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**Electronic Monitoring Systems (EMS)
in the Pre-Trial Environment:
Constitutionality, Cost-Effectiveness,
and Other Factors.**

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January 9, 1992

149771

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U.S. Department of Justice
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EXECUTIVE SUMMARY

The correctional population of both sentenced and pre-trial offenders continues to increase at an accelerated pace. The criminal justice system must devise effective and innovative ways of dealing with an avalanche of criminal offenders that endanger our society. Constructions of jails and detention facilities have not and cannot effectively address this problem, therefore, alternatives to incarceration must be developed. One such alternative has been the development of Electronic Monitoring Systems (EMS) and their application to community corrections. Although originally designed as an intermediate sanction for sentenced offenders, this technology is crossing over and is being successfully applied to the pre-trial population.

This report will focus on the application of this technology to pre-trial detainees, EMS goals and applications, cost-effectiveness, and most important, its constitutionality under Florida Statutes. All these factors will be weighed and evaluated in forecasting future applications and possibilities for success.

Home Monitoring System

I. BACKGROUND

On December 14, 1984, the Palm Beach County Sheriff's Department initiated the first Electronic Monitoring Program in the state of Florida. The program's original intent and design was to assure the compliance of inmates in their work release program. Since its inception in late 1984, electronic monitoring systems (E.M.S.) have flourished and been adopted by more than 37 states and the District of Columbia. By February 1989, these programs had enrolled in excess of 6,490 offenders across the country; (Renzema and Skelton, 1990), and 1990 projections indicate that this figure has at least doubled since the completion of the 1989 report (Bureau of Justice Statistics, 1991).

E.M.S. offers a technique and a mechanism that allows the verification of an offender's specific location at any given time. Through this technology, local authorities have the ability to impose a wide range of restrictions on an offender; from observing a curfew, to complete home confinement. Because of its flexibility, E.M.S. is being used for several purposes such as an alternative to probation, work-release, and/or as a diversion from prison. E.M.S. has been referred to as the "magic fence" which isolates offenders and protects the public at relatively little cost. (Mathews 1988).

Currently, there are two types of monitoring devices: one is passive and the other active. The passive system, which is several

years old, does not have the ability to verify if the participant is absent from his/her restricted zone. This system's mode of operation consists of making random telephone calls to the participant at various times, and through a voice recognition mechanism, then determines only if the participant is present or not present.

The more widely used and modern type is the active system. The active system is generally composed of three parts: 1) a central processing unit located at the controlling agency, 2) a receiver unit located in the offender's home, and 3) a transmitter device which is worn by the offender. The system can be operated by either a probation or correctional department or on a contract basis with a private company or institution.

The components of the active monitoring system consist of a battery powered transmitter that is attached to either the offender's ankle or wrist and a receiver, which is installed in the offender's restricted area, usually his home. As long as the offender does not violate the conditions of his program, the system remains inactive. Once the pre-set conditions are violated or the signal is blocked, the transmitter will emit a signal to the receiver or central processing unit located at the controlling agency. The computer then logs the date and time that the first signal was absent from the defendant's transmitter. When the defendant returns within the electronic radius of the receiver, a second call is made to the controlling agency indicating that the offender has returned. Through this process, E.M.S. can effectively monitor an

offender, indicating each and every time the individual leaves the restricted area or violates a condition of his/her release. (People v. Ryan).

Presently, more than two-thirds of the E.M.S. sites charge offenders a monthly administrative fee for monitoring. Fees differ drastically from jurisdiction to jurisdiction, with half of the programs charging between \$100 and \$300 per month. Twenty-five percent (25%) charge less than \$100, the remaining over \$300. These fees are usually sufficient to cover the lease of the monitoring equipment and to partially administer the program. (Renzema and Skelton 1990).

Between 1980 and the end of 1988, the correctional population in the United States increased by over 90%. (Bureau of Justice Statistics). This increase has caused crowding in many prisons across the country. As a result, correctional agencies have been forced to respond to crowding with new and innovative ideas. E.M.S. has been an effective alternative to incarceration, as it allows states to monitor offenders without occupying jail beds, which in turn can be reserved for more serious habitual offenders or career criminals.

