COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SUFFOLK COUNTY SJC-12545

COMMONWEALTH

v.

ERVIN FELIZ

BRIEF FOR THE DEFENDANT-APPELLANT*
ON APPEAL FROM THE
SUFFOLK COUNTY SUPERIOR COURT

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*This brief contains references to impounded materials

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INTRODUCTION

General Laws c. 265, § 47 requires that all defendants convicted of a broad list of sex offenses be placed on GPS monitoring for the full term of their probation. This GPS condition is mandatory; judges have no discretion to waive it.

The privacy intrusion caused by the GPS device is breathtaking. Twenty-four hours per day, every day, for years on end, these defendants must have a device strapped to their leg they can never take off. The device logs every step they take and transmits this information to the State, which retains it indefinitely. When an "alert" issues – either due to a technical problem or an actual violation – a warrant will follow unless it can be quickly resolved.

Over his nearly three years on GPS, Ervin Feliz has experienced hundreds of blameless alerts, causing him significant anxiety, and forcing him to spend hours walking in circles outside trying in vain to find a signal. Although he has never violated his probation, four warrants have issued for his arrest. He fears that the device will eventually cost him his job.

This onerous condition was imposed with no judicial consideration of its necessity, and despite a psychologist's judgment that Mr. Feliz "is not a significant sexual offense recidivism risk (contact or

non-contact sexual offenses) going forward in time" (R.45). No matter his success on probation or risk of recidivism, this condition can never be removed.

In Commonwealth v. Cory, 454 Mass. 559 (2009), this Court recognized that a "GPS device burdens liberty in two ways: by its permanent, physical attachment to the offender, and by its continuous surveillance of the offender's activities." Id. at 570. It also acts as a scarlet letter, "exposing the offender to persecution or ostracism." Id. at 570 n.18. This burden "appears excessive ... to the extent that it applies without exception to convicted sex offenders sentenced to a probationary term, regardless of any individualized determination of their dangerousness or risk of reoffense." Id. at 572.

In Commonwealth v. Guzman, 469 Mass. 492 (2014), this Court "note[d] again" the "excessive" nature of § 47's blanket imposition of GPS monitoring. Id. at 500. Although Guzman held that § 47 did not violate the defendant's due process rights, the Court declined to consider the defendant's claim that § 47 worked an unreasonable search and seizure because "questions of reasonableness are necessarily fact-dependent," and the record there was inadequately developed. Id.

After a three-day evidentiary hearing, this case developed that record, and now raises the exact issue that Guzman declined to address, stated below.

ISSUE PRESENTED

Whether the mandatory imposition of GPS monitoring as a condition of probation required by G.L. c. 265, § 47 – with no consideration of the individual defendant's circumstances or likelihood of re-offense – is unconstitutional under the Fourth Amendment and art. 14 as applied to those (like this defendant) who have been convicted of non-contact sex offenses.

STATEMENT OF THE CASE

On March 3, 2015, a Suffolk County Grand Jury returned indictment SUCR2015-10127, charging Defendant Ervin Feliz with two counts of possession of child pornography, in violation of G.L. c. 272, § 29C, and five counts of dissemination of child pornography, in violation of G.L. c. 272, § 29B (R.7).[1] On April 22, 2016, Mr. Feliz pled guilty, and was sentenced (Krupp, J.) to a five-year term of probation (R.9-10). At sentencing, GPS monitoring was imposed and Mr. Feliz preserved an objection to that condition (R.26).

Mr. Feliz then filed a motion to waive the GPS requirement, arguing that it violated his rights under the Fourth Amendment and art. 14 (R.27). An evidentiary hearing was held on the motion on February 10, 17, and 24, 2017. The motion judge (Gordon J.)[2] denied the motion by written order (R.275), and a timely appeal followed (R.315). On February 9, 2018,

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[1] Herein, the Record Appendix is cited as "R.", the Supplemental Record Appendix is cited as "S.R.", and the motion hearing transcript is cited by Volume/Page.

[2] Judge Gordon heard the motion after the Commonwealth moved to recuse the sentencing judge (R.87).

appellate proceedings were stayed for the defendant to file a motion to reconsider in the Superior Court. The motion to reconsider was allowed in part (R.442), and the judge amended his opinion while again ultimately denying the motion to waive the GPS requirement (R.448). Mr. Feliz entered a timely appeal (R.488), and the two pending appeals were consolidated.

STATEMENT OF FACTS

Enacted in 2006, G.L. c. 265, § 47 divests judges of discretion: all sex offenders[3] must wear GPS monitoring devices for the full duration of their probation. In this challenge to that condition, the Court below heard testimony from six witnesses over three days, including Mr. Feliz, his probation officer, the director of the GPS Program, and two experts in the field of sex offender treatment.

Mr. Feliz's Offense Conduct

Mr. Feliz pled guilty to seven non-contact sex offenses.[4] According to the Commonwealth's statement of the case (R.23), on five dates between June and

[3] The definition of a "sex offense" is found in G.L. c. 6, § 178C, and includes, as relevant here, the possession and dissemination of child pornography.

[4] In its response below, the Commonwealth repeatedly portrays the use of the term "non-contact" as an effort by the defense to somehow minimize Mr. Feliz's crimes, even using quotation marks to describe things the defendant has never said (R.84). To be clear, the distinction between "contact" and "non-contact" sex offenses is purely descriptive – contact offenses involve physical contact, non-contact offenses do not.

December 2014 authorities were alerted to the display of suspected child pornography on social media. The postings all resolved back to the same IP address, and a search of the associated physical address revealed a computer in Mr. Feliz's bedroom with child pornography images on it. During a police interview, Mr. Feliz confessed (I/91-92). As the judge found, he "has no history of committing 'contact offenses' against children" (R.449), and has otherwise "not been charged with or convicted of any additional sex offenses or other crimes" (R.455; I/82).

GPS Monitoring in Massachusetts

GPS enrollees are monitored by the Electronic Monitoring Center ("ELMO") in Clinton (III/9).[5] Each enrollee wears a device around their ankle that records location data once per minute (III/11). This data is retained indefinitely (III/12-13).

The GPS system typically consists of two pieces: the bracelet and a stationary beacon placed in the

[5] About 3,195 people in Massachusetts are on GPS monitoring (III/37), though it is unclear how many of those are monitored pursuant to § 47 in particular (R.450). See Daniel Pires, Presentation at the Mass. Bar Association (March 20, 2018) (estimating that 24% of GPS enrollees are sex offenders). Across the United States, the number of people wearing mandatory GPS monitors "hovers around 80,000 each day." See generally Milner, Pinpoint, 170-201 (2016) (tracing the origin and evolution of GPS tracking in supervision, from a "method of positive reinforcement" meant to make prisons "obsolete," to a punitive system in which the "rehabilitative aspect of tracking ... has all but disappeared").

enrollee's home (III/50). Massachusetts leases the GPS software, bracelets, and beacons from the 3M Corporation (III/8). 3M says that its technology is "90 percent accurate within thirty feet" (III/11); there are no studies verifying this claim and Massachusetts has done no testing to determine its accuracy (III/21, 29). ELMO also does no maintenance on the 3M hardware (III/29).[6]

It takes two hours every day to charge the GPS bracelet (III/31).[7] Electronic monitoring costs $5.95 per day for the person monitored (III/36), or about $2,170 per year, unless the fees are waived by the sentencing judge. See G.L. c. 265, § 47.

The GPS devices trigger "alerts" that notify the central ELMO office in Clinton (I/34; III/9).[8] There are a number of different types of alerts:

- "Unable to connect" – arises when the software has a connectivity issue (III/18).

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[6] The location data is transmitted to ELMO via the Verizon cellular network (III/13-14). ELMO does nothing to ensure that an enrollee's residence or place of business has sufficient cellular service to support the GPS system (III/15-16).

[7] ELMO recommends that enrollees not charge the device while they are sleeping because the charger can disconnect (R.42). See Daniel Pires, Presentation at the Mass. Bar Association (March 20, 2018).

[8] According to Daniel Pires, the statewide director of the ELMO program who testified below, ELMO fields 1,700 alerts per day, only 1% of which result in the issuance of warrants. See Daniel Pires, Presentation at the Mass. Bar Association (March 20, 2018).

- “Charging” – arises when the battery on the device is low. This is the most frequent alert (III/19).

- “Alert Beacon/AC Power Disconnected” – arises when the in-home beacon gets unplugged (III/52).

- “Tampering” – arises when the device is cut or broken in a manner that suggests it had been tampered with (III/34-35, 62).

- “Exclusion Zone” – arises when the device enters an exclusion zone that was input into the monitoring system (III/44; II/83, 85).

- “Curfew Violation” – arises when an individual is not at their home pursuant to a curfew (III/51).

- “No GPS” – arises when “there is cell coverage, but there is no GPS” (III/59). As a result, the system would detect movement, but would not transmit location data (III/59).

When there is an alert, ELMO employees generally try to contact the probationer (III/22). If the issue cannot be resolved, the ELMO central office contacts their probation officer, who may then seek a warrant for the probationer’s arrest (I/52, 57; II/83-84).[9]

Mr. Feliz’s probation officer testified that the GPS bracelets malfunctioned “on a fairly regular basis” before the change to “new equipment” (I/35).

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[9] Probation Officer Connolly, who exclusively supervises sex offenders (II/79), testified that when he receives an exclusion zone alert he tries to contact the probationer (II/89). If he cannot make contact, he will “automatically request a warrant” (II/89). If he does make contact, and the probationer says the alert was inadvertent, he still seeks a warrant to “cover [him]self” and because he “tend[s] not to believe ... what they’re saying” (II/90).

The old equipment malfunctioned "upwards of thirty percent" of the time, while the new equipment – which came into use approximately six months prior to the February 2017 hearing (I/35) – malfunctions about ten percent of the time (I/38).[10] At the time of the hearing, Mr. Feliz used the older equipment (I/60).

Mr. Feliz's Experience on GPS Supervision

Mr. Feliz was sentenced to a five-year term of probation (I/28). As to his GPS, Mr. Feliz has a condition that he remain 300 feet away from schools, parks, and daycares (I/38). However, if he enters a restricted area, there is no alert triggered in "real time" because this zone is too broad to be entered into the ELMO system (III/45-46; R.453).

During the motion hearing, Mr. Feliz described a number of problems with his GPS device.[11] He has experienced hundreds of blameless alerts, four of which resulted in warrants for his arrest. These

[10] PO Connolly testified that the new devices and old devices have connectivity problems at "pretty much the same" rate (II/98).

[11] At the hearing, Mr. Feliz testified that alerts were ongoing up to the time of the February 2017 hearing, but the motion judge originally did "not credit" that testimony because there was no documentary evidence to corroborate six months of that period (R.281-282). Mr. Feliz then moved to reconsider and submitted case management notes confirming the ongoing problems with his GPS device (R.316). The motion judge changed his credibility finding accordingly, but did not change his finding that the "GPS bracelet is working substantially as it is designed to do" (R.282, 446).

alerts are well documented (R.174, 328). Despite that documentation, the judge found as a fact "that false alerts are infrequent and easily resolved" (R.454).

The GPS device has exacerbated Mr. Feliz's pre-existing anxiety and made him fear for his job (R.59). On the very first day of his enrollment, an "unable to connect" alert could not be cleared – despite his repeatedly walking outside for about two hours in the cold – and triggered a warrant (though Mr. Feliz was not arrested) (I/74-77; III/56-57; R.184). The same thing happened three days later, resulting in another warrant that was also rescinded (R.188, 228). Two more warrants have since issued (R.193, 358).

Mr. Feliz wore the GPS bracelet as a condition of pretrial release from December 12, 2014 to April 2, 2015, when the condition was removed (I/69; R.58-59). It was then re-imposed on April 22, 2016 after his guilty plea, as a mandatory condition of his probation (R.93). At the motion hearing, his probation officer did not "recall any connectivity issues with respect to Mr. Feliz" (I/52). In reality – as summarized by the judge and reflected in the case notes – Mr. Feliz had 31 alerts from April 2016 to February 2017 that were each resolved in an average of 30 minutes (R.454).[12] Mr. Feliz reported problems with the GPS,

[12] In ruling on the defendant's motion to reconsider, the motion judge refused to consider documentation of

which usually occur while he is at work, at a rate of "two to three times a month" (I/79, 82).[13] When these problems arise, Mr. Feliz has coworkers cover for him while he walks around outside to get a signal (I/79). Despite these issues, Mr. Feliz has maintained steady employment (I/66). He works in a warehouse with "cement everywhere" (I/67), which can create connectivity issues (I/81; III/18). Mr. Feliz worries that he will lose his job as a result of having to go outside to get a signal (I/81),[14] in addition to the general anxiety created by the possibility of his arrest due to a malfunction or connectivity problem (I/82). Overall, up to February 2018, Mr. Feliz has experienced 244 alerts and four warrants, causing him considerable anxiety and embarrassment (R.59).

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148 alerts that post-dated the February 2017 motion hearing (R.445). This was error. The defendant filed his motion to reconsider in the alternative, as a renewed motion to waive the GPS condition (see R.316). The motion judge did not address that aspect of the defendant's motion, and this Court should weigh these 148 additional alerts in assessing the intrusiveness of the GPS device.

[13] Mr. Feliz had a higher rate of problems with the GPS device during his pretrial supervision (I/83). The motion judge does not appear to have considered these 65 earlier alerts either, even though they are also confirmed by the case management notes (see R.183-217). This Court should consider these alerts as well.

[14] PO Connolly testified that he has seen probationers lose their jobs due to GPS issues (II/98). The judge seemed to hold Mr. Feliz's success against him, using his retention of his job as evidence that the claimed burden of the GPS device was overblown (R.455).

Non-Contact Sex Offenders & The Risk of Recidivism

Two experts testified about the risks of re-offense posed by non-contact sex offenders: Dr. Joseph Plaud for Mr. Feliz (II/15), and Dr. Gregory Belle for the Commonwealth (III/74). Only Dr. Plaud had examined Mr. Feliz (see report at S.R.3). As the motion judge found, "many of the conclusions they offered ... aligned in material respects" (R.455). For example, "the rates of recidivism for sex offenders is lower than the rates of re-offense for all crimes," while the rate of recidivism of non-contact sex offenders "is lower still" (R.455-456; II/32; III/131, 134).[15] These conclusions were based on a number of studies that were admitted as exhibits at the motion hearing:

- Seto & Eke, The Criminal Histories & Later Offending of Child Pornography Offenders, Sexual Abuse, Apr. 17(2), 201-210 (2005) (finding, over 2 ½ year period, that among child pornography offenders with no other criminal history, 1.3% committed a contact sex offense and 5.3% committed a noncontact sex offense). (See II/24-26; R.140.)

- Webb, et al, Characteristics of Internet Child Pornography Offenders: A Comparison with Child Molesters, Sexual Abuse, Dec. 19(4), 449-465 (2007)

[15] Dr. Plaud testified that "generally" he cannot evaluate whether a person is likely to re-offend "[w]ithout any information other than that the person has been convicted of a sex offense" (II/24). He did, however, say that noncontact sex offenders "are always the lowest" in terms of their recidivism (II/47). Dr. Belle testified that he "wouldn't be comfortable" giving an opinion on a person's risk of re-offense from the sole fact that he had been convicted of a child pornography offense (III/118), nor could he make a diagnosis of pedophilia (III/119; II/57).

(finding that non-contact offenders are significantly less likely to re-offend as compared to contact offenders). (See II/27-28; R.150.)

- Endrass, et al, The Consumption of Internet Child Pornography and Violent and Sex Offending, BMC Psychiatry, 9:43 (July 2009) (concluding that, applying a "broad definition of recidivism," non-contact sex offenders re-offend at a rate of 3.9% for non-contact offenses and 0.8% for contact offenses). (See II/33-35; R.167.)

- Seto, et al, Contact Sexual Offending by Men with Online Sexual Offenses, Sexual Abuse, Dec. 23(1), 124-145 (2010) (finding, upon meta-analysis of nine recidivism studies, that of online offenders, 2% commit a contact offense and 3.4% commit a new child pornography offense). (See III/120-121; R.115.)

- Seto & Eke, Predicting Recidivism Among Adult Male Child Pornography Offenders, Law and Human Behavior, Aug. 39(4), 416-429 (2015) (finding, in a five-year follow-up, that 9% of child pornography offenders committed another such offense, while 3% committed a contact offense). (See III/122-124; R.126.)

- Kim, From Fantasy to Reality, American Prosecutors Research Institute, Vol. I(3) (2004). This article reports no independent findings of its own (III/126-128; R.109).[16]

[16] The evidence also included the so-called "Butner Study," which is an outlier in its finding of high rates of recidivism among non-contact sex offenders. See Bourke & Hernandez, The "Butner Study" Redux, J. Fam. Viol. 24:183-191 (2009). (See II/35-40; R.100.) The Butner Study has been subject to considerable criticism. See United States v. Johnson, 588 F. Supp. 2d 997, 1007 (S.D. Iowa 2008) (adopting expert conclusion "that the Butner Study 'isn't scientifically vetted, [ ] doesn't meet scientific standards for research, and [ ] is based upon, frankly, an incoherent design for a study.'"). Dr. Plaud also described the failings of the Butner Study (II/38), and testified that he was unaware of any studies reporting similar findings (II/39-40). Dr. Belle noted that the Butner Study had "been refuted"

Overall, Dr. Belle – the Commonwealth's expert – testified that the risk of a contact offense by a non-contact sex offender "would be low" (III/99, see also II/32). The reason for such low recidivism rates is that "upwards of 55 to 60 percent of men who engaged in ... contact based [offenses] with children do so for reasons that do not involve the presence of a paraphilia such as pedophilic disorder" (II/51, emphasis added; II/60-61). One cannot diagnose someone with pedophilia based only on the fact that they have been convicted of a non-contact sex offense (II/57; supra note 15).[17] Dr. Plaud also testified that "over 90 percent" of sex offenses are committed by first-time offenders (II/32).

The motion judge offered a few theories to explain the low rate of recidivism among sex offenders – theories not argued by the Commonwealth and

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and was "methodologically flawed" (III/95, 98, 125). Even "one of the study's authors has criticized the government's characterization of his work, stating that the argument that the majority of [child pornography] offenders are indeed contact sexual offenders and, therefore, dangerous predators ... simply is not supported by the scientific evidence." United States v. Apodaca, 641 F.3d 1077, 1083 n.1 (9th Cir. 2011) (citation omitted).

