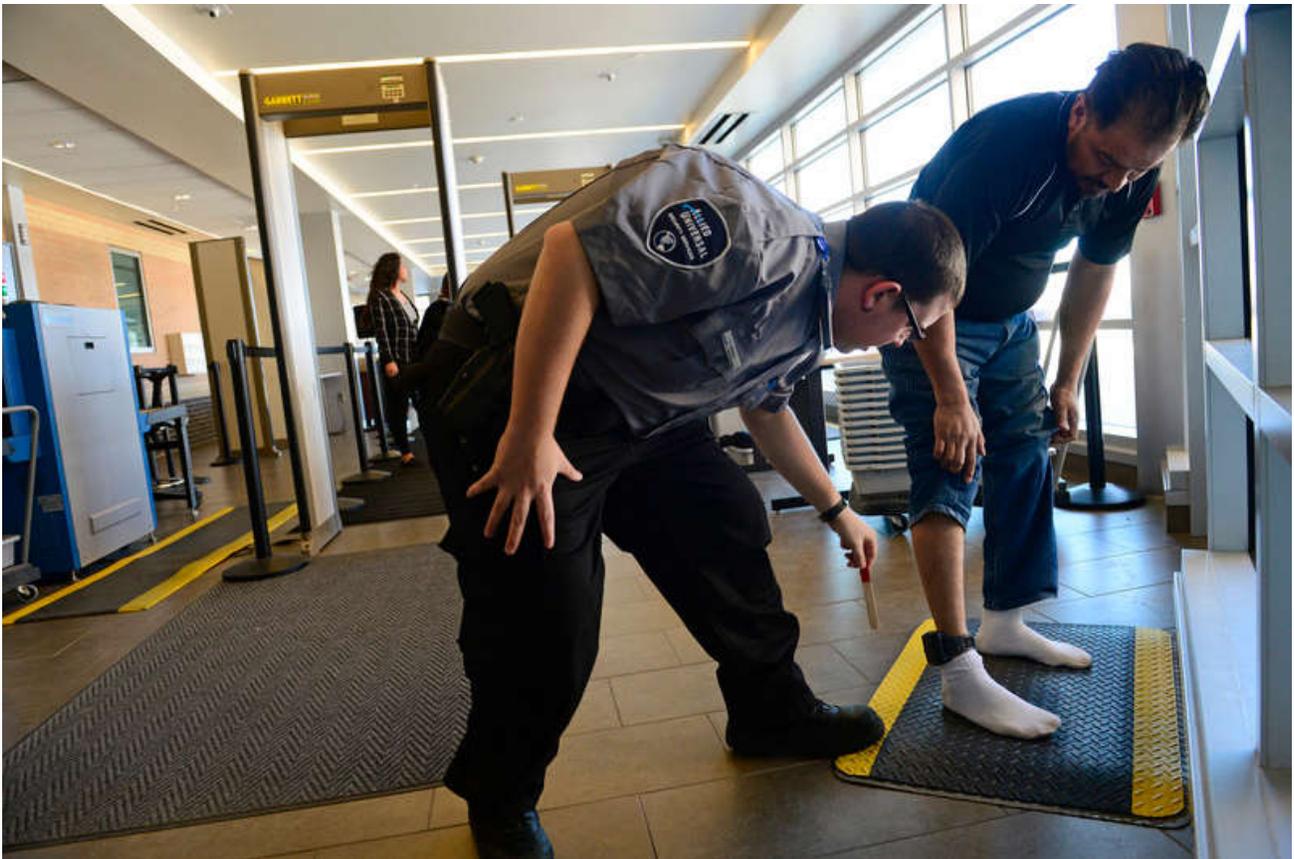


Ankle Monitors Are Replacing Cash Bail, But At A Cost

By **Jack Karp** | May 10, 2020, 8:02 PM EDT



As the use of pretrial electronic monitoring increases because of factors like bail reform, advocates say many defendants are facing fees they can't afford, and the possibility of jail time as a result. (Getty)

Isaac McClendon had 24 hours to come up with \$300.

He had just been released from a St. Louis jail after being charged with resisting arrest and criminal action on the condition he wear an electronic ankle monitor. And while McClendon was now free, there was one problem — that monitor cost \$300 to set up and \$300 a month to keep activated after

that.

"And, of course, I just came home from jail with no job," said McClendon, who owed that money to Eastern Missouri Alternative Sentencing Services, the private company managing the city's electronic monitoring program. "Can't nobody come home and get a job in 24 hours and pay \$300."

He got \$150 from The Bail Project, a nonprofit helping indigent defendants, and \$150 from his parents to have the monitor attached. But the monthly fees took their toll.

"I lost my apartment that I was living in, and my girlfriend and the kids went to a program that helps women," said McClendon, who moved in with his aunt.