Additionally, E.M.S. is more economical than building and operating new jails. The cost of running a successful E.M.S. program is only a fraction of the cost of building, staffing, and maintaining a new detention facility. Because many E.M.S. programs charge offenders

to participate, the cost to the state is hedged by the generated revenue. Nationwide estimates indicate that the average cost of housing an inmate in a medium security detention facility is \$47-\$55 per day. E.M.S. allows upkeep costs (shelter, medical, food, and entertainment,) to be absorbed by the offender/ participant. Administrative and supervisory costs under the E.M.S. concept shrink to \$10-15 per day per offender, making this alternative a very cost-effective alternative to incarceration.

II. OBJECTIVES OF E.M.S. IN A PRETRIAL ENVIRONMENT

Since its inception, E.M.S. has been used for many purposes within the criminal justice process. However, its use had been focused at the post-conviction stage. Recently, E.M.S. use has been growing in the pre-trial area as well. This expanded use has surfaced both advantages and disadvantages.

Similar to post-conviction programs, relieving jail crowding is an important objective of pretrial release programs. In effect, for every person released to pretrial E.M.S., a jail bed is vacated. However, pretrial programs have additional objectives which are not present in post conviction programs. The two most important objectives are: 1) to insure appearance at trial, and; 2) to protect public safety. (Maxfield and Baumer, 1990).

The first and foremost objective of any Pretrial Program is to insure appearance at trial. E.M.S. programs alone cannot insure the

court appearance of a defendant who is determined to escape. Although the wristlet worn by the defendant may be an effective monitoring device, it alone will not deter nor prevent an offender from escaping, (as the wristlet or anklet may be broken or torn off). Therefore, the pretrial screening process is crucial to the success of the program. Pretrial screening must eliminate any high risk defendants and limit E.M.S. enrollment to "low-to-medium risk" individuals.

The second objective of pretrial E.M.S is to protect the public from any potential threat from a defendant. Once again, careful screening is of utmost importance in order to achieve this objective. A hardened criminal will not be deterred by a wristlet or anklet. By releasing only "low-to-medium risk" defendants there will be a low probability of violation of the program.

III. ELIGIBILITY

When developing eligibility requirements for any E.M.S. program, the aforementioned two objectives must be of utmost consideration. Because no E.M.S. system alone has the ability to accomplish these, the participant's state of mind becomes an integral component. A successful E.M.S. participant must have more to lose by violating the conditions of the program than he/she has to gain. For example, a defendant for murder who faces life in jail would have little incentive in following the conditions of the program. In fact, the defendant for murder who violates the conditions of the

program could regain his/her freedom. Conversely, a defendant accused of a misdemeanor, facing only 6 months in jail, would have an incentive to follow the conditions of the program. Violating the conditions could result in a longer, more severe punishment. Both of these examples are clear cut cases. Reality indicates that as the spectrum of possible crimes and defendants widens, the incentive to remain in custody becomes blurry and more difficult to distinguish. For example, a man charged with burglary facing 10 years could view E.M.S. as a chance to escape, or as an opportunity to begin his retribution to society and a new life. (Maxfield and Baumer, 1990)

The most important factor influencing the success of both a pre-trial and post-sentence E.M.S. program is the screening process. There are five items that pretrial services must consider to ensure a successful completion. First, the nature and circumstances of the offense must be reviewed. The more serious the offense, the greater risk the defendant will be to the public. Second, the weight of the evidence against the accused must be considered. If the evidence against the defendant is substantial, there is a greater probability of escape. If the defendant believes he/she will be convicted and ultimately serve jail time, the motivation to escape will be strong. Third, the defendant's family ties and support system must be considered. A defendant who has grown up in a community and is surrounded by family and friends will have an incentive to remain. A defendant who has a spouse and children in the community will have an even stronger incentive to stay.

However, a defendant who is a loner, does not have a commitment or family ties, or is transient, will have little motive or reason to remain within the jurisdiction. Fourth, the defendant's employment and financial status must be reviewed. A defendant who has a secure job and financial resources tied to the community will find it difficult to leave it behind and start all over again. Finally, pretrial services must carefully review the defendant's prior criminal record to determine the likelihood of escape. A defendant who has previously attempted to escape would be more likely to attempt to escape again.

