IN THE CIRCUIT COURT OF SPECIFY COUNTY, ILLINOIS
CRIMINAL DIVISION — (DISTRICT NAME)

PEOPLE OF THE STATE OF ILLINOIS	)	
	)	
vs.	)	CASE NO.
	)	
NAME OF ACCUSED	)	

MEMORANDUM OF LAW IN SUPPORT OF PETITION TO REMOVE OR MODIFY ORDER OF ELECTRONIC MONITORING TO COMPLY WITH THE PRETRIAL FAIRNESS ACT

INTRODUCTION

Electronic monitoring is an intrusive and restrictive form of confinement. It "is a form of incarceration, not an alternative," requiring "people to wear radiofrequency (RF) or GPS devices and stay confined in their homes 24/7" unless prior permission for movement has been granted.[1]

Because of the severe burden that electronic monitoring[2] and home confinement impose upon people awaiting trial, the Illinois legislature has enacted new provisions concerning its use. *See* Pretrial Fairness Act, Pub. Act 101-0652 (2020). Some of these provisions came into force on January 1, 2022. Those provisions have substantially changed how courts may assign electronic monitoring and home confinement in the State of Illinois.

First, the Pretrial Fairness Act has established mandatory freedoms of movement that must be granted to people ordered onto electronic monitoring and home confinement. *Second*, the law now provides for mandatory reconsideration of electronic monitoring orders every 60

[1] Chicago Appleseed, *10 Facts About Pretrial Electronic Monitoring in Cook County* (Sep. 2021), available at, https://www.chicagoappleseed.org/2021/09/22/10-facts-about-pretrial-electronic-monitoring-in-cook-county/

[2] For simplicity, this petition uses the term "electronic monitoring" to refer to both GPS tracking and other forms of electronic location monitoring.

days. *Third*, in the context of these 60-day redeterminations, the law imposes a new, significantly more stringent standard that must be met to reimpose an order of electronic monitoring. 725 ILCS 5/110-5(i). These new statutory protections must also be read in accordance with constitutional and statutory constraints that limit the imposition and cost of electronic monitoring on people awaiting trial.

Petitioner asks this Court to conform the electronic monitoring order previously entered in this case to the new statutory landscape in Illinois. Petitioner offers this memorandum to elaborate the legal principles that govern this Court's consideration of that request.

ARGUMENT

I. ELECTRONIC MONITORING ORDERS MUST ALL NOW INCLUDE CERTAIN MANDATORY FREEDOMS OF MOVEMENT.

If the Court imposes electronic monitoring or home confinement, the Pretrial Fairness Act now requires the Court to provide specific, enumerated freedoms of movement. 730 ILCS 5/5-8A-4(A). The law imposes two overarching provisions governing the assignment of movement while on EM.

First, the law now provides that "instances of approved absences from the home shall include but are not limited to" the following eight circumstances:

> (1) working or employment approved by the court or traveling to or from approved employment;
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> (2) unemployed and seeking employment approved for the participant by the court;
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> (3) undergoing medical, psychiatric, mental health treatment, counseling, or other treatment programs approved for the participant by the court;
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> (4) attending an educational institution or a program approved for the participant by the court;
>
> (5) attending a regularly scheduled religious service at a place of worship;

(6) participating in community work release or community service programs approved for the participant by the supervising authority; or

(7) for another compelling reason consistent with the public interest, as approved by the supervising authority.

(8) purchasing groceries, food, or other basic necessities.

730 ILCS 5/5-8A-4(A).

These eight freedoms of movement are a statutory floor and may be augmented by the Court with additional freedom to leave home confinement. *Id.* Such freedom can include the ability to leave the home for a specified number of hours per day. 730 ILCS 5/5-8A-4(A)–(A-1).