[17] Dr. Belle testified that there are "two primary pathways of sexual offending," one being "antisocial personality disorder" and the other being a "deviant sexual preference" in children (III/85). Dr. Plaud concluded that Mr. Feliz was not "motivated by sexual deviance" and would not meet the diagnostic criteria for a paraphilic disorder (R.45).

unsupported by any submitted literature – such as the civil commitment of sexually dangerous persons and the under-reporting of sex offenses generally (R.456; II/56). But, most relevant here, the judge seemed convinced that GPS monitoring itself was causing the reduced recidivism rates (R.456). Dr. Plaud testified that there was no empirical evidence for this conclusion (II/42). And Probation Officer Connolly testified that, in his six years of experience supervising sex offenders both with and without GPS, he did not think that GPS reduced recidivism (II/92). Nonetheless, the judge set "[e]mpiricism aside" and accepted as a fact the "common-sense conclusion" that GPS monitoring deters crime (R.457). That hypothesis is unsupported by any record evidence.[18]

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[18] The judge, acting sua sponte, sought out and cited four studies, none of which support the conclusion that GPS deters crime (R.457). In particular, the three superficially supportive studies cited – two out of California and one out of New Jersey – all involve GPS monitoring of high risk sex offenders. A 2005 meta-analysis of past studies concluded that uses of electronic monitoring "as a tool for reducing crime are not supported by existing data." Renzema & Mayo-Wilson, Can Electronic Monitoring Reduce Crime for Moderate to High Risk Offenders?, J. of Experimental Criminology 1:215-237 (July 2005).

Indeed, the Tennessee study cited by the judge concluded that there was no statistically significant difference in recidivism for sex offender probationers monitored by GPS. See Tennessee Bd. Of Probation & Parole, Monitoring Tennessee's Sex Offenders Using Global Positions Systems: A Project Evaluation (April 2007). In fact, that study noted that "lower risk offenders who are supervised at enhanced levels re-

SUMMARY OF ARGUMENT

The reasonableness of a search depends on a weighing of the degree of privacy intrusion against the government interest served by the search. Here, that balance weighs decidedly in the defendant's favor. The privacy intrusion occasioned by a GPS monitor is enormous: it invades bodily integrity and reveals and catalogs location information, causing stigma and isolation, and does so every minute of every day for years on end. The mandatory imposition of this condition – which is the only aspect of § 47 in dispute in this case – serves no government interest. The Commonwealth has yet to explain what interest is served by imposing GPS on a mandatory rather than case-by-case basis like every other condition of probation. Non-contact sex offenders, who have the lowest recidivism rates of all defendants subject to § 47, must be allowed an individualized hearing before this severe condition is imposed.

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offend more frequently and have overall higher recidivism rates than similar offenders supervised at lower risk levels." Id. at 6. In other words, the level of monitoring should be commensurate with the offender's level of risk: "more intense correctional interventions are more effective when delivered to higher-risk offenders," while "they can increase the failure rates of low-risk offenders." Lowenkamp & Latessa, Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-Risk Offenders, Topics in Community Corrections, at 6 (2004). See also Doe No. 380316 v. SORB, 473 Mass. 297, 306 n.12 (2015) (noting adverse consequences that can arise from "exceptionally burdensome" conditions).

ARGUMENT

The mandatory attachment of a GPS device to non-contact sex offenders for the full duration of their probation, without any individualized consideration of their dangerousness or risk of recidivism, violates Article XIV and the Fourth Amendment.

"In setting this matter in context, it is useful to delineate what this case is not about." Commonwealth v. Pugh, 462 Mass. 482, 494 (2012). Mr. Feliz is not arguing that judges are powerless to impose GPS monitoring on non-contact sex offenders. Instead, he merely argues that judges should be free to waive the condition when they think it unnecessary, after a hearing regarding the particular defendant's risk of recidivism. In other words, Mr. Feliz is arguing no more than what this Court has already twice said: GPS monitoring "appears excessive ... to the extent that it applies without exception to convicted sex offenders sentenced to a probationary term, regardless of any individualized determination of their dangerousness or risk of reoffense." Guzman, 469 Mass. at 500, quoting Cory, 454 Mass. at 572. This is not a statute carefully calibrated to identify offenders who need GPS supervision; it is a dragnet.

This is the glaring hole in the Commonwealth's case: it has yet to articulate why GPS monitoring must be mandatory. Of course, it strenuously argues that GPS monitoring serves its interests. But at no point has the Commonwealth explained why conscientious

Superior Court judges, acting in good faith, are incompetent to determine when GPS is reasonably necessary to serve the various interests it has asserted. This omission is noteworthy, as that is the only issue in dispute in this case.

Thus, a ruling for the defendant here would potentially relieve from GPS only those defendants (1) who were convicted of non-contact sex offenses, and (2) who a sentencing judge determines do not present a risk of re-offense such that GPS is necessary. The Fourth Amendment does not permit the constant, pervasive, and intrusive search required by § 47 in the absence of an individualized need for it.

(1) Attaching a GPS bracelet to a probationer's body is a constitutional "search".

This Court has already concluded that a GPS device imposes two "serious, affirmative restraint[s]" on liberty: (1) the "physical[] attach[ment] [of] an item to a person, without consent and also without consideration of individual circumstances"; and (2) the "continuous reporting of the offender's location to the probation department." Cory, 454 Mass. at 570. The statute invades privacy in the same way it restrains liberty. Were there any doubt, the Supreme Court has explicitly said so: "a State ... conducts a search when it attaches a device to a person's body,

without consent[19], for the purpose of tracking that individual's movements." Grady v. North Carolina, 135 S. Ct. 1368, 1370 (2015). See also Commonwealth v. Rousseau, 465 Mass. 372 (2013).

Because constant GPS monitoring is a search, the Commonwealth "has the burden to show that its search was reasonable and, therefore, lawful." Commonwealth v. Berry, 420 Mass. 95, 105-106 (1995). This inquiry involves weighing, "on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." Samson v. California, 547 U.S. 843, 848 (2006) (citation omitted). See Grady, 135 S. Ct. at 1371 (GPS monitoring is only permissible if reasonable in light

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[19] During the hearing below, the Commonwealth cited the fact that Mr. Feliz had signed the probation and ELMO forms (I/54, 85). Such consent is not voluntary when the condition imposed is mandatory and the alternative is incarceration (I/94). Indeed, Mr. Feliz has objected to the GPS condition since the day it was imposed (R.10, 26). See Commonwealth v. LaFrance, 402 Mass. 789, 791 (1988) ("The coercive quality of the circumstance in which a defendant seeks to avoid incarceration by obtaining probation on certain conditions makes principles of voluntary waiver and consent generally inapplicable."); Commonwealth v. Moore, 473 Mass. 481, 487 n.6 (2016). But see Commonwealth v. Johnson, 91 Mass. App. Ct. 296, 303, 305 n.13 (2017) (GPS imposed as a matter of discretion pursuant to pretrial release is not a search because the defendant "voluntarily chose" the intrusion "in order to enjoy [his] liberty", particularly where there was no record evidence "that the defendant was compelled to either accept GPS monitoring or be held without bail").

of "the totality of the circumstances").[20]

(2) To be reasonable under the Fourth Amendment and art. 14, a search of a probationer must be based on individualized suspicion.

This Court need go no further than this: "art. 14 bars the imposition on probationers of a blanket threat of warrantless searches." Commonwealth v. LaFrance, 402 Mass. 789, 795 (1988). See also Chandler v. Miller, 520 U.S. 305, 313 (1997). LaFrance struck down a condition requiring the probationer to submit to a search, at any place and time, without suspicion or a warrant. Id. at 790. This Court held that the condition was unconstitutional, id., "notwithstanding the fact that such a condition might aid in the probationer's rehabilitation and help to ensure their compliance with other conditions of probation." Commonwealth v. Obi, 475 Mass. 541, 548 (2016).

Section 47 does exactly what LaFrance does not

[20] On remand in Grady, the state appeals court held "the Supreme Court's mandate ... to require case-by-case determinations of reasonableness." State v. Grady, 2018 WL 2206344, at *3 (N.C. Ct. App. May 15, 2018). The Court concluded that the government failed to meet its burden to prove that GPS monitoring was "reasonable as applied to this particular defendant" – who had been convicted of multiple sexually violent offenses – citing the absence of evidence that he posed a "current threat of reoffending." Id. at *6 (original emphasis). The Court "reiterate[d] the continued need for individualized determinations of reasonableness at Grady hearings." Id. at *8. At the hearing, the court must do more than "summarily conclude" that imposition of GPS is reasonable in light of the conviction. State v. Morris, 783 S.E.2d 528, 529 (N.C. Ct. App. 2016).

permit – it subjects the probationer to a blanket, ongoing search, via GPS monitoring, without any individualized suspicion. Although the motion judge sought to distinguish LaFrance on two grounds, neither survives serious scrutiny.

First, the judge counted the pervasiveness of GPS monitoring as a factor in its favor. To the motion judge, probationers subject to the sort of random searches at issue in LaFrance would live with "an element of uncertainty as to if, when, and in some cases where, the search would be conducted," whereas those subject to GPS monitoring are "well aware of when the search will occur" (R.477) – every minute of every day, and the data retained indefinitely. This distinction is unpersuasive. Uncertainty is unpleasant, but the Fourth Amendment and art. 14 protect against invasions of privacy. Infrequent, random searches are far less invasive than continuous intrusions upon both bodily integrity and locational privacy; a constant threat of a search is less intrusive than a constant actual search.[21]

[21] Even taking the motion judge's distinction on its terms, a GPS device also carries with it a pervasive uncertainty of far greater significance: at any time, a warrant can issue for Mr. Feliz's arrest for no fault of his own (R.59). Like the random searches in LaFrance, GPS connectivity problems can also be (in the words of ELMO's director) "very random" (III/16). A constant threat of a random search is less intrusive than a constant threat of a random, unfounded arrest.

Second, the motion judge sought to distinguish LaFrance by arguing that the two probation conditions serve different purposes – GPS monitoring "serves salutary goals that benefit both the offender and society at large" such as deterrence, rehabilitation, and compliance with probation conditions, while the random search condition in LaFrance was "a search broadly directed at the discovery of evidence of criminal activity" (R.478). This is factually incorrect. The random searches in LaFrance were meant to serve the exact same purported purpose as GPS monitoring: to "aid in the probationer's rehabilitation and to ensure her compliance with the conditions of probation." 402 Mass. at 792-793; Obi, 475 Mass. at 548.[22] Section 47 imposes a far more onerous search condition than the one at issue in LaFrance, and it does so for the exact same reasons. To comply with LaFrance's requirements of judicial oversight and individualized suspicion, GPS monitoring cannot be imposed on a mandatory basis.[23]

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[22] This was the Commonwealth's exact argument in LaFrance: "The Commonwealth submits that the use of probationary search conditions as a means of supervision assure that the probation serves as a period of genuine rehabilitation." Commonwealth's LaFrance Brief at 4 (citation omitted). See also id. at 6 (citing the "deterrent effect of the condition").

[23] Below, the Commonwealth tried to distinguish LaFrance on a third basis: unlike in LaFrance, "section 47 does not involve the search of a probationer's home" (R.81). But a constant search of

The commission of any non-contact sex offense cannot create per se reasonable suspicion to support this invasive and constant search. First, such an approach defies LaFrance, as it makes a categorical assumption about all offenders with no particularized suspicion. Second, it is contrary to social science and experience. "It's a mistake to lump together different types of sex offender[s]." United States v. Garthus, 652 F.3d 715, 720 (7th Cir. 2011). Indeed, both testifying experts warned against such a rule: one cannot determine a person's risk or re-offense, or diagnose pedophilia, solely by virtue of the fact that the person has committed a non-contact sex offense. See supra note 15. The Commonwealth's own expert explicitly stated that internet sex offenders are "not a homogenous group" (III/98), yet § 47 treats them as one. The expert further explained the ten-factor test that he uses to assess sexual dangerousness (III/102-103). Section 47 replaces a ten-factor test with a one-factor test.[24] LaFrance does not permit this

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the body is worse than that in the home. After all, "[t]he Fourth Amendment lists 'persons' first among the entities protected against unreasonable searches and seizures." Maryland v. King, 569 U.S. 435, 469 (2013) (Scalia, J., dissenting) (original emphasis).

[24] The use of even the ten-factor test in SDP proceedings has been criticized by this Court because "substantial variation exists among sex offenders ascribed identical risk category labels." Commonwealth v. George, 477 Mass. 331, 340 (2016).

blanket judgment.[25]

Mandatory GPS tracking is unconstitutional. See Dante, Tracking the Constitution, 42 Seton Hall L. Rev. 1169, 1222-1223 (2012).

(3) Sex offenders on probation retain an expectation of privacy in both their bodily integrity and their location information.

The motion judge constructed a loss by accretion theory of Fourth Amendment rights: As probationers, those subject to § 47 have a reduced expectation of privacy. As sex offender probationers, their privacy interest is further reduced due to their high level of supervision. And, finally, as sex offenders subject to registration, any privacy interest they might have is even more diminished (R.464-468). This was error.

This Court has repeatedly rejected the notion

[25] Our entire system of civil commitment and sex offender registration rests on the premise that experts can conduct an individualized assessment of a person's future sexual dangerousness with some degree of precision. See G.L. c. 123A, § 1 (defining a "sexually dangerous person" as someone who is "likely to engage in sexual offenses if not confined to a secure facility"); G.L. c. 6, § 178K (varying registration obligations depending upon whether the risk of re-offense is "low", "moderate", or "high"). The ability to conduct this predictive assessment is perhaps dubious, see Commonwealth v. Coates, 89 Mass. App. Ct. 728, 737 (2016), but Massachusetts courts have embraced it. See Commonwealth v. Bradway, 62 Mass. App. Ct. 280, 285-289 (2004). It seems unfair to employ this proposition as a one-way ratchet, to commit and register people against their will while then abandoning it when the defendant seeks relief from onerous probation conditions.

that GPS monitoring imposes only a slight added burden on sex offenders:

> As "continuing, intrusive, and humiliating" as a yearly registration requirement might be, a requirement permanently to attach a GPS device seems dramatically more intrusive and burdensome.... While GPS monitoring does not rise to the same level of intrusive regulation that having a personal guard constantly and physically present would impose, it is certainly far greater than that associated with traditional monitoring.

Cory, 454 Mass. at 570-571 (emphasis added).[26] Of course, sex offenders have less privacy than the rest of us – they are privately supervised and publicly registered. But they retain their privacy in exactly the two ways that GPS monitoring infringes it: bodily integrity and location information.

Neither probation nor registration affects bodily integrity. Supervision by a probation officer does not touch the probationer's person. Similarly, level two and three sex offenders have their information put on the internet, but that information is only available

[26] In Commonwealth v. Goodwin, 458 Mass. 11 (2010), this Court held that a sex offender probationer cannot have GPS monitoring added to his probation unless there is a material change in circumstances because it "is so punitive in effect as to increase significantly the severity of the original probationary conditions." Id. at 23. See also Commonwealth v. Selavka, 469 Mass. 502, 505 n.5 (2014) ("GPS monitoring is singularly punitive in effect."); Doe v. Mass. Parole Bd., 82 Mass. App. Ct. 851, 858 (2012) (GPS monitoring is "materially different and more onerous than other terms of probation").

to those who go online and search for it.[27] It does not follow them every step they take and everywhere they go. The registry may shame their name, but it does not brand their body. By infringing bodily integrity, GPS supervision works a privacy intrusion of an entirely different kind than either the general conditions of probation or the registration obligation.

As to location data, GPS monitoring invades the probationer's privacy to a fundamentally different degree. Probationers must report their home and work addresses and may have exclusion zones. But no part of the probation or registration obligation updates the state of their whereabouts in real time, around the clock, and retains that location information indefinitely. As described infra part 4, this information, taken together, can create a mosaic that tells the entire story of a person's lived experience.

The government's position is in tension even with its own logic. If the location information created by GPS monitoring really "add[ed] modestly" to that generated by probation supervision or sex offender

[27] And note that the only sex offenders who will likely be relieved of the GPS monitoring condition are also those who are most likely to be classified as level one, low-risk sex offenders, whose information is not publicly disseminated. Mr. Feliz, for example, is a level one offender; visitors to SORB's website will not find his name. As a result, he does not have the further reduced expectation of privacy of level two and three sex offenders cited by the motion judge.

registration – as the motion judge found (R.477) – then it would not serve any of the government's asserted interests. The magnitude of the privacy intrusion is directly correlated with the government's claimed interest; it wants this location data precisely because it is invasive. It is irreconcilably inconsistent to say that probationers have little interest in their location data because the government already has so much of it, while the government has a strong interest in this GPS information because of its value. The Commonwealth cannot have it both ways. Knowing a person's every move is profoundly more intrusive than just knowing where they live and work, which is the reason the government wants this condition imposed in the first place. GPS supervision is highly intrusive, and that is by design.

The fact that an individual "has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." Riley v. California, 134 S. Ct. 2473, 2488 (2014). The privacy intrusion occasioned by GPS monitoring is different, "in both a quantitative and a qualitative sense," from probation supervision or sex offender registration. Id. at 2489. See also Maryland v. King, 569 U.S. 435, 463 (2013) (noting that searches of those with reduced expectations of privacy may be unreasonable if they involve categorically "greater intrusions or higher

expectations of privacy"). Sex offender probationers retain the exact privacy interests that GPS monitoring infringes. Any diminished expectation of privacy does not justify an intrusion of this magnitude without an individualized and demonstrated need for it.

(4) GPS monitoring constitutes a severe invasion of privacy.

Even when the device functions flawlessly – which it very often does not – GPS monitoring works a deeply invasive search. First, it intrudes upon the body; second, it tracks one's location; and, finally, it indefinitely retains that location data. And it works this intrusion for a period of many years, because "the term of probation in sex offense cases may be quite long." Cory, 454 Mass. at 570 n.17.

GPS monitoring infringes Mr. Feliz's "right ... to be secure in [his] person." U.S. Const. amend IV. "[E]ven a limited search of the person is a substantial invasion of privacy," New Jersey v. TLO, 469 U.S. 325, 337 (1985), and GPS monitoring is far from limited. It requires a "permanent, physical attachment to the offender." Cory, 454 Mass. at 570. For five years, Mr. Feliz must have a device strapped to his leg that he can never remove.[28] He has described

[28] The motion judge argued that "the GPS bracelet appears to visit no greater physical intrusion than mandatory DNA collection" (R.477). This is contrary to precedent, which describes the one-time pin prick of DNA collection as "only a minimally intrusive search,"

the pain this causes (R.59). See Dante, supra at 1201-1203 ("a constant government infringement on the offender's body"). There is no lull in this intrusion.