Each of these factors are critical to maintaining a successful pretrial E.M.S. Program. Reviewing these variables allows pretrial services to characterize each defendant and to develop a set of guidelines. Although not flawless, these analyses give pretrial services an insight into what motivates and drives a particular defendant. By applying these factors to the goals of pretrial E.M.S., defendants will be selected with the best opportunity for success.

IV. CONSTITUTIONAL CHALLENGES

To date, federal or state appellate courts have received few constitutional challenges related to E.M.S. programs. However, most legal scholars believe that the constitutionality of E.M.S. at the post conviction stage is strongly defensible whereas it is vulnerable and weak during the pre-trial process. That belief is

based primarily on the concept of diminished rights. Pretrial programs involve a different set of rights than post-conviction programs. Because pretrial defendants have not been adjudicated, their rights are substantially greater than those of post-conviction participants. (Del Carmen and Vaughn, 1981)

The question of whether the rights of a pretrial defendant are being violated is dependent upon the defendant's right to bail. The court must first determine whether it can legally hold the defendant in pretrial detention before considering whether to use E.M.S. If a defendant has the constitutional right to bail, it would be illegal to detain the defendant. Additionally, the defendant's constitutional rights could limit the use of E.M.S. as a condition of release.

In Florida, prior to January 1, 1983, a defendant's right to release on bail was guaranteed even to those who were identified as "high risk". The right of an accused to be released on bond was governed by Article I, section 14 of the Florida Constitution. Prior to January 1, 1983, that section read as follows:

14. Bail

Until adjudicated guilty, every person charged with a crime or violation of a municipal or county ordinance shall be entitled to release on reasonable bail with sufficient surety, unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great.

Accordingly, only persons charged with capital offenses or offenses punishable by life imprisonment could be denied release on bail.

However, Article I, section 14, (amended on the November 2, 1982,

general election and becoming effective of January 1, 1983) reads as follows:

14. Pretrial release and detention unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions or release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

Under the amended version the courts have the power to deny bail to any defendants posing a threat to society, even if they are not accused of a capital offense or an offense punishable by life imprisonment.

A comprehensive statutory scheme is outlined to implement Article 1, section 14 as amended in section 907.041, Florida statutes (1983). The legislative intent of this statute is as follows:

907.041. Pretrial detention and release

1) legislative intent - It is the policy of the state that persons committing serious criminal offenses, posing a threat to the safety of the community or the integrity of the Judicial Process, or failing to appear at trial be detained upon arrest. However, persons found to meet specified criteria shall be released under certain conditions until proceedings are concluded and adjudication has been determined. The legislature finds that this policy of pretrial detention and release will assure the detention of those persons posing a threat to society while reducing the costs of incarceration by releasing until trial, those persons not considered a danger to the community who meet certain criteria. It is the intent of the legislature that the primary consideration be the protection of the community from risk of physical harm to persons.

Section 907.041(4)(b) states that a person accused of committing a dangerous crime may be held if any one of the four enumerated conditions are met.

Under the amended version of Article I, section 14, it is clear that the court has the authority to detain any defendant who is believed to pose a threat to society and/or cannot assure appearance at trial. In fact, the legislative intent makes it clear that the courts primary consideration should be the protection of the community from risk of physical harm to persons.

The Florida Rules of Criminal Procedure provides the court with a guide to implement the amended version of Article I, section 14 and section 907.041 of the Florida Statutes (1983). Rule 3.131(6)(1) includes a list of conditions that can be imposed to protect the community from risk of physical harm and assure the presence of the accused at trial. The rule lists 6 conditions, noting that a court can use any single condition or a combination to assure the integrity of the Judicial process. Conditions three and six are the most significant in relation to Pretrial E.M.S.

Condition Three provides authority for the court to: "place restrictions on the travel, association, or place of abode of the defendant during the period of release." This condition authorizes the courts to restrict the movements of a pretrial defendant if such restriction is necessary and reasonable. E.M.S. would notify authorities as soon as a defendant violates any restriction a court

placed on a defendant. In effect, using E.M.S. would allow courts to impose restrictions while monitoring the defendant to assure compliance.