Second, the law now requires that such freedoms must be spread out across the week and cannot be reserved to a single day. Specifically, "any person ordered to pretrial home confinement with or without electronic monitoring must be provided with movement spread out over no fewer than two days per week, to participate in basic activities such as those listed in paragraph (A)," described above. 730 ILCS 5/5-8A-4(A-1).

Both of these new movement provisions went into effect on January 1, 2022. 730 ILC 5/5-8A-4(j). They differ from the prior law in two ways. *First*, the old statute made the eight enumerated freedoms of movement merely discretionary, providing only that "such instances of approved absences from the home *may* include" the enumerated freedoms. 730 ILCS 5/5-8A-4(A) (effective August 12, 2016) (emphasis added). The new law replaced the word "may" with "shall" clearly evincing the legislature's intent to make these freedoms mandatory and to give the accused a statutory right to such freedoms. *Ryan v. Retirement Bd. of Firemen's Annuity and Ben. Fund of Chicago*, 136 Ill. App. 3d 818, 820–21 (1st Dist. 1985) (The word "shall," particularly when "used with reference to a right or benefit," is a "mandatory directive.")

Second, the provision for movement spread across no fewer than two days is entirely new and likewise mandatory. 730 ILCS 5/5-8A-4(A-1) (stating that this allowance "*must* be provided" (emphasis added)). That provision reflects the legislature's decision to increase the baseline minimum level of freedom afforded to people on electronic monitoring. It also reflects the legislature's intent to mitigate the severe intrusion on liberty and basic life activities that home confinement and electronic monitoring impose.

Consistent with those legislative objectives, the Cook County Sheriff's Office has agreed that, with a Court order, the statutory requirement of movement two days a week can be implemented by permitting the accused to leave the home between the hours of 8 a.m. and 4 p.m., two days per week.[3] If this option is ordered by the Court, people on electronic monitoring can use these periods of permitted movement to take care of life activities enumerated in the statute—*e.g.*, medical appointments or grocery shopping—and to pursue other lawful activities. It will also often be appropriate for the Court to allow additional specified movement in addition to the two days of 8 a.m. to 4 p.m. movement, for example to permit a person to maintain a regular employment schedule outside the home. During any periods of movement, the Sheriff's Office continues to track the accused's location using the GPS devices attached to the accused's ankle.

II. ELECTRONIC MONITORING ORDERS MUST NOW BE RECONSIDERED AT LEAST EVERY 60 DAYS AND MAY ONLY BE REIMPOSED IF A NEW, STRICTER STANDARD IS MET.

Where the Court has imposed "electronic monitoring, GPS monitoring, or home

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[3] The notion of allowing people on electronic monitoring periods of open movement during the day is a familiar one in Illinois. The Illinois Department of Correction routinely allows 12 hours of daily open movement to people who are placed on electronic monitoring as a condition of mandatory supervised release or parole.

confinement" as a pretrial condition, Illinois statutes now require that "the court *shall* determine every 60 days" whether such conditions remain warranted. 725 ILCS 5/110-5(i) (emphasis added). This 60-day reconsideration requirement did not previously exist and went into effect January 1, 2022. *Id.* It means, in effect, that a single electronic monitoring order cannot be imposed for a period longer than 60 days; electronic monitoring can only be imposed for longer periods if the court redetermines "every 60 days" whether it remains lawful and warranted.

The statute also imposes a new, more stringent test that limits when electronic monitoring and/or home confinement can remain in effect upon this 60-day review. Specifically, the Court may only reimpose such conditions "if no less restrictive condition of release or combination of less restrictive conditions of release would reasonably ensure the appearance, or continued appearance, of the defendant for later hearings or protect an identifiable person or persons from imminent threat of serious physical harm." 725 ILCS 5/110-5(i). In addition: "If the court finds that there are less restrictive conditions of release, the court shall order that the condition be removed." *Id.* This standard differs from the preexisting standard for imposing electronic monitoring or home confinement in two significant ways.

