



January 10, 2019

Judges of the 22nd Judicial Circuit Court (St. Louis City)
10 N Tucker Blvd.
St. Louis, MO, 63101

Dear Circuit and Associate Circuit Judges of the 22nd Judicial Circuit:

We write to make you aware of a troubling practice by this Circuit that allows a private company – Eastern Missouri Alternative Sentencing Services (“EMASS”) – to effectively extort money from poor St. Louis residents. The 22nd Judicial Circuit has contracted with EMASS to provide bond supervision, GPS monitoring, and alcohol tracking devices for people on pretrial court-ordered supervision. This Circuit’s judges have determined that these individuals may be released from jail before trial. However, this release comes at a cost, as individuals have to pay significant fees to this private company in order to remain free, and risk re-incarceration if they find themselves unable to pay. As a result, these presumptively innocent individuals are essentially shackled, often unconstitutionally, by the cost and burdens of private supervision, and their inability to afford such costs has resulted in re-incarceration. Those who benefit from the Circuit’s current practices appear to be private companies, not the St. Louis public.¹

This letter outlines the ways in which the privatization of bond supervision by the 22nd Judicial Circuit and individuals’ subsequent incarceration if they cannot afford these privatized requirements result in systemic constitutional violations and fails to promote good public policy. It also suggests reforms we believe this Circuit could take to remedy these issues. We write on behalf of individuals impacted by this system and look forward to further communications with the Circuit to immediately address the problems posed by the expansion and improper threats of privatized supervision.

1. THE PROBLEM

The 22nd Judicial Circuit contracts with a private supervision company, Eastern Missouri Alternative Sentencing Services (“EMASS”), to provide pretrial supervision of criminal defendants. *See Exhibit A, 22nd Judicial Circuit contract with EMASS.* The Circuit Court does not pay for EMASS supervision, but instead transfers the cost of supervision onto individuals

¹ *Think crime doesn't pay? Probation-monitoring companies beg to differ.*, ST. LOUIS POST-DISPATCH (2018), https://www.stltoday.com/opinion/editorial/editorial-think-crime-doesn-t-pay-probation-monitoring-companies-beg/article_f0c31519-54ff-54d4-a4a1-082c1248d43a.html (last visited Nov 26, 2018).

referred to the program for supervision. *See Exhibit A, Section 4* (“All fees or services owed to EMASS shall be paid by the individual offender”). Individuals risk re-incarceration if they cannot afford these fees.

Costs can be prohibitively expensive, for example:

- GPS monitoring and house arrest electronic monitoring costs a \$50 installation fee and \$10 *per day* (requiring an initial payment of \$300 from individuals immediately upon release from jail for the first month);
- Pretrial “supervision” check-ins: \$30 per month;
- Alcohol monitoring costs a \$75 installation fee and \$15 *per day* (requiring an initial payment of \$525 from individuals immediately upon release from jail).

Before an individual is ordered to EMASS supervision, no inquiry is made into whether or not they are able to afford the EMASS fees prior to it being added as a condition of release. The vast majority of individuals referred to EMASS are indigent, based on the fact that the majority of people referred to EMASS are individuals represented by the Public Defender’s Office. *See Mo. Rev. Stat. §600.086 for eligibility guidelines to be represented by the Public Defender’s Office.*

The effects of this Circuit’s relationship with EMASS further erodes the trust between the courts and the community the 22nd Judicial Circuit seeks to serve. The stories we hear from our clients precipitate the need for this letter and for immediate court action. For example:

- One man, a single father, was forced to borrow the \$300 from his mother for the activation fee. After he lost his temp job he could no longer afford the \$300 per month GPS supervision fee. He had no method of transportation to get to the EMASS office. His mother lost her job and was on the verge of homelessness and was unable to offer any financial help. He chose to provide what limited funds he had to provide for his child over paying the EMASS fee. At a bond revocation hearing that occurred because he failed to report to EMASS, this man was re-incarcerated. If he had had money, he could have remained free and be involved in his child’s life.
- Another man was released from detention and ordered to report to EMASS for GPS monitoring. The man has severe medical issues and is unable to work. The man reported to EMASS immediately after being released from the hospital upon his release from jail and explained that he could not afford the fee. EMASS filed a notice with a court in this Circuit stating that he failed to comply with bond conditions, and a warrant was put out for his arrest. He was only kept from re-incarceration because of efforts by his public defender, community support in court, and fundraising efforts to pay his EMASS fees.

Our collective experiences in this Circuit Court demonstrate that the above examples are emblematic of broader unconstitutional trends and practices.

Pre-release from detention: At least one associate judge in St. Louis City’s Circuit Court would not release criminal defendants on bond if the individual was not able to pay EMASS’s installation and activation fees prior to their release. This has resulted in the continued incarceration of individuals eligible for release due *solely* to their inability to afford a private service.

