-stigmatize.
[39] Cantú, *supra* note 17.

iii. Financial Harm

Like strong social ties, gainful employment is a protective factor against reoccurring system involvement.[40] Not only does employment provide economic stability to the worker and their family, it also positively impacts their sense of self-worth and dignity.[41] However, "the sad irony of electronic monitoring is that it divorces individuals from the very things they need for success."[42] Employment opportunities are no exception.[43]

For individuals seeking employment, electronic monitoring presents obstacles from the moment a potential employer requests an interview. Needing permission to leave home or to travel beyond a designated list of pre-authorized places means scheduling an interview is not a simple matter of checking one's calendar. In the words of one wearer, "[i]f a job calls you and says, 'We'd like to see you tomorrow, come in and talk to us,' you can't."[44] This inflexibility has even led to tentative job

[40] *See* Berg & Huebner, *supra* note 25, at 382; Arnett, *supra* note 5, at 686.
[41] *See* Arnett, *supra* note 5, at 687.
[42] *Id*. at 680.
[43] *See* James et al., *supra* note 7, at 34 ("A National Institute of Justice study in 2011 found that both monitored people and the probation officers who supervised them were "almost unanimous" in agreeing that the visibility of ankle monitors impeded people's efforts to find employment."); Giustini et al., *supra* note 26, at 19 ("[O]ver two-thirds of participants (67%) reported that they lost or had difficulty obtaining work because of their electronic ankle shackle"); Koffman, *supra* note 2 ("22 percent of people surveyed in a National Institute of Justice study said they had been fired or asked to leave a job because of the [ankle monitor]."); Zampierin, *supra* note 5, at 624.
[44] Dholakia, *supra* note 16.

offers being revoked, a particular risk in industries where follow-up interviews or orientations may be required on short notice.[45]

Assuming a potential employer is not deterred by the difficulties in scheduling the interview, seeing an ankle monitor attached to the candidate's leg when they finally appear is certain to be prejudicial.[46] While people on electronic monitoring generally go to great lengths to keep their shackle hidden, the device may reveal itself with beeps, buzzes, or blares despite their best efforts to camouflage it.[47] The ever-present threat of the shackle's discovery hangs like a cloud over its wearer throughout the interview, potentially sabotaging their performance—and thus, their candidacy—irrespective of whether the employer ever detects the device.[48]

The demands of electronic monitoring also artificially shrink the job market. Travel restrictions, curfews, and preauthorization mandates can foreclose jobs that require flexibility in terms of location or scheduling.[49] Additionally, practical

[45] *See* James et al., *supra* note 7, at 29 (one woman on electronic monitoring received a tentative job offer, "only to subsequently lose it when she was unable to get permission to meet for a follow up interview the next day").
[46] *See* Cantú, *supra* note 17.
[47] *See id.*
[48] *See* James et al., *supra* note 7, at 34.
[49] *See id*. at 29 (Noting that construction, transportation, landscaping, delivery work and the service industry require flexibility that many people on electronic monitoring are prohibited from offering); Cantú, *supra* note 17 ("It's even worse for people working as independent contractors, who need to move freely to earn money.").

complications like poor signal or lack of Wi-Fi at the proposed job site have resulted in the monitoring authorities themselves withholding approval for work.[50]

Unfortunately, individuals who already have steady employment are not immune from the damaging effects of electronic monitoring.[51] The same stigma that causes shackled job seekers to be rejected precipitates the firing of those currently employed.[52] Appearance aside, the shackles can materially interfere with their wearer's ability to do their jobs. They may require the wearer to take long breaks to charge the device or to troubleshoot the frequent technological glitches that plague them.[53] They may prohibit the wearer from accommodating necessary schedule adjustments.[54] They may also increase the risk of workplace injury.[55] As one construction worker noted: "I cannot do my job safely with the ankle monitor. I do

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[50] *See* Smith & Robson, *supra* note 23, at 10 (Authorities in Cook County, for instance, have "den[ied] employment in places where detecting devices' signals might be difficult – warehouses, high-rise buildings, or concrete parking structures.").