And the physical intrusion triggers a deeper harm: it is "inherently stigmatizing, a modern-day 'scarlet letter.'" Commonwealth v. Hanson H., 464 Mass. 807, 815 (2013). The ankle monitor serves as "a badge of shame." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 663 (1995). It "may have the additional punitive effect of exposing the offender to persecution or ostracism, or at least placing the offender in fear of such consequences." Cory, 454 Mass. at 570 n.18.[29] The intrusion upon bodily integrity – as well as the fear, anxiety, and shame

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Landry v. Attorney General, 429 Mass. 336, 347 (1999), and a permanent GPS device as a "serious, affirmative restraint" that is both "intrusive and burdensome." Cory, 454 Mass. at 570. The fact that GPS does not draw blood does not mean it is benign.

[29] Mr. Feliz has described the anxiety that the device causes him (R.57; I/82). The judge's casual response – that he can "easily ... obscure[] it with clothing" (R.470) – has never been cited by this Court to minimize the shaming aspect of GPS devices. Indeed, the Supreme Court has recognized that the intrusiveness of a search is heightened by the availability of less invasive alternatives. See Birchfield v. North Dakota, 136 S. Ct. 2160, 2184 (2016). "A modern-day GPS chip is approximately the size of a postage stamp." McJunkin & Prescott, Fourth Amendment Constraints on the Technological Monitoring of Convicted Sex Offenders, forthcoming in New Criminal Law Review Vol. 21, at 19 (2018). "Yet thus far the devices used to track sex offenders are substantially more onerous than consumer versions of GPS technology." Id.

that this intrusion causes – cannot be overstated. See Michigan v. Summers, 452 U.S. 692, 702 (1981) (citing the "public stigma associated with the search" in assessing invasiveness).

Once attached, the device catalogs the offender's every move. Recently, in Carpenter v. United States, 2018 WL 3073916 (June 22, 2018), the U.S. Supreme Court recognized that detailed location information "provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" Id. at *9, quoting United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring). "These location records hold for many Americans the privacies of life." Id. (citation omitted). Indeed, the Court emphasized that location tracking of a cellular phone "achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user." Id. at *10. Carpenter's metaphorical ankle monitor is literal for Mr. Feliz, and creates "a detailed chronicle of [his] physical presence compiled every day, every moment, over several years." Id. at *12.

Justice Sotomayor has described the power of this information and its potential for abuse:

> The Government can store such records and efficiently mine them for information years into the future. And because GPS monitoring is cheap

> in comparison to conventional surveillance techniques ..., it evades the ordinary checks that constrain abusive law enforcement practices: limited police resources and community hostility. Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring ... may alter the relationship between citizen and government in a way that is inimical to democratic society.

Jones, 565 U.S. at 415-416 (Sotomayor, J., concurring) (citations omitted). And Jones involved the attachment of a GPS device to a car (for only 28 days). The degree of intrusiveness here is much greater: tracking a person's body paints a far more detailed picture, as it allows the government to "reconstruct someone's specific movements down to the minute, not only around town but also within a particular building." Riley, 134 S. Ct. at 2490. See also Commonwealth v. Augustine, 467 Mass. 230, 249-253 (2014).

Of course, the device also follows Mr. Feliz home. The Supreme Court has recognized that "to determine by means of an electronic device, without a warrant and without probable cause or reasonable suspicion, whether a particular article – or a person, for that matter – is in an individual's home at a particular time ... present[s] far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." United States v. Karo, 468 U.S. 705, 716 (1984). This

is because, "[i]n the home, our cases show, all details are intimate details." Kyllo v. United States, 533 U.S. 27, 37 (2001).

The motion judge concluded that this vast invasion of privacy was "mitigated" because, as he found, the government was "only accessing this collected information ... [1] where there is reason to believe that a sex offender may be involved in a probation violation (viz., when an alert issues); or ... [2] when a crime has been committed in a geographic area that suggests a probationer may have been involved" (R.471-472, original emphasis). This factual assertion finds no record support. No witness at the hearing said that the government "only" accesses location data when there is an alert or when there is a crime under investigation.[30] The judge cited no statutory or regulatory authority that curtails ELMO's access to the location information of those under its supervision. To the contrary, the statewide director of the program testified that location data is stored for an "infinite" period of time (III/12), there is no mechanism he knows of to delete old data (III/12), and if a person is on GPS monitoring for ten years he can "look up [their] location information for

[30] Perhaps the closest testimony was the ELMO director's agreement with the prosecutor's statement that he does not "look[] at someone's GPS points just to look at them" (III/69-70).

every minute for the last ten years" (III/13). He testified that ELMO employees can "go into the system" to check a person's whereabouts (III/45), and can do so "very easily" (III/13), never suggesting that this would be contrary to any established rules or procedures. Probation officers also have access to the GPS software (I/34, 39). The judge's legal distinction rests on a clearly erroneous factual premise – there is no policy or practice that so limits access to location data.[31]

In any event, the motion judge did not cite a single case drawing his distinction between data collection and data access. That dearth of precedent makes sense – the government cannot cure its vast over-seizure of location data by promising not to look at it. This is the geographic equivalent of a general warrant (albeit, without an actual warrant). See United States v. Ganias, 824 F.3d 199, 217 (2d Cir. 2016) (en banc) (recognizing that the "seizure of a computer hard drive" raises privacy concerns "even if such information is never viewed"); United States v. CDT, Inc., 621 F.3d 1162, 1176 (9th Cir. 2010) (en banc). That the government has some asserted interest

[31] Nor is this much of a limitation anyway. Even if the government "only" checks an enrollee's location upon an alert, that would include 1,700 daily checks (only 1% of which merit the issuance of a warrant). See supra note 8. Mr. Feliz himself has experienced 244 alerts – and thus 244 breaches of his privacy – despite never actually violating his probation.

in a narrow subset of data does not authorize it to seize (and retain indefinitely) vastly greater quantities, particularly acting without individualized suspicion or a warrant.

From the perspective of the probationer, the motion judge's distinction does not change the magnitude of the privacy intrusion. When the government collects long-term location data, as the director of the ELMO program here made clear, it can access it whenever it wants. This is doubly intrusive: the probationer can be tracked in real time and his movements are catalogued indefinitely for future examination. And the person monitored knows that their movements are open to government examination; indeed, this is the premise of the Commonwealth's argument that GPS monitoring deters crime. Whether the government ever chooses to conduct that examination does not diminish the magnitude of the privacy intrusion. The breach of privacy "is fully accomplished by the original search." United States v. Calandra, 414 U.S. 338, 354 (1974). The collection of the data itself makes the probationer "[a]ware that the Government may be watching" and thus "chills associational and expressive freedoms" whether the government mines the data or not. Jones, 565 U.S. at 416 (Sotomayor, J., concurring).

Similarly, the collection and retention of this

data is "susceptible to abuse" regardless of the government's typical practice around accessing it. Id. "[T]he Government can now travel back in time to retrace [Mr. Feliz's] whereabouts." Carpenter, supra at *10. "Even if the law enforcement agency is precluded" from subsequent review of the data, "the potential remains and may result in anxiety for the person" monitored. Birchfield, 136 S. Ct. at 2178.

Moving beyond the two intrusions inherent in any GPS program – bodily integrity and locational privacy – the Massachusetts GPS system, as administered, causes a number of additional invasions of privacy. For one, the device is physically incapacitating: Mr. Feliz must be tethered to an electrical outlet for two hours every day (III/31; R.42). See McJunkin & Prescott, supra note 29, at 18. He cannot take a bath or swim (I/62; III/40).

Most importantly, the GPS device causes Mr. Feliz considerable anxiety that he might be arrested for no fault of his own (I/82). This anxiety is far from baseless – he has experienced hundreds of alerts and multiple warrants. And, according to the head of the program, ELMO: (1) makes no effort to check if an enrollee's home or work has sufficient cell service (III/15-16); (2) has conducted no studies or research to determine the accuracy or error rate of its hardware or software (III/21, 29); (3) does not

determine if an alert is due to an equipment malfunction (III/22-23); and (4) conducts no routine maintenance on the hardware it uses (III/29). See Bishop, The Challenges of GPS & Sex Offender Management, 74(2) Fed. Probation 55, 56 (2010) ("Non-violation innocuous alerts are common."). Connectivity alerts are "not uncommon" (R.452) and "very random" (III/16). The follow-up on alerts involves ELMO personnel calling the probationer – who may well not have cell service if the alert itself is due to a loss of service (III/22).

The issuance of a warrant is left to the unfettered discretion of the probation officer. See supra note 9. Armed with a warrant – which the probation officer may issue without the imprimatur of a court (I/64; II/84) – probation can hold a person in custody for up to 72 hours or until the next court sitting. See G.L. c. 279, § 3. Four warrants have already issued for the arrest of Mr. Feliz, who worries that the GPS may one day cause him to lose his job (I/81), which is a distinct possibility because it has happened to others (II/97-98). This is not the condition that was imposed.

Imagine the fear of knowing that a loss of cell service could trigger a loss of liberty. Even if this system worked perfectly, the invasion of privacy it caused would be profound. But, here, the government is

seeking the authority to impose a GPS condition on a mandatory basis, while simultaneously making zero effort – by regular testing or maintenance – to ensure that it does not needlessly burden those it supervises. The Massachusetts GPS monitoring system constitutes a severe invasion of privacy.

(5) When imposed in a blanket fashion, with no assessment of need, GPS monitoring does not serve the government's asserted interests.

The motion judge, relying heavily on this Court's opinion in Guzman, concluded that § 47 "serves salutary goals that benefit both the offender and society at large" (R.478). In reaching that conclusion, the judge fundamentally misunderstood the nature of the Fourth Amendment inquiry.

i. A rational search is not necessarily a reasonable one.

In repeatedly citing Guzman, the motion judge conflated the due process inquiry with the Fourth Amendment and art. 14 inquiry. This was at the urging of the Commonwealth, which argued below that the interest served by § 47 "ha[d] already been decided" by Guzman (R.266). But Guzman decided only the due process question presented by § 47 and reserved the search-and-seizure question for a case, like this one, with a record adequate for an examination of that issue. See 469 Mass. at 500.

There is an obvious difference between what is

rational and what is reasonable. As a matter of due process, Guzman applied a "diminished level of scrutiny" and asked "only whether [§ 47] meets the rational basis test." Id. at 497. Under that test, statutes "bear[] a strong presumption of validity." FCC v. Beach Communications, Inc., 508 U.S. 307, 314 (1993). Most importantly, a "rational basis" for a statute can be supplied by "rational speculation unsupported by evidence or empirical data." Id. at 315. See also Commonwealth v. McGonagle, 478 Mass. 675, 679 n.4 (2018) ("[W]e analyze due process claims in this area under the same framework" as the federal standard.). There need only be some "reasonably conceivable state of facts" to justify the statute. Armour v. City of Indianapolis, 566 U.S. 673, 681 (2012) (citation omitted). In other words, a statute survives rational basis scrutiny if it is logically rational, even if factually and empirically wrong, starting from a strong presumption of validity.

The search-and-seizure inquiry is fundamentally different. When a warrantless search occurs, courts presume it unreasonable unless the government (which bears the burden) can prove otherwise. Courts do not defer to legislative judgments; they undertake their own balancing of interests to determine whether the statute – as a matter of factual reality rather than conceivable logic – is reasonable.

For example, in Riley v. California, 134 S. Ct. 2473 (2014), the Supreme Court considered the propriety of cell phone searches incident to arrest. The government there argued that searches of cell phones would protect officer safety by "alerting officers that confederates of the arrestee are headed to the scene." Id. at 2485. The Court rejected that argument, noting that while there was "undoubtedly a strong government interest in warning officers about such possibilities," the government had not offered any "evidence to suggest that their concerns are based on actual experience." Id. See also Berger v. New York, 388 U.S. 41, 60 (1967) (finding no "empirical statistics" to prove that the search procedure served the government's asserted interest).[32] In this context, rational speculation cannot fill evidentiary gaps.

The Fourth Amendment and art. 14 demand more than a rational basis. Indeed, it would be odd to think that the Commonwealth could defend § 47 without record evidence when – in response to an identical claim –

[32] The Supreme Court has routinely invalidated statutes under the Fourth Amendment, despite their self-evident rational bases, because the asserted justification was not borne out by record evidence. See, e.g., Chandler v. Miller, 520 U.S. 305 (1997) (state statute requiring candidates for political office to take drug tests); Payton v. New York, 445 U.S. 573 (1980) (state statute authorizing warrantless in-home felony arrests); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (federal statute allowing OSHA inspectors to make warrantless searches of businesses).

this Court declined to address it because "questions of reasonableness are necessarily fact-dependent." Guzman, 469 Mass. at 500 (without "evidence concerning the details of the GPS monitoring," court could not "address the ... Fourth Amendment claims"). As Guzman made clear, the government does not meet its burden unless its argument is grounded in factual reality, based upon record evidence.

ii. Blanket imposition of GPS monitoring does not serve any government interest.

Here, the government has asserted an interest of the highest order: protecting children from sexual abuse. But, as the Supreme Court has observed, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000).[33] At issue here is not whether this interest is legitimate, but whether the means employed to serve that interest can overcome the privacy rights of individuals subject to GPS monitoring. The government – per its burden to prove the reasonableness of its search – must

[33] See also Missouri v. McNeely, 569 U.S. 141, 160 (2013) (magnitude of government interest "does not justify departing from" traditional Fourth Amendment analysis); Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (striking down statute designed to protect children from sexual abuse on First Amendment grounds because the state had not "met its burden to show that this sweeping law is necessary or legitimate to serve that purpose").

establish that § 47 serves its asserted interest.

The government has failed to meet its burden. When § 47 requires GPS monitoring of non-contact sex offenders without any individualized hearing, the Commonwealth's interest is not sufficiently compelling to outweigh the privacy intrusion. During the motion hearing, it offered no study or other evidence establishing that GPS monitoring deters crime in general or sex offenses in particular. To the contrary, PO Connolly testified that he did not think that GPS monitoring had any impact on recidivism (II/92). And, when asked directly, the ELMO director could not cite a single example of GPS monitoring preventing non-contact sex offenses (III/41). But the motion judge apparently sought out additional evidence sua sponte and settled for studies that did not support this asserted proposition. See supra note 18. Lacking evidentiary or literary support, the judge then set "[e]mpiricism aside" and accepted the idea that GPS deters sex offenses as a "common-sense conclusion" (R.457).

This, again, is akin to rational basis review. As this Court recognized in Guzman, one cannot set experience, empiricism, and evidence aside when reviewing the reasonableness of an invasive search that the government has the burden to justify. Facts matter. This Court has explicitly cautioned against

intrusions that "serve safety or deterrence values which are merely speculative, and have no basis in the record." Horsemen's Benev. & Protective Ass'n, Inc. v. State Racing Comm'n, 403 Mass. 692, 705 (1989). This is a "necessarily fact-dependent" inquiry, Guzman, 469 Mass. at 500, and the government has put forward no record evidence at all that GPS monitoring actually deters crime or facilitates rehabilitation. Reliance solely on logic and rationality is appropriate in a due process case. But here the government needed evidence, and it failed to meet its burden.

Even examining the extant literature, there is little reason to think that GPS monitoring will reduce recidivism. "[C]ontrary to popular belief, the rates of recidivism for sex offenders are actually lower than the rates of recidivism for those convicted of other crimes." Doe No. 380316 v. SORB, 473 Mass. 297, 312 n.22 (2015).[34] This has proven true in Massachusetts. See MA DOC, Recidivism of 2002 Released Department of Correction Inmates, at 21 tbl. 17

[34] The government, as it did below (R.79), will surely cite the Supreme Court's statement that sex offenders have "a frightening and high risk of recidivism." McKune v. Lile, 536 U.S. 24, 34 (2002). This has been widely debunked. See Liptak, Did the Supreme Court Base a Ruling on a Myth?, N.Y. Times, March 6, 2017 (noting that this assertion "was rooted in an offhand and unsupported statement in a mass-market magazine, not a peer-reviewed journal," and citing two law review articles and a Sixth Circuit opinion disputing it).

(2009).[35] The five-year violent recidivism rate for all offenders is about 28.6%, while the rate of recidivism for all sex offenders ranges from 6.5% to 14%. See Seattle, Wash., Ordinance 125393, 131 Harv. L. Rev. 1844, 1848 n.41 (2018). And the rate of recidivism for non-contact sex offenders is lower still (II/32; III/131, 134) – on the order of 3.9% and 0.8% (R.167). Numerous studies support the fact that those who have "possessed and/or viewed child pornography present substantially lower risks of harm than do individuals who have committed contact sex offenses." United States v. Apodaca, 641 F.3d 1077, 1086 (9th Cir. 2011) (Fletcher, J., concurring). See also 803 CMR 1.33(36) (noting that child pornography offenders "pose a lower risk of re-offense" than contact offenders). GPS or no GPS, the vast majority of non-contact sex offenders simply will not re-offend. If "base rates matter" (II/44), then the marginal deterrent effect of GPS on a population with recidivism rates of 3.9% and 0.8% falls somewhere between de minimis and nil.[36]

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[35] Available at: http://www.mass.gov/eopss/docs/doc/research-reports/recidivism/rec2002.pdf.

[36] The lack of deterrent value of GPS supervision is discussed supra note 18. Research on sex offender residency restrictions – which also sought to limit proximity to children and can perhaps be thought of as an analog version of GPS supervision – suggests that these statutes are also largely ineffective. This is "in part because child molesters often abuse children with whom they have preexisting social relationships, rather than those whom they" just happen to see or be

But even if we assume that GPS monitoring does, in fact, deter crime and aid rehabilitation – a big assumption – mandatory GPS monitoring is still unreasonable. That some non-contact sex offenders might properly be subjected to GPS monitoring "is a reason to decide each case on its facts, ... not to accept the considerable overgeneralization that a per se rule would reflect." McNeely, 569 U.S. at 153 (citation omitted). Our regime of sex offender registration and commitment depends upon the ability to assess the likelihood of recidivism. See supra note 25. In the context of sexual dangerousness, "[e]ach case is fact specific." Commonwealth v. Suave, 460 Mass. 582, 589 (2011).[37] And the government has never

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located near. 131 Harv. L. Rev. at 1851. "[T]he failure of residency restrictions at least shows that what seem like commonsense policies aimed at reducing sex crimes may not work as intended (and, given the relationship between stable housing and recidivism, may even make communities less safe)." Id.

