COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-12545

COMMONWEALTH OF MASSACHUSETTS,
Appellee

V.

ERVIN FELIZ,
Defendant-Appellant

COMMONWEALTH'S BRIEF & RECORD APPENDIX ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY

DANIEL F. CONLEY
District Attorney
For the Suffolk District

CAILIN M. CAMPBELL
Assistant District Attorney
For the Suffolk District
BBO# 697996
One Bulfinch Place
Boston, MA 02114
(617) 619-4070
Cailin.Campbell@state.ma.us

JULY 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ISSUE PRESENTED

Whether G.L. c. 265, § 47, which provides that individuals convicted of certain sex offenses be subject to GPS monitoring while on probation, violates the Fourth Amendment and art. 14 proscription against unreasonable search and seizure where the governmental interest far outweighs the probationer's diminished expectation of privacy and where such monitoring is lawful under the "special needs" exception to the search warrant requirement as GPS monitoring of probationers convicted of sex related offenses advances a substantial governmental interest beyond the ordinary needs of law enforcement.

STATEMENT OF THE CASE

On March 3, 2015, a Suffolk County grand jury returned indictments against the defendant, Ervin Feliz, for two counts of possessing child pornography, in violation of G.L. c. 272, § 29C; and five counts of disseminating child pornography, in violation of G.L. c. 272, § 29B (CA.2, 4).[1]

---

[1] "(CA._)" herein refers to the Commonwealth's record appendix; "(Tr._:_)" refers to the motion transcript; and "(D.Br._)" refers to the defendant's brief.

On April 22, 2016, the defendant pled guilty to the charges against him and was sentenced to concurrent sentences of two and a half years in the house of correction suspended over five years (CA.6-8). One of the terms of his probation, as required by statute, was that he be subject to GPS monitoring during his probationary period. (CA.8).

That same day, the defendant filed a memorandum in opposition to imposition of GPS monitoring as a condition of his probation alleging that GPS monitoring violated his right to remain free from unreasonable search and seizure (CA.8). On February 10, February 17, and February 24, Judge Robert B. Gordon held an evidentiary hearing on the defendant's motion (CA.9). On April 21, 2017, the judge denied the defendant's motion (CA.10). On May 18, 2017, the defendant filed a notice of appeal (CA.10).

On February 13, 2018, a year after the evidentiary hearings were held, the defendant filed a motion to reconsider (CA.10).[2] On March 22, 2018, Judge Gordon denied in part and allowed in part, the

[2] Though untimely, the Appeals Court gave the defendant and trial court leave to consider the defendant's motion to reconsider.

defendant's motion to reconsider (CA.10), and filed amended findings of fact and rulings of law (CA.10; 14-53). On March 27, 2018, the defendant filed a notice of appeal from the denial of his motion to reconsider (CA.10).

On April 13, 2018, the Appeals Court consolidated the defendant's appeals from the denial of his original motion and from his motion to reconsider. On May 10, 2018, the defendant filed for direct appellate review, which this Court allowed on June 22, 2018 (CA.13).

STATEMENT OF FACTS

1. Judge's Findings of Fact.

After taking evidence and considering the defendant's motion to reconsider, the judge made the following factual findings:

> 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.[3] For the two possession offenses, the Court (Krupp, J.) sentenced Feliz to two concurrent terms to 2 1/2 years in the House

---

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

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 Position 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 hi 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.

...

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.

(CA.14-16).

As to GPS monitoring in Massachusetts, the judge found:

> 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.[4] The GPS bracelets are leased to ELMO by the 3M Corporation, and data is transmitted from these devices to ELMO servers equipped with 3M computer software.

---

[4] "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 (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)."

> The GPS devices worn by probationers (typically on the ankle) collect latitude and longitude 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.[5] 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

---

[5] "In Commonwealth v. Thissell, 457 Mass. 191, 198 n.15 (2010), the SJC states 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, adjust, 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)."

cases, the matter is resolved without an arrest warrant being issued.[6]

ELMO alerts issue in a variety of contexts, and calls 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 with 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, broke or otherwise tampered with will generate a 'Tampering' alert. And so forth. Each of these alerts precipitates a different type of intervention from law enforcement; and, because many of the alerts arise in innocent circumstances,[7] warrants for the arrest of the probationer are relatively uncommon.

Much of the testimony at the hearing discussed the limitations of ELMO's alerts system, and the practical problems and life inconveniences that can arise as a result.

---

6 "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 probation[er] 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 on the nature of the alert."

7 "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."

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 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 probation 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[8] - 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.

(CA.16-19).

As to the defendant in particular the judge found:

> 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 in good working order.

---

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

> Although P.O. Phillips testified that he could not recall receiving alerts from ELMO related to the defendant's GPS monitoring, documentation introduced at [the] 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).[9] 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 resolve[], and that the overall reliability of the monitoring system has improved since the change-over to 4G equipment that occurred in 2017.[10]

---

9 "The judge did not explain what 'false alert' meant. Nor was the Commonwealth ever given the opportunity to present evidence from ELMO about what these alerts signified."

10 "Thus, although the Court acknowledges that Feliz experience[d] 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 2016 when he needed to remove it so he could undergo an MRI procedure. Likewise, although GPS-wearers are discouraged from submerging the device in a bathtub or swimming pool,[11] 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.

(CA.20-21).

Both the Commonwealth and the defendant presented expert testimony about a sex offender's risk of re-offense and the effect of GPS monitoring on the deterrence of crime (CA.21). The judge found:

> "A good deal of testimony taken at hearing addressed the risks of re-offense posed by internet sex offenders,[12] and the extent to which GPS monitoring mitigates such risks.

---

[11] "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."

[12] "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."

> 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;[13] and at least one study concluded 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 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.[14]

---

[13] "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 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 reoffend 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 the 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.

[14] "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)."

> 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 of the point, both agreed as a logical matter that, because of their evident sexual interest in children, interest 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 or recidivism among sex offenders.[15]

---

15 "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/njj/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

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 pornographer from committing even non-contact offenses.

Finally, GPS monitoring furthers the rehabilitation-oriented goals of probation

---

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)."

> by allowing a probationer's address to be verified in real time. Through GPS, a probation officer is able to confirm that his/her charge is continuing to work at the places of employment and during the hours of service claimed, and attending all required rehabilitative programs.

(CA.21-24).

ARGUMENT

GENERAL LAW CHAPTER 265, § 47 DOES NOT VIOLATE EITHER THE FOURTH AMENDMENT OR ARTICLE FOURTEEN BECAUSE THE GOVERNMENT'S PARTICULAR AND SUBSTANTIAL INTEREST IN MONITORING A SEXUAL OFFENDER WHILE ON PROBATION OUTWEIGHS THE PROBATIONER'S DIMINISHED EXPECTATION OF PRIVACY IN HIS LOCATION INFORMATION. ALTERNATIVELY, SUCH MONITORING IS LAWFUL UNDER THE "SPECIAL NEEDS" EXCEPTION TO THE SEARCH WARRANT REQUIREMENT BECAUSE GPS MONITORING OF PROBATIONERS CONVICTED OF SEX RELATED OFFENSES ADVANCES A SUBSTANTIAL GOVERNMENTAL INTEREST BEYOND THE ORDINARY NEEDS OF LAW ENFORCEMENT.