[51] *See* Koffman, *supra* note 2 ("With all of the restrictions and rules, keeping a job on a monitor can be as difficult as finding one.)

[52] *See* Linda Greene, *Guest Column: Electronic Monitoring is Oppressive Confinement*, HERALD TIMES (Oct. 14, 2019) (documenting that "[s]ome people have lost their jobs because their employers didn't like the appearance of employees wearing [ankle monitors]") https://www.heraldtimesonline.com/story/opinion/columns/2019/10/14/guest-column-electronic-monitoring-is-oppressive-confineme/46647561; Smith & Robson, *supra* note 22, at 36.

[53] *See* Cantú, *supra* note 17; James et al., *supra* note 7, at 325 ("Throughout our interviews, system actors noted that EM technology was not always reliable. Interviewees reported a wide range of technological glitches and issues."); Smith & Robson, *supra* note 23, at 9 (Of the people who reported being fired because of electronic monitoring, 32 percent identified "signal loss" as the primary cause).

[54] *See* James Kilgore, Emmett Sanders, and Kate Weisburd, *The Case Against E-carceration*, INQUEST (July 30, 2021) (a woman on pre-trial electronic monitoring lost her job when the Sheriff's office denied a change to her work schedule), https://inquest.org/the-case-against-e-carceration.

[55] *See* Giustini et al., *supra* note 25, at 19.

construction and almost fell off of a roof once because of the ankle monitor. Another time my bracelet got caught on a ladder and I fell."[56]

iv. Psychological Harm

Although electronic monitoring causes quantifiable loss to its wearers in myriad ways, its most pervasive harm is also its most intangible. In the public consciousness, ankle monitors are an "archetypal display of criminality,"[57] "viscerally akin to being made to wear a criminal record on one's body."[58] Unlike regular attire, however, which can be removed or exchanged when circumstances dictate, the electronic shackle is immutable. It goes everywhere with its wearer—to school, to work, to the grocery store, to the playground, inviting ostracization and marginalization with every step.[59] "It's embarrassing," one wearer confessed. "I feel judged."[60]

This judgment provokes profound anxiety and hypervigilance in monitored individuals: "I wear it afraid that someone at work will notice the bulge," explained

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[56] *Id.*
[57] Ben A. McJunkin & J.J. Prescott, *Fourth Amendment Constraints on the Technological Monitoring of Convicted Sex Offenders*, 21 NEW CRIM. L. REV. 379, 416 (2018).
[58] Kilgour*, supra* note 6, at 140.
[59] *See* Giustini et al., *supra* note 26, at 18 (84% of respondents in a survey reported that "the stigma associated with the shackles caused others to shun them."); *see also* Idowu et al., *supra* note 38 (An individual on pretrial electronic monitoring describes the stigma of having a visible monitor: "Taking my nephew to a bounce house or going to the gym I am automatically judged. Moms pull kids away."); Koffman, *supra* note 2 (detailing one wearer's experience: "[w]henever he left the house, people stared. There were snide comments ([']nice bracelet[']) and cutting jokes").
[60] James et al., *supra* note 7, at 31.

one wearer.[61] "When I go to school, I worry my friends will spot it and leave me. I push it up into my jeans, hoping they won't see. But the higher up I push it, the more it starts to hurt."[62]

Even those successfully able to hide the device under their clothes cannot breathe easily. In a report by the Shriver Center on Poverty, individuals who had previously been subjected to electronic monitoring recalled always being "worried that an alarm would sound while they were at work or picking their child up from school, risking their employment or embarrassing themselves and their family members."[63] For many, the constant worrying is too high a price to pay—they withdraw from social settings altogether.[64]

Estrangement from the community has profoundly negative effects on the mental health of individuals subjected to electronic monitoring at a time they most need support.[65] This isolation, in conjunction with the day-to-day stress of navigating the various movement restrictions and maintenance requirements, can trigger new mental health symptoms or exacerbate ones that were already present. Wearers