McClendon is one of a growing number of criminal defendants awaiting trial under electronic supervision rather than in jail. While 53,000 Americans were monitored electronically in 2005, that number had ballooned by 140% to over 125,000 by 2015, according to a study by the [Pew Charitable Trusts](#).

Attorneys and activists say that number has only risen since and will likely rise further after the 2018 passage of the First Step Act, a federal criminal justice reform bill that includes provisions for greater electronic monitoring of released inmates.

Efforts to reform the cash bail system have been an important factor in the increase. In San Francisco, for instance, the number of defendants under electronic monitoring tripled after a 2018 court ruling that California's use of cash bail violated due process and equal protection rights, according to that city's sheriff's department.

"What we're seeing ... is just the significant increase in the use of electronic monitoring pretrial as a way for jurisdictions who are under some pressure to reduce their pretrial population to feel comfortable taking somebody out of jail," said Cherise Fanno Burdeen, executive partner at the Pretrial Justice Institute.

That may seem like welcome news to defendants and criminal justice reform advocates, who have long argued that cash bail unfairly penalizes those who can't pay it. But, as McClendon found out, there's a catch.

"The irony, of course, is that the vast majority of those jurisdictions are charging defendants for the use of electronic monitoring," Fanno Burdeen said.

Freedom for a Price

Every state except Hawaii places at least some of the burden of paying for electronic supervision on defendants, according to a 2014 study by the Brennan [Center for Justice](#) and the National Center for State Courts. And more and more jurisdictions are making defendants shoulder that entire burden, activists say.

That burden can cost anywhere from \$5 to \$35 per day, according to James Kilgore, director of

Challenging E-Carceration, which works to change policy around electronic monitoring. Foisting those costs onto defendants is becoming "the dominant practice, definitely," he said, and he's seen people go back to jail because they couldn't pay up.

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In Alameda County, California, for instance, William Edwards paid \$25.50 per day to Leaders in Community Alternatives after he was released.

Edwards, who has leukemia, had to borrow money after LCA repeatedly threatened him with jail, according to Phil Telfeyan, executive director of Equal Justice Under Law, which launched a proposed class action suit accusing LCA and the county of "extortion."

"The stress of LCA's threats was so great that it caused his white blood cell count to go down and his chemotherapy drugs stopped working," Telfeyan said. When the charges against Edwards were dropped, "he lost all the money he paid to LCA, and is still in debt to friends and family."

Monitoring company SCRAM charged Robert Hiskett \$195 every two weeks on top of a several-hundred-dollar activation fee after he was indicted in Mohave County, Arizona.

"The good grace of my friends helped a lot, because they basically fed me for that entire time," Hiskett said.

When Hiskett's defense attorney, Mike Wozniak, told the court his client couldn't afford those fees, the judge instead threw Hiskett in jail on a \$100,000 bond. He spent three weeks locked up before being put back under electronic monitoring, at his own expense.

"Either I pay the fees and keep the ankle monitor, or if I don't pay 'em, I would go to jail," Hiskett

said. "So, they were kind of top priority on the list, even above my rent."

LCA, for one, insists it works with defendants to help them afford the fees, often providing sliding scales and payment plans.

"In the event the client is struggling to pay the fees, extensive efforts are made to allow for more flexibility and smaller daily fees," LCA's former interim executive director, Jeffrey Essex, told Law360 by email. "In some cases, fees can be modified to as low as \$5 per day, which is below cost."

But Edwards and others monitored by LCA tried to have their fees reduced to no avail, according to Telfeyan, and McClendon said EMASS refused to adjust his fees.

SCRAM worked with some of Wozniak's other clients to manage their payments, Wozniak said. But the company did not help out Hiskett when he asked for an adjustment.

"It was, 'Nope, this is the cost, and that's that,'" Hiskett said.

'No Oversight'

It's unclear how many companies like SCRAM and LCA provide electronic monitoring services to law enforcement, but a market survey published by the National Criminal Justice Reference Service in 2016 listed 33 vendors providing location-based offender tracking technology.

The arrangements those companies have with law enforcement vary, and while some are bound by official contracts, many of them are not.

LCA, for instance, is contracted with Alameda County to provide tracking services, according to the complaint against it and the county. But SCRAM has no such contract with the Mohave County probation department, according to that county's chief probation officer, Alan Palomino.

Instead, SCRAM contracts directly with individual defendants, an arrangement the county chose because it lets the company "collect payment directly from the defendant, not holding the department liable for any outstanding fees," Palomino told Law360.

As a result, SCRAM has complete authority over its fees, underscoring that "this is completely up to them, that there is no oversight from the courts, and that they were just charging whatever they wanted," said Jared Keenan, a criminal justice staff attorney at the [ACLU](#) of Arizona who worked with Wozniak to challenge the practice in that state.

That means that unlike bail, which is usually set by a court and returned if a defendant is acquitted or has their charges dropped, ankle monitor fees are often determined solely by private companies and are almost never returned, activists say. And courts rarely if ever audit their practices, according to Kilgore and Fanno Burdeen.