There is no merit to the defendant's contention that G.L. c. 265, § 47 is unconstitutional because the imposition of GPS monitoring as a condition or probation is a search that violates the Federal (Fourth Amendment) and State (art. 14) prohibitions against unreasonable search and seizure (D.Br.27, 31, 45). The statute is presumed constitutional, *see Landry v. Attorney General*, 429 Mass. 336, 343 (1999); *Commonwealth v. Blood*, 400 Mass. 61, 75 (1987), and the Court reviews the defendant's legal arguments de

novo, *see Commonwealth v. McGhee*, 472 Mass. 405, 412 (2015), and factual findings for clear error, *Commonwealth v. Scott*, 440 Mass. 642, 646 (2004). *See also Commonwealth v. Guzman*, 469 Mass. 492, 501-502 (2014) (declining to reach Fourth Amendment challenge to statute at issue because insufficient factual record and appellate court is not in a position to find facts).

The defendant's primary assertion is that the statute is unconstitutional because probationary GPS monitoring is a search conducted without a warrant without any quantum of individualized suspicion. However, "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *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, 665 (1989)); *see also Commonwealth v. Grant*, 57 Mass. App. Ct. 334, 339 (2003) (individualized suspicion not required under art. 14 for a variety of situations).

Commonwealth v. LaFrance, 402 Mass. 789 (1988), on which the defendant largely relies (D.Br.27-31), is

inapposite to the constitutional challenge at issue here because the imposition of GPS monitoring on probationers convicted of sexual offenses implicates qualitatively different privacy concerns from the warrantless search of a probationer's home. In *LaFrance*, the Court considered the constitutionality of a special condition of probation, imposed by a judge, that allowed a probation officer to search a probationer's premises without a search warrant during her probationary term. 402 Mass. at 790. Here, in contrast, the GPS monitoring mandated under section 47 does not involve the warrantless search of a probationer's home, which is accorded special value in the privacy calculus. *See, e.g., Payton v. New York*, 445 U.S. 573, 585 (1980) (Fourth Amendment applies to all invasions by government "of the sanctity of a man's home"); *United States v. United States Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 313 (1972) ("physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); *Commonwealth v. Henry*, 475 Mass. 117, 123 (2016) (interpreting the holding of *LaFrance* as "[a] probation officer may search the home of a probationer

by obtaining a warrant supported only by reasonable suspicion rather than probable cause"); *Commonwealth v. Lopez*, 458 Mass. 383, 389 (2010) ("The full protection of the Fourth Amendment and art. 14 expressly extends to 'houses'"). No such special value is accorded a probationer's ankle or location data. Indeed, convicted sexual offenders have a very low expectation of privacy in their location while on probation. *See also Landry*, 429 Mass. at 344-345 (no constitutional violation in DNA databank of convicted felons); *Commonwealth v. Whitehead*, 85 Mass. App. Ct. 134, 154-155 (2014) (rejecting statutory challenge that collection of DNA sample is substantial violation of rights).

Moreover, even in the context of the home, *LaFrance* recognizes that the fact of conviction reduces a probationer's expectation of privacy such that neither probable cause nor a particularized suspicion is constitutionally required. Rather, "a reduced level of suspicion, such as 'reasonable suspicion,'" or "reasonable grounds" would justify a search of a probationer's premises. 402 Mass. at 381-82. Also of note is that section 47 is a statutory

requirement that mandates GPS monitoring of all probationers convicted of defined sex related offenses, thereby eliminating the discretion of the probation officer to rummage without restraint. *See Commonwealth v. Gonsalves*, 429 Mass. 658, 678-679 (1999) (Fried, J., dissenting). Indeed, the court in *LaFrance* explicitly "express[ed] no view on whether the adoption of statutorily authorized regulations, governing warrantless searches of probationers and providing for approval of a supervisor, would meet the requirements of art. 14 and make a search warrant unnecessary." 402 Mass. at 795.

In assessing the constitutional propriety of the GPS monitoring required under section 47, the more appropriate question under both the Fourth Amendment and art. 14 is whether the challenged search is *reasonable*. *See Commonwealth v. Sanborn*, 477 Mass. 393, 397 (2017) (the touchstone of both the Fourth Amendment and art. 14 is reasonableness). The Supreme Court's per curiam decision in *Grady v. North Carolina*, 135 S.Ct. 1368 (2015), is instructive on this point. There, the Court concluded that lifetime GPS monitoring for recidivist sex offenders, as

mandated by a North Carolina statute, constituted a search for constitutional purposes. 135 S.Ct. at 1371. However, it indicated that such monitoring was permitted if reasonable, and remanded for consideration of that issue. *Id.* In doing so, it directed the court on remand to consider the constitutionality of the statute under two strands of case law: searches of individuals with diminished expectation of privacy, such as parolees, and special needs searches:

> The Fourth Amendment prohibits only unreasonable searches. The reasonableness of a search depends on 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. *See, e.g., Samson v. California*, 547 U.S. 843, (2006) (suspicionless search of parolee was reasonable); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (random drug testing of student athletes was reasonable).

Accordingly, whether analyzed as a search of an individual with a diminished expectation of privacy (a probationer) or as a special needs search, the GPS monitoring of probationers convicted of sex related offenses mandated G.L. c. 265, § 47 is a reasonable search that offends neither the Fourth Amendment of

the United States Constitution nor art. 14 of the Massachusetts Declaration of Rights.

A. General Law Chapter 265, § 47 Does Not Violate Either The Fourth Amendment Or Article Fourteen Because The Government Has A Particular And Substantial Interest In Monitoring Sexual Offenders On Probation That Outweighs The Probationer's Diminished Expectation Of Privacy In His Location Information.

The Court should determine the reasonableness of the search at issue "'by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *O'Connor*, 408 Mass. at 327 (quoting *Commonwealth v. Shields*, 402 Mass. 162, 164 (1988) and *Commonwealth v. Silva*, 366 Mass. 402, 405 (1974)). "A statute, or other rule or regulatory provision, is unlikely to be found constitutional . . . if it invades an area in which the targeted person has a high expectation of privacy, even if the search and seizure is, for the sake of argument, minimally intrusive." *Landry*, 429 Mass. at 348.

Here, it is important to be precise about the particular type of search that that is entailed in the GPS monitoring of probationers. The first, as recognized by the Supreme Court in *Grady*, is the

physical intrusion of wearing the GPS tracking device. *See Grady*, 135 S.Ct. at 1371. The second is the collection of the defendant's location information during the period of time the he is on probation. *Cf. Commonwealth v. Augustine*, 467 Mass. 230 (2014), *Commonwealth v. Rousseau*, 465 Mass. 372 (2013).

Considering the type of search being challenged is essential to analysis because it informs the legal framework for consideration of the defendant's claim. Insofar as intrusions upon the person of those convicted of crimes, the Supreme Judicial Court, has declined to apply a "special needs" test per se, but instead has applied a reasonableness test that balances the need to search against the invasion the search entails. *Landry*, 429 Mass. at 348 (citing *Shields*, 402 Mass. at 164 and *Silva*, 366 Mass. at 405). Integral to the test is not individualized suspicion but analysis of the particularized governmental interest that animates the search. *Id.* This particularized governmental interest is then balanced against "the degree of invasiveness occasioned by the action." *Id.* If the governmental interest outweighs the privacy interest of the

convicted individual, the search is reasonable; if it does not, the search is unreasonable. *Compare Shields*, 402 Mass. at 167 (government's interest in stopping "carnage caused by drunk driving" outweighed the public's relatively low expectation of privacy while driving on a highway permitted for suspicionless drunk driving roadblocks) *with Horsemen's Benevolent & Protective Ass'n, Inc. v. State Racing Comm'n*, 403 Mass. 692, 706 (1989) (suspicionless drug testing of racing commission licensees was unreasonable search where licensees maintained an undiminished expectation of privacy and government's interest was not particularly strong).