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[61] M.M., *Living with an Ankle Bracelet*, MARSHALL PROJECT (July 16, 2015), https://www.themarshallproject.org/2015/07/16/living-with-an-ankle-bracelet.
[62] *Id.*
[63] James et al., *supra* note 7, at 34.
[64] *See* Giustini et al., *supra* note 26, at 17 (87% of participants in a survey of electronic monitoring wearers reported "withdrawing from social contacts because they felt embarrassed or worried about being judged."); Zampierin, *supra* note 5, at 625 (People on monitors withdraw "from their communities and social contacts because they are embarrassed or worried about being seen as a dangerous criminal.").
[65] *See generally* Berg & Huebner, *supra* note 25, at 384.

report struggling with anxiety, depression and even suicidality because of the monitors.[66] And few escape unscathed. Eighty-eight percent of those surveyed reported that the ankle shackles worsened their mental health.[67] As the UN Special Rapporteur on the Human Rights of Migrants cautioned, "the stigmatizing and negative psychological effects of the electronic monitoring are likely to be disproportionate to the benefits."[68]

B. Even As It Permitted Pretrial Electronic Monitoring, the Legislature Sought to Limit Its Reach.[69]

Although electronic shackles have been affixed to people in the parole, probation and immigration context for decades, it was not until 2020 that New York authorized their use pretrial. Electronic monitoring made its debut in arraigning courts all over the state in conjunction with other sweeping changes to the pretrial detention landscape—all ushered in by a package of amendments to the Criminal Procedure Law known as the Bail Elimination Act of 2019.

After years of advocacy spotlighting the harms of pretrial detention and mass incarceration, the New York Legislature resolved to restrict judicial reliance on

[66] *See* Giustini et al., *supra* note 26, at 15.
[67] *Id.* at 14.
[68] Pittman, *supra* note 5, at 602.
[69] N.Y. Assembly Debate on A.02009C, Mar. 31 2019, at 455 (Assemblymember Latrice Walker: "We're trying to make sure that people aren't stigmatized by the usage of electronic monitoring."), https://www2.assembly.state.ny.us/write/upload/transcripts/2019/3-31-19.html.

wealth-based detention.[70] Although 'Bail Elimination Act' is a bit of a misnomer, as New York did not actually eliminate bail, the various statutory amendments served to discourage the reflexive and widespread use of bail in favor of release on recognizance or, where absolutely necessary, release under various newly-implemented non-monetary conditions. *See* C.P.L. §§ 500.10(3-a); 510.40. The non-exhaustive list of enumerated non-monetary conditions ranged from minimally restrictive encouragements like "mak[ing] diligent efforts to maintain employment, housing or enrollment in school" to the extraordinarily restrictive electronic monitoring program. *Compare* C.P.L. § 500.10(3-a)(g) *with* 500.10(3-a)(j).

Even as it authorized electronic monitoring as a pretrial non-monetary condition of release, the Legislature cautioned against its widespread use. Given the overarching intent of the Bail Elimination Act, it would not do to "replace [mass incarceration] with E-incarceration or mass surveillance."[71] Thus, to safeguard against this possibility, and "[i]n recognition of the profound restrictions inherent in [electronic monitoring]" the Legislature heavily restricted its use. *People v. Polanco*, 82 Misc. 3d 1003, 1006 (N.Y. City Ct. 2024).

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[70] *See* N.Y. Senate Debate on S.01509C, Mar. 31, 2019, at 2629 (Senator Michael Gianaris: "We like to talk about we're all innocent until proven guilty, but that's not the way the system works. The way the system works is you're guilty unless you have enough money to pay your way out. And that is what we're trying to change here today."), https://www.nysenate.gov/transcripts/2019-03-31t1109.

[71] N.Y. Assembly Debate, *supra* note 69, at 455.

