

Public Policy Position

Michigan Department of Corrections Use of GPS Monitoring

The Prisons & Corrections Section is a voluntary membership section of the State Bar of Michigan, comprised of 168 members. The Prisons & Corrections Section is not the State Bar of Michigan and the position expressed herein is that of the Prisons & Corrections Section only and not the State Bar of Michigan. To date, the State Bar does not have a position on this item.

The Prisons & Corrections Section has a public policy decision-making body with 15 members. On June 19, 2018, the Section adopted its position after a discussion and vote at a scheduled meeting. 12 members voted in favor of the Section’s position on the Michigan Department of Corrections use of GPS Monitoring, 2 members voted against this position, 1 member abstained, 0 members did not vote.

SUPPORT

Explanation:

GPS monitoring should not be used regardless of the risk assessment. The conditions it enforces are very closed to house arrest. The Prisons and Corrections Section does not oppose either the use of GPS monitoring or carefully tailored restrictions on freedom of movement when warranted by an individual parolee’s behavior or risk. The Section recognizes that having the option of requiring monitoring promotes release in situations where the parole board might otherwise be reluctant to act. However, the Section makes the following recommendations to make the application of GPS monitoring fairer and more cost-effective.

RECOMMENDATIONS:

1. Make individualized decisions to apply GPS monitoring on the basis of risk.
2. If GPS monitoring continues to be applied to people who are not objectively determined to be at high risk for reoffending, allow the maximum freedom of movement permitted by other parole conditions.
 - a. Train parole agents to initially set monitoring parameters only to alert when the wearer enters an expressly prohibited exclusion zone, such as school property, and when a nighttime curfew is violated.
 - b. Tighten restrictions only in response to substantial willful violations.
3. Establish a process for routine periodic reviews by the agent and parolee of the use and intensity of monitoring. Require agents to justify in writing the denial of requests to relax monitoring requirements. If the parolee disagrees with the agent’s decision, require an automatic review by the

agent's supervisor.

4. Reduce or eliminate charges to parolees for the cost of monitoring.

Voting Procedure:

The Section Council discussed and modified this position paper throughout seven scheduled meetings. A committee was appointed and it went through multiple versions. The position paper and the recommendations were voted on separately. The votes for and against varied for the 4 different recommendations and for the position paper.

The four recommendations were adopted on April 7, 2018.

The votes for the recommendations are:

#1 - 10 in favor, 1 opposed, 2 abstained;

#2 - 10 in favor, 1 opposed, 2 abstained;

#3 - 11 in favor, 2 abstained;

#4 - 11 in favor, 2 abstained.

A revised recommendation #3 was adopted on May 5 - 9 in favor, 0 opposed, 1 abstained (5 absences).

The position paper was given a final edit and submitted to the Council members electronically. The final vote was received on June 19, 2018. The votes set forth above are related to the position statement. The final position paper is attached as Appendix A.

Opposition:

The opposition felt that challenges should be made to the underlying parole conditions rather than to the use of unlimited GPS monitoring to enforce those conditions. The opposition paper is attached as Appendix B.

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Appendix A

State Bar of Michigan Prisons & Corrections Section Position Statement MDOC Use of GPS Monitoring

May 2018

In 2016, the average number of parolees in Michigan was 13,732. Of these, an average of 2,165 – roughly 16 percent – were subject to Global Positioning System (GPS) monitoring.¹ The vast majority of those had been convicted of sex offenses.

GPS monitoring tracks the person's movements at all times. It enforces restrictions on movement by setting off an alarm if the person steps outside a permitted area, however briefly. The widespread use of this surveillance mechanism raises multiple questions:

1. To whom should GPS monitoring be applied?
2. What restrictions on movement should GPS be used to enforce?
3. Does GPS monitoring impact the goal of promoting offender reentry to the community?
4. Does GPS actually improve public safety?
5. What is the financial cost of the technology and who should bear it?