Applying that test to the case at bar reveals that the search contemplated by G.L. c. 265, § 47, is reasonable. First, there is nothing unreasonable about the way the GPS requirement is implemented. More specifically, there is nothing unreasonable in the way that the GPS device is attached to the probationer or the data is transmitted or maintained. Indeed, while GPS data is collected continuously, it is not normally examined in real time unless an alert is issued (CA.17). If an alert issues, which can happen for a

host of reasons, the Assistant Coordinator who works at ELMO contacts the probationer and attempts to resolve the issue (CA.17). "Arrest warrants are pursued and issued only if the alert cannot be explained and cleared after a substantial period of time," and arrest warrants issuing are uncommon (CA.17, n.4).

Second, individuals subject to this search, like the defendant, are people who have been convicted of a "sex offense", a "sex offense involving a child," or a "sexually violent offense," all as defined by the Legislature, and are currently on probation. Such individuals have a lessened expectation of privacy than a person who has not committed a crime. *See Ferguson v. City of Charleston*, 532 U.S. 67, 79 n.15 (2001) (citing *Griffin v. Wisconsin*, 483 U.S. 868, 874-875 (1987)); *Commonwealth v. Ericson*, 85 Mass. App. Ct. 326, 338 (2014). That lessened expectation allows for mandatory post-conviction physical intrusions such as a blood draw or a DNA test and the retention of a DNA profile. *See Landry*, 429 Mass. at 350. The physical intrusion attendant to the defendant's wearing a GPS device on his ankle is

certainly not more physically intrusive than a blood draw or a DNA test. Where the language of the statute provides that eligible probationers are required to "wear a global positioning system device, or any comparable device," G.L. c. 265, § 47, it cannot be said that the statute is unconstitutional due to the physical intrusion caused by the device itself.

Nor can it be gainsaid that a probationer has a diminished expectation of privacy in his location. Though cases like *Augustine; Rousseau,* and *Commonwealth v. Connolly,* 464 Mass. 808 (2009), address the expectation of privacy an individual has in electronic location tracking over a period of time, those cases are inapposite because they deal with individuals who are not on probation. The difference is determinative because comparison because individuals who have not been convicted have an undiminished expectation of privacy generally and in their location specifically. In contrast, a probationer, especially an individual on probation for a sex-related crime, has a sharply diminished expectation of privacy sex offender probationers are subject to a high level of supervision while on

probation. Such probationers have to report every fourteen days to their probation officer with proof of address (CA.7). They have to register their address with the Sex Offender Registry Board. *See* G.L. c. 6, § 178D. If they are at classified at a certain level, their addresses and the fact that they are a sex offender can be accessed by the public at large. *See* G.L. c. 6, § 178I-J. As a condition of probation, such probationers can be ordered to stay away from certain locations, *see Commonwealth v. MacDonald*, 435 Mass. 1005, 1006 (2001); to live in certain places, *see* G.L. c. 276, § 87A, to not live with certain people, *see Commonwealth v. Morales*, 70 Mass. App. Ct. 839, 843-844 (2007); and to attend certain programs, *see* G.L. c. 276, § 87A, which may include taking classes on another religion, *see Commonwealth v. Obi*, 475 Mass. 541, 548-549 (2016).

As a result, where a probationer is permitted to go, what he is permitted to do, and who he is permitted to do it with is highly regulated and monitored. It is this supervision and monitoring that drastically changes the expectation of privacy in the tracking of location for a probationer. Indeed,

critical to the holding of a case like *Augustine* that found an expectation of privacy in the compilation of location information over a period of time is that tracking location can reveal not just where an individual goes but also the "people and groups they choose to affiliate with and when they actually do so. That information cuts across a broad range of personal ties with family, friends, political groups, health providers, and others . . . In other words, details about the location of [an individual] can provide an intimate picture of one's daily life." *Augustine*, 467 Mass. at 248 (quoting *State v. Earls*, 214 N.J. 564, 586 (2013)). Such a concern with intruding upon privacy stands on different footing when, as here, the individual is convicted and at liberty under probationary supervision that requires scrutiny of the picture of the probationer's daily life to be monitored by probation to facilitate probationary goals of rehabilitation and specific deterrence. Further, "G.L. c. 276, § 90, permits the police to inspect probation records at any time, and G.L. c. 276, § 100, as appearing in St. 1966, c. 623, permits probation records to be shared with the 'police

commissioner for the city of Boston," and "to all chiefs of police,' among others." *Commonwealth v. Johnson*, 91 Mass. App. Ct. 296, 307 (2017). Very simply, a probationer has a very low expectation of privacy in his location or in law enforcement's tracking of that location.

It is this diminished expectation of privacy that needs to be weighed against the governmental interest. The defendant takes pains in his brief to argue that *Guzman*, 469 Mass. at 499-500, is inapplicable to the case at bar because it involves a due process claim, a different type of constitutional challenge (D.Br.44). However, *Guzman* is instructive because it constitutes a binding legal conclusion as to the legitimate governmental interests furthered through the statute. As articulated in *Guzman*,

> Permissible legislative objectives concerning criminal sentencing include deterrence, isolation and incapacitation, retribution and moral reinforcement, as well as reformation and rehabilitation. The provisions of G.L. c. 265, § 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."

469 Mass. at 499-500.

Those legitimate government interests do not disappear because the defendant mounts a Fourth Amendment and art. 14 challenge as opposed to a due process challenge. Indeed, all of the factors cited by the Supreme Judicial Court above are legitimate governmental interests that must be weighed by the Court in the reasonableness calculus. In setting GPS monitoring as a probationary condition for individuals convicted of certain sex related offenses, the government is doing nothing more than promoting its substantial interest in protecting the public, deterring and preventing future crime, promoting reformation, and facilitating rehabilitation. As Probation Officer Connolly testified, and the motion judge explicitly credited and found one of the reasons, in his experience, that the sex offender

probationers he oversaw had such low rates of re-offense was because they were monitored so closely, including GPS monitoring (CA.40). The defendant's own expert, Dr. Plaud, also explicitly credited by the judge, testified to the same and explained that GPS has a deterrent effect and lowered the risk of re-offense by sex offenders (CA.51).

Further, there is nothing unreasonable either in the way that the GPS device is attached or the data is transmitted or maintained. While GPS data is collected and retained, it is not normally examined in real time unless an alert is issued (CA.17).[16] If an alert issues, which can happen for a host of reasons, the Assistant Coordinator who works at ELMO contacts the probationer and attempts to resolve the issue (CA.17). "Arrest warrants are pursued and issued only if the alert cannot be explained and cleared after a substantial period of time," and arrest warrants issuing are uncommon (CA.17, n.4).

---

[16] The defendant contends that the judge's finding on this point was clearly erroneous (D.Br.39). That finding was supported by the testimony of Daniel Pires (Tr.3:12, 69-70).