[37] In particular, Mr. Feliz's case has many hallmarks of low risk. He has not been diagnosed with a paraphilic disorder, and Dr. Plaud has concluded that he was not "driven to commit sexual offenses by underlying sexual deviance" (R.45). See 803 CMR 1.33(1). Most of the risk factors listed in the CMR do not apply to him. To cite just a few: this offense is the sole criminal conviction in Mr. Feliz's life, id. at (2), (10), (11), (29); he inflicted no bodily injury, id. at (8); he has not violated the terms of his probation, a condition of which includes continuing his ongoing mental health treatment, id. at (13), (24), (28); this was a non-contact offense, id. at (19) & (36); and he has stable employment and a strong support system (R.60-69), id. at (33) & (34).

sought to explain how a mandatory regime (as compared to case-by-case decisions) serves any of its asserted interests. If the government can establish that an offender needs supervision beyond the conditions already applicable to all sex offenders, the sentencing judge will order GPS. But the government has yet to explain why it needs to violate the bodily integrity and follow the every move of those whom a judge decides do not need to be monitored.[38]

The motion judge also relied upon the government's interest in monitoring an offender's location "in real time" to mitigate the risk to children "by immediately notifying authorities when an offender enters a location pre-determined to place them at an increased risk of re-offense" (R.481-482).[39] But this reasoning is irrelevant to non-contact sex offenders, since they generally will not have their exclusion zones entered into the ELMO system. Take Mr. Feliz as an example. He has an exclusion zone

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[38] "[A] case-by-case approach is hardly unique within our Fourth Amendment jurisprudence." McNeely, 569 U.S. 141 at 158. And this case raises none of the concerns that often call for bright lines or mandatory rules, such as giving clear guidance to officers in situations requiring split-second judgments. Id. There is "no valid substitute for careful case-by-case evaluation of reasonableness here." Id.

[39] Note that the reference to "real time" monitoring is in some tension with the conclusion – when discussing the magnitude of the intrusion – that "this is surely not the same thing as the government monitoring a probationer's movements in real time" (R.471).

requiring that he not go within 300 feet of parks and schools (III/44). But that zone is not entered into the system (R.453), so there is no "real time" alert when he enters such a zone (III/45-47; II/86).[40] This will generally be true of this category of offenders – there is often no specific, identified victim that they are required to stay away from. Their exclusion zones will be so broad that they will not be entered into the system. As applied to such offenders, a GPS device does not at all serve the government's interest in real-time monitoring of probation compliance.[41]

Indeed, there is every reason to think that the overbroad imposition of GPS monitoring undermines the government's asserted interests.[42] See Corsaro, Sex,

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[40] Similarly, Mr. Feliz has no curfew (R.93), so the device also does not monitor compliance with that condition as it might in other cases (III/50-51).

[41] An attorney for the Probation Department stated during a recent conference that GPS is primarily designed to effectuate other probation conditions, such as exclusion zones and curfews. As a result, GPS monitoring serves little purpose when the device does not monitor compliance with those conditions. Sarah Joss, Presentation at the Mass. Bar Association (March 20, 2018) (noting that the "bracelet doesn't actually do anything in terms of changing behavior if the person" does not have those other conditions).

[42] See Doe No. 380316, 473 Mass. at 313-314 ("[T]he State also has an interest in avoiding overclassification, which both distracts the public's attention from those offenders who pose a real risk of reoffense, and strains law enforcement resources."); Hanson H., 464 Mass. at 815 (noting that unnecessary imposition of GPS monitoring can interfere with "rehabilitation and stigmatize").

Gadgets, & the Constitution, 48 Suffolk U. L. Rev. 401, 421 (2015). Applying "exceptionally burdensome" probation conditions "may even trigger some sex offenders to relapse." Doe No. 380316, 473 Mass. at 306 n.12. "When we take lower-risk offenders, who by definition are fairly prosocial (if they weren't, they wouldn't be low-risk), and place them in a highly structured, restrictive program, we actually disrupt the factors that make them low-risk." Lowenkamp & Latessa, supra at 7.

The Tennessee GPS monitoring study, cited by the motion judge and supra note 18, illustrates this dynamic. Probationers can lose their jobs or housing due to their GPS bracelets (II/98). Doe No. 380316, 473 Mass. at 306. The device operates as a constant reminder of the offender's crime, ensuring continued isolation, shame, and embarrassment for years without end. Id. at 306 n.12. When seen by other people, it can lead to "persecution or ostracism," or fear of the same. Cory, 454 Mass. at 570 n.18. Such onerous conditions also may make life outside of prison less appealing, making the prospect of a return to prison less of a deterrent. See Prescott, Portmanteau Ascendant: Post-Release Regulations & Sex Offender Recidivism, 48 Conn. L. Rev. 1035, 1063 (2016).[43] Just

[43] Making GPS mandatory – with no input from the offender – also undermines the perceived fairness of

as a matter of best practice, "low-risk offenders should be identified and excluded, as a general rule, from higher-end correctional interventions." Lowenkamp & Latessa, supra at 8.[44] Sometimes, less is more.

Given the narrow nature of this dispute – mandatory versus case-by-case imposition of GPS – the question presented almost answers itself: Does the government have an interest in monitoring those who a judge determines it has no interest in monitoring? Of course not. Such an invasive condition should be reserved for those who truly need it.

(6) Section 47 cannot be justified as a "special needs" search.

The motion judge also held that § 47 was permissible as a "special needs" search (R.479). The

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its imposition, which can affect compliance. See Commonwealth v. McIntyre, 436 Mass. 829, 833-834 (2002) ("We must seek to penalize offenders in such a way that they understand the reasonableness of the punishment, free of any legitimate hatred for the system that punished them, and without the unnecessary venom we generate by excessive punishment."). See also Meares & Tyler, Justice Sotomayor & the Jurisprudence of Procedural Fairness, 123 Yale L.J. Forum 525, 526-527 (2014). And allowing an individualized assessment "gives offenders an incentive to change their behavior, as a determination that they no longer pose a danger can help them avoid infringements on their liberty." Corsaro, supra at 421 n.146.

[44] See also Best Practices in Sentencing, Utilizing Social Science Data & Research, at 1, 5-6 (2016) (citing the same "risk principle" and noting that "the level of service provided to an offender should match their risk of reoffending"), available at: https://www.mass.gov/files/documents/2016/08/wk/best-practices-in-sentencing-using-social-science.pdf.

"special needs" exception to the individualized suspicion requirement is "rather exceptional and very limited." Commonwealth v. Anderson, 406 Mass. 343, 347 (1989). It applies only "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." Chandler, 520 U.S. at 314 (citation omitted). Individualized suspicion must also be "impracticable." Vernonia Sch. Dist. 47J, 515 U.S. at 653 (citation omitted). By way of example, courts have used this exception to justify sobriety checkpoints, as well as searches at airport and courthouse entrances. See Commonwealth v. Rodriguez, 430 Mass. 577, 580-581 (2000).

This case is far afield from such circumstances. Unlike the slight intrusion of a sobriety checkpoint or airport search, the invasion of privacy caused by the GPS monitor is enormous, requiring permanent physical attachment to the body and allowing long-term location tracking. The government interest served by the mandatory use of this condition – as opposed to its case-by-case imposition – is non-existent. And such case-by-case review is far from impracticable, as it already happens in the setting of probation conditions in every criminal case. This exception applies only "where an intrusion is limited and serves

a pressing public purpose." Rodriguez, 430 Mass. at 580-581.[45] That is not this case.[46]

CONCLUSION

Especially "[i]n cases where a condition touches on constitutional rights, the goals of probation are best served if the conditions of probation are tailored to address the particular characteristics of the defendant and the crime." Commonwealth v. LaPointe, 435 Mass. 455, 459 (2001) (citation omitted). See also Commonwealth v. Gomes, 73 Mass. App. Ct. 857, 859 (2009). Judges do not impose onerous conditions merely by virtue of the conviction – the person matters, if for no other reason than the fact that "[e]ach of us is more than the worst thing we've ever done." Stevenson, Just Mercy: A Story of Justice & Redemption, 17-18 (2014).

Uniquely, § 47 divests judges of discretion and imposes a particularly severe search condition with no

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[45] In relying on the special needs doctrine, the motion judge discussed at some length (R.461-462) the Supreme Court's opinion in Griffin v. Wisconsin, 483 U.S. 868, 875 (1987), without mentioning that the SJC expressly rejected Griffin's reasoning in LaFrance. See 402 Mass. at 794 (describing Griffin as "not persuasive" and concluding that its dissenters "ha[d] the better of the argument").

[46] Also, "[t]he special needs doctrine is a questionable fit given that at least some of the interests served ... are the specific deterrence of the offender and the collection of evidence in the event that deterrence is unsuccessful." McJunkin & Prescott, supra note 29, at 11 n.65.

assessment of the need for it. Of course, when GPS supervision is necessary to serve the interests that the Commonwealth has asserted here, judges will order it. But surely "the totality of the circumstances" includes more than just the fact of the conviction itself. Grady, 135 S. Ct. at 1371. Accordingly, this Court should hold that non-contact sex offenders have a right to an individualized "reasonableness hearing" addressed to the particular offender's need for GPS monitoring. See, e.g., State v. Johnson, 801 S.E.2d 123 (N.C. Ct. App. 2017).

As to Mr. Feliz, for the reasons explained herein, the motion judge erred as a matter of law in his weighing of the privacy interests at stake and the government interest served by § 47, including the hundreds of alerts that the judge expressly refused to consider. Given Mr. Feliz's individual circumstances, see supra note 37, the Commonwealth did not meet its burden to justify the imposition of GPS monitoring in his case. Due to these errors, this Court should reverse the order of the motion judge and strike the GPS monitoring condition from Mr. Feliz's probation. In the alternative, this Court should remand back to the sentencing judge for this determination to be properly made in the first instance. See Commonwealth v. Lydon, 477 Mass. 1013 (2017) (remanding due to failure to exercise discretion in sentencing).

Respectfully Submitted,

/s/ David Rangaviz
BBO #681430

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Dated: June 2018

ADDENDUM

Constitutional Provisions

(1) Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(2) Article XIV of the Massachusetts Declaration of Rights:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

Statutory Provisions

(1) General Laws c. 265, § 47:

Any person who is placed on probation for any offense listed within the definition of “sex offense”, a “sex offense involving a child” or a “sexually violent offense”, as defined in section 178C of chapter 6, shall, as a requirement of any term of probation, wear a global positioning system device, or any comparable device, administered by the commissioner of probation, at all times for the length of his probation for any such offense. The commissioner of probation, in addition to any other conditions, shall establish defined geographic exclusion zones including, but not limited to, the areas in and around the victim's residence, place of employment and school and other areas defined to minimize the probationer's contact with children, if applicable. If the probationer enters an excluded zone, as defined by the terms of his probation, the probationer's location data shall be immediately transmitted to the police department in the municipality wherein the violation occurred and the commissioner of probation, by telephone, electronic beeper, paging device or other appropriate means. If the commissioner or the probationer's probation officer has probable cause to believe that the probationer has violated this term of his probation, the commissioner or the probationer's probation officer shall arrest the probationer pursuant to section 3 of chapter 279. Otherwise, the commissioner shall cause a notice of surrender to be issued to such probationer.

The fees incurred by installing, maintaining and operating the global positioning system device, or comparable device, shall be paid by the probationer. If an offender establishes his inability to pay such fees, the court may waive them.

(2) General Laws c. 279, § 3:

At any time before final disposition of the case of a person placed under probation supervision or in the custody or care of a probation officer, the probation officer may arrest him without a warrant and take him before the court, or the court may issue a warrant for his arrest. When taken before the court, it may, if he has not been sentenced, sentence him or make any other lawful disposition of the case, and if he has been sentenced, it may continue or revoke the suspension of the execution of his sentence; provided however, that in all cases where the probationer is served with notice of surrender and at least one of the underlying crimes for which he is on probation is a felony, then the probation officer shall provide a duplicate copy of the notice of surrender to the district attorney, and the court shall provide to the district attorney the opportunity to be heard and present evidence at the surrender hearing. If such suspension is revoked, the sentence shall be in full force and effect. If a warrant has been issued by the court for the arrest of such a person and he is a prisoner in any correctional institution, jail or house of correction, the commissioner of correction, the sheriff, master or keeper of said house of correction, or in Suffolk county, the penal institutions commissioner of the city of Boston, as the case may be, having such prisoner under his supervision or control, upon receiving notice of such warrant, shall notify such prisoner that he has the right to apply to the court for prompt disposition thereof. Such an application shall be in writing and given or sent by such prisoner to the commissioner of correction, or such sheriff, master, keeper, or penal institutions commissioner, who shall promptly forward it to the court from which the warrant issued, by certified mail, together with a certificate of said commissioner of correction, sheriff, master, keeper, or penal institutions commissioner, stating (a) the term of commitment under which such prisoner is being held, (b) the amount of

time served, (c) the amount of time remaining to be served, (d) the amount of good time earned, (e) the time of parole eligibility of such prisoner, and (f) any decisions of the board of parole relating to such prisoner. Said commissioner of correction, sheriff, master, keeper, or penal institutions commissioner shall notify the appropriate district attorney by certified mail of such application to the court. Any such prisoner shall, within six months after such application is received by the court, be brought into court for sentencing or other lawful disposition of his case as hereinbefore provided.

In no case where a provision of this chapter provides for a finding, disposition or other order to be made by the court, or for a warrant to be issued, shall such be made or issued by any person other than a justice, special justice or other person exercising the powers of a magistrate.

Notwithstanding any restriction in the preceding paragraph, if a probation officer has probable cause to believe that a person placed under probation supervision or in the custody or care of a probation officer pursuant to sections 42A, 58A or 87 of chapter 276 or any other statute that allows the court to set conditions of release, has violated the conditions set by the court, the probation officer may arrest the probationer or may issue a warrant for the temporary custody of the probationer for a period not to exceed 72 hours or until the next sitting of the court, during which period the probation officer shall arrange for the appearance of the probationer before the court pursuant to the first paragraph of this section. Such warrant shall constitute sufficient authority to a probation officer and to the superintendent, jailer, or any other person in charge of any jail, house of correction, lockup, or place of detention to whom it is exhibited, to hold in temporary custody the probationer detained pursuant thereto.

(3) General Laws c. 6, § 178C:

As used in sections 178C to 178P, inclusive, the following words shall have the following meanings:--

...

“Sex offense”, an indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under the age of 14 under section 13B ½ of said chapter 265; a repeat offense under section 13B ¾ of said chapter 265; indecent assault and battery on a mentally retarded person under section 13F of said chapter 265; indecent assault and battery on a person age 14 or over under section 13H of said chapter 265; rape under section 22 of said chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; aggravated rape of a child under 16 with force under section 22B of said chapter 265; a repeat offense under section 22C of said chapter 265; rape and abuse of a child under section 23 of said chapter 265; aggravated rape and abuse of a child under section 23A of said chapter 265; a repeat offense under section 23B of said chapter 265; assault with intent to commit rape under section 24 of said chapter 265; assault of a child with intent to commit rape under section 24B of said chapter 265; kidnapping of a child under section 26 of said chapter 265; enticing a child under the age of 16 for the purposes of committing a crime under section 26C of said chapter 265; enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude under section 50 of said chapter 265; a second or subsequent violation of human trafficking for sexual servitude under section 52 of chapter 265; enticing away a person for prostitution or sexual intercourse under section 2 of chapter 272; drugging persons for sexual intercourse under section 3 of said chapter 272; inducing a minor into

prostitution under section 4A of said chapter 272; living off or sharing earnings of a minor prostitute under section 4B of said chapter 272; second and subsequent adjudication or conviction for open and gross lewdness and lascivious behavior under section 16 of said chapter 272, but excluding a first or single adjudication as a delinquent juvenile before August 1, 1992; incestuous marriage or intercourse under section 17 of said chapter 272; disseminating to a minor matter harmful to a minor under section 28 of said chapter 272; posing or exhibiting a child in a state of nudity under section 29A of said chapter 272; dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; possession of child pornography under section 29C of said chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; aggravated rape under section 39 of chapter 277; and any attempt to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274 or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority.

“Sex offense involving a child”, an indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under the age of 14 under section 13B ½ of said chapter 265; a repeat offense under section 13B ¾ of said chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; aggravated rape of a child under 16 with force under section 22B of said chapter 265; a repeat offense under section 22C of said chapter 265; rape and abuse of a child under section 23 of said chapter 265; aggravated rape and abuse of a child under section 23A of said chapter 265; a repeat offense under section 23B of said chapter 265; assault of a child with intent to commit rape under section 24B of said chapter 265; kidnapping of a child under the age of 16

under section 26 of said chapter 265; enticing a child under the age of 16 for the purposes of committing a crime under section 26C of said chapter 265; enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude upon a person under 18 years of age under subsection (b) of section 50 of said chapter 265; inducing a minor into prostitution under section 4A of chapter 272; living off or sharing earnings of a minor prostitute under section 4B of said chapter 272; disseminating to a minor matter harmful to a minor under section 28 of said chapter 272; posing or exhibiting a child in a state of nudity under section 29A of said chapter 272; dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; aggravated rape under section 39 of chapter 277; and any attempt to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274 or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority.

“Sexually violent offense”, indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under the age of 14 under section 13B ½ of said chapter 265; a repeat offense under section 13B ¾ of said chapter 265; indecent assault and battery on a mentally retarded person under section 13F of said chapter 265; rape under section 22 of said chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; aggravated rape of a child under 16 with force under section 22B of said chapter 265; a repeat offense under section 22C of said chapter 265; assault with intent to commit rape under section 24 of said chapter 265; assault of a child

with intent to commit rape under section 24B of said chapter 265; enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude under section 50 of chapter 265; a second or subsequent violation of human trafficking for sexual servitude under section 52 of chapter 265; drugging persons for sexual intercourse under section 3 of chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; aggravated rape under section 39 of chapter 277; and any attempt to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274 or a like violation of the law of another state, the United States or a military, territorial or Indian tribal authority, or any other offense that the sex offender registry board determines to be a sexually violent offense pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. section 14071.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. ~~2014-03606-C~~
15-10127

COMMONWEALTH

v.

ERVIN FELIZ

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO RECONSIDER

This matter comes before the Court on the defendant's Motion to Reconsider. The defendant, Ervin Feliz ("Feliz" or the "defendant"), asks the Court to reconsider the factual findings and conclusions of law set forth in its April 21, 2017 Findings of Fact, Rulings of Law, and Order of Decision on Defendant's Opposition to GPS Monitoring as a Condition of Probation. Upon consideration of the arguments of the parties, the complete motion record, and the defendant's proposed supplemental exhibits, Feliz's Motion to Reconsider will be **ALLOWED IN PART** and **DENIED IN PART**.