Condition Six provides the court with even greater authority to "impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours." This condition allows courts a broad control of a defendant, even once released on bail. A court can require that a defendant spend nights in jail, while spending days working. The E.M.S. concept is, in fact, less restrictive than condition six. E.M.S. allows a defendant to travel to work during the day while confining the individual to his/her to home at night. E.M.S. is arguably more humane.

Under E.M.S. a defendant returns home rather than to a jail cell. While at home, a defendant has the opportunity to build and develop family relationships which may have been lost during the defendant's criminal activities. The literature suggests that home confinement often has a rehabilitative effect on a defendant, a situation which is lost under a correctional setting.

Under the amended version of Article I, section 14, the courts clearly have the authority to order pretrial detention. Section 907.041 of the Florida Statutes regulates the court when determining which defendants are eligible for pretrial detention and which are eligible for release. Lastly, Florida rules of criminal

procedure Rule 3.130 guides the courts when determining the conditions of release. Although Rule 3.130 does not mention E.M.S. specifically, it grants the courts sufficient power to use reasonable measures as a condition of release. E.M.S. would be included as a reasonable condition to protect the public and to assure appearance at trial. (Gomez v. Hincley)

Florida laws are in accordance with federal laws relating to the right to bail; and the Pretrial detention measures provided for in the Bail Reform Act intend to prevent flight and protect the safety of the community. Under federal law, a judicial officer can order pretrial detention if he or she finds that no condition or combination of conditions would reasonably assure the defendant's appearance at trial. In other words, under present case law, only the judge has the power to create and impose E.M.S. as a condition of community control. The courts have refused to grant the Department of Corrections the power to impose E.M.S. as a condition on a defendant. In Carson vs. State the court held that a defendant's failure to wear an electronic monitoring device could not form the basis for revocation of community control when electronic monitoring was required by the defendant's community control officer, not by the trial judge. Following Carson, the pretrial services have been limited to making recommendations to the judge in any given case. The judge, on his/her own discretion, can decide how much weight to give to a recommendation.

In United States v. Botero, the court refused to grant pretrial release even with a two million dollar personal security bond. In that case, the defendant was charged in a money laundering scheme. The court reasoned that even stringent conditions would not be sufficient to reasonably assure the defendant's appearance at trial. In reaching it's conclusion the court considered the factors set forth in the Bail Reform Act of 1984.

The court concluded that due to the defendant's prior history of evading the judicial process, the possible length of the sentence, and the weight of the evidence against the defendant, the risk of flight was great. The court disregarded the defendant's proposal, which included an E.M.S. device as a condition of bail. The Botero court recognized the need to impose stringent conditions on defendants who were likely to escape.

V. CREDIT FOR TIME SERVED

One issue which has been frequently brought before the court is whether credit for time served should be granted to pre-trial offenders under E.M.S. The courts have consistently held that E.M.S. does not constitute incarceration under the meaning of existing laws. In People v. Thompson the court refused to view the electronic monitoring program as incarceration. 528.N.E.2d 1016(111. App. 2 Dist. 1988). There, the defendant was arrested for the sale of cocaine and placed under supervised bail, conditioned on his participation in the Lake County Electronic Monitoring Program. Ninety-seven days later he was convicted and

sentenced to nine years. The court held that the defendant was not in "custody" during his time on E.M.S. and therefore was not entitled to credit for his time in the program.

Pennsylvania courts have also refused to grant the defendant credit for time spent under E.M.S., i.e. Commonwealth v. Kriston, (564 A. 2d 1306 Pa. Super. 1990). The minority makes a compelling argument in favor of granting credit and argues that in light of recent technological advances, the courts need to re-think the definition of incarceration. The dissent reasoned that since the defendant could not venture more than one hundred feet from his home, was subject to rigorous drug testing and submitted to unannounced visits from prison officials, credit for time served should be awarded. The minority stressed that because the defendant's conditions were so confining, the E.M.S. Program could and should qualify as imprisonment. In spite of the compelling argument by the minority, most courts refuse to extend credit. Directly as a result of the courts refusal to give credit, most defendants have refused to participate in E.M.S. Programs.