There is also a substantial legitimate government interest in the investigation and prosecution of crime. *See Landry,* 429 Mass. at 348. GPS is a tool to further that interest for both contact and non-contact sexual offenses. Most obviously, GPS can pinpoint a defendant's location within thirty feet, which can be used as evidence against the defendant for both contact and non-contact offense (CA.17).

With a contact offense, GPS tracking puts the defendant in a certain location with a victim. With a non-contact offense, like possession of child pornography, GPS can be used to investigate an IP address that was used to upload child pornography (CA.23). If a person is on GPS, the location data collected would confirm, or disprove, that the person was at the location at the time the child pornography was uploaded (CA.23). This would be especially helpful if the child pornography were uploaded at a public location like a library. Thus, just as with a contact sexual offense, GPS monitoring can be used to deter and ultimately solve such crimes because it produces the evidence against a defendant.

Further, GPS monitoring is related to the goals of rehabilitation. As the motion judge found, a sex offender probationer is required to provide his address every fourteen days (CA.20). GPS tracking can be used to verify that address. Similarly, a probationer can be required to show proof of income and GPS can verify that a probationer is indeed going to work. A probationer can be ordered to complete certain rehabilitative programs. GPS can verify that the probation is doing so. Largely, GPS tracking is a minimally intrusive mechanism to ensure compliance with the terms of probation, the aim of which is to rehabilitate the probationer. Moreover, GPS data can be concrete proof that a probationer is doing well on probation and that the length of his probationary sentence should be shortened.

GPS monitoring also furthers the substantial government interest in protecting the public, especially children. When G.L. c. 265, § 47, was enacted, the act itself was titled, "An Act increasing the statute of limitations for sexual crimes against children." *Cory*, 454 Mass. at 575 (Ireland, J., dissenting). Further, the terms of the statute tie GPS

to exclusion zones, "that must include the 'victim's residence, place of employment, school and other areas defined to minimize the probationer's contact with children, if applicable.' This language clearly indicates that the Legislature's concern was protection of the victim." *Id.* Protecting victims is certainly a valid and important government interest.

Indeed, just as government has a strong interest in lessening the "carnage caused by drunk drivers" in setting up drunk driving road blocks, *see Shields*, 402 Mass. at 167 n.3; the government also has a strong interest in deterring probationers from committing contact and non-contact sexual offenses against children, a most vulnerable population, especially where sexual crimes against children are underreported (CA.42, n.23). Even non-contact sexual offenses like possession of child pornography involve victims. The pornography possessed and disseminated depicts an actual child who is further victimized when a market is created for the pornography. "Increased use of the Internet in the 1990s greatly expanded the ways in which child pornography could be created, spread, and viewed. With each passing decade, the legislature has

responded with more punitive measures, casting an ever wider and finer net," which is an acknowledgment of the great harm that this crime causes both the victim and society. *United States v. Polizzi*, 549 F. Supp. 2d 308, 380 (E.D.N.Y. 2008). "The harms caused by child pornography, however, are still more extensive because child pornography is 'a permanent record' of the depicted child's abuse, and 'the harm to the child is exacerbated by [its] circulation.'" *Paroline v. United States*, 134 S. Ct. 1710, 1716-1717 (2014) (quoting *New York v. Ferber*, 458 U.S. 747, 759 (1982)).

In sum, the government has a strong interest in deterring sex related offenses, protecting the public, particularly children, and rehabilitating those who have been convicted of sex related offenses. Comparing this strong governmental interest against the minimal intrusion GPS monitoring imposes on a probationer's already diminished expectation of privacy compels a conclusion that the search is reasonable and thus constitutional under both the Fourth Amendment and art. 14.

B. Alternatively, The Statute Is Constitutional Because Is As A Reasonable "Special Needs" Search That Advances a Substantial Governmental Interest Beyond the Ordinary Needs of Law Enforcement.

Viewed alternatively, GPS monitoring is also justified here under the special needs exception to the warrant requirement. *See O'Connor*, 408 Mass. at 327. The special needs doctrine applies to suspicionless searches designed to serve needs beyond the normal need of law enforcement to "uncover evidence of ordinary criminal wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000). At least under the Fourth Amendment, supervision of probationers is a "special need" of the government, "permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987). Under both the Fourth Amendment and art. 14, "[special needs typically involve an immediate or particularly serious risk to the public. 'Where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as "reasonable . . ..."'" *Commonwealth v. Rodriguez*, 430 Mass. 577, 579-580 (2000) (quoting *Chandler v.*

Miller, 520 U.S. 305, 323 (1997)). Moreover, where the search is "not a generalized search for evidence of criminal activity," *id.* at 583-584, and where "the search involves no discretion that could properly be limited by the 'interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer,'" *Maryland v. King*, 569 U.S. 435, 447 (2013) (quoting *Treasury Employees v. Von Raab*, 489 U.S. 656, 667 (1989)), the search typically is upheld.

As set forth above, GPS monitoring under section 47 is designed to serve a special need. The program reduces recidivism by letting offenders know that they are being monitored and creates a repository of data that may be used as an enhanced enforcement mechanism of otherwise valid probationary conditions such as orders to stay away from certain victims or places, orders to not reside in certain places, and orders to attend certain programs. The monitoring itself reveals only a defendant's location at given points of time and the speed with which he was traveling (CA.16-17). That information is not a generalized evidence of wrongdoing nor does the transmission or retention of

this data constitute generalized evidence of criminal wrongdoing.

Moreover, as was established at the evidentiary hearing, the goal of GPS monitoring is not focused on obtaining evidence to investigate a particular crime, even if information gathered may, at some later time, be used as evidence in a criminal prosecution. That this information may be used at a later time does not render it invalid under the special needs exception. *See also United States v. Miller*, 530 Fed. App'x 335, 338 (5th Cir. June 12, 2013) (upholding post-conviction GPS monitoring condition because it provides "effective verification of compliance with the other conditions of supervised release, deterrence of future crimes, and protection of the public"); *United States v. Porter*, 555 F. Supp. 2d 341, 345 (E.D.N.Y. 2008) (GPS condition as part of supervised release not unlawful because it "addresses the special need for deterrence and the protection of the public").

The GPS monitoring requirement imposed on probationers by the statute is not left to the discretion of government officials -- it applies

without exception to all individuals convicted of certain sex offenses. *See King*, 569 U.S. at 447 (need for warrant lessened when there is no discretion in who and how search conducted); *Commonwealth v. Anderson*, 406 Mass. 343, 347 (1989) (special needs search upheld when discretion who, when, and how to search removed from individual administering search). There is no surprise as to how, where, and why the search is administered. *See Anderson*, 406 Mass. at 347 (special needs roadblock search upheld where standard neutral guidelines minimized the intimidation and surprise driver's feel when stopped by police); *Shields*, 402 Mass. at 165 (same).

In sum, because imposition of GPS monitoring of convicted sex offenders under G.L. c. 265, § 47 serves to deter and rehabilitate sex offenders as well as protect the public, especially children, from the risk of re-offense, the statute serves a "special need" and should be upheld under both the Fourth Amendment and art. 14.