PROCEDURAL BACKGROUND

On April 22, 2016, Feliz filed a motion seeking to have the Court's imposition of GPS monitoring as a condition of his probation stricken as an unconstitutional search and seizure under the Fourth Amendment of the U.S. Constitution and article 14 of the Massachusetts Declaration of Rights. On February 10, February 17 and February 24, 2017, and in accordance with the dictates of Grady v. North Carolina, 135 S. Ct. 1368, 1370 (2015), the Court held an evidentiary hearing addressed to the reasonableness of the defendant's mandatory GPS monitoring. At hearing, Feliz introduced documentation that disclosed that his GPS device had

triggered 13 alerts during the five-month period between April 1 and September 1, 2016.[1] On April 21, 2017, the Court denied Feliz's motion, finding, *inter alia*, that Feliz's GPS bracelet was working substantially as it was designed to do, that false alerts were infrequent, and that the pertinent governmental interests underlying compulsory electronic monitoring substantially outweighed the modest inconveniences experienced by Feliz in light of his already reduced expectation of privacy in his person and location data.

Feliz timely appealed the Court's ruling. On February 12, 2018, the Appeals Court allowed Feliz's motion to stay appellate proceedings, and granted him leave to file the instant motion to reconsider. In support of this motion, Feliz has submitted evidence that his GPS device triggered 166 false alerts between September, 2016 and February, 2018. Feliz contends that this evidence lends additional support to his argument that the volume of false alerts significantly increases the burden that the GPS device imposes on his privacy interests.

DISCUSSION

"It is settled that a judge has considerable discretion to reconsider prior orders, provided the request is made within a reasonable time." Commonwealth v. McConaga, 79 Mass. App. Ct. 524, 527 (2011) (quoting Commonwealth v. Pagan, 73 Mass. App. Ct. 369, 374 (2008)). In the present case, the Commonwealth argues that Feliz did not make his request within a "reasonable time," because he filed his Motion to Reconsider more than 30 days after the Court's ruling (and thus outside of the time during which the rules allowed him to file an appeal). The Court does

[1]The Commonwealth's opposition to the instant motion incorrectly contends that the records Feliz submitted at the February, 2017 hearing documented GPS alerts triggered through the *end* of September, 2017. As a result, the Commonwealth's opposition fails to address the significance *vel non* of eight GPS alerts that were triggered between September 9 and September 30, 2016.

not agree.

The cases the Commonwealth has cited in support of its assertion that Feliz's request is untimely "involve[d] efforts to revise the final judgment or disposition of a case." Commonwealth v. Barriere, 46 Mass. App. Ct. 286, 289 (1999). See, e.g., Commonwealth v. Montanez, 410 Mass. 290, 294 (1991) (motion for new trial brought outside appeal period untimely); Commonwealth v. Cronk, 396 Mass. 194, 197 (1985) (district court did not have jurisdiction over motion to reconsider dismissal of complaint after appeal period expired); Commonwealth v. Mandile, 15 Mass. App. Ct. 83 (1983) (motion to reconsider dismissal of complaint with prejudice untimely after expiration of appeal period). Feliz's motion, by contrast, does not seek to revise the final disposition of his case, but rather to revise the Court's ruling on the propriety of a condition of his probation – a matter over which this Court retains discretion until Feliz's term of probation has expired. See Commonwealth v. Goodwin, 458 Mass. 11, 16 (2010) (quoting Buckley v. Quincy Div. of the Dist. Court Dep't, 395 Mass. 815, 818 (1985)) (judges retain "discretion to modify [the] conditions [of probation] 'as a proper regard for the welfare, not only of the defendant but of the community, may require'").

The Court recognizes that the Appeals Court has already accepted jurisdiction over Feliz's appeal, and that, ordinarily, "[o]nce a party enters an appeal . . . the court issuing the judgment or order from which an appeal was taken is divested of jurisdiction to act on motions to rehear or vacate." Cronk, 396 Mass. at 197. However, in the case at bar, the Appeals Court granted Feliz's Motion to Stay his appellate proceedings for the express purpose of allowing the undersigned to act on his Motion to Reconsider. In doing so, the Appeals Court has evidently acted to promote the efficient use of judicial resources. In view of the foregoing considerations,

Feliz's present motion is properly considered. See Cronk, 396 Mass. at 196 ("[N]o policy prohibits reconsideration of an order or judgment in appropriate circumstances.").

"Allowing a party to request reconsideration of a prior order is consistent with [the] fair and efficient administration of justice." Commonwealth v. Downs, 31 Mass. App. Ct. 467, 469 (1991). While a judge should naturally hesitate to undo his own work, King v. Driscoll, 424 Mass. 1, 9 (1996), "it is more important . . . to do justice . . . than to avoid adverse criticism." Franchi v. Stella, 42 Mass. App. Ct. 251, 258 (1997).

In the present case, Feliz's Opposition to GPS Monitoring as a Condition of Probation has raised a constitutional challenge of considerable significance – not only to him, but to citizens of the Commonwealth at large. The Court thus finds that justice requires that the issue presented in Feliz's motion be decided on the most complete and accurate factual record available, and will for this reason allow Feliz's Motion to Reconsider insofar as it seeks to supplement the record with evidence of the 18 false GPS alerts that occurred during the six-month period between September, 2016 and the close of the hearing in February, 2017.[2]

That said, however, justice does not require the Court to admit into evidence documents that did not even come into existence until *after the close of* Feliz's February, 2017 hearing. Evidence-taking at motion hearings needs to have some point of finality. Modifying a record to include within it evidence that came into existence over a period of a *year* following the

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[2]The hearing on Feliz's motion had originally been scheduled to occur in September of 2016, and it appears that defense counsel only subpoenaed GPS data from ELMO through that date. When the motion was continued to February of 2017, counsel evidently neglected to re-serve the subpoena to bring his information current. But for such neglect, the record would surely include evidence of the 18 false alerts that took place between September, 2016 and February, 2017. There being no unfair prejudice to the Commonwealth arising from a consideration of such evidence, fairness compels the Court to allow the defendant's Motion to Reconsider to this extent.

conclusion and briefing of the subject motion hearing threatens to render such hearings interminable and the justice they seek a mirage in the desert. See Commonwealth v. Amirault, 424 Mass. 618, 637 (1997) ("The regular course of justice may be long, but it must not be endless."). To conclude otherwise would undermine the strong public interests in the finality of judgments and the efficient use of court resources. See Amirault, 424 Mass. at 636-37 (once a defendant has a fair opportunity to present his case, "the community's interest in finality comes to the fore"); Commonwealth v. Bly, 444 Mass. 640, 649 (2005) (recognizing "strong public interest in finality"). Cf. See Harker v. Holyoke, 390 Mass. 555, 558 (1983) (impairing the finality of judgments "would not be in the best interests of litigants or the public"). Accordingly, Feliz's Motion to Reconsider shall be denied insofar as it seeks to supplement the record with evidence that came into existence following the close of the hearing.

In accordance with this ruling, the Court has amended the findings of fact set forth in its April 21, 2017 decision to account for evidence of the 18 false GPS alerts that transpired during the six-month period between September, 2016 and the close of the hearing in February, 2017. The Court has also amended its analysis to address this additional evidence, but its conclusions of law remain the same: Feliz's GPS device is working substantially as it is designed to do, and the interference with privacy that false alerts entail remains both relatively modest and, in all events, substantially outweighed by the government's more compelling countervailing interests.[3]

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[3] It is worth noting that, even if Feliz's hearing had occurred in 2018, and the record included all of the 166 alerts that are alleged to have issued from September, 2016 through February, 2018, the greater volume of false alerts would not materially affect the Court's constitutional analysis. Of the myriad privacy incursions occasioned by mandatory GPS monitoring, the periodic inconvenience of having to notify ELMO of a false alert would seem to be the least substantial.

ORDER

For the foregoing reasons, Feliz's Motion to Reconsider is **ALLOWED** insofar as it seeks to supplement the record with evidence of the 18 false GPS alerts that occurred during the six-month period between September, 2016 and February, 2017. The Motion to Reconsider is **DENIED** insofar as it seeks to supplement the record with evidence that came into existence after February, 2017.

The Court will issue Amended Findings of Fact, Rulings of Law, and Order of Decision on Defendant's Opposition to GPS Monitoring as a Condition of Probation in accordance with the rulings set forth herein.

SO ORDERED.

Robert B. Gordon
Justice of the Superior Court

Dated: March 21, 2018

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
NO. ~~16-00077~~
15-10127

COMMONWEALTH

vs.

ERVIN FELIZ

AMENDED FINDINGS OF FACT, RULINGS OF LAW, AND ORDER OF DECISION ON DEFENDANT'S OPPOSITION TO GPS MONITORING AS CONDITION OF PROBATION

Defendant Ervin Feliz ("Feliz" or the "defendant") has brought the present motion, by which he seeks to have the Court's imposition of GPS monitoring as a condition of his probation stricken as an unconstitutional search and seizure under the Fourth Amendment of the U.S. Constitution and article 14 of the Massachusetts Declaration of Rights. For the reasons that follow, the defendant's motion shall be **DENIED**.

BACKGROUND

On April 22, 2016, Feliz pleaded guilty to two counts of possession of child pornography in violation of G.L. c. 272, § 29C, and five counts of dissemination of child pornography in violation of G.L. c. 272, § 29B(a). The subject crimes entailed Feliz's possession and online posting of large amounts of child pornography, in which prepubescent (in some instances toddler-

aged) male children were depicted engaged in explicit sex acts with adult males.[1] For the two possession offenses, the Court (Krupp, J.) sentenced Feliz to two concurrent terms of 2 ½ years in the House of Corrections, suspended for five years. For each of the dissemination charges, the Court sentenced Feliz to concurrent five-year terms of probation. Among the conditions of the defendant's probation, the Court ordered Feliz to have no contact with children under the age of 16, to remain at least 300 feet from schools, parks and day care facilities, and to wear a Global Positioning System ("GPS") device at all times during the pendency of his probationary term. Mandatory GPS monitoring throughout the course of this convicted sex offender's probation sentence was in accordance with the express requirements of G.L. c. 265, § 47 ("Section 47").

Pursuant to the terms of his probationary sentence, Feliz was outfitted with a GPS ankle bracelet and placed under the supervision of the Suffolk County Superior Court Probation Department. In this connection, Feliz signed an Order of Probation Conditions Form, an Electronic Monitoring Program Enrollment Form, and an Equipment Liability Acceptance Form. Feliz now asserts that the imposition of GPS monitoring as a condition of probation, both on its face and as applied to him, violates his right to be free from unreasonable searches and seizures under the Fourth Amendment of the U.S. Constitution and article 14 of the Massachusetts Declaration of Rights.

On February 10, February 17 and February 24, 2017, and in accordance with the dictates of Grady v. North Carolina, 135 S. Ct. 1368, 1370 (2015), the Court held an evidentiary hearing

[1] The defendant was convicted of possessory and distribution offenses only. Feliz has no history of committing "contact offenses" against children.

addressed to the reasonableness of the defendant's mandatory GPS monitoring under Section 47. The Court heard testimony from six witnesses: Feliz; Edward Phillips (the defendant's Probation Officer); Probation Officer Thomas Connolly; Daniel Pires (the Electronic Monitoring Program Coordinator in Massachusetts); Dr. Joseph Plaud; and Dr. Gregory Belle. The undersigned finds that these witnesses testified truthfully and, in most material respects, consistently with one another throughout; although not all of their testimony bears relevantly on the issues presented in the motion before the Court. Based on this credited testimony, which is adopted except to the extent expressly noted infra, the Court here issues the following findings of pertinent fact.

FINDINGS OF FACT

A. GPS Monitoring in Massachusetts

In Massachusetts, GPS enrollees like Feliz are monitored by the Electronic Monitoring Center ("ELMO") in Clinton, Massachusetts. At present, 3,195 people are subject to such GPS monitoring, a number that includes both pre-trial (defendants on bail) and post-conviction (parolees and probationers) enrollees.[2] The GPS bracelets used are leased to ELMO by the 3M Corporation, and data is transmitted from these devices to ELMO servers equipped with 3M computer software.

The GPS devices worn by probationers (typically on the ankle) collect latitude and

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[2] Inasmuch as the Court has discretion to order GPS monitoring outside the mandate of Section 47, it is unclear how many of these individuals are subject to GPS monitoring pursuant to Section 47 in particular. See Emelio E. v. Commonwealth, 453 Mass. 1024, 1025 (2009) (judges retain discretion to impose GPS monitoring absent statutory authorization). Section 47 does not apply to persons charged with sex offenses placed on pre-trial probation, persons charged with sex offenses serving a term of probation whose cases were continued without a finding after a guilty plea or admission to sufficient facts, juveniles adjudicated delinquent, or youthful offenders placed on probation for sex offenses. See Commonwealth v. Doe, 473 Mass. 76, 77 (2015), and cases cited; see also Commonwealth v. Samuel S.,476 Mass. 497, 509 (2017).

longitude location information through satellites, once per minute, and then transmit this time-referenced data over a cellular network maintained by Verizon Corporation. Recorded data also includes the speed and direction in which the bracelet-wearing individual is traveling. 3M reports that the location information so harvested is 90% accurate within 30 feet.[3] Transmitted data is stored by ELMO indefinitely.

The GPS system operated by ELMO is based on "alerts" that are monitored by employees known as Assistant Coordinators. This means that a probationer's location data, though collected, is not ordinarily being examined in real time unless an alert has issued. When an alert issues, an Assistant Coordinator is notified (on his/her computer screen) and he or she will then address the issue. This typically entails contacting the probationer; and, in the vast majority of cases, the matter is resolved without an arrest warrant being issued.[4]

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[3] In Commonwealth v. Thissell, 457 Mass. 191, 198 n.15 (2010), the SJC stated that the origins of GPS technology provide "assurance of its reliability," and explained that:

> "The GPS system consists of three segments operated and maintained by the United States Air Force. . . . The space segment is comprised of twenty-four satellites which transmit one-way signals giving the current GPS location and time. The control segment consists of monitor and control stations that command, adust, track, maintain, and update the satellites. Finally, the user segment includes the GPS receiver equipment that utilizes the transmitted information to calculate a user's position and time."

Id. (citations omitted).

[4] Assistant Coordinators are called upon to exercise some level of discretion to determine in the first instance whether the situation presents a bona fide compliance concern. If the probationer cannot be reached, the Assistant Coordinator will contact his Probation Officer. If an alert activates after hours and the Probation Officer cannot be located, an on-call Chief Probation Officer is available to address the matter. Arrest warrants are pursued and issued only if the alert cannot be explained and cleared after a substantial period of time, and that period of time will vary depending upon the nature of the alert.

ELMO alerts issue in a variety of contexts, and call for different types of responses. For example, a probationer who violates an established exclusion zone (such as by failing to remain at least 300 feet away from identified victims) will trigger an "Exclusion Zone" alert. A cellular signal or connectivity problem will produce an "Unable to Connect" alert. A probationer's failure to keep the GPS battery properly charged will result in a "Charging" alert. A GPS device that has been cut off, broken or otherwise tampered with will generate a "Tampering" alert. And so forth. Each of these alerts precipitates a different kind of intervention from law enforcement; and, because many of the alerts arise in innocent circumstances,[5] warrants for the arrest of the probationer are relatively uncommon.

Much of the testimony at hearing addressed the limitations of ELMO's alerts system, and the practical problems and life inconveniences that can arise as a result. Charging alerts, for example, which are triggered when the GPS's battery is running low, are frequent. Probationers are advised to charge the device once or twice per day, as the battery is only designed to stay charged for 24 hours. Battery life has also been observed to decline after two years, requiring probationers to obtain replacements.

Signal and connectivity alerts, which typically issue when the probationer travels to a location or structure with poor cellular coverage, are likewise not uncommon; although reliability has improved substantially since ELMO upgraded its hardware to Verizon 4G equipment in 2017. When a probationer experiences a problem of this nature, he may be directed to go outside or walk around the block to restore the connection. But this is an infrequent occurrence, and very

[5] For example, an Unable to Connect Alert may issue if the probationer is situated in a basement apartment or traveling in a remote area with poor cellular reception.

few issues of this nature have been observed by ELMO management since the Verizon upgrade.

The ability of GPS to monitor exclusion zones is another matter of significant limitation. The software utilized by ELMO allows for "rules" to be coded into individual GPS devices, such as the definition of an exclusion zone that will trigger an alert if the probationer comes within the distance parameter established by the sentencing judge. Feliz's injunction to remain at least 300 feet from schools, parks and day care centers is a conventional limitation; but ELMO cannot code and monitor the restriction in such a broad manner, as it requires specified addresses to define an exclusion zone. So while specific schools, parks and day care facilities can be entered into the software program for particular probationers (e.g., the ones closest to where the probationer lives or works and would thus be most likely to frequent), ELMO cannot define an exclusion zone to include *all* such venues. However, because the system is collecting location data in an undifferentiated manner, law enforcement can examine a GPS device's points after a given crime has been committed, and thereby determine if the subject probationer was at the scene at the time of such crime's commission. Thus, while an alert will not necessarily issue in real time whenever a probationer happens to pass within 300 feet of a park, school or day care center – which would create an obvious problem of over-alerting, given the ubiquity of these venues in the modern city[6] – the ability of law enforcement to connect a probationer to a particular site *post hoc* means that GPS is both a useful tool of crime detection and a deterrent to crimes a given probationer might otherwise be tempted to commit.

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[6] At hearing, for example, the evidence revealed that it would be challenging for a probationer to commute to the Suffolk County Superior Courthouse (as is frequently required) without passing near a school, public park or day care center.

B. Feliz's Experience With GPS

Since his April 22, 2016 sentencing, the defendant has been subject to continuous GPS monitoring under the supervision of Probation Officer Edward Phillips ("P.O. Phillips") of the Suffolk County Superior Court Probation Department. As a sex offender, Feliz is required by law to report to his Probation Officer every two weeks, provide proof of residency and employment, and maintain the GPS device on his person and in good working order.