CURRENT MICHIGAN PRACTICE

The nature of monitoring

All Michigan parolees are subject to certain basic conditions, such as reporting to a parole agent, not changing a residence without permission, submitting to drug and alcohol testing, not possessing weapons and attempting to maintain employment. Specific additional conditions are sometimes tailored to the individual, such as not allowing people convicted of computer scams to have computers or people convicted of embezzling to work in positions that afford access to other people's money. However those convicted of sex offenses are subjected to special conditions that are applied across-the-board without regard to the circumstances of the crime, the parolee's statistical risk of reoffending or current psychological evaluations.

These conditions include:

- 1.10 Submit to and pay for polygraph exams as ordered by the agent.
- 1.11 Register as required by the Sex Offender Registration Act (SORA) [MCL 28.721 *et seq*] and comply with all its requirements.
- 1.12 Not own, possess or use a computer or other device capable of connecting to the internet or reside where these are present (without permission of agent).
- 1.13 Not use sexually oriented telephone services.
- 1.14 Not enter topless bars or other places where sexual acts or nudity is a source of

¹ Michigan also uses electronic monitoring to remotely detect alcohol consumption and to enforce compliance with curfews. These less restrictive forms of monitoring are not the subject of this paper. In addition, Michigan requires lifetime GPS monitoring for selected sex offenders. People convicted of 1st or 2nd degree CSC with a victim younger than 13 must be sentenced to GPS for the rest of their lives. MCL 750.520n. The statute applies to offenses committed after August 2006 so long as the offender was at least 17 years old. While there are no supervision conditions to enforce once these offenders have finished their parole terms, their movements can be tracked for the rest of their lives. Lifetime monitoring is also beyond the scope of this position statement.

- entertainment.
- 1.2 No written, verbal, electronic or physical contact with anyone 17 or younger (except with written permission of parole agent and in the presence of adult responsible for minor).
 - 1.3 Not have any romantic involvement with anyone who resides with or has physical custody of any individual age 17 or under, without agent's permission.
 - 1.4 Not possess or use any sexually stimulating materials.
 - 1.5 Complete sex offender treatment when referred by the agent.
 - 1.6 Not reside, work or loiter within 1,000 feet of school property.
 - 1.7 Not be within 500 feet of parks, swimming pools, playgrounds, child care centers, arcades (without permission of field agent).
 - 1.8 Not possess children's clothing, toys, games or videos without agent's permission.
 - 1.9 Not possess or use photographic equipment.
 - 2.0 Not use alcohol. Not enter bars except with agent's permission for purpose of employment.
 - 2.1 Complete substance abuse treatment when referred by the agent
 - 4.19 "[S]ubmit to Global Positioning System monitoring and comply with all requirements of the system as directed by the field agent or managing law enforcement agency." Pay for the cost of the monitoring and any loss of or damage to monitoring equipment at rates established by the Michigan Department of Corrections.
 - 4.2 Consent to a search of his person and/or property upon demand by a law enforcement officer or parole officer.

The requirement of GPS monitoring is, in part, a tool for enforcing conditions 1.6 and 1.7 since the monitor will alert if the parolee gets too close to a school or other prohibited area. Tracking will also reveal if the person has entered a bar or a place of sexual entertainment. However, GPS has no relationship to most of the other parole conditions. It cannot reveal whether the parolee spoke to a minor, used a camera or drank a beer.

What GPS reflects is the manner in which technology tends to promote the implementation of the actions it makes possible, regardless of how much value they actually add. Simply stated, the more technology is available, the more ways people will find to use it. Once GPS monitoring is made a condition of parole, it permits the imposition of a host of other requirements that are not applied to parolees generally and that may or may not promote safe reintegration to the community.

GPS has made it possible to enforce conditions that are tantamount to house arrest. The parolee can only leave home at the times and for the purposes approved by his parole agent. "Home" is defined as the area within the property boundaries of his residence, which are effectively marked with an electronic fence. The inclusion zone around a residence may be so tightly drawn as to exclude the front and back yards. If the parolee steps out to shovel snow or get mail from a roadside mailbox, he is in violation. When the inclusion zone does cover the yard, it is a violation if the parolee steps over the property line to assist a neighbor or retrieve a dog that has strayed.

An MDOC policy directive requires that parolees on GPS be permitted to seek or maintain paid employment; attend approved educational, vocational or treatment programs; obtain necessary medical services; participate in required community service and attend religious services. MDOC

PD 06.03.105, para M. Except for standing permission to seek work five mornings a week, these activities must be cleared in advance with the parole agent.