C. The Statute is Constitutional As-Applied to the Defendant.

The defendant also alleges that GPS monitoring in this case constitutes a "severe invasion of privacy" (D.Br.36), as it affects his mental health (D.Br.42);[17] and his ability to take a bath or swim (D.Br.42).[18] He also claims that the statute is unconstitutional as applied to him as a non-contact sexual offender. For reasons already discussed, the GPS monitoring that is mandated by statute is not an invasion of the diminished expectation of privacy accorded a

---

[17] The defendant's specific argument is that "[t]he GPS device causes [the defendant] considerable anxiety that he might be arrested for no reason" (D.Br.42). The judge did not make that factual finding, nor is it supported by the evidence adduced at the hearing. Further, the defendant has never been arrested and has experienced fewer than three alerts per month (CA.50). Most of these alerts are resolved within thirty minutes (CA.50). There is simply no basis to conclude that GPS monitoring, imposed statutorily as a condition of probation in lieu of incarceration, constitutes an unreasonable interference with this defendant's day to day life or activities such that it constitutes an unreasonable search and seizure.

[18] The judge specifically discredited the defendant's assertions that wearing a GPS device impeded with his ability to bathe (CA.36, 50). The judge also discredited the defendant's assertions that malfunctions in the defendant's GPS device made him repeatedly have to go outside while he was working, an assertion "debunked by ELMO records and by P.O. Phillips credited testimony" (CA.50).

probationer, much less is it a severe invasion of privacy. As for the defendant's claim that the statute is unconstitutional as applied to him as a non-contact offender, that challenge is nothing more than a reformulating of a due process claim already rejected by the Supreme Judicial Court in *Guzman*, 469 Mass. at 499-500. The principal goals of probation are rehabilitation of the defendant and protection of the public." *Commonwealth v. LaPointe*, 435 Mass. 455, 459 (2001). As already at length *supra*, GPS monitoring of sex offenders, including those convicted of non-contact sexual offenses like the defendant here, facilitates the goals of sentencing and probation,' which are rehabilitation of the probationer and protection of the public." *Rousseau*, 465 Mass. at 390 (quoting *Commonwealth v. Pike*, 428 Mass. 393, 403 (1998)). Thus, there is no basis to conclude that G.L. c. 265, § 47 is unconstitutional as applied to the defendant.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court affirm the motion judge's denial of the defendant's motion and uphold the constitutionality of G.L. c. 265, § 47.

Respectfully submitted
FOR THE COMMONWEALTH,

DANIEL F. CONLEY
District Attorney
For the Suffolk District

Cailin M. Campbell
CAILIN M. CAMPBELL
Assistant District Attorney
BBO# 676342
One Bulfinch Place
Boston, MA 02114
(617) 619-4070
Cailin.campbell@state.ma.us

JULY 2018

ADDENDUM

G.L. c. 272, § 29B. Dissemination of visual material of child in state of nudity or sexual conduct; punishment.

(a) Whoever, with lascivious intent, disseminates any visual material that contains a representation or reproduction of any posture or exhibition in a state of nudity involving the use of a child who is under eighteen years of age, knowing the contents of such visual material or having sufficient facts in his possession to have knowledge of the contents thereof, or has in his possession any such visual material knowing the contents or having sufficient facts in his possession to have knowledge of the contents thereof, with the intent to disseminate the same, shall be punished in the state prison for a term of not less than ten nor more than twenty years or by a fine of not less than ten thousand nor more than fifty thousand dollars or three times the monetary value of any economic gain derived from said dissemination, whichever is greater, or by both such fine and imprisonment.

(b) Whoever with lascivious intent disseminates any visual material that contains a representation or reproduction of any act that depicts, describes, or represents sexual conduct participated or engaged in by a child who is under eighteen years of age, knowing the contents of such visual material or having sufficient facts in his possession to have knowledge of the contents thereof, or whoever has in his possession any such visual material knowing the contents or having sufficient facts in his possession to have knowledge of the contents thereof, with the intent to disseminate the same, shall be punished in the state prison for a term of not less than ten nor more than twenty years or by a fine of not less than ten thousand nor more than fifty thousand dollars or three times the monetary value of any economic gain derived from said dissemination, whichever is greater, or by both such fine and imprisonment.

(c) For the purposes of this section, the determination whether the child in any visual material prohibited hereunder is under eighteen years of age may be made by the personal testimony of such child, by the testimony of a person who produced, processed, published, printed or manufactured such visual material that the child therein was known to him to be under eighteen years of age, by testimony of a person who observed the visual material, or by expert medical testimony as to the age of the child based upon the child's physical appearance, by inspection of the visual material, or by any other method authorized by any general or special law or by any applicable rule of evidence.

(d) In a prosecution under this section, a minor shall be deemed incapable of consenting to any conduct of the defendant for which said defendant is being prosecuted.

(e) Pursuant to this section, proof that dissemination of any visual material that contains a representation or reproduction of sexual conduct or of any posture or exhibition in a state of nudity involving the use of a child who is under eighteen years of age was for a bona fide scientific, medical, or educational purpose for a bona fide school, museum, or library may be considered as evidence of a lack of lascivious intent.

G. L. c. 276, § 90. Powers of probation officers; reports; records; inspection.

A probation officer shall not be an active member of the regular police force, but so far as necessary in the performance of his official duties shall, except as otherwise provided, have all the powers of a police officer, and if appointed by the superior court may, by its direction, act in any part of the commonwealth. He shall report to the court, and his records may at all times be inspected by police officials of the towns of the commonwealth; provided, that his records in cases arising under sections fifty-two to fifty-nine, inclusive, of chapter one hundred and nineteen

shall not be open to inspection without the consent of a justice of his court.

G.L. c. 265, § 47. Global positioning system device to be worn by certain sex offender probationers.

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.

G.L. c. 272, § 29C. Knowing purchase or possession of visual material of child depicted in sexual conduct; punishment.

Whoever knowingly purchases or possesses a negative, slide, book, magazine, film, videotape, photograph or other similar visual reproduction, or depiction by computer, of any child whom the person knows or reasonably should know to be under the age of 18 years of age and such child is:

(i) actually or by simulation engaged in any act of sexual intercourse with any person or animal;

(ii) actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus or sex organs of the child and the sex organs of another person or animal;

(iii) actually or by simulation engaged in any act of masturbation;

(iv) actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal;

(v) actually or by simulation engaged in any act of excretion or urination within a sexual context;

(vi) actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or

(vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child; with knowledge of the nature or content thereof shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one-half years or by a fine of not less than $1,000 nor more than $10,000, or by both such fine and imprisonment for the

first offense, not less than five years in a state prison or by a fine of not less than $5,000 nor more than $20,000, or by both such fine and imprisonment for the second offense, not less than 10 years in a state prison or by a fine of not less than $10,000 nor more than $30,000, or by both such fine and imprisonment for the third and subsequent offenses.

A prosecution commenced under this section shall not be continued without a finding nor placed on file.

The provisions of this section shall not apply to a law enforcement officer, licensed physician, licensed psychologist, attorney or officer of the court who is in possession of such materials in the lawful performance of his official duty. Nor shall the provisions of this section apply to an employee of a bona fide enterprise, the purpose of which enterprise is to filter or otherwise restrict access to such materials, who possesses examples of computer depictions of such material for the purposes of furthering the legitimate goals of such enterprise.

G.L. c. 276, § 100. Detailed reports of probation work; records; accessibility of information.