Although P.O. Phillips testified that he could not recall receiving alerts from ELMO related to the defendant's GPS monitoring, documentation introduced at hearing disclosed that Feliz's device triggered 13 alerts during the five-month period between April and September, 2016. On February 18, 2018, Feliz supplemented the record with six additional months of data (and evidence of 18 additional false alerts). Altogether, the GPS data demonstrates that, during the eleven-month period between April, 2016 and February, 2017, Feliz was experiencing fewer than three false alerts per month. Virtually all of these alerts concerned power and connectivity issues, and were resolved in an average of just 30 minutes. A small number required somewhat more time (a few hours) for ELMO to resolve, but none resulted in the issuance of an arrest warrant or otherwise imposed extraordinary hardships on Feliz. The preponderant evidence thus shows that Feliz's GPS bracelet is working substantially as it is designed to do, that false alerts are infrequent and easily resolved, and that the overall reliability of the monitoring system has improved since the change-over to 4G equipment that occurred in 2017.[7]

[7]Thus, although the Court acknowledges that Feliz experienced more frequent problems with the device (and the personal inconveniences associated with responding to alerts) during his period of pre-trial release in 2016, the evidence at hearing (as supplemented) showed that those problems were relatively modest in 2016 and thereafter.

Although Feliz is required to wear his GPS at all times, the Court observes that an accommodation was made in May 2016 when he needed to remove it so that he could undergo an MRI procedure. Likewise, although GPS -wearers are discouraged from submerging the device in a bathtub or swimming pool,[8] the Court credits the testimony of P.O. Phillips that showering can take place in a normal fashion. Despite the occasional inconvenience and feeling of stigma that Feliz has experienced while on GPS as a probationer, he has been able to maintain full-time employment and has developed a substantial network of family and close friends to support him. Apart from this instance, Feliz has not been charged with or convicted of any additional sex offenses or other crimes.

C. Sex Offenders' Risk of Re-Offense and GPS Monitoring's Deterrence of Sex Crime

A good deal of the testimony taken at hearing addressed the risks of re-offense posed by internet sex offenders[9], and the extent to which GPS monitoring mitigates such risks. Although the testifying experts (Dr. Plaud for the defendant, Dr. Belle for the Commonwealth) did not agree on all points, many of the conclusions they offered based on the available social science research aligned in material respects. Thus, both experts testified that the rates of recidivism for sex offenders is lower than the rates of re-offense for all crimes;[10] and at least one study concluded

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[8]Aside from its potential to destroy the device, submerging a GPS bracelet in water disrupts transmission of the signal from device to satellite to GPS monitoring center. Thissell, 457 Mass. at 193.

[9] That is, persons convicted of possessing and distributing child pornography over the internet, as distinguished from persons convicted of committing so-called "contact offenses" with children.

[10] Neither expert, however, addressed the hypothesis suggested by the Court that the more prevalent use of GPS monitoring among sex offenders on probation and parole may *itself* be

that the relative risk of re-offense posed by internet sex offenders is lower still. However, Dr. Belle opined that internet child pornography offenders with an anti-social behavioral disorder present a moderate to high risk of committing a contact sexual offense in the future; and internet offenders without such a disorder present a low to moderate risk of committing a contact sexual offense in the future. The Court credits this testimony.[11]

Further to the above, Drs. Belle and Plaud agree that persons who possess and disseminate child pornography display a deviant sexual interest in – that is, a sexual attraction to – children. Dr. Belle opined that permitting persons with such a sexual interest to have access to children is worrisome, and the Court credits this testimony. Although neither expert could cite published social science research on the point, both agreed as a logical matter that, because of their evident sexual interest in children, internet offenders (with or without an anti-social behavioral disorder) are substantially more likely to commit a contact offense with children than members of the general public. The Court credits this testimony as well.

The impact of GPS monitoring on the risk and rate of sex offender recidivism does not appear to have been the subject of significant empirical study. There have, however, been a few published studies suggesting that GPS monitoring does lower rates of recidivism among sex

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deterring re-offense, and thus (at least to some degree) account for the lower rate of recidivism. The fact that sex offenders found likely to re-offend are civilly committed as sexually dangerous persons, see G.L. c. 123A, § 1 *et seq.*, may also account for a reduced rate of recidivism, a proposition likewise not addressed by the experts at hearing. Both experts, however, did acknowledge a general under-reporting phenomenon observed in cases involving contact sex offenses with children, which when accounted for would also tend to lessen the gap in *actual* rates of relative recidivism.

[11] But see Doe, SORB No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 313 n.24 (2015) (citing recent studies concluding "sex offenders' rates of committing an additional sex offense are low overall").

offenders.[12] Empiricism aside, Dr. Plaud acknowledged that, because GPS can pinpoint a defendant's location at the time a sex offense is committed, and because defendants know this, the imposition of GPS monitoring on sex offenders logically (at least to some degree) operates to deter such crimes and lower the risk of re-offense. The Court accepts this common-sense conclusion.

In addition to deterring contact offenses (whatever level of risk might be posed by those convicted of possession of internet child pornography), GPS monitoring likewise facilitates the investigation of non-contact offenses. Law enforcement officers frequently investigate the dissemination of child pornography by ascertaining the internet protocol ("IP") address that was utilized to upload the images. Because the IP address is traceable to a physical location, GPS location data can confirm or refute whether the device-wearer was at such location at the time of an offending upload. This, in turn, the Court infers, logically operates to deter child

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[12] See Turner *et al.*, "Does GPS Improve Recidivism Among High Risk Sex Offenders? Outcomes for California's GPS Pilot for High Risk Sex Offender Parolees," 10 Victims & Offenders 1, 1-28 (2015) (study of California's pilot program of GPS monitoring of high-risk sex offenders on parole showed that GPS-monitored parolees were less likely to fail to register as a sex offender, and slightly less likely to abscond from supervision); Stephen V. Gies *et al.*, "Monitoring High-Risk Sex Offenders with GPS Technology: An Evaluation of the California Supervision Program–Final Report" (2002) (available at https://www.ncjrs.gov/pdffiles1/nij/grants/238481.pdf) (California GPS program resulted in reductions in sex violations, new arrests, and returns to custody). Cf. New Jersey State Parole Board, "New Jersey GPS Monitoring of Sex Offenders: Implementation and Assessment, Corrections Forum" 17(3), 55-59 (2008) (New Jersey study examining use of GPS on 250 sex offenders found that only one sex offender had committed a new sex crime). But see Tennessee Board or Probation and Parole and Middle Tennessee State University, "Monitoring Tennessee's Sex Offenders Using Global Positioning Systems: A Project Evaluation" (2007) (available at https://ccoso.org/sites/default/files/import/BOPP-GPS-Program-Evaluation%2C-April-2007.pdf) (Tennessee study found "no statistically significant differences" between GPS-monitored sex offenders and a comparison group of sex offenders with regard to parole violations, new criminal charges, or the number of days prior to the first parole violation).

pornographers from committing even non-contact offenses.

Finally, GPS monitoring furthers the rehabilitation-oriented goals of probation by allowing a probationer's addresses to be verified in real time. Through GPS, a probation officer is able to confirm that his/her charge is continuing to reside at the home address he has reported, adhering to court-imposed curfews, continuing to work at the places of employment and during the hours of service claimed, and attending all required rehabilitative programs.

RULINGS OF LAW

I. LEGAL LANDSCAPE

Section 47 provides in relevant part as follows:

> "Any person who is placed on probation for any offense listed within the definition of "sex offense", a "sex offense involving a child" or a "sexually violent offense", as defined in section 178C of chapter 6, shall, as a requirement of any term of probation, wear a global positioning system device ... at all times for the length of his probation for any such offense. The commissioner of probation ... shall establish defined geographic exclusion zones including, but not limited to, the areas in and around the victim's residence, place of employment and school and other areas defined to minimize the probationer's contact with children, if applicable. If the probationer enters an excluded zone ... the probationer's location data shall be immediately transmitted to the police department ...."

G.L. c. 265, § 47. In Commonwealth v. Guzman, 469 Mass. 492 (2014), the SJC held that this statute did not violate a probationer's due process rights, but noted in dictum that "the sanction of GPS monitoring appears excessive to the extent that it applies without exception to convicted sex offenders sentenced to a probationary term, regardless of any individualized determination of their dangerousness or risk of re-offense." Id. at 500 (quotations and alterations omitted). The Court nonetheless abjured consideration of the issue that is currently before the undersigned, viz.,

whether the GPS requirement constitutes an unreasonable search or seizure, since such questions "are necessarily fact-dependent . . . . [and] neither the Commonwealth nor the defendant [had] presented evidence concerning the details of the GPS monitoring to which the defendant is subject." Id.

Subsequently, in Grady v. North Carolina, 135 S. Ct. 1368, 1371 (2015), the U.S. Supreme Court held that a North Carolina statute imposing mandatory GPS requirements similar to those required by Section 47 gave rise to a search for Fourth Amendment purposes. The statute at issue required the "continuous tracking of the geographic location of the subject" and the "[r]eporting of the subject's violation of prescriptive and proscriptive schedule or location requirements." Id. The Court noted, however, that its conclusion did "not decide the ultimate question of the program's constitutionality," which turned on the reasonableness of North Carolina's monitoring program"when properly viewed as a search." Id. The Court thus expressly declined to consider the reasonableness of North Carolina's GPS program in the first instance, and remanded the case for further proceedings to review the search in light of 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.

The defendant in the case at bar requests that we pick up where the Supreme Court left off in Grady, and review whether Section 47 imposes unconstitutional searches under the Fourth Amendment and article 14. Inasmuch as Grady has already concluded that the imposition of GPS monitoring is, indeed, a search in the constitutional sense, the burden rests upon the Commonwealth to show that it is reasonable. See Commonwealth v. Berry, 420 Mass. 95, 105-06 (1995). The Court is unaware of any legal authority (and the parties have offered conflicting, but

largely unsubstantiated, arguments on the subject) addressing whether the hearing contemplated by Grady requires an examination of Section 47 as it applies generally in Massachusetts or only as it applies to the defendant personally. For this reason, the Court shall review Section 47's constitutionality through both perspectives.[13]

II. ANALYTICAL FRAMEWORK

Article 14 and the Fourth Amendment do "not proscribe all searches and seizures, but only those that are unreasonable." Skinner v. Railway Executives' Ass'n, 489 U.S. 602, 619 (1989). What is "reasonable" depends on the totality of the circumstances surrounding the search or seizure, and is determined by weighing "the nature and purpose of the search" against "the extent to which the search intrudes upon reasonable privacy expectations." Grady, 135 S. Ct. at 1371; see also Commonwealth v. Catanzaro, 441 Mass. 46, 56 (2004) ("There is no ready test for reasonableness except by balancing the need to search or seize against the invasion that the search or seizure entails.").

Generally, in criminal cases, the constitutional balance is struck pursuant to the warrant and individualized suspicion requirements of the Fourth Amendment and article 14. See Skinner,

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[13] The parties are in disagreement as to whether the GPS monitoring prescribed by Section 47 amounts to a search in the constitutional sense. As set forth supra, the U.S. Supreme Court directly addressed this question in Grady. Grady, 135 S. Ct. at 1371 ("[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."). Compare Commonwealth v. Connolly, 454 Mass. 808, 818 (2009) (installation of GPS device on motor vehicle and continued use for surveillance purposes is a "seizure") and Commonwealth v. Augustine, 467 Mass. 230, 255 (2014) (compelled production of cell site location information constituted search). The Commonwealth, however, contends that the defendant has failed to specify which conduct constitutes the Fourth Amendment search: the physical intrusion of wearing the GPS tracking device, or the collection of the defendant's location information during the pendency of his probation. As the defendant has challenged both features of Section 47's GPS requirement, and inasmuch as both can occur simultaneously, the Court will address them together.

489 U.S. at 619; Commonwealth v. Shields, 402 Mass. 162, 169 (1988). A reasonableness analysis performed under what is known as the "special needs" doctrine, however, provides an exception to this general rule. See Ferguson v. Charleston, 532 U.S. 67, 79 n.15 (2001) (special needs doctrine "has been used to uphold certain suspicionless searches performed for reasons unrelated to law enforcement, [and] is an exception to the general rule that a search must be based on individualized suspicion of wrongdoing") (quotation omitted).

When faced with "special needs" that render individualized suspicion and/or obtaining a warrant impracticable, the Court must determine whether the government's situational needs outweigh its citizens' reasonable expectation of privacy. See id.; O'Connor v. Police Comm'r of Boston, 408 Mass. 324, 327 (1990), quoting National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). A "blanket suspicionless" search is reasonable, and thus constitutional under the special needs exception, where "the risk to public safety is substantial and real" and the search at issue is "calibrated to the risk . . . ." Chandler v. Miller, 520 U.S. 305, 323 (1997); accord Commonwealth v. Rodriguez, 430 Mass. 577, 580 (2000). "We are particularly reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends." Indianapolis v. Edmond, 531 U.S. 32, 43 (2000).

Many decisions reviewing the constitutionality of a search or seizure purported to intrude on a probationer's or parolee's privacy interests rest on something of a hybrid of the totality of the circumstances and special needs analyses. In Griffin v. Wisconsin, 483 U.S. 868, 875 (1987), for example, the U.S. Supreme Court held that the "special needs of the probation system" permitted the search of a probationer's person or residence without a warrant or probable cause. Griffin did

not, however, find that the searches at issue met Fourth Amendment requirements based on special needs alone. Id. at 878-79. Equally important was the fact that the contested regulation permitting the warrantless searches required probation officers to have "reasonable grounds to believe" that the search would lead to the discovery of contraband. Id. Although Griffin's invocation of the special needs exception did not do away with the need for individualized suspicion entirely, it suggested that there is a constitutionally significant distinction between special needs searches of individuals under penal supervision and special needs searches of the general public. See Ferguson, 532 U.S. at 79 n.15 ("We agree with petitioners that Griffin is properly read as limited by the fact that probationers have a lesser expectation of privacy than the public at large.").

Subsequently, in United States v. Knights, 534 U.S. 112 (2001), the Supreme Court left open the question of whether suspicionless searches of probationers are permitted under the Fourth Amendment when conducted for law enforcement purposes alone:

> "We do not decide whether the probation condition so diminished, or completely eliminated, Knight's reasonable expectation of privacy . . . that a search by a law enforcement officer without any individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment. The terms of the probation condition permit such a search, but we need not address the constitutionality of a suspicionless search because the search in this case was supported by reasonable suspicion."

Id. at 120 n.6. The Court subsequently addressed this question with respect to *parolees* (who have a somewhat lesser expectation of privacy than probationers) in Samson v. California, 547 U.S. 843 (2006). See also Commonwealth v. Moore, 473 Mass. 481, 485 (2016) ("[A]rt. 14 provides to a parolee an expectation of privacy that is less than even the already diminished expectation

afforded to a probationer."). In Samson, the Court found that a suspicionless search of a parolee's person conducted pursuant to a policy that proscribed "arbitrary, capricious or harassing searches," and thus did not confer upon parole officers "a blanket grant of discretion . . .," was reasonable under the Fourth Amendment. 547 U.S. at 856. Samson nonetheless disclaimed the need to consider the search at issue under a special needs analysis, noting that its "holding under general Fourth Amendment principles," i.e., a totality of the circumstances test, rendered a special needs analysis unnecessary. Id. at 852 n.3.

Unlike the federal courts, Massachusetts courts generally apply the special needs exception only to searches that lack individualized suspicion altogether, and have yet to apply the analysis to warrantless searches of probationers and parolees. See, e.g., Moore, 473 Mass. at 487 (declining to apply special needs exception, while holding that a warrant is not required to search a parolee's home). Cf. Landry v. Attorney General, 429 Mass. 336, 347-48 (1999) (finding no need to conduct special needs analysis, because court did not rely on fact that convicted persons were likely to re-offend, the relevance of DNA evidence to prove crimes, or penological interests within the prison in determining warrantless collection of offender's DNA was "reasonable" based on totality of circumstances).

With the foregoing principles in mind, the Court turns to the defendant's facial and as-applied challenges to Section 47's GPS requirement. The Court will, by turns, consider the privacy interests of individuals on probation for sex offenses, the degree of intrusion visited upon them by GPS monitoring, the government's interest in continuously tracking the location of a sex offender on probation, and whether *either* the balance of the totality of the circumstances or the special needs of law enforcement justify Section 47's inherent lack of individualized suspicion.

III. FACIAL CHALLENGE

A. Intrusion on Privacy

i. Probationer Interests

"Privacy interests protected by the Fourth Amendment . . . and art. 14 . . . exist where it is shown that a person has exhibited an actual (subjective) expectation of privacy, and when that expectation is one that society is prepared to recognize as reasonable." In the Matter of a Grand Jury Subpoena, 454 Mass. 685, 688 (2009) (quotations and alterations omitted).

It is well settled that the fact of a criminal conviction operates to reduce a person's reasonable expectation of privacy. See Landry, 429 Mass. at 344-45. A person's expectation of privacy is further reduced when his conviction requires him to serve a sentence along the continuum of State-imposed punishments, viz., probation, parole, or incarceration. Ferguson, 532 U.S. at 79 n.15 (citing Griffin, 483 U.S. at 874-75). See generally Knights, 534 U.S. at 118-20; Commonwealth v. LaFrance, 402 Mass. 789, 792-93 (1988).

Although a probationer is subject "to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison." Morrissey v. Brewer, 408 U.S. 471, 482 (1972). Notwithstanding the fact that a probationer's expectation of privacy is diminished, therefore, the permissible infringement upon it "is not unlimited." Griffin, 483 U.S. at 875; see also Samson, 547 U.S. at 850 n.2 (diminished expectation of privacy is different than no expectation of privacy).

The distinctive privacy interests of those convicted of crime have to date received only limited discussion in our reported cases. As stated supra, the Fourth Amendment does not require a warrant or probable cause to search a probationer's home, but the search must still be predicated

on reasonable suspicion. Knights, 534 U.S. at 121. And in Massachusetts,"art. 14 offers greater protections for paroleess than does the Fourth Amendment." Moore, 473 Mass. at 482. Article 14 does not, however, offer as much protection to parolees as it affords to probationers. Id. Accordingly, article 14 does require probation officers who wish to search a probationer's home to obtain a warrant; although such a warrant may be supported by reasonable suspicion rather than probable cause. See LaFrance, 402 Mass. at 794.