Post-release and Re-arrest: When an individual is unable to afford EMASS supervision, EMASS reports to the court that they have not complied with a condition of release. This is true even where individuals have come to report to the EMASS office or complied with other conditions of sobriety or house arrest and only “failed to comply” by failing to bring the entirety of the money owed to EMASS for the court-ordered supervision because they could not afford the fee. If an individual fails to pay for EMASS services, or fails to report with EMASS because they are told that they cannot report without paying, EMASS will file a report with the court stating that the individual “failed to comply with bond conditions.” This notice does not state with specificity how the individual failed to comply with their bond conditions, even when that failure is only due to their inability to comply with fees owed, due to their poverty. *See Exhibit B*, “EMASS Report filed in court.” Based only on these notices from EMASS, courts in this Circuit have issued *capias* warrants for the re-arrest of pretrial criminal defendants without any hearing on the issue. We have documented examples of this where individuals are ordered to be on GPS-monitoring, but cannot afford the fee.

While EMASS may argue that its only option where individuals fail to pay is to violate them and provide notice to the court of that violation, this Circuit Court’s contract with EMASS specifically allows the Court to “assign a limited number of cases of indigent defendants to EMASS, which EMASS shall handle *at no charge*.” *See Exhibit A*, 22nd Judicial Circuit contract with EMASS. We are not aware of any courts in this Circuit referring someone to EMASS at no cost due to their indigency.

2. THE LEGAL BACKGROUND: CURRENT UNCONSTITUTIONAL AND ILLEGAL PRACTICES

A. Individuals have a right to pretrial liberty under the Fourteenth Amendment of the U.S. Constitution and Missouri law.

The Fourteenth Amendment protects liberty interests that are derived from either the text of the Amendment itself or from state law.² Missouri law recognizes pretrial freedom as a protected liberty interest. *See* Mo. Const. art. I, §§ 20, 21; Mo. Rev. Stat. §§ 544.455.1(6), 544.455.2, 544.455.4. While these laws recognize restrictions on the guarantee of pretrial

² *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989).

freedom, for example to protect general safety, they clearly require the restrictions be reasonable³ and balanced with the loss of liberty. In 2017, the District Court in Harris County, Texas rejected the argument that imposing financial conditions served the County's interest in ensuring the arrestee appeared at the future court date and committed no further crime.⁴

B. Incarcerating individuals without due process violates the Fourteenth Amendment of the Constitution.

In order to ensure that restrictions on pretrial liberty are reasonable, the Fourteenth Amendment requires certain procedures. This usually includes provision of a pre-deprivation hearing. As outlined by the Supreme Court in *Mathews v. Eldridge*, the court is required to consider the affected private interest, the risk of erroneous deprivation and the probable value of additional safeguards, and the governmental interest in the function and administrative burdens. 424 U.S. 319, 335 (1976). During this hearing, the adjudicator must consider the arrested individual's ability to pay.⁵ Specifically, the Supreme Court found in *Bearden v. Georgia* that in order to satisfy due process, a court's inquiry into inability to pay must examine "such factors as 'the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose.'" 461 U.S. 660 (1983). Neither this procedure, nor these inquiries, currently exist in this Circuit.

C. Incarcerating individuals because of their poverty violates Equal Protection under the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment prohibits punishing people, including returning them to jail, simply because they are poor. *Bearden v. Georgia*, 461 U.S. 660 (1983). EMASS violates the rights of many pretrial supervisees by acting in ways that lead to individuals' incarceration simply because of their wealth status. Wealthy supervisees who can afford to pay for their supervision and monitoring devices continue their daily lives, inconvenienced only by the devices themselves. Poor supervisees are frequently dragged into court for "compliance violations" stemming solely from their inability to afford the high supervision costs even after borrowing money from friends and family and giving up basic

³ "To assist the trial court in determining just and reasonable conditions for release in non-capital cases, section 544.455 provides that the trial court may release a defendant on a written promise to appear (i.e., a "recognizance") unless the court "determines, in the exercise of [its] discretion, that such a release will not reasonably assure the appearance of the person as required." § 544.455.1. See also Rule 33.01(a) ("Any person charged with a bailable offense shall be entitled to be released pending trial.") and Rule 33.01(b) ("The court shall set such conditions for release as will reasonably assure the appearance of the accused."). *Lopez-Mattias v. State*, 504 S.W.3d 716, 718 (Mo. 2016).

⁴ See *O'Donnell v. Harris Cty., Texas*, 251 F. Supp. 3d 1052, 1156 (S.D. Tex. 2017).