Every probation officer, or the chief or senior probation officer of a court having more than one probation officer, shall transmit to the commissioner of probation, in such form and at such times as he shall require, detailed reports regarding the work of probation in the court, and the commissioner of correction, the penal institutions commissioner of Boston and the county commissioners of counties other than Suffolk shall transmit to the commissioner, as aforesaid, detailed and complete records relative to all paroles and permits to be at liberty granted or issued by them, respectively, to the revoking of the same and to the length of time served on each sentence to imprisonment by each prisoner so released specifying the institution where each such sentence was served; and under the direction of the commissioner a record shall be kept of all such cases as the commissioner may require for the information of

the justices and probation officers. Police officials shall co-operate with the commissioner and the probation officers in obtaining and reporting information concerning persons on probation. The information so obtained and recorded shall not be regarded as public records and shall not be open for public inspection but shall be accessible to the justices and probation officers of the courts, to the police commissioner for the city of Boston, to all chiefs of police and city marshals, and to such departments of the state and local governments as the commissioner may determine. Upon payment of a fee of three dollars for each search, such records shall be accessible to such departments of the federal government and to such educational and charitable corporations and institutions as the commissioner may determine. The commissioner of correction and the department of youth services shall at all times give to the commissioner and the probation officers such information as may be obtained from the records concerning prisoners under sentence or who have been released. The commissioner may use systems operated by the department of criminal justice information services, pursuant to sections one hundred sixty-seven to one hundred seventy-eight, inclusive, of chapter six, for any record-keeping lawfully required by him provided that such records remain subject to the regulations of said department.

G.L. c. 276, § 87A. Placing certain persons in care of probation officer.

The superior court, any district court and any juvenile court may place on probation in the care of its probation officer any person before it charged with an offense or a crime for such time and upon such conditions as it deems proper, with the defendant's consent, before trial and before a plea of guilty, or in any case after a finding or verdict of guilty; provided, that, in the case of any child under the age of 18 placed upon probation by the superior court, he may be placed in the care of a probation officer of any district court or of any juvenile court, within the judicial district of which such child resides; and

provided further, that no person convicted under section twenty-two A, 22B, 22C, 24B or subsection (b) of section 50 of chapter two hundred and sixty-five or section thirty-five A of chapter two hundred and seventy-two shall, if it appears that he has previously been convicted under said sections and was eighteen years of age or older at the time of committing the offense for which he was so convicted, be released on parole or probation prior to the completion of five years of his sentence.

G.L. c. 6, § 178D. Sex offender registry.

The sex offender registry board, known as the board, in cooperation with the department, shall establish and maintain a central computerized registry of all sex offenders required to register pursuant to sections 178C to 178P, inclusive, known as the sex offender registry. The sex offender registry shall be updated based on information made available to the board, including information acquired pursuant to the registration provisions of said sections 178C to 178P, inclusive. The file on each sex offender required to register pursuant to said sections 178C to 178P, inclusive, shall include the following information, hereinafter referred to as registration data:

(a) the sex offender's name, aliases used, date and place of birth, sex, race, height, weight, eye and hair color, social security number, home address, any secondary addresses and work address and, if the sex offender works at or attends an institution of higher learning, the name and address of the institution;

(b) a photograph and set of fingerprints;

(c) a description of the offense for which the sex offender was convicted or adjudicated, the city or town where the offense occurred, the date of conviction or adjudication and the sentence imposed;

(d) any other information which may be useful in assessing the risk of the sex offender to reoffend; and

(e) any other information which may be useful in identifying the sex offender.

Notwithstanding sections 178C to 178P, inclusive, or any other general or special law to the contrary and in addition to any responsibility otherwise imposed upon the board, the board shall make the sex offender information contained in the sex offender registry, delineated below in subsections (i) to (viii), inclusive, available for inspection by the general public in the form of a comprehensive database published on the internet, known as the ''sex offender internet database''; provided, however, that no registration data relating to a sex offender given a level 1 designation by the board under section 178K shall be published in the sex offender internet database but may be disseminated by the board as otherwise permitted by said sections 178C to 178P, inclusive; and provided further, that the board shall keep confidential and shall not publish in the sex offender internet database any information relating to requests for registration data under sections 178I and 178J:

(i) the name of the sex offender;

(ii) the offender's home address and any secondary addresses;

(iii) the offender's work address;

(iv) the offense for which the offender was convicted or adjudicated and the date of the conviction or adjudication;

(v) the sex offender's age, sex, race, height, weight, eye and hair color;

(vi) a photograph of the sex offender, if available;

(vii) whether the sex offender has been designated a sexually violent predator; and

(viii) whether the offender is in compliance with the registration obligations of sections 178C to 178P, inclusive.

All information provided to the general public through the sex offender internet database shall include a warning regarding the criminal penalties for use of sex offender registry information to commit a crime or to engage in illegal discrimination or harassment of an offender and the punishment for threatening to commit a crime under section 4 of chapter 275. The sex offender internet database shall be updated regularly, based on information available to the board and shall be open to searches by the public at any time without charge or subscription. The board shall promulgate rules and regulations to implement, update and maintain such a sex offender internet database, to ensure the accuracy, integrity and security of information contained therein, to ensure the prompt and complete removal of registration data for persons whose duty to register has terminated or expired under section 178G, 178L or 178M or any other law and to protect against the inaccurate, improper or inadvertent publication of registration data on the internet.

The board shall develop standardized registration and verification forms, which shall include registration data as required pursuant to sections 178C to 178P. The board shall make blank copies of such forms available to all agencies having custody of sex offenders and all city and town police departments; provided, however, that the board shall determine the format for the collection and dissemination of registration data, which may include the electronic transmission of data. Records maintained in the sex offender registry shall be open to any law enforcement agency in the commonwealth, the United States or any other state. The board shall promulgate rules and regulations to implement the provisions of sections 178C to 178P, inclusive. Such rules and regulations shall include provisions which may permit police departments located in a city or town that is divided into more than one zip code to disseminate information pursuant to the provisions of section 178J categorized

by zip code and to disseminate such information limited to one or more zip codes if the request for such dissemination is so qualified; provided, however, that for the city of Boston dissemination of information may be limited to one or more police districts.

The board may promulgate regulations further defining in a manner consistent with maintaining or establishing eligibility for federal funding pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. section 14071, the eligibility of sex offenders to be relieved of the obligation to register, including but not limited to, regulations limiting motions under subsection (e) of section 178E, section 178G and relief from registration pursuant to paragraph (d) of subsection (2) of section 178K.

G.L. c. 6, § 178I. Report identifying sex offender; request for information; confidentiality

Any person who is 18 years of age or older and who states that he is requesting sex offender registry information for his own protection or for the protection of a child under the age of 18 or another person for whom the requesting person has responsibility, care or custody shall receive at no cost from the board a report to the extent available pursuant to sections 178C to 178P, inclusive, which indicates whether an individual identified by name, date of birth or sufficient personal identifying characteristics is a sex offender with an obligation to register pursuant to this chapter, the offenses for which he was convicted or adjudicated and the dates of such convictions or adjudications. Any records of inquiry shall be kept confidential, except that the records may be disseminated to assist or defend in a criminal prosecution.

Information about an offender shall be made available pursuant to this section only if the offender is a sex offender who has been finally classified by the board as a level 2 or level 3 sex offender.