A parolee who is not employed is allowed four hours a week of “personal” time to engage in “prosocial” activities not specifically listed in policy, such as shop for groceries, do laundry, visit relatives, go out to dinner with friends or get a haircut. A parolee who is employed at least 30 hours is afforded eight hours of personal time.

Any use of personal time must be cleared in advance with the parole officer during business hours. A spontaneous decisions to run an errand or accept a last minute invitation – or, in unanticipated circumstances, to take a car in for repair or a family member to urgent care – may result in a violation. Each activity must be “purposeful” and travel must be by a direct route. Permission to visit someone else’s home will not be granted until the parole agent contacts the homeowner to be sure there are no weapons or minors in the house.

The GPS device is programmed to send an alert when the person enters an exclusion zone or leaves an inclusion zone at a time that has not been “opened up.” If the parolee is minutes late returning from an approved activity, the monitor will indicate a “zone” violation which may prompt a call from the electronic monitoring center. In addition to enforcing the hours programmed into the device for specific activities, GPS enables strict enforcement of whatever curfew the agent imposes.

Agents who monitor parolees with a GPS device have reduced caseloads of 25 people instead of the usual 50. These agents review GPS maps daily to ensure that parolees have traveled only to permitted locations by approved routes, have not come too close to exclusion zones and were in their approved residences as required. Possible sanctions for violations include verbal warnings, increased restrictions, jail time and parole revocation.²

When monitoring is required

MCL 791.236 (15) permits but does not require the use of GPS monitoring for parolees convicted of first and second-degree CSC. However, under MDOC Operating Procedure 06.03.105, GPS monitoring is automatically required based on the offense of conviction as shown in the chart below. A parolee who is not required to be on GPS for his or her entire term may be reduced to curfew monitoring if in compliance during the required period.

² The GPS equipment itself can be problematic. The devices work best when used with a clear view of a cloudless sky. The technology is not good at tracking people in high-rise buildings, subways, basements or large commercial structures like shopping malls. Staying too long in a big box store may result in the monitor going off so the parolee has to go outside and reorient it. Signals can be lost due to rain or fog, proximity to dense vegetation or tall buildings, or when the person is riding in a car or other enclosed vehicle. They can also be interrupted by satellites crossing paths. Consequently, dropped signals and false alerts are common.

Minimum Time on GPS Required			
Entire Term*	First Year	First 6 months	90 days
CSC 1 st degree	CSC 2 nd degree	Offense requiring sex offender registration	Parole board ordered
Aggravated Stalking	CSC 3 rd degree	Failure to register as Sex offender	
		Domestic violence 3 rd degree	

*For people who were serving parolable life sentences, statute requires this term to be four years.

While risk assessment instruments are used to determine whether and how much treatment programming prisoners and parolees must attend, GPS monitoring is imposed without regard to the parolee’s risk or the actual facts of the offense. There is no administrative or judicial review process available for parolees to demonstrate that their individual risk does not warrant GPS tracking or that specific monitoring conditions are unwarranted.

The cost of monitoring

Parolees are supposed to pay \$14 a day or \$5,100 a year to cover the cost of monitoring. However most cannot afford that amount. One recent parolee observed that the cost of the monitoring was more than his rent. And this amount is in addition to routine [statutory] supervision fees of \$0 to \$175 a month and an average \$375 per polygraph exam. In 2015, the MDOC collected \$2.4 million in electronic monitoring fees – about one-fifth of the total assessed.

CONCERNS

Indiscriminate requirement of GPS without regard to individual risk.

GPS monitoring is clearly logical when applied to someone convicted of domestic violence or stalking who is at risk of repeating their offenses. The technology can help ensure that a parolee is not attempting prohibited contact with a specific prior victim. It can also provide both deterrence to and surveillance of sex offenders who might actually seek sexual contact with unknown children. However there is no evidence that GPS monitoring of people who do not score high risk on a sex offender risk assessment instrument further increases public safety.

The indiscriminate application of GPS surveillance to all sex offenders cannot be empirically justified.