⁵ This is reflected in Missouri's Bail Statute: If the judge finds the person unable to afford the costs associated with electronic monitoring, the judge may order that the person be placed on house arrest with electronic monitoring if the county commission agrees to pay from the general revenue of the county the costs of such monitoring. If the person on house arrest is unable to afford the costs associated with electronic monitoring and the county commission does not agree to pay the costs of such electronic monitoring, the judge shall not order that the person be placed on house arrest with electronic monitoring. See Mo. Rev. Stat. § 544.455.1(6).

necessities. Since this Circuit often accepts information received by EMASS and acts on information about non-compliance to re-incarcerate individuals, EMASS employees have been given broad discretion by the Court to effectively violate supervisees too poor to afford their supervision costs.

Moreover, this Circuit should consider that EMASS's corporate practices are likely violative of state law. The Missouri Merchandising Practices Act (MMPA) prohibits the use of "deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact" to lease or sell a product or service. *See* Mo. Rev. Stat. § 407.020 et al. Because EMASS states that if an individual does not have the money to pay for its services, they should not come in, and then informs the court that the individual is not complying with the conditions of their release, EMASS is threatening individuals with jail time. This is a power EMASS does not have and, therefore, it is acting deceptively in violation of the MMPA. In addition, the contracts between EMASS and criminal defendants are likely procedurally unconscionable as they are one-sided, non-negotiable, and entail unjust enrichment. *See e.g. Brewer v. Mo. Title Loans, Inc.*, 323 S.W.3d 486, 493 (Mo. 2010); *Pitman v. City of Columbia*, 309 S.W.3d 395, 402 (Mo. App. W.D. 2010).

3. RECOMMENDATIONS TO THIS CIRCUIT

Whereas we oppose in principle the use of private pretrial supervision services as outlined above, including the use of GPS monitoring, the following recommendations can immediately mitigate some of the most egregious harms highlighted herein. We therefore encourage this Circuit to implement the following reforms:

- ***Waive fees*** where someone is found to be unable to pay the fees charged by EMASS but a court continues to require supervision as a condition of bond (pursuant to Section 8 of the contract). This determination will require that an ***inquiry into someone's ability to afford EMASS fees occur*** before requiring EMASS as a condition of release.
- ***Stop the practice of incarcerating for failure to pay EMASS fees.*** Where someone is unable to afford EMASS fees, ***require a hearing*** before issuing a warrant for their arrest. Historically, such hearings have occurred in Division 16 and should be instituted across the board. ***At the hearing***, the Court would inquire into an individual's ability to afford the condition, as well as whether supervision is necessary at all⁶, before taking any further action.
- ***Require that EMASS specifically inform the Court where the inability to pay is the reason for alleged noncompliance with conditions.*** This Court should instruct EMASS

⁶ Cook County instituted a model for how to inquire into a defendant's ability to afford a condition of release. Under the new Cook County policy, defendants will be interviewed about their financial resources before a bond hearing. That information will be provided to judges, who then will be required to set a bond that the defendant "has the present ability to pay." *See Judges Ordered to Set Affordable Bonds for Defendants who Pose No Danger*, CHICAGO TRIBUNE (2017), <https://www.chicagotribune.com/news/local/breaking/ct-cook-county-bail-reform-met-20170717-story.html> (last visited Nov 26, 2018).

that whenever a person's only issue with EMASS is failure to pay fees EMASS shall report only that the individual failed to pay fees assessed by the company.

- **Evaluate** the Circuit's current contract with EMASS and EMASS's current practices and services in light of the legal and constitutional implications of such practices. This evaluation should engage those currently subject to EMASS's conditions.

As cities around the country work to reform their judicial systems to address mass incarceration, the expanded use and reliance on private entities to surveil and monitor primarily poor, black, and brown communities presents a troubling new trend.⁷ The pretrial supervision practices in this Circuit result in the incarceration of individuals solely because of their poverty. The undersigned groups strongly encourage immediate action to mitigate the harms imposed by EMASS monitoring, and would be happy to meet with you to further discuss the above recommendations.

Sincerely,

Blake A. Strode
ArchCity Defenders, Inc.

Mary Fox
St. Louis Public Defender's Office

Robin Steinberg
The Bail Project

Jeffrey Mittman
American Civil Liberties Union of Missouri

Amy Breihan
Roderick & Solange MacArthur Justice Center

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Mound City Bar Association

CC: 22nd Judicial Circuit Court Administrator

⁷ A recent analysis by a Brookings Institute fellow found that "efforts to reduce recidivism through intensive supervision are not working." Reducing the requirements and burdens of community supervision, so that people can more easily hold jobs, care for children and escape the stigma of criminality "would be a good first step toward breaking the vicious incarceration cycle." See *Study after study shows ex-prisoners would be better off without intense supervision*, BROOKINGS INSTITUTE (2018), <https://www.brookings.edu/blog/up-front/2018/07/02/study-after-study-shows-ex-prisoners-would-be-better-off-without-intense-supervision/> (last visited Nov. 26, 2018).