To begin, the Legislature made electronic monitoring available only in cases that charged certain enumerated offenses, or which met other record-based criteria. *See* C.P.L. § 500.10(21). It has the distinction of being the only non-monetary condition restricted in this way. The other types of securing orders subject to qualifying offense restrictions are the two which authorize jail-based detention: bail and remand. Thus, while electronic monitoring is not jail in the traditional sense, the Legislature saw fit to cabin its availability all the same.

The restrictions on the use of electronic monitoring go beyond the qualifying/non-qualifying paradigm. Even where the accused is charged with an offense that qualifies for electronic monitoring, courts are permitted to impose it only where "no other realistic non-monetary condition or set of non-monetary conditions w[ould] suffice to reasonably assure a principal's return to court." S*ee* C.P.L. § 510.40(4)(a).[72] If that additional criterion is met, electronic monitoring may be imposed, but with the additional mandate that its terms be "unobtrusive to the greatest extent practicable." C.P.L. § 510.40(4)(b). This multi-layered analysis courts must conduct when imposing electronic monitoring is more involved than that required by any other securing order, including monetary bail.

[72] In C.P.L. § 500.10(3-a)(j), the legislation reinforces this specific prerequisite, requiring that "no other realistic monetary condition or set of non-monetary conditions will suffice to reasonably assure the principal's return to court…in accordance with such subdivision four of section 510.40."

While these measures were taken to preempt overreliance on electronic monitoring in the first instance, the Legislature did not stop there. Believing that electronic monitoring was "in and of itself a type of incarceration," they implemented strict temporal limits on its imposition.[73] If the prosecution failed to timely dispose of a pending criminal complaint pursuant to C.P.L. §§ 170.70 or 180.80, a monitored individual would be entitled to immediate release, just as if they had been physically detained. *See* C.P.L. § 510.40(4)(d) ("A defendant subject to electronic location monitoring under this subdivision shall be considered held or confined in custody for purposes of section 180.80 of this chapter and shall be considered committed to the custody of the sheriff for purposes of section 170.70 of the chapter, as applicable."). Assuming the prosecution met this early obligation, the Legislature nevertheless limited electronic monitoring orders to a maximum period of 60 days. *See id*. Upon the expiration of this time limit, courts would be required to make a *de novo* determination as to its continuing necessity. *See id*.

The Legislature's determination to severely restrict the use of electronic monitoring makes sense in the context of its practical realities. Although widely thought of as a preferable alternative to bail, that inclination is only supported when the bail proposed is unaffordable. Bail, if paid, does not prohibit the accused from leaving their home, from going to the pharmacy to pick up their prescription, or from

[73] N.Y. Assembly Debate, *supra* note 69, at 459.

attending the birth of their baby in the hospital. People released on bail are able to visit loved ones in other cities and states, to take baths, to wear shorts in the summer without attracting looks of disgust from a passerby. Thus, when bail is set in an amount the accused can afford, bail becomes the release mechanism, while electronic monitoring continues their confinement in another form.[74]

C. Electronic Monitoring Was Not Contemplated as a Release Condition In the Context of C.P.L. §30.30.

Criminal Procedure Law § 30.30(2)(a) mandates that a person who stands charged with a felony "be released on bail or on his or her own recognizance, upon such conditions as may be just and reasonable, if the people are not ready for trial in that criminal action within ninety days[.]" The plain language of the statute makes clear that the only two options before the court are affordable bail or release on recognizance. *See People ex rel. Chakwin on Behalf of Ford v. Warden, New York City Corr. Facility, Rikers Island*, 63 N.Y.2d 120, 125 (1984) ("The plain meaning of CPL 30.30 (subd 2) is that a defendant's showing of a violation of that section will result in the defendant's release, either by a fixing of bail at an amount which the defendant can post or by a release of the defendant on his own recognizance.").

[74] *See* Weisburd et al., *supra* note 10, at 27 ("Short of a prison cell, electronic monitoring is the most restrictive form of government surveillance and control.").