- Sex offenders have always had low recidivism rates.
- Fewer than five percent of all sex offenders are actual pedophiles who might lure children from public places in order to molest them.

Fear of “stranger danger” is widespread but unsupported by crime statistics. In fact, mounting research in Michigan and many other jurisdictions shows that the rate at which paroled sex offenders commit another sex offense is about three percent.³ Moreover, many offenders did

³ See summary of research in Citizens Alliance on Prisons and Public Spending, *Denying parole at first eligibility: How much public safety does it actually buy?* (Lansing, Aug. 2009) at pp. 23-27. See also Barbara Levine and Elsie Kettunen, *Paroling people who committed serious crimes: What is the actual risk?* (Lansing: Citizens Alliance on Prisons and Public Spending, Dec. 2014) [Of 4,109 sex offenders paroled from 2007

not have child victims. And most of those who did were known to the children and committed their offenses in the home of the child or a relative.

Parole conditions apart from GPS monitoring already prohibit parolees convicted of sex offenses from living in homes with children, being in the company of children without other adults present and being in romantic relationships with people who have minor children. That is, their access to children in the conditions most likely to result in an offense against a child is severely restricted. They are also barred from residing or working near schools and other locations where children congregate.

Simply wearing a GPS tracking device stigmatizes the wearer. It identifies the parolee as a dangerous person who must be monitored at all times to protect public safety. It communicates to parole agents that for these parolees, surveillance is a higher priority than reentry. It may discourage employers if work time is disrupted by false alerts. It saps whatever meagre financial resources parolees may have and still costs taxpayers millions of dollars. The myriad restrictions and risk of unwarranted alarms cause continuing stress for parolees and their families.

Scope of restrictions on movement

The concerns that arise from across-the-board application of GPS monitoring to a class of offenders are magnified many times over when the restrictions on movement are extremely rigid and the extent of movement allowed is close to house arrest. For the 84 percent of all parolees who are not on GPS, the current focus of parole is on promoting successful reentry into the community. Parolees are encouraged to build supportive networks of family and friends and to engage in prosocial activities. Other than having to meet basic required conditions of parole, they can try to rebuild their lives as they choose. This relative freedom allows parole agents to see how parolees exercise judgment and to intervene when behavior warrants.

For those on GPS, the approach is the opposite. The implicit assumption is that allowing any activity beyond going to work, school, religious services and medical appointments poses an unwarranted threat to public safety. Instead of affording paroled sex offenders as much freedom of movement as is permitted by the highly restrictive conditions of their paroles and monitoring how they behave, these parolees are kept in a sort of limbo until their supervision ends. The parolee has little opportunity to demonstrate that virtual house arrest during the course of their parole is not warranted or to develop the social networks and daily routines they will need to sustain them when they are off parole. The parole agent has little chance to see how the person will actually adjust in the community and to intervene as necessary. Moreover simply by creating more highly restrictive parole conditions to be observed, it increases the likelihood of technical parole violations.

Former parolees report having had less freedom of movement at their residences than they had in prison. There they could routinely be in a large “yard” where they could socialize with other prisoners and engage in exercise. Depending on the nature of the residence and how the supervising agent sets the GPS parameters, the parolee may not be permitted to step outdoors except at specified times. With little time to do the routine tasks of daily living or build positive

through the first quarter of 2010, 32 or 0.8 percent returned to prison for a new sex offense within three years.]

social networks, their opportunities to adjust to the community are stunted by the very system that is meant to help them make that transition. Moreover, highly restrictive movement conditions also burden the lives of the parolees' family members and roommates and cause constant anxiety about the potential consequences of inadvertent noncompliance.

The situation can be exacerbated by the discretion afforded to parole agents. While agents are expected to exercise reasonable judgment, they start with the presumption that strict surveillance is warranted in every case and that sex offenders cannot be safely treated as "normal" parolees. Their discretion may be used to relax certain conditions once the parolee demonstrates compliance, but the individual parolee has no assurance this will occur. Agents can choose to give the maximum latitude within an inherently highly restrictive scheme or use GPS to effectuate virtual house arrest. If the agent chooses the latter option, the parolee, who can never undo the nature of his offense no matter how herculean his effort to redefine his future, has little recourse.