"Often, the county is sort of like, 'We just need you to watch these people. However you want to watch them is fine,'" Fanno Burdeen said.

A suit against now-defunct Rehabilitation Home Incarceration in Louisiana federal court highlights this lack of oversight, according to Emily Early, senior staff attorney at the [Southern Poverty Law Center](#), which brought that case.

RHI, which had no contract with the court but only an "informal arrangement," used the threat of jail to "extort" defendants into paying a \$525 fee that "was the creation of RHI alone — it was not ordered by any court," according to a second amended complaint.

Once they were out, Early's clients were then charged a \$225 monthly monitoring fee, even though they were never actually provided with an electronic monitor.

"The problem with supervision often, in the investigations we've done, is not only the issue with the fees that are being borne by those who can't pay them in most instances," Early said, "but also, it's not truly supervision."

Looking to the Courts

LCA's Essex disputed that characterization.

"The courts or agencies receive reports on enrollment, status, violations and release. Additional tracking info may be provided to governmental agencies upon request," he told Law360.

"On any contracts we have, there is extensive oversight by the contracting agency," he added.

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Emily Early

Senior staff attorney
Southern Poverty Law Center

A spokesperson for SCRAM seconded that, saying in an emailed statement, "It's up to the court and

pretrial services to decide who is monitored and up to them to agree to pricing and determine how it will be paid for."

Electronic monitoring also offers flexibility and freedom to those who might otherwise be jailed while providing peace of mind to crime victims, Essex said. "We think any alternative to incarceration is preferable."

But that alternative costs money. Electronic monitoring participation agreements from several states list charges for installation, daily monitoring, wireless units, power supplies and replacement of various parts. And that's money that counties and probation departments often don't have, the practice's defenders say.

In an email that was introduced as part of Hiskett's case challenging the fees in Mohave County, Palomino wrote that his budget had been cut by 15% each of the past four years, "so to say we don't have the money to pay for this is an understatement."

Mohave County Superior Court Judge Rick Lambert, who jailed Hiskett when he asked the county to pay his fees, was more blunt.

"If we have numerous defendants who are being placed on electric monitoring, and for whatever reason the appellate courts and the legislature are mandating the courts put the defendants on electric monitoring, it's going to bankrupt Mohave County," he said in court.

Defendants, though, are starting to challenge that justification, and some courts are backing them up.

Hiskett asked the Arizona Court of Appeals to step in after Judge Lambert jailed him rather than use public funds to cover his monitoring fees. In October, the appeals court sided with Hiskett, ruling that "counties are not authorized to shift the costs of pretrial electronic monitoring to defendants" in Arizona, especially "where petitioner is accused of certain crimes but has not yet been tried, much less convicted."

Mohave County, which says it can't afford the fees itself, currently has no pretrial defendants under electronic monitoring as a result, Palomino told Law360. Defendants are instead being released without monitoring if they can post bond but are remaining in jail if they can't, according to Keenan.

In February, RHI settled the lawsuit brought against it by the SPLC on behalf of two people who claimed they were kept in jail because they couldn't pay RHI. The terms of that settlement are confidential, Early says, but RHI is no longer operating.

Not all the court challenges have been successful, though. A California federal judge awarded LCA summary judgment in the suit against it in December, after dismissing Alameda County from the case in 2018.

LCA was not extorting the released inmates because it didn't threaten them with jail, the judge wrote in his December order. It simply informed them that "failing to pay at all would be a violation report with the likely possibility of being remanded to jail."

That ruling is currently on appeal to the Ninth Circuit. Alameda County did not respond to a request for comment.

Whether successful or not, defendants and activists find themselves pinning their hopes on court challenges like these. The ACLU's Keenan says there is no legislation pending in Arizona — or elsewhere that he's aware of — to stop jurisdictions from imposing electronic supervision costs on defendants.

In California, a bail reform bill passed in 2018 also prohibited passing supervision costs onto defendants, Fanno Burdeen says, but that bill was challenged by bail agencies, which have forced a referendum on the law onto the state's November ballot.

Some local officials have opted to make administrative changes on their own. A spokesperson for the 22nd Judicial Circuit Court in Missouri, which ordered McClendon to be monitored by EMASS, told Law360 that as of July 2019, indigent defendants would no longer pay their own monitoring fees, after community members questioned the policy. EMASS did not respond to a request for comment.

But while indigent defendants in St. Louis will no longer be made to choose between finding the money to pay for electronic monitoring and going to jail, as McClendon did, many in other parts of the country may still find themselves facing that dilemma.

"These people are being let out under threat of re-arrest should they not pay this money," Keenan said. "And so just like the cash bail system, if you don't have access to money, then you essentially, while presumed innocent, spend your time in jail, and that just seems sort of intuitively wrong."

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--Editing by Katherine Rautenberg.

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