First, the new statute significantly narrows the circumstances in which electronic monitoring can be imposed because of a perceived threat. The prior statute permitted electronic monitoring if "necessary . . . to protect the integrity of the judicial proceedings from a specific threat to a witness or participant." 725 ILCS 5/110-5(a-5) (effective Aug. 20, 2021). The parallel provision of new statute only permits electronic monitoring if there is an "imminent threat" of "serious physical harm" to an "identifiable person or persons." 725 ILCS 5/110-5(i) (effective January 1, 2022).

Thus, the Court may not re-impose EM at the mandatory 60-day reconsideration hearing unless there is a "imminent" threat of "serious physical harm" to one or more people that are specifically "identifiable." *Id.* The requirements of "serious physical harm" that is "imminent" are new and demanding. *See* Black's Law Dictionary, *Imminent* (11th ed. 2019) ("threatening to occur immediately; dangerously impending"); *Morgan v. Dept. of Financial and Prof. Regulation*, 374 Ill. App. 3d 275, 293 (1st Dist. 2007) ("imminent" means "'[n]ear at hand; * * * close rather than touching; impending; on the point of happening; threatening; menacing; perilous.'") (citing Black's Law Dictionary 750 (6th ed. 1990)). Moreover, such harm must be tied to a specific "identifiable" person or persons—generalized threats do not suffice.

Second, the revised statute singles out electronic monitoring and home confinement as pretrial conditions that are subject to special limits and judicial scrutiny. The prior law lumped together electronic monitoring and home confinement with other less severe restrictions, like curfews, drug counseling, stay-away orders, and in-person reporting. *See* 725 ILCS 5/110-5(A-5) (effective before January 1, 2022). The new statute, by contrast, focuses separately on electronic monitoring and home confinement and limits the use of these restrictions to circumstances where no less restrictive conditions would serve the narrow purposes described above. 725 ILCS 5/110-5(g)–(i). Likewise, the law now provides for mandatory 60-day reconsideration only of orders imposing electronic monitoring and home confinement. 725 ILCS 5/110-5(i).

The changes reflect the legislature's expectation that courts will typically see fit to lift electronic monitoring after an initial 60-day period (where it is ordered at all). The new statutory scheme requires that the use of these conditions pretrial should be limited to circumstances where strictly necessary and only for 60 days at a time. Unless there is reliable evidence that electronic monitoring continues to be necessary to achieve one of the two narrow permissible statutory objectives, electronic monitoring must be lifted upon reconsideration.

Moreover, because the statutory standard for imposing electronic monitoring is different and more stringent in the context of mandatory 60-day reconsideration, the Court may not reimpose electronic monitoring as a matter of course. It must instead make judicial findings to determine whether the new standard is met.

For example, to the extent that electronic monitoring was initially imposed because of the Court's concern with ensuring appearance in court, the Court should on reconsideration take into consideration the accused's conduct during a prior 60-day period of electronic monitoring and redetermine whether less restrictive conditions of release—such as requirements merely to periodically check in with the Sheriff's office—would serve the State's interest in ensuring Petitioner's continued appearance at court proceedings.

If, on the other hand, electronic monitoring was initially imposed because of a perceived threat, a determination under the old standard—which only required a threat to the integrity of the proceedings—no longer satisfies existing law. The Court may only continue electronic monitoring if the evidence establishes that the accused poses an imminent threat of serious physical harm to an identifiable person. 725 ILCS 5/110-5(i). The new "imminence" requirement means that it should be an exceedingly rare case where electronic monitoring may be reimposed after 60 days. Unless there is current evidence to establish that there remains an imminent threat of serious physical harm to an identifiable person, electronic monitoring may not be imposed on this basis.

III. ELECTRONIC MONITORING ORDERS MUST ALSO COMPLY WITH CONSTITUTIONAL CONSTRAINTS.

In addition to the new statutory requirements, this Court's decision whether and how to reimpose electronic monitoring must be consistent with the accused's due process rights and protection against unreasonable searches guaranteed by the U.S. Constitution and Illinois Constitution.