The parolee who feels that monitoring is being implemented in a manner that is unfair or unjustified has no effective recourse. In theory, the parolee can attempt to complain to the agent's supervisor, but most parolees recognize that may only result in antagonizing the agent. MDOC PD 3.02.130 establishes a grievance process that is applicable to both prisoners and parolees. However, it is not really designed to address expressly permitted exercises of discretion. Paragraph E says that "[g]rievances may be submitted regarding alleged violations of policy or procedure or unsatisfactory conditions of confinement..." Paragraph F prohibits grieving "the content of policy or procedure except as it was specifically applied to the grievant."⁴ Given the deference afforded agents and the presumption of parolee dangerousness built into the monitoring requirement by the parole board, alleging that an agent's exercise of the discretion expressly permitted by policy is an abuse would succeed only in the most extreme cases.

The Prisons and Corrections Section does not oppose either the use of GPS monitoring or carefully tailored restrictions on freedom of movement when warranted by an individual parolee's behavior or risk. The Section recognizes that having the option of requiring monitoring promotes release in situations where the parole board might otherwise be reluctant to act. However, the Section makes the following recommendations to make the application of GPS monitoring fairer and more cost-effective.

⁴ Paragraph F. 3. prohibits grieving parole board decisions "to grant, deny, rescind, amend or revoke parole, or not to proceed with a lifer interview or a public hearing." While this provision does not specifically address parole conditions, it reflects the broad disinclination to intervene in parole board decisionmaking generally.

RECOMMENDATIONS

1. Make individualized decisions to apply GPS monitoring on the basis of risk.
2. If GPS monitoring continues to be applied to people who are not objectively determined to be at high risk for reoffending, allow the maximum freedom of movement permitted by other parole conditions.
 - a. Train parole agents to initially set monitoring parameters only to alert when the wearer enters an expressly prohibited exclusion zone, such as school property, and when a nighttime curfew is violated.
 - b. Tighten restrictions only in response to substantial willful violations.
3. Establish a process for routine periodic reviews by the agent and parolee of the use and intensity of monitoring. Require agents to justify in writing the denial of requests to relax monitoring requirements. If the parolee disagrees with the agent's decision, require an automatic review by the agent's supervisor.
4. Reduce or eliminate charges to parolees for the cost of monitoring.

Appendix B

OPPOSITON TO PRISON AND CORRECTIONS POSITION PAPER REGARDING GPS MONITORING [Second Draft]

The Prisons and Corrections Section is publishing a position paper critical of the use of GPS monitoring on parolees, justifying the position by attacking the use of GPS monitoring of parolees by parole officers. The only position I completely agree with is the proposition that the cost of using GPS should not be prohibitive to the parolee and fees for its use should be based on an ability to pay basis; \$14.00 per day is cost prohibitive to most parolees and should not be charged.

There is complete justification for the use of GPS monitoring on MDOC parolees. It is not harsh, let alone unduly harsh. Due to actions in the 1990's concerning the sentencing guidelines, the Michigan prison population has transitioned to a limited, overwhelmingly violent and career offender grouping. Assaultive criminals in Michigan make up about 72% of the prison population while the average of other states is 53%, with the federal system at about 7% violent. Drug offenders in Michigan make up about 7% of that population. Only 1 in 10 Defendants initially go to prison in Michigan, as opposed to the 4 in 10 national average. 80% or more of those violent offenders Michigan puts in prison do only their minimum sentence which is much less than their maximum allowable sentence. Much of that is due to alternatives to incarceration, such as GPS monitoring. However, studies from 2016 reflect that 23% of parolees and 24% of all probationers were rearrested within one year of release from supervision.