While the dependent clause "upon such conditions as may be just or reasonable" grants the court authority to make additional demands of the accused—such as a requirement that they abide by an order of protection—it does not provide back-door entry into continued detention. The accused is entitled to be free, irrespective of whether freedom is deemed prudent by the court or the prosecutor. *See Chakwin,* 63 N.Y.2d at 125 ("As the People concede, the words 'upon such conditions as may be just and reasonable' do not give the trial court the right to maintain bail at an amount which the defendant is unable to meet.").

The principle underlying the provision is clear. There comes a point—usually after months or even years of delay—when it is no longer just to make an individual who is presumed innocent pay for the prosecution's inability to bring them to trial. *See People v. Johnson*, 38 N.Y.2d 271, 279 (1975) ("[S]ince the State initiates the action, it is the State's duty to see that the defendant is promptly brought to trial …and whether the delay is an intentional effort to hinder the defense or merely the result of public inattention to the needs of the trial process, the responsibility must ultimately rest on the State"); *Klopfer v. State of N.C.,* 386 U.S. 213, 221–22 (1967) (speedy trial rights are meant to prohibit the government from "indefinitely prolonging th[e] oppression" of a criminal prosecution).

The proposition that an accused person should not have their life upended indefinitely due to prosecutorial failures also informs the C.P.L. §§ 170.70 and

180.80 release requirements. *See* Peter Preiser, Practice Commentary, McKinney's Cons Law of N.Y., C.P.L. § 180.80 ("The purpose of this section is to assure that a defendant…is not held in custody on the basis of the hearsay felony complaint for an unreasonable period awaiting a determination by a Grand Jury on the basis of competent evidence.").Those provisions award the prosecution five days to properly dispose of a criminal complaint, with failure to do so requiring the accused be released from custody. *See* C.P.L. §§ 170.70; 180.80.

As noted in section (b) *supra*, the Legislature explicitly identified electronic monitoring as a type of "custody" the accused must be released from should the prosecution fail to meet the five-day C.P.L. §§ 170.70/180.80 deadline. *See* C.P.L. § 510.40(4)(d). And while it did not explicitly reference C.P.L. § 30.30(2)(a) in the same provision, it would be a mistake to interpret that silence as tacit approval for the imposition of electronic monitoring when the prosecution fails to meet its C.P.L. § 30.30(2)(a) obligation. That is because the question before this Court is not whether electronic monitoring triggers the running of the C.P.L. § 30.30(2)(a) clock as it does for C.P.L. §§ 170.70/180.80.[75] Instead, the question is whether electronic monitoring can be imposed *after* the C.P.L. § 30.30(2)(a) clock has expired.

[75] On this question, there is a rational explanation for the Legislature's silence. Electronic monitoring orders have an expiration date of 60 *calendar* days, after which the issuing court must conduct a *de novo* determination of necessity. Conversely, the C.P.L. § 30.30(2)(a) release mechanism is not triggered until 90 *chargeable* days have elapsed, a period that can translate to several months or even years in custody. Thus, if courts followed the mandates of C.P.L. §

The historical record demands an answer in the negative. When C.P.L. § 30.30 was enacted in 1972, electronic monitoring had not yet been introduced into the criminal legal system infrastructure. It was not until 1983 that the first rudimentary devices were deployed by a New Mexico judge; 1984 saw the first formal pilot program in Florida.[76] Yet even as electronic monitoring made its way to New York, its use was narrowly circumscribed, limited only to postconviction matters until 2020. This protracted timeline establishes that at the time of C.P.L. § 30.30(2)(a)'s enactment, electronic monitoring was not contemplated as a just and reasonable alternative to the two release options expressly referenced. Indeed, it was not until the Legislature sought to reduce the jail population by offering courts an alternative to *incarceration* that the electronic shackle was made available for pretrial use.