A. Due Process requires, at minimum, that the State bear the burden to prove sufficient facts to establish that electronic monitoring is permitted by the statute and required.

Imposing electronic monitoring and home confinement on a person awaiting trial constitutes a severe restriction of the person's liberty and triggers the protections of the Due Process Clause. The "right to remove from one place to another according to inclination" is an "attribute of personal liberty" under the Due Process Clause. *Williams v. Fears,* 179 U.S. 270, 274 (1900); *see also Papachristou v. Jacksonville,* 405 U.S. 156, 164 (1972); *Kent v. Dulles*, 357 U.S. 116, 126 (1958). Electronic monitoring and home confinement directly interfere with the liberty of movement by literally confining people to their homes or to other specified places—on pain of being jailed or other penalties. Ordering electronic monitoring on the accused thus engages the procedural protections of the Due Process Clause. *See, e.g.*, *United States v. Merritt*, 612 F. Supp. 2d 1074, 1079 (D. Neb. 2009) ("A curfew with electronic monitoring restricts the defendant's ability to move about at will and implicates a liberty interest protected under the Due Process Clause" such that the government "must afford the defendant procedural due process."); *United States v. Torres*, 566 F. Supp. 2d 591, 596–99 (W.D. Tex. 2008) (same); *United States v. Polouizzi*, 697 F. Supp. 2d 381, 390–91 (E.D.N.Y. 2010) (same, collecting authorities).

The procedural protections that must be observed before electronic monitoring is imposed include, centrally, that the State bears the burden of proving sufficient facts to show that electronic monitoring is warranted under the applicable statutory standards. Just as the State bears the burden to prove sufficient facts where it seeks to jail a person pretrial, it must do the same where it seeks to confine a person to their home and subject them to 24/7 monitoring by law enforcement. *See People v. Purcell*, 201 Ill.2d 542, 550 (2002) ("[The prosecution must have the burden of showing sufficient evidence that a defendant should be denied that constitutional right [to pretrial release]" and "[t]he denial of bail must not be based on mere suspicion but must be supported by sufficient evidence to show that it is required."); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (discussing stringent federal due process standards when government seeks to detain pretrial); *cf.* 725 ILCS 5/110-6.1 (requiring showing of clear and convincing evidence to detain pretrial). The Court must then make a finding that the State has met its burden. 725 ILCS 5/110-5(i).

Thus, in the context of Illinois' pretrial release scheme, in order to reimpose electronic monitoring on the accused, the State must establish and the Court must then find that there are no less restrictive alternatives to serve the narrow statutory purposes of ensuring appearance at trial or preventing certain imminent threats. Moreover, if the State seeks to detain on the basis of a perceived threat, it must establish that there is indeed an "imminent threat" of "serious physical harm" and it must establish which "identifiable person or persons" are subject to that threat. 725 ILCS 5/110-5(i).

B. GPS tracking orders must comply with the constitutional prohibition against unreasonable searches.

Electronic monitoring also engages the right against unreasonable searches of the Fourth Amendment to the U.S. Constitution and Article I, Section 6 of the Illinois Constitution.

Electronic monitoring is a means of pervasive surveillance and monitoring that tracks literally all a person's movements and severely intrudes upon the accused's privacy.

The Supreme Court of the United States has confirmed that being "forced to wear tracking devices at all times" is indeed a "search" within the meaning of the Fourth Amendment. "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." *Grady v. North Carolina*, 575 U.S. 306, 309 (2015). Such tracking also triggers the protection of Article I, Section of the Illinois Constitution. *See People v. Caballes*, 221 Ill.2d 282, 313–14 (2006) (affirming that Article I, Section 6 is interpreted to be at least as protective as the Fourth Amendment).