Article 14 also permits a reduced level of suspicion to support the search of a probationer's person, "but any standard below . . . reasonable suspicion" has been held impermissible. Commonwealth v. Waller, 90 Mass. App. Ct. 295, 304 (2016) (quotation omitted).[14] To that end, the Supreme Judicial Court has rejected conditions of probation "that subjected probationers to a blanket threat of warrantless searches . . . notwithstanding the fact that such a condition might aid in the probationers' rehabilitation and help to ensure their compliance with other conditions of probation." Commonwealth v. Obi, 475 Mass. 541, 548 (2016) (citation omitted); see also Moore, 473 Mass. at 487 (citing LaFrance, 402 Mass. at 792-93) ("[A]rt. 14 guarantees that any condition of probation compelling a probationer to submit to searches must be accompanied by reasonable suspicion."). At the same time, and by contrast, the SJC has recognized that any convicted person's expectation of privacy in his or her *identity* is so diminished as to allow the compulsory and suspicionless seizure of identifying information

[14] The Court is not aware of any U.S. Supreme Court cases that speak to a probationer's Fourth Amendment privacy interest in his or her person. The Court did, however, address a *parolee's* privacy interests in his or her person in Samson v. California,547 U.S. 843, 848, 856-57 (2006), where it held that the Fourth Amendment permitted suspicionless searches of a parolee's person pursuant to a policy that proscribed "arbitrary, capricious or harassing searches" and therefore did not confer upon parole officers "a blanket grant of discretion . . . ."

derived from a blood sampling. See Landry, 429 Mass. at 344-45.

Although Massachusetts appellate courts have had occasion to discuss how a probationer's *liberty* interests are impacted by GPS monitoring, they have yet to address explicitly the extent to which the collection of location data by GPS implicates a probationer's *privacy* interests where the probationer did not consent to the GPS monitoring condition.[15] See, e.g., Commonwealth v. Cory, 454 Mass. 559, 569 (2009) (GPS monitoring "imposes a significant limitation on liberty"); Commonwealth v. Johnson, 91 Mass. App. Ct. 296, 303-05 (2017) (addressing privacy interests of defendant who consented to GPS monitoring as a term of pre-trial release). The evidence adduced at hearing, however, including most particularly the testimony of Probation Officers Phillips and Connolly, as well as the legal regulations governing probationers and sex offenders in general, persuade the Court that the privacy interests of a sex offender serving a term of probation in his or her GPS location data are modest.

For one, sex offenders are required to report their work and home addresses (and all secondary addresses), and to promptly update such information with the Probation Department. See G.L. c. 6, §§ 178D, 178F. Sex offenders must also "register the names and addresses of the institutions of higher learning they attend . . . ." Doe, SORB No. 380316 v. Sex Offender Registry

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[15] Here, GPS monitoring was a statutorily required condition of Feliz's release. See LaFrance, 402 Mass. at 791 n.3 ("The coercive quality of the circumstance in which a defendant seeks to avoid incarceration by obtaining probation on certain conditions makes principles of voluntary waiver and consent generally inapplicable."); Commonwealth v. Johnson, 91 Mass. App. Ct. 296, 303 (2017) (distinguishing situations where GPS monitoring is a statutory requirement or done without defendant's knowledge from situations where defendant consents to GPS monitoring, imposed pursuant to an act of judicial discretion, as a condition of pre-trial release); see also Moore, 473 Mass. at 487 n.6 (terms of penal supervision cannot "contract around" constitutional requirements in order to compel an offender "to accept a condition that would unnecessarily and unreasonably limit his or her art. 14 privacy rights").

Bd., 473 Mass. 297, 305 (2015). Furthermore, individuals serving a term of probation for sex offenses are required to report to their probation officers with proof of address every fourteen days. "An offender may be arrested without a warrant '[w]henever a police officer has probable cause to believe that [he or she] has failed to comply with the registration requirements." Id. at 306 n.13 (quoting G.L. c. 6, § 178P). The Probation Department similarly directs and monitors the location of probationers by administrating and enforcing orders to stay away from certain locations (i.e., parks, schools, and daycare facilities), to adhere to specified curfews, to avoid living near certain places or certain people (i.e., children or the victims of prior offenses), and to attend certain rehabilitative programs. See G.L. c. 276, § 87A; Commonwealth v. MacDonald, 435 Mass. 1005, 1006 (2001); Commonwealth v. Morales, 70 Mass. App. Ct. 839, 843-44 (2007).

Second, convicted sex offenders are also subject to registry laws that call "for extensive dissemination of offenders' registry information. Both level two and level three sex offenders' information is now posted on the internet . . . . [and] [n]o limits are placed on the secondary dissemination of this information." Doe, SORB No. 380316, 473 Mass. at 307. "Where previously the time and resource constraints of local police departments set functional limits on the dissemination of registry information, the Internet allows for around-the-clock, instantaneous, and worldwide access to that information – a virtual sword of Damocles." Id. at 307. "Although level one offenders' information is not disseminated publicly, it still may be released to the local police department where they attend institutions of higher learning . . . as well as to a variety of State agencies and the Federal Bureau of Investigation. . . . In addition, a level one sex offender's classification level and the city or town in which the offender lives, works, or attends an institution of higher learning may be released to a victim who submitted a written victim impact

statement as part of the offender's classification hearing." Id. at 308.[16] The Court thus finds that the privacy interests of a convicted sex offender serving a term of probation are diminished *below* the privacy interests the SJC and Appeals Court have recognized with respect to probationers and parolees who were convicted of other types of crimes. See, e.g., Moore, 473 Mass. at 481 (assault with a firearm); LaFrance, 402 Mass. at 790 (burglary and larceny); Waller, 90 Mass. App. Ct. at 296 (animal cruelty).

ii. Level of Intrusion

The SJC has acknowledged that GPS monitoring is a "restraint on liberty that is 'dramatically more intrusive and burdensome' than sex offender registration . . . ." Commonwealth v. Doe, 473 Mass. 76, 83 (2015); see also Cory, 454 Mass. at 570 ("There is no context other than punishment in which the State physically attaches an item to a person, without consent and also without consideration of individual circumstances, that must remain attached for a period of years and may not be tampered with or removed on penalty of imprisonment."); Doe v. Massachusetts Parole Bd., 82 Mass. App. Ct. 851, 858 (2012) ("GPS monitoring conditions are a form of punishment that are materially different and more onerous than other terms of probation or parole . . . .").

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[16] Recently, in Johnson, 91 Mass. App. Ct. at 305, the Appeals Court found that a defendant required to wear a GPS device during a period of *pre-trial* release had no possessory interest in his GPS data, because it was stored in the ELMO server – which was "not a place the defendant controll[ed] or possess[ed], or to which he ha[d] access." It is important to note, however, that the Appeals Court's finding was clearly influenced by the fact that the defendant had consented to GPS monitoring and had thereby failed to protect his possessory interest in the data. See Johnson, 91 Mass. App. Ct. at 305 ("[B]y agreeing to the terms of his release, i.e., an agreement to provide the probation department with his constant and continuous location, the defendant . . . expressly and intentionally signed [his GPS data] away and, thus, he failed to manifest a subjective expectation of privacy in that information.").

A GPS device invades privacy in substantially the same way that it intrudes on liberty: "[1] by its permanent, physical attachment to the offender, and [2] by its continuous surveillance of the offender's activities." Commonwealth v. Goodwin, 458 Mass. 11, 22-23 (2010) (citations omitted); Grady, 135 S. Ct. at 1371 (GPS monitoring physically intrudes on a subject's body).[17] The Court will address each feature in turn.

"A GPS device . . . consists of two pieces of electronic equipment: an ankle bracelet, which is permanently attached to the probationer, and a GPS-enabled cellular telephone, which communicates with the ankle bracelet and transmits the probationer's current location to the probation department." Commonwealth v. Hanson H., 464 Mass. 807, 815 (2013) (quotation omitted). The defendant contends that the compulsory attachment of a GPS device to his ankle at all times represents an unreasonable intrusion on a privacy interest in his body, and is akin to being made to wear a scarlet letter of criminality. See Grady, 135 S. Ct. at 1370 (attaching device to person's body without consent for purpose of tracking individual's movements is a physical intrusion on constitutionally protected area); see also Hanson H., 464 Mass. at 815 ("We have recognized that, as currently implemented, GPS monitoring is inherently stigmatizing, a modern-

[17] Several decades ago, the U.S. Supreme Court held that "to determine by means of an electronic device, without a warrant and without probable cause or reasonable suspicion, whether a particular article—or a person, for that matter—is in an individual's home at a particular time .... present[s] far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight." United States v. Karo, 468 U.S. 705, 716 (1984). This principle drove the Supreme Court's determination in Kyllo v. United States, 533 U.S. 27, 40 (2001), that thermal imaging technology used by law enforcement to surveil a defendant's home violated the Fourth Amendment. The Supreme Court explained, "[i]n the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes." Id. at 37-40. These cases demonstrate the extent to which technology may intrude on the expectation of privacy a citizen has in his or her home; but they do not address whether the degree of intrusion is sufficiently mitigated for constitutional purposes when technology is applied to monitor the location of a sex offender serving a term of probation.

day 'scarlet letter'. . . . [and] may have the additional punitive effect of exposing the offender to persecution or ostracism, or at least placing the offender in fear of such consequences.") (citation omitted). Insofar as the visibility of the GPS bracelet implicates privacy interests, according to Feliz's own testimony, a probationer can easily avoid detection of the device by others if he obscures it with clothing. The ability to control visibility in this manner restores privacy to a significant extent.

With respect to the defendant's contention that the GPS device unreasonably intrudes on a privacy interest in his body, the Court also observes that the Probation Department readily accommodates probationers when they need to remove the bracelet for emergency reasons, such as when Feliz needed to undergo an MRI procedure. Moreover, P.O. Phillips' testimony dispelled the defendant's concern that, on account of the GPS's electronics, he needed to shower with his ankle held away from the water. Once again, therefore, the practical implementation of GPS mitigates some of the more serious hardships that might otherwise be posed by forced wearing of the device.

The second privacy interest implicated by GPS monitoring is a probationer's interest in his or her movements and location at all times. In Commonwealth v. Cory, the SJC stated that, "[w]hile GPS monitoring does not rise to the same level of intrusive regulation that having a personal guard constantly and physically present would impose, it is certainly far greater than that associated with traditional monitoring." 454 Mass. at 570-71.[18] In addition to tracking the

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[18] It is important to note that, in Cory, the SJC evaluated GPS intrusiveness in a context vastly different than the reasonableness standards prescribed by article 14 and the Fourth Amendment. The SJC's analysis of Section 47 related solely to the issue of whether "the statutory scheme [was] so punitive either in purpose or effect as to negate the State's intention to deem it civil." Cory, 454 Mass. at 565 (internal quotations and modifications omitted). For the

location of a probationer's person, GPS devices (particularly, two-piece devices like the one Feliz uses in his home) can pinpoint a probationer's location within his own residence through a stationary device known as a "beacon." The devices also collect massive amounts of data – approximately 525,600 data points per year based on a collection rate of once per minute. See Riley v. California, 134 S. Ct. 2473, 2490 (2014), quoting United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."); Commonwealth v. Rousseau, 465 Mass. 372, 381 (2013) (same).

That said, however, the significant intrusion of 24/7 data collection is mitigated by the reality that this information is (to an overwhelming degree) left unexamined on a remote ELMO server. Cf. United States v. Karo, 468 U.S. 705, 712 (1984) ("[W]e have never held that potential, as opposed to actual, invasions of privacy constitute searches for purposes of the Fourth Amendment."). A large volume of location data is, to be sure, being collected and stored on a government server. But this is surely not the same thing as the government *monitoring* a probationer's movements in real time. See United States v. Jones, 565 U.S. 400, 430 (2012) (recognizing constitutionally significant distinction between "short-term monitoring of a person's movements on public streets" and "longer term GPS monitoring") (Alito, J., concurring). Law enforcement is only *accessing* this collected information when it might reveal what a probationer was doing during a specific moment in time where there is reason to believe that a sex offender

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reasons cited above, the Court held that the purposes and effects of Section 47 are sufficiently punitive in nature to bar retroactive application of the statute pursuant to the constitutional prohibition barring *ex post facto* laws. Id. at 563-73.

may be involved in a probation violation (*viz.*, when an alert issues); or, less frequently, when a crime has been committed in a geographic area that suggests a probationer may have been involved. See Commonwealth v. Augustine, 467 Mass. 230, 254 (2014) (duration of time for which historical location data is sought is "relevant consideration" in privacy calculus); Rousseau, 465 Mass. at 381-82 ("[T]he government's *contemporaneous* electronic monitoring of one's comings and goings in public places invades one's reasonable expectation of privacy.") (emphasis added). Although these circumstances may fall short of satisfying an individualized reasonable suspicion test, the infrequency with which a probationer's location data is actually accessed by law enforcement serves to mitigate what might otherwise seem to be a vast privacy intrusion by the government. See Commonwealth v. Connolly, 454 Mass. 808, 835-36 ("Our constitutional analysis should focus on the privacy interest at risk from contemporaneous GPS monitoring. . . .") (Gants, J., concurring); cf. Johnson, 91 Mass. App. Ct. at 312 (availability, efficiency, and low cost of GPS monitoring has fundamentally altered what constitutes a reasonable expectation of privacy) (Grainger, J., concurring).

In light of the inquiry at hand, and the nature and extent of a probationer's privacy interests acknowledged, the Court turns next to an assessment of the countervailing governmental interests that have been invoked to demonstrate the reasonableness of the Section 47 search.

B. Government Interests

Having acknowledged the significantly diminished expectations of privacy held by sex offenders serving a term of probation, and the *contextually* modest intrusion upon that expectation

caused by mandatory GPS bracelet-wearing,[19] the Court will now consider the legitimate governmental interests underlying Section 47. See Catanzaro, 441 Mass. at 56 (2004).

In Commonwealth v. Kelsey, 464 Mass. 315, 321 (2013), the SJC identified certain interests the Commonwealth has with respect to probationers generally, including "an interest in expeditiously containing the threat posed by a noncompliant probationer; in imposing effective punishment when a convicted criminal is unable to rehabilitate himself on probation; . . . in keeping judicial administrative costs to a minimum[;] . . . . [and] in a reliable, accurate evaluation of whether the probationer indeed violated the conditions of his probation." (Quotations omitted.) In this regard, our precedents recognize that "[t]he two principal goals of probation are rehabilitation of the defendant and protection of the public." Goodwin, 458 Mass. at 15 and cases cited.[20] "While these goals are intertwined, because a defendant who is rehabilitated is not committing further crimes, they remain distinct, because a probation condition that protects the public from the defendant may not advance the likelihood of his rehabilitation." Id. at 15-16. "In cases where a condition touches on constitutional rights, the goals of probation 'are best served if

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[19] Once again, the incursion into privacy occasioned by the compulsory wearing of a GPS bracelet must be evaluated in the context of a probationer whose conviction for sex crime already subjects him to a substantial amount of government oversight and data-collection. See supra.

[20] The Commonwealth cites to Guzman, 469 Mass. at 499-500, to argue that the SJC has already recognized Section 47 "as serving" the goals of "deterrence, isolation, incapacitation, retribution and moral reinforcement, as well as reformation and rehabilitation." Id. This is true. The SJC in Guzman, however, addressed the constitutionality of Section 47 under the due process provisions of the Fourteenth Amendment of the U.S. Constitution and articles 1, 10, 11 and 12 of the Massachusetts Declaration of Rights. The Court expressly *declined* to address constitutionality under the search and seizure provisions of article 14 or the Fourth Amendment, id. at 500; and the balancing of relative interests in this context is surely different. Thus, although the SJC has acknowledged important governmental interests underlying Section 47, Guzman does not control the constitutional question in the case at bar.

the conditions of probation are tailored to address the particular characteristics of the defendant and the crime.'" Commonwealth v. LaPointe, 435 Mass. 455, 459 (2001) (quoting Commonwealth v. Pike, 428 Mass. 393, 403 (1998)).

The Commonwealth has provided ample evidence to support the conclusion that both of these governmental interests are served by Section 47. First, Section 47's GPS tracking requirement promotes deterrence and rehabilitation, because probationers are aware that the government is capable of monitoring (or, more frequently, retroactively determining) their physical location. P.O. Connolly testified to this effect, reporting that he has observed low rates of re-offense among his probationers because they know they can be closely tracked. P.O. Connolly additionally testified that probationers are obligated to comply with myriad reporting requirements (i.e., providing proof of address every fourteen days, attendance at rehabilitation programs, and securing and maintaining employment). GPS tracking helps ensure compliance with these terms of probation, an obviously legitimate interest of the government.[21]

Second, both Dr. Plaud and Dr. Belle testified that GPS tracking can help confirm whether a probationer has re-offended, whether it be by a contact or non-contact offense, thereby promoting public safety. GPS data is clearly able to place a probationer in the location of a reported contact crime. Less obvious, however, is the role GPS information can play in detecting non-contact crimes such as the possession of child pornography. Dr. Plaud testified that law

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[21] But see Doe, SORB No. 380316, 473 Mass. at 305-06 & n.12 (sex offender registration combined with intensive conditions imposed on sex offenders under penal supervision are "exceptionally burdensome" and, according to one study, can result in the offender "[f]eeling alone, isolated, ashamed, embarrassed, hopeless, or fearful[,] [which] may threaten a sex offender's reintegration and recovery and may even trigger some sex offenders to relapse") (quotation omitted).

enforcement agencies often use IP addresses to identify the geographical location from which child pornography is being disseminated. GPS data, in turn, can pinpoint a probationer to the given IP address, thereby furnishing probable cause to establish his involvement in the dissemination. Once again, the government plainly has a legitimate interest in facilitating law enforcement in this manner.

Finally, the Commonwealth contends that the government has an interest in even non-contact sex offenders' physical locations, because they pose a heightened risk of both re-offending in the realm of internet pornography *and* offending in the realm of child abuse. See Doe v. Sex Offender Registry Bd., 428 Mass. 90, 103 (1998) (acknowledging state's interest in protecting children "and other vulnerable people from recidivistic sex offenders").[22] The former inference is unexceptional, the latter less intuitive. But both Dr. Plaud and Dr. Belle acknowledged at hearing that the risk of a non-contact sex offender committing a future contact offense was substantially higher than the same risk posed by a member of the general population. The reason for this is that persons who possess and disseminate child pornography display a deviant sexual interest in – that is, a sexual attraction to – children. Drs. Plaud and Belle thus credibly opined that, as a logical matter, because of their evident sexual interest in children, internet-based offenders (with or without an anti-social behavioral disorder) are substantially more likely to commit a contact offense with children than members of the general public are.[23] The Court concludes, therefore,

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[22] But see Doe, SORB No. 380316, 473 Mass. at 313-14 (noting state's interest in avoiding overbroad sex offender regulation, which "distracts the public's attention from those offenders who pose a real risk of reoffense, and strains law enforcement resources").