These statistics should not be understated or misinterpreted. The Michigan prison population has declined from 51,454 inmates in 2006, to 43,359 in 2014. Recently, that number fell below 40,000. MDOC has reduced its full time employees by over 20% since 2006. This doesn't mean crime has gone down in Michigan, and the percentages for incarceration may be misleading to some. In 2017, Michigan accounted for 9 of the top 100 most dangerous cities in the United States [per Neighborhood Scout]. In one top ten poll, we were rated the #1 most dangerous State in this country. In another, we had the 2nd highest violent crime rate in the Midwest; we are 29.9% higher in violent crime than the average Midwestern State, 39.9% higher than Ohio and 12.8% higher than the national average. It is clear being released from prison is not a sign of reformation. Yet even after accounting for probation and parole violators, Michigan sent only 21.8% of convicted felons to prison while the national average prison commitment rate was over 40%. Less than 1% of those in prison are there for their first offense.

GPS is merely used to enforce conditions of parole. Reasonable time/place restrictions are not overly burdensome and serve a legitimate parole purpose. The attack on GPS is to have the ability to efficiently monitor a parolee effectively removed, allowing a parolee more leeway to violate conditions of parole, requiring a parole agent to personally monitor the client. Other than cost, the only burden of GPS is a parolee knows that

others know when a specific term of that parole is being violated. There is no reasonable way to watch the parolee 24/7.

GPS set to ensure compliance with parole rules is an attempt to ensure public safety while getting people out of prison faster. It is also an imposition of structure on a life generally riddled with a lack of structure. It is not naive to believe people leaving prison need or deserve supervision or structure. Most people are not in prison for making mistakes. The idea of parole and conditions is to help convicts become successful citizens. They have been convicted of crimes, therefore are no longer innocent, as parolees they have not been technically "rehabilitated" yet, and are actually moving toward reunification with the community. Despite the arguments, it's not the GPS; it is the rules being attacked. Even though classified as a "condition", GPS enforces the other rules of parole.

GPS and other types of tether were suggested and developed to get people out while giving them structure in their lives to hopefully help them succeed on parole and in life. But for the availability of GPS, some of these parolees would not be released. A long time ago an argument was made we did not need to keep so many people locked up for such a long time because of alternatives to incarceration including technology such as GPS. Someone came up with tether as a means of keeping [or getting] people out of prison [or jail, or even on bond] as a way of protecting society and lowering costs while allowing a suspect [or convicted person] a level of freedom they may not otherwise have. The sheer fact of conviction takes away any presumption of safety in the community. Serving prison doesn't prove reformation. The parolee has shown they were ready for freedom and the parole board/agent want to ensure that while giving the parolee structure that may help them succeed. Allowing the agent to set the terms as they see fit is reasonable.

I support the part of the Position Statement of the American Probation and Parole Association which asserts as follows:

The purpose of parole is to improve public safety by reducing the incidence and impact of crime committed by parolees. Parole is not leniency or clemency but a logical extension of the sentence to provide the opportunity to return offenders to society as productive and law-abiding citizens after a reasonable period of incarceration and at a time when they are assessed to have the capability and desire to succeed and live up to the responsibilities inherent in such a release. Conditions of parole and supervision services provided to conditionally released offenders are means by which the parole authority can assist the offender to successfully reintegrate into the community while providing a

continuing measure of protection to society. The core services of parole are: to provide investigation and reports to the parole authority, to help offenders develop appropriate release plans and to supervise those persons released on parole.

...

The majority of incarcerated offenders can benefit from a period of transition into the community prior to completion of their sentence. While incarceration is necessary in many cases to ensure protection of society, to act as a deterrent to criminal activity and as a punishment for criminal acts, it is limited in its ability to prepare offenders for return to the free world. Parole is a means of allowing for a period of transition, testing and assistance, which affords a continuing measure of protection to the public while supporting the individual offender in establishing himself or herself as a productive and law-abiding member of the community.

...

Not all offenders have the same potential and motivation to benefit from conditional release. Each offender must be judged on his or her own merits. Similarity of offense, sentence length and background, while important considerations, must be viewed in the total context of a complete assessment of the individual. Risk evaluation and selection criteria may be used successfully by many parole authorities, but it is fundamental that each individual offender be assessed on the basis of complete and comprehensive information about his or her circumstances. This is important not only in relation to the release decision but also in relation to the conditions and services determined to be required upon release.

GPS monitoring is an effective tool to accomplish the goals of parole. It is an inexpensive tool in ensuring the purpose of parole.

Respectfully,

David E. Gilbert
Calhoun County Prosecuting Attorney