Because it is a "search," electronic monitoring is subject to constitutional limits. In *Grady*, the U.S. Supreme Court held that electronic monitoring must comply with the Fourth Amendment's "reasonableness" requirement. 575 U.S. at 310. At minimum, that "reasonableness" inquiry "depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Id.*

In the context of pretrial detention this "reasonableness" requirement prescribes, at minimum, that electronic monitoring only be imposed for one of the narrow reasons authorized by statute. *See Commonwealth v. Norman*, 142 N.E.3d 1 (Mass. 2020). The Fourth Amendment and Article I, Section 6 may impose additional constraints, such as a requirement to balance whether "the legitimate governmental interests" favoring the imposition of electronic monitoring in a particular case "outweigh[s] the level of intrusion" on the accused. *Id.* at 339.

In order to protect these constitutional rights, the Court should hew carefully to the statutory constraints that the Illinois legislature has adopted to limit the use of electronic monitoring. Moreover, to the extent that there is any ambiguity in the newly enacted statutes, the Court should construe those ambiguities in favor of the accused so as to avoid constitutional concerns that could otherwise arise. *See Pritz v. Chesnul*, 106 Ill. App. 3d 969, 974 (1st Dist. 1982) (discussing constitutional avoidance principle in statutory interpretation).

IV. FEES IMPOSED FOR ELECTRONIC MONITORING MUST TAKE ACCOUNT OF THE ACCUSED'S ABILITY TO PAY

If fees will be imposed for electronic monitoring, the Court must make a determination regarding Petitioner's ability to pay and reduce or eliminate the fee as appropriate. In addition, an individual may not be jailed simply because they are unable to pay for electronic monitoring or keep up with such fees. These are the clear commands of Illinois statute and the U.S. Constitution.

The Illinois Code of Criminal Procedure explicitly provides that electronic monitoring fees should be adjusted based on ability to pay. Fees may be imposed for "costs incidental to . . . electronic monitoring . . . *unless after determining the inability of the defendant to pay the fee, the court assesses a lesser fee or no fee as the case may be*." 725 ILCS 5/110-10(b)(14.2) (emphasis added); *see also* 725 ILCS 5/110-10(b)(14.1), (14.3). These provisions, which predate the Pretrial Fairness Act and continue in effect, require the Court to make a determination as to "inability . . . to pay" and to adjust the fee accordingly.

Even if such a determination were not required by statute, it is mandated by the Fourteenth Amendment to the U.S. Constitution. The rule that the government may not incarcerate a person—or prolong their incarceration—because they are unable to make a monetary payment is firmly rooted in our law. *See, e.g.*, *Williams v. Illinois*, 399 U.S. 235, 242

(1970) (state may not prolong sentence of those unable to pay fine); *Tate v. Short*, 401 U.S. 395, 398 (1971) (fine may not be converted to imprisonment for people unable to pay); *Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983) (person on probation may not be imprisoned for failure to pay fine without inquiry into ability to pay). This principle applies equally to pretrial detention. *See, e.g.*, *Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (stating, in the context of a challenge to pre-trial detention, that "imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible").

Under the same principles, it is unconstitutional to remand a person to jail simply because they are unable to pay fees for electronic monitoring. *See, e.g.*, *United States v. Flowers*, 946 F. Supp. 2d 1295, 1301 (M.D. Ala. 2013) ("Sending [defendant] to prison because she is poor and cannot pay the cost of monitored home confinement thus raises serious constitutional concerns."). To deny electronic monitoring and jail a person because they cannot afford to pay such fees—or cannot keep up with such payments—would violate "the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible." *Pugh*, 572 F.2d at 1056. The Court must therefore impose such fees only in an amount consistent with the accused's ability to pay and may not deny electronic monitoring in favor of jail on account of the accused's inability to pay.

CONCLUSION

Petitioner asks the Court to modify or rescind the electronic monitoring order in this case consistent with the new requirements of the Pretrial Fairness Act, constitutional requirements, and the laws limiting fees for electronic monitoring.

Respectfully Submitted,

BY: ______________________
Counsel for NAME