[23] The Court submits that this is the proper inquiry when evaluating the reasonableness of requiring non-contact sex offenders to wear GPS bracelets. That some studies have suggested that sex offenders display lower rates of recidivism than other types of convicted criminals is of

that the government has demonstrated a legitimate interest in deterring physical contact between non-contact sex offenders on probation (such as Feliz) and potential victims of criminal child abuse – an interest that the GPS requirement of Section 47 reasonably serves.

C. Balance of Interests

i. Totality of the Circumstances

Placing these interests in proper balance, the Court concludes that the important governmental interests in investigating and deterring child sex crime substantially outweigh the intrusion into the already diminished expectations of privacy afforded to sex offenders serving a term of probation. To be sure, probationers retain *some* residual expectation of privacy in their physical persons and whereabouts, and the compulsory wearing of a GPS bracelet on their ankle (and the resulting transmittal of 24/7 location data to ELMO) visits *some* degree of intrusion into that privacy. Nevertheless, given the compelling interest in preventing and punishing those who would commit sex offenses against children – an interest the SJC in Guzman acknowledged cleared rational basis scrutiny – the Court finds that this balance tilts decidedly in favor Section 47's constitutionality. See Doe, SORB No. 380316, 428 Mass. at 313 ("The State has a strong interest in protecting children and other vulnerable people from recidivistic sex offenders.") (quotation omitted). Cf. Johnson, 91 Mass. App. Ct. at 305-06 (society unwilling to recognize expectation of privacy in GPS data of defendant on pre-trial release).

While the decisions in Moore, LaFrance, and Waller (relied upon extensively by the defendant) held that individualized reasonable suspicion is required to justify the search of a

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no moment, particularly given the acknowledged under-reporting of sex crime and the other reasons to question the reliability of this conclusion. See supra at n.10.

parolee or probationer and/or a parolee's or probationer's residence, these decisions are distinguishable in several important respects. First, these cases concerned searches broadly targeted at evidence of criminal activity that involved an element of uncertainty as to if, when, and in some cases where, the search would be conducted. See Moore, 473 Mass. at 483-84 (search of parolee's home following arrest); LaFrance, 402 Mass. at 790 (condition allowing search of probationer for any or no reason); Waller, 90 Mass. App. Ct. at 304 (condition allowing random inspections by Massachusetts Society for Prevention of Cruelty to Animals and/or the Probation Department). By contrast, a probationer subject to GPS monitoring under Section 47 is well aware of when the search will occur (for the duration of his or her probationary term), how it will take place (satellite monitoring of a device affixed to the probationer's ankle), and the precise information or evidence that the government seeks to obtain (the probationer's location data). See Shields, 402 Mass. at 165 (minimizing the surprise and fear occasioned by a search also minimizes the intrusiveness of the search). In point of fact, GPS monitoring of convicted sex offenders adds modestly to the interference with privacy already engendered by the Commonwealth's sex offender registry laws – i.e, statutory mandates to avoid certain exclusion zones, requirements to regularly report their primary address, secondary addresses, workplace, and institutions of higher learning, and in some instances, broad public dissemination of this sensitive information. See Doe v. Sex Offender Registry Bd., 466 Mass. 594, 596 (2013) (recognizing that sex offender registry laws compromise constitutionally protected privacy interests).

Second, as compared to the potentially extreme physical invasiveness sanctioned by the search of a probationer's person, a GPS bracelet appears to visit no greater physical intrusion than mandatory DNA collection under G.L. c. 22E, § 3 – a form of search the SJC has found to be

constitutionally reasonable despite the lack of individualized suspicion required to conduct it. See Landry, 429 Mass. at 350 (collecting DNA from convicted persons represents a "minor intrusion" that is outweighed by a strong state interest in the ability to identify serious offenders). Indeed, the wearing of the GPS device on one's ankle arguably entails *less* interference with human dignity and privacy than a supervised extraction of blood from the body.

Third, Section 47 may be further distinguished from the searches at issue in Moore, LaFrance and Waller in that GPS monitoring is not a search broadly directed at the discovery of evidence of criminal activity. Rather, GPS is a monitoring system that effects a search tailored to collect a specific type of data, from a specific and targeted type of offender, and does so in a manner that serves salutary goals that benefit both the offender and society at large. In this regard, Justice Botsford's reasoning under the analogous due process paradigm at issue in Guzman is instructive:

> "Permissible legislative objectives concerning criminal sentencing include deterrence, isolation and incapacitation, retribution and moral reinforcement, as well as reformation and rehabilitation. The provisions of [Section 47] reasonably can be viewed as serving many, if not all, of these goals. We have noted the danger of recidivism posed by sex offenders. The Legislature permissibly has determined that the risk of being subjected to GPS monitoring might deter future or repeat offenders. The Legislature similarly was free to conclude that enabling police to track the movements of all convicted sex offenders would promote the security and well-being of the general public. Within constitutional limitations, the Legislature may establish harsh punishments for particular offenses in order to discourage reoffense and promote rehabilitation. The present statute, therefore, is obviously an attempt to deter through a nondiscretionary penalty.
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> In promulgating [Section 47], the Legislature saw fit to impose GPS monitoring as a condition for probation even for those sex offenders

> convicted of noncontact offenses. We cannot say that the Legislature's determination is without rational basis."

Guzman, 469 Mass. at 499-500 (citations and quotations omitted).[24]

The Court thus finds that GPS monitoring pursuant to Section 47 effects a lesser intrusion on a probationer's privacy expectations than the searches that LaFrance, Moore and Waller determined require individualized reasonable suspicion. This intrusion on the already diminished privacy interests of sex offenders serving a term of probation, in turn, is outweighed by the Commonwealth's compelling interest in monitoring the location of convicted sex offenders while on probation. For these reasons, the Court concludes that GPS monitoring pursuant to Section 47 is, under the totality of the circumstances, reasonable, and thus withstands the balancing of relative interests mandated by the Fourth Amendment and article 14.

ii. Special Needs

Although the Court has found that the balance of interests under a totality of circumstances

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[24] Citing Cory, the SJC noted in Guzman that "the sanction of GPS monitoring appears excessive to the extent that it applies without exception to convicted sex offenders sentenced to a probationary term, regardless of any individualized determination of their dangerousness or risk of reoffense." 469 Mass. at 500 (alterations omitted). This Court observes that the foregoing dictum is susceptible to construction as an observation that the Legislature may have been unnecessarily harsh or expansive in imposing the GPS penalty on all convicted sex offenders (without an individualized determination of dangerousness). That is, Justice Botsford's commentary is not necessarily a forecast that Section 47 violates the state or federal constitution. Indeed, the very next sentence appears to belie such a reading of the dictum. "At least for purposes of due process analysis, however, this is a debate that has already been settled on the floor of the Legislature," Guzman, 469 Mass. at 500 (quotation omitted). If the SJC were intending to make the point that Section 47 appears excessive for *constitutional* purposes, as Feliz argues, it would never have stated that this is an issue that has been settled on the floor of the Legislature. The Legislature resolves issues of sentencing policy, and it is the courts that settle questions of constitutionality. For this reason, the Guzman dictum relied upon by the defendant carries less force than initially meets the eye.

analysis militates toward the conclusion that GPS monitoring under Section 47 is reasonable and thus constitutional, the mandatory GPS monitoring of probation-sentenced sex offenders is independently justified as a special need.

The myriad registration and other statutory requirements imposed on convicted sex offenders reflect the Legislature's determination that sex crimes pose a greater threat to public safety than other categories of crime. Section 47 addresses the Legislature's concern, in part, by mandating closer supervision of sex offenders serving a term of probation than the level of supervision customarily applied to probationers convicted of other types of offenses. See Guzman, 469 Mass. at 499-500. See also Commonwealth v. Boe, 456 Mass. 337, 345 n.13 (2010) (citing Commonwealth v. Jackson, 369 Mass. 904, 919-20 (1976)) ("[I]t is not [the] court's function to question the necessity, expediency, or wisdom of settled legislative judgment").

The role of the sentencing court under Section 47 is to implement the mechanism the Legislature enacted to facilitate the closer supervision of an entire classification of convicted felons. See Jackson, 369 Mass. at 923 ("The establishment of the probation system and the limitations upon its exercise are set forth in the statutes. The bounds imposed by the statute must be observed when the machinery provided by the probation system is invoked.") (quotation omitted). This is a context that is manifestly unsuited to an individualized suspicion analysis. Absent a mandatory GPS requirement for all sex offenders, the delay inherent in a probation officer's ability to determine whether a sex offender serving a term of probation has entered an exclusion zone or violated registration requirements, such as by providing inaccurate information or absconding, "would make it more difficult for probation officials to respond quickly to evidence of misconduct" and reduce the deterrent effect that real-time monitoring of the

probationer's location would otherwise create. See Griffin, 483 U.S. at 876.

Although courts should be "reluctant to recognize exceptions to the general rule of individualized suspicion where governmental authorities primarily pursue their general crime control ends," Indianapolis, 531 U.S. at 43, GPS monitoring under Section 47 is not imposed principally as an investigative tool (as it is, for example, in the conventional case of a criminal suspect being monitored by authorities with law enforcement objectives). Rather, GPS monitoring under Section 47 is imposed to facilitate rehabilitation and deterrence, objectives that a requirement of individualized suspicion would surely thwart. See Illinois v. Lidster, 540 U.S. 419, 424-25 (2004) (certain police objectives permissible under special needs exception would be defeated by requirement of individualized suspicion). A probation officer plays a unique role in assisting a probationer in his quest to reintegrate into society. GPS location data can provide the officer with important information about a probationer, such as whether he is adhering to curfews, respecting exclusion zones, and maintaining regular employment. The possession of such information better enables the parole officer to advise his or her charge and guide him in the appropriate direction. See Morrissey, 408 U.S. at 478. The ability to monitor a probationer's location, without specific grounds to believe that he has committed or will imminently commit a violation of law, represents both a powerful deterrent to probation violations going forward and an invaluable asset to a probation officer's efforts to assist in the sex offender's rehabilitation.

Further to the above, the relationship between releasing a sex offender on probation and the safety of children and other vulnerable individuals "is obvious and direct." See Rodriguez, 430 Mass. at 583. Monitoring a sex offender-probationer's location in real time mitigates the dangers posed to the safety of children and other at-risk citizens by immediately notifying

authorities when an offender enters a location pre-determined to place them at an increased risk of re-offense. This function is of vital importance to the State's interest in protecting the community during a probationer's service of his sentence, and in this regard differs dramatically from the use of GPS devices to gather information about suspected criminal activity.

To be sure, while the government's episodic (and infrequent) monitoring of a probationer's location data may be substantially less burdensome to privacy than what is occurring when the police surveil a criminal suspect through a GPS device, the physical intrusion of requiring a probationer to wear the device on his person (rather than unknowingly on his automobile, as in United States v. Jones, 565 U.S. 400, for example) is obviously greater. That fact acknowledged, however, the interference with a probationer's reasonable expectations of privacy caused by GPS is a good deal less. This is at once because a probationer has such a low expectation of privacy to begin with; because the government is not doing anything unannounced to interfere with such expectation as does exist (*i.e.*, monitoring him in secret, showing up to search his house without reason, etc.); and because the government is merely collecting information that is being stored on a remote server and which goes unexamined unless the government has been alerted to the possibility that the probationer might have violated the terms of his probation or otherwise been involved in a particular crime. See Johnson, 91 Mass. App. Ct. at 304 & n.10 (distinguishing between privacy interests implicated by wearing GPS device for "express purpose of tracking his location" and government's surreptitious use of GPS to investigate criminal activity).

Taking into account the diminished expectation of privacy that attaches to the location data of a sex offender serving a term of probation, and the special need of law enforcement to

supervise closely convicted sex offenders who are on probation, the Court concludes that the mandatory GPS bracelet-wearing feature of G.L. c. 265, § 47, even as imposed on non-contact offenders such as Feliz, does not violate the Fourth Amendment to the U.S. Constitution or article 14 of the Massachusetts Declaration of Rights. The defendant's facial challenge to the constitutionality of Section 47, therefore, is **DENIED**.

IV. AS-APPLIED CHALLENGE

The defendant alternatively challenges Section 47 as it applies to him as an individual, arguing that GPS monitoring, in his particular circumstances, is unreasonable. The argument is three-fold. First, Feliz maintains that GPS monitoring visits exceedingly serious invasions into his privacy. Second, Feliz reprises his contention that non-contact offenses, like the offenses related to internet child pornography of which he stands convicted, do not demonstrate that he is likely to commit a future offense that could be detected by GPS monitoring. Third, Feliz insists that his lack of criminal history, consistent employment, and large network of responsible family and friends provide reasonable grounds to believe that GPS tracking will not uncover any evidence of wrongdoing. Placing these relative interests into balance, Feliz argues that his interests in privacy outweigh the government's interests in GPS monitoring.[25] The Court does not agree.

A. Intrusion Into Privacy

With respect to the intrusion into Feliz's privacy (both physically and through the collection of location data), the record demonstrates that such intrusion by GPS is – viewed in

[25]The same standard of review applies to the defendant's facial and as-applied challenges to Section 47, see Section II, supra, and the Court will not rehearse that legal standard here.

proper context – a modest one. As a threshold matter, and for the reasons discussed ante at Section IV, Feliz has a highly diminished expectation of privacy in his body and location information. As for Feliz's personal experience with GPS, and what he maintains are the onerous burdens that wearing an electronic bracelet has visited upon his life, the Court finds that the device and its occasional malfunctions have intruded on the defendant's privacy in only limited ways. For the eleven-month period between April 2016 and February, 2017, Feliz's device has generated only 31 alerts. This is fewer than three per month, and the average amount of time to resolve such alerts was just 30 minutes. Feliz makes much of the fact that two arrest warrants were issued as a result of these alerts; but the Probation Department resolved the issues that precipitated those warrants in only a couple of hours, and law enforcement never actually arrested Feliz as a result of them. Furthermore, the defendant's claim that he was inconvenienced by having to shower with his ankle away from the water and by repeatedly having to go outside to assist the GPS device in regaining signal connection has been largely debunked by ELMO records and by P.O. Philips' credited testimony. Likewise, the record discloses that the Probation Department is able to relax the requirement of GPS bracelet-wearing when circumstances so warrant, such as when Feliz needed to remove the device in order to undergo an MRI procedure. Thus, although wearing a GPS bracelet on one's ankle at all times surely visits *some* degree of intrusion into a probationer's life, the record in this case demonstrates that Feliz himself has personally experienced only minor impacts on an already diminished expectation of privacy.

B. Legitimate Government Interests

The same governmental interests described supra (see Section III(B)) apply to Feliz's as-applied challenge to Section 47. And these interests are substantial. With respect to the social

science literature addressing the correlation between non-contact sex offenders and the risk of committing future sex offenses detectable by GPS, the defendant's own expert (Dr. Plaud) testified that there are many offenses that GPS monitoring can detect even when tracking a non-contact offender.[26] As discussed ante, GPS monitoring could locate a probationer in the area where a suspected contact or non-contact offense occurred. Furthermore, both Dr. Plaud and Dr. Belle testified that even internet sex offenders have a greater potential to commit future sex offenses, including contact offenses, than the general public, a legitimate legislative concern sufficient to justify GPS tracking of individuals like the defendant.

C. Balance of Interests

The governmental interests enumerated above substantially outweigh the modest inconveniences faced by Feliz in light of his already reduced expectation of privacy in his body and location data. Regarding Feliz's background and circumstances, the defendant again characterizes the potential for uncovering wrongdoing (and the government's interest in the same)

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[26] Feliz relies on three cases that have little relevance to the issue before the Court to support his argument that non-contact offenders are not likely to re-offend in a physical manner that GPS could detect. First, Feliz points to non-binding decisions by two federal courts that address the sentencing of non-contact offenders. See United States v. Apodaca, 641 F. 3d 1077, 1083 (9th Circuit 2011); United States v. Garthus, 652 F. 3d 715, 720 (7th Circuit 2011). Feliz also cites to Commonwealth v. Suave, 460 Mass. 582, 588 (2011), wherein the SJC reversed a sexually dangerous person determination "[w]here the judge found no evidence that the defendant had ever stalked, lured, approached, confined, or touched a victim, ... and that there was no reason to believe that the defendant's future sexual offenses would escalate into contact offenses ...." Id. A sexually dangerous person determination, however, differs substantially from the reasonableness inquiry under article 14, both in terms of the legal standard applied and the burden of proof borne. See G. L. c. 123A, § 1; Suave, 460 Mass. at 585 n.3 ("The Commonwealth's burden of proof is proof beyond a reasonable doubt."). Compare Catanzaro, 441 Mass. at 56 ("There is no ready test for reasonableness [under article 14] except by balancing the need to search or seize against the invasion that the search or seizure entails."). The decisions cited by the defendant thus shed only scant light on the case at bar.

too narrowly. There is no question but that Feliz has made extraordinary progress in his rehabilitation, as evidenced by his friends and family's recommendations and his consistent compliance with the requirements imposed by the Probation Department. However, these acknowledged advances do *not* compel the conclusion that there is no reasonable grounds to believe that GPS monitoring will either discourage or uncover evidence of future sex offenses by Feliz.

As Dr. Plaud and Dr. Belle's testimony reflect, persons who possess and disseminate child pornography display a deviant sexual interest in children. It logically follows (according to both experts) that people in Feliz's circumstances are substantially more likely to commit contact offenses against children than the general population. GPS tracking represents a bulwark against this heightened risk. In addition, rehabilitation (the continuing reminder of his past wrongdoing and the consequences that can flow from it), deterrence from committing future criminal offenses in general, and enforcement of other location-related terms and conditions of probation (updating residential and work addresses, maintaining employment, and adherence to curfews and attendance at programs) also justify the GPS monitoring of Feliz. There are, therefore, many legitimate government interests served by GPS monitoring the defendant that do not relate to his criminal background or personal circumstances.[27]

Accordingly, the Court concludes that Section 47, as applied specifically to the defendant, does not offend either article 14 or the Fourth Amendment. The mandatory requirement of GPS monitoring of this probationer is constitutionally permissible, and the defendant's as-applied

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[27] The "special needs" analysis set forth supra applies with equal force to Feliz's facial challenge to Section 47.

challenge to this feature of Section 47 is **DENIED**.

ORDER

For all the foregoing reasons, the defendant's Motion in Opposition to GPS Monitoring as a Condition of Probation shall be, and hereby is, **DENIED**.

SO ORDERED.

Robert B. Gordon
Justice of the Superior Court

Dated: March 21, 2018

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the rules of court that pertain to filing of briefs, including those specified in Rule 16(k) of the Massachusetts Rules of Appellate Procedure.

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