All reports to persons making inquiries shall include a warning regarding the criminal penalties for use of sex offender registry information to commit a crime or to engage in illegal discrimination or harassment of an offender and the punishment for threatening to commit a crime under section 4 of chapter 275.

The board shall not release information identifying the victim by name, address or relation to the offender.

G.L. c. 6, § 178J. Request for sex offender information; notice of penalty for misuse; data required to receive report.

(a) A person who requests sex offender registry information shall:

(1) be 18 years of age or older;

(2) appear in person at a city or town police station and present proper identification;

(3) require sex offender registry information for his own protection or for the protection of a child under the age of 18 or another person for whom such inquirer has responsibility, care or custody, and so state; and

(4) complete and sign a record of inquiry, designed by the board, which shall include the following information: the name and address of the person making the inquiry, the person or geographic area or street which is the subject of the inquiry, the reason for the inquiry and the date and time of the inquiry.

Such records of inquiries shall include a warning regarding the criminal penalties for use of sex offender registry information to commit a crime or to engage in illegal discrimination or harassment of an offender and the punishment for threatening to commit a crime under the provisions of section 4 of chapter 275. Such records of inquiries shall state, before the signature of the inquirer, as follows: ''I understand

that the sex offender registry information disclosed to me is intended for my own protection or for the protection of a child under the age of 18 or another person for whom I have responsibility, care or custody.'' Such records of inquiries shall be kept confidential, except that such records may be disseminated to assist in a criminal prosecution.

(b) The person making the inquiry may either:

(1) identify a specific individual by name or provide personal identifying information sufficient to allow the police to identify the subject of the inquiry; or

(2) inquire whether any sex offenders live, work or attend an institution of higher learning within the same city or town at a specific address including, but not limited to, a residential address, a business address, school, after-school program, child care center, playground, recreational area or other identified address and inquire in another city or town whether any sex offenders live, work or attend an institution of higher learning within that city or town, upon a reasonable showing that the sex offender registry information is requested for his own protection or for the protection of a child under the age of 18 or another person for whom the inquirer has responsibility, care or custody; or

(3) inquire whether any sex offenders live, work or attend an institution of higher learning on a specific street within the city or town in which such inquiry is made.

(c) If the search of the sex offender registry results in the identification of a sex offender required to register pursuant to this chapter who has been finally classified by the board as a level 2 or level 3 offender under section 178K, the police shall disseminate to the person making the inquiry:

(1) the name of the sex offender;

(2) the home address and any secondary address if located in the areas described in clause (2) or (3) of subsection (b);

(3) the work address if located in the areas described in said clause (2) or (3) of said subsection (b);

(4) the offense for which he was convicted or adjudicated and the dates of such conviction or adjudication;

(5) the sex offender's age, sex, race, height, weight, eye and hair color; and

(6) a photograph of the sex offender, if available.

(7) the name and address of the institution of higher learning where the sex offender works or is enrolled as a student, if located in the areas described in clause (2) or (3) of subsection (b).

The police shall not release information identifying the victim by name, address or the victim's relation to the offender.

RECORD APPENDIX

1584CR10127 Commonwealth vs. Feliz, Ervin

Case Type	Indictment
Case Status	Open
File Date	03/03/2015
DCM Track:	B - Complex
Initiating Action:	CHILD PORNOGRAPHY, POSSESS c272 §29C
Status Date:	03/03/2015
Case Judge:	
Next Event:	07/26/2018

All Information | Party | Charge | Event | Tickler | Docket | Disposition

Party Information

Commonwealth - Prosecutor

Alias

Party Attorney

Attorney	Cahill, Esq., Gerald H
Bar Code	670058
Address	PO Box 79063 Belmont, MA 02479
Phone Number	(617)759-1030
Attorney	Poirier, Esq., Nicole A
Bar Code	682577
Address	Suffolk County District Attorney's Office 1 Bulfinch Place Boston, MA 02114
Phone Number	(617)619-4277
Attorney	Zanini, Esq., John P
Bar Code	563839
Address	Office of Suffolk County D.A. One Bulfinch Place Boston, MA 02114
Phone Number	(617)619-4000

More Party Information

Feliz, Ervin - Defendant

Alias

Party Attorney

Attorney	Hackett, Esq., Alyssa Thrasher
Bar Code	676880
Address	Committee For Public Counsel Services 1 Congress St Boston, MA 02114
Phone Number	(617)209-5500
Attorney	Kiley, Esq., Rebecca Catherine
Bar Code	660742
Address	Committee for Public Counsel Services 44 Bromfield St Appeals Unit Boston, MA 02108
Phone Number	(617)482-6212
Attorney	Rangaviz, Esq., David Rassoul
Bar Code	681430
Address	Committee for Public Counsel Services 44 Bromfield St Boston, MA 02108
Phone Number	(617)482-6212

More Party Information

Stanton ,Clerk, Joseph - Other interested party

Alias

Party Attorney

More Party Information

Party Charge Information

Feliz, Ervin - Defendant

Charge # 1 :

272/29C/A-1 - Felony CHILD PORNOGRAPHY, POSSESS c272 §29C

Original Charge 272/29C/A-1 CHILD PORNOGRAPHY, POSSESS c272 §29C (Felony)

Indicted Charge

Amended Charge

Charge Disposition
Disposition Date
Disposition
04/22/2016
Guilty Plea

Feliz, Ervin - Defendant

Charge # 2 :

272/29C/A-1 - Felony CHILD PORNOGRAPHY, POSSESS c272 §29C

Original Charge 272/29C/A-1 CHILD PORNOGRAPHY, POSSESS c272 §29C (Felony)

Indicted Charge

Amended Charge

Charge Disposition
Disposition Date
Disposition
04/22/2016
Guilty Plea

Feliz, Ervin - Defendant

Charge # 3 :

272/29B/A-1 - Felony CHILD IN NUDE, DISTRIB MATERIAL OF c272 §29B(a)

Original Charge 272/29B/A-1 CHILD IN NUDE, DISTRIB MATERIAL OF c272 §29B(a) (Felony)

Indicted Charge

Amended Charge

Charge Disposition
Disposition Date
Disposition
04/22/2016
Guilty Plea

Feliz, Ervin - Defendant

Charge # 4 :

272/29B/A-1 - Felony CHILD IN NUDE, DISTRIB MATERIAL OF c272 §29B(a)

Original Charge 272/29B/A-1 CHILD IN NUDE, DISTRIB MATERIAL OF c272 §29B(a) (Felony)

Indicted Charge

Amended Charge

Charge Disposition
Disposition Date
Disposition
04/22/2016
Guilty Plea

Feliz, Ervin - Defendant

Charge # 5 :

272/29B/A-1 - Felony CHILD IN NUDE, DISTRIB MATERIAL OF c272 §29B(a)

Original Charge 272/29B/A-1 CHILD IN NUDE, DISTRIB MATERIAL OF c272 §29B(a) (Felony)