VI. CATEGORIES OF PRETRIAL E.M.S. PROGRAMS

Pretrial E.M.S. Programs have been successful across the country because, for the most part, participation is on a voluntary basis. As a result, most participants view E.M.S. as a privilege and have not challenged it in court. Most Pre-Trial Programs fall into one of two categories. First, there are programs which target

defendants to participate in E.M.S. These programs believe that pretrial E.M.S. is an effective tool to combat jail crowding and that not all defendants need to be behind bars. With those goals in mind, pretrial services screen defendants for eligibility. A defendant who is considered to be a "low-to-medium risk" is offered an opportunity to participate in the program. Most of these defendants are accused of non-violent felonies and remain in jail because of an inability to post bond. Therefore, charging these defendants to participate is difficult. Inference dictates that most defendants who are not able to post bond, will not be able to afford the weekly E.M.S. charge. As a result, some jurisdictions have instituted a sliding fee scale which adjusts the defendant's fees according to his/her ability to pay and income earning capacity. Generally, jurisdictions that have operated under these guidelines have enjoyed high success rates.

The second group of programs follows a different philosophy. Offenders in these programs are sentenced by a judge, who imposes E.M.S. as a condition of release. In these cases, the defendant is usually more dangerous, which is the reason why the judge requires E.M.S. Once again, the screening process is crucial for the success of the program. Pretrial must eliminate defendants who pose a risk to the community or of escaping. Additionally, the judge must follow the Florida constitution which regulates pretrial release since a defendant who has that right of release without conditions cannot be required to participate in E.M.S.

Regardless of the philosophy of the program, most E.M.S. Programs have similar advantages and disadvantages. A major advantage of E.M.S. is its rehabilitative effect. Because E.M.S. limits a defendant's free time, the individual is forced to plan daily activities and in an effort to restore order to their life. Also, unlike jail, home confinement offers the defendant the opportunity to reform and to develop strong family ties. Furthermore, and as previously mentioned, in addition to reducing jail crowding, E.M.S. can be a cost-effective mechanism to skyrocketing correctional costs.

In spite of its many advantages, there are also underlying problems with pretrial E.M.S. One problem centers on the lack of power afforded to the program staff. Staff generally has the power to issue verbal warnings but are unable to follow up with any action. Police generally do not get involved until the defendant fails to appear for court. Another fundamental problem with pretrial E.M.S. is that participants have a greater incentive to escape as their trial date grows closer. Defendants who fear the outcome of the trial, may view their remaining time as their last opportunity to escape. Conversely, post conviction participants' incentive to escape lessens as their E.M.S. program nears the end. These participants know that they will be free following successful completion of the program. It is important to note that these liabilities should not serve as roadblocks, but rather as temporary obstacles to be removed or corrected in order to run a more effective pretrial E.M.S. program. (Coopridge and Kerby 1990)

VII. CONCLUSION

As local governments face more jail crowding, pretrial E.M.S. has become an attractive and effective alternative to incarceration. Florida judges must follow the guidelines set out in the Florida constitution when considering whether to impose E.M.S. as a condition of pre-trial release. Whereas imposition of an electronic monitor on a post-sentence inmate is strongly defensible, such imposition is weak and susceptible to legal challenges at the pre-trial stage. Because pretrial defendants have yet to be adjudicated, their rights are substantially greater than those of post-conviction participants. Furthermore, before the application of E.M.S. may be considered, the court must first determine the defendant's constitutional right to bail. Only after the right to bail has been determined, may the courts consider the imposition of E.M.S. as a condition of bail; unless of course, E.M.S. is accepted voluntarily by the offender.

Pretrial services plays a crucial role in the screening of potential candidates. In addition to helping maintain correctional populations at federally mandated levels, successful pretrial E.M.S. programs must effectively combine insuring a defendant's appearance at trial, the individual's constitutional right to bail, and maintaining the public safety. The application of E.M.S. technology to pretrial offenders can be an effective management tool for a judge, as well as a benefit to both the participants and the community in which they reside. Participants may benefit from the potential rehabilitative effect the pre-trial release program

can have upon them; whereas the community benefits by having its tax dollars spent more efficiently and effectively and by freeing up jail-beds for the more serious habitual offender and career criminal.