Although seemingly well-intentioned, practitioners and scholars have highlighted the perverse consequences of this introduction. Rather than facilitate a "reduction in physical detention, [electronic monitoring] often serves to expand surveillance and control over people who would otherwise be free."[77] For instance, bestselling author and civil rights attorney Michelle Alexander analogized the relationship between physical incarceration and electronic monitoring to the

510.40(4) faithfully, individuals generally would not be electronically shackled long enough for the question of C.P.L. § 30.30(2)(a) release to arise.

[76] *See* James et. al., *supra* note 7, at 10.

[77] Zhang et al., *supra* note 3, at 7.

relationship between slavery and Jim Crow.[78] Others have deemed it a "self-fulfilling prophecy," imposed because it is available rather than because it is necessary.[79]

Regardless of the broader conversation around electronic monitoring's ability to serve as a true alternative to physical incarceration in any context, this much is clear: electronically shackling an individual who would have been permitted to move freely throughout the community prior to bail reform would constitute a further entrenchment of this perverse outcome. It would mean that in their efforts to curb pretrial detention, the Legislature actually *diminished* the freedoms of individuals entitled to release. *See United States v. Polouizzi*, 697 F. Supp. 2d 381, 389 (E.D.N.Y. 2010) ("Required wearing of an electronic bracelet, every minute of every day, with the government capable of tracking a person not yet convicted as if he were a feral animal would be considered a serious limitation on freedom by most liberty-loving Americans."). By their own admission, this is precisely the outcome the Legislature sought to avoid.

On the transition from physical jail to a digital one, one individual explained: "[a]ll you did was switch from a prison setting to a housing setting, which is now

[78] Michelle Alexander, *The Newest Jim Crow*, N.Y. TIMES (November 8, 2018), https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html.
[79] ACLU, *supra* note 30, at 6.

your new cell . . . you're not really free when you got the monitoring system."[80] Another referred to electronic monitoring as "21st century slavery, electronic style."[81] There are undoubtedly countless means of describing the carceral nature of electronic monitoring, unique to each individual subjected to it. For the purposes of this case, however, this Court is not tasked with deciding what electronic monitoring conceptually is. It need only decide what electronic monitoring is not. And there can be no doubt that it is neither a just nor reasonable response to the prosecution's failure to timely prosecute, not when the accused has already spent months or even years languishing in a cage of the traditional sort.

CONCLUSION

For the reasons stated above, this Court should reverse the order of the Second Department and hold that electronic monitoring is not a "just and reasonable" condition of release pursuant to C.P.L. § 30.30(2)(a).

[80] James Kilgore, URBANA-CHAMPAIGN INDEP. MEDIA CTR, *Electronic Monitoring Is Not The Answer: Critical Reflections on a Flawed Alternative*, 6 (October 2015), https://mediajustice.org/wp-content/uploads/2015/10/EM-Report-Kilgore-final-draft-10-4-15.pdf.
[81] *Id.* at 21.

Respectfully submitted,

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APL-2024-00060

COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK
***EX REL*. PETER BARTA ON BEHALF OF SHYHEID GIBSON**,

Defendant-Appellant,

- against -

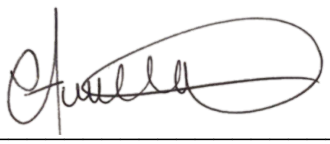
LOUIS MOLINA, COMMISSIONER, NEW YORK CITY DEPARTMENT OF CORRECTIONS

Respondent.

CERTIFICATE OF COMPLIANCE

Pursuant to Part 500.13(c)(1) of the Rules of Practice of the Court of Appeals, State of New York, I hereby certify that this Brief was prepared on a computer; that Times New Roman, a 14-point proportionally spaced serifed typeface, was used; that the body of the brief is double-spaced; with 12-point, single spaced footnotes; and that, according to the Microsoft Word Processing System used, the total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the Table of Contents, the Table of Authorities, Disclosure Statement, Proof of Service, and Certificate of Compliance is 6,897.

Dated: April 9, 2025



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