Indicted Charge

Amended Charge

Charge Disposition
Disposition Date
Disposition
04/22/2016
Guilty Plea

Load Party Charges 6 through 7 Load All 7 Party Charges

Events

Date	Session	Location	Type	Event Judge	Result
04/02/2015 09:30 AM	Magistrate's Session		Arraignment		Held as Scheduled
04/13/2015 09:30 AM	Magistrate's Session		Arraignment		Canceled
05/12/2015 09:30 AM	Magistrate's Session		Pre-Trial Conference		Held as Scheduled
06/10/2015 09:30 AM	Magistrate's Session		Status Review		Rescheduled
07/17/2015 09:30 AM	Magistrate's Session		Status Review		Held as Scheduled
08/10/2015 09:00 AM	Criminal 1		Pre-Trial Hearing		Held as Scheduled
10/08/2015 09:00 AM	Criminal 9		Evidentiary Hearing on Suppression		Rescheduled
11/09/2015 09:00 AM	Criminal 9		Evidentiary Hearing on Suppression		Not Held
12/01/2015 09:00 AM	Criminal 9	BOS-7th FL, CR 713 (SC)	Hearing for Change of Plea	Salinger, Hon. Kenneth W	Canceled
12/01/2015 02:00 PM	Criminal 4		Final Pre-Trial Conference		Held as Scheduled
12/16/2015 09:00 AM	Criminal 4		Jury Trial		Canceled
01/14/2016 09:30 AM	Magistrate's Session	BOS-7th FL, CR 705 (SC)	Hearing RE: Discovery Motion(s)		Not Held
02/26/2016 09:30 AM	Magistrate's Session	BOS-7th FL, CR 705 (SC)	Conference to Review Status	Curley, Edward J	Held as Scheduled
04/11/2016 09:30 AM	Criminal 1	BOS-7th FL, CR 704 (SC)	Lobby Conference		Held as Scheduled
04/22/2016 09:00 AM	Criminal 1	BOS-7th FL, CR 704 (SC)	Hearing for Change of Plea	Krupp, Hon. Peter B	Held as scheduled
05/03/2016 02:00 PM	Criminal 4	BOS-8th FL, CR 815 (SC)	Final Pre-Trial Conference		Canceled
05/09/2016 09:00 AM	Criminal 4	BOS-8th FL, CR 815 (SC)	Jury Trial		Canceled
06/01/2016 09:30 AM	Criminal 1	BOS-7th FL, CR 704 (SC)	Conference to Review Status		Not Held
08/26/2016 09:30 AM	Criminal 1	BOS-7th FL, CR 704 (SC)	Motion Hearing		Canceled
09/09/2016 09:30 AM	Criminal 1	BOS-7th FL, CR 704 (SC)	Motion Hearing	Miller, Hon. Rosalind H	Not Held
09/14/2016 09:30 AM	Criminal 1	BOS-7th FL, CR 704 (SC)	Motion Hearing	Miller, Hon. Rosalind H	Held as Scheduled
10/18/2016 09:30 AM	Criminal 1	BOS-7th FL, CR 704 (SC)	Motion Hearing		Held as Scheduled
11/23/2016 09:30 AM	Criminal 1	BOS-7th FL, CR 704 (SC)	Conference to Review Status	Miller, Hon. Rosalind H	Not Held
11/28/2016 09:30 AM	Criminal 1	BOS-7th FL, CR 704 (SC)	Conference to Review Status	Miller, Hon. Rosalind H	Held as Scheduled
02/10/2017 09:30 AM	Criminal 9	BOS-7th FL, CR 713 (SC)	Motion Hearing	Gordon, Hon. Robert B	Held as Scheduled
02/17/2017 09:30 AM	Criminal 9	BOS-7th FL, CR 713 (SC)	Motion Hearing	Gordon, Hon. Robert B	Held as Scheduled
02/24/2017 09:00 AM	Criminal 9	BOS-7th FL, CR 713 (SC)	Evidentiary Hearing on Suppression	Gordon, Hon. Robert B	Held - Under advisement
07/17/2017 09:30 AM	Criminal 1	BOS-7th FL, CR 704 (SC)	Probation Administrative Conference	Sullivan, Hon. William F	Held as Scheduled

Date	Session	Location	Type	Event Judge	Result
06/04/2018 09:30 AM	Criminal 1		Motion Hearing	Cannone, Hon. Beverly J	Held as Scheduled
06/26/2018 09:30 AM	Criminal 1		Conference to Review Status	Cannone, Hon. Beverly J	Held as Scheduled
06/29/2018 12:00 PM	Criminal 1		Bail Hearing	Cannone, Hon. Beverly J	Held as Scheduled
07/26/2018 02:30 PM	Criminal 1		Motion Hearing	Cannone, Hon. Beverly J	

Ticklers

Tickler	Start Date	Due Date	Days Due	Completed Date
Pre-Trial Hearing	04/02/2015	04/02/2015	0	04/22/2016
Final Pre-Trial Conference	04/02/2015	12/14/2015	256	04/22/2016
Case Disposition	04/02/2015	12/28/2015	270	04/22/2016
Under Advisement	02/24/2017	03/26/2017	30	

Docket Information

Docket Date	Docket Text	File Ref Nbr.
03/03/2015	Indictment returned	1
03/03/2015	MOTION by Commonwealth for summons of Deft to appear; filed & allowed (Lauriat, J.)	2
03/03/2015	Summons for arraignment issued ret April 12, 2015	
03/16/2015	Summons returned without service	
04/02/2015	Defendant came into court.	
04/02/2015	Committee for Public Counsel Services appointed, pursuant to Rule 53, Atty. J Sandman.	
04/02/2015	Court inquires of Commonwealth if abuse, as defined in G.L. c.209A, s1, is alleged to have occurred immediately prior to or in connection with the charged offense(s).	
04/02/2015	Court finds NO abuse is alleged in connection with the charged offense(s). (G.L. 276, s56A)	
04/02/2015	Deft arraigned before Court	
04/02/2015	Deft waives reading of indictments	
04/02/2015	RE Offense 1:Plea of not guilty	
04/02/2015	RE Offense 2:Plea of not guilty	
04/02/2015	RE Offense 3:Plea of not guilty	
04/02/2015	RE Offense 4:Plea of not guilty	
04/02/2015	RE Offense 5:Plea of not guilty	
04/02/2015	RE Offense 6:Plea of not guilty	
04/02/2015	RE Offense 7:Plea of not guilty	
04/02/2015	Deft released on personal recognizance in the sum of $100.00 without prejudice. Bail Warning Read. COB: See Comm's Motion requesting Pre-trial Conditions of release Paper # filed and allowed in part, Denied in part. See Endorsement. Condition #10 Denied. GPS order vacated. Added Conditions - Report to probation in person 1 time per week face to face with PO.	
04/02/2015	Commonwealth files Requested Pre-trial Condtions of release.	3

Docket Date	Docket Text	File Ref Nbr.
04/02/2015	Motion Paper # 3, allowed in part, Denied in part. Condition #10 Denied. GPS order vacated.	
04/02/2015	Commonwealth files Notice of Appearance of ADA Gerald Cahill.	4
04/02/2015	Commonwealth files Statement of the Case.	5
04/02/2015	Commonwealth files Notice of Discovery I.	6
04/02/2015	Commonwealth files Notice of Discovery II.	7
04/02/2015	Assigned to Track "B" see scheduling order	
04/02/2015	Tracking deadlines Active since return date	
04/02/2015	Continued to 5/12/2015 for hearing Re: PTC by agreement.	
04/02/2015	Continued to 8/10/2015 for hearing Re: PTH by agreement.	
04/02/2015	Continued to 12/1/2015 for hearing Re: FPTC by agreement in Rm. 815 at 2pm.	
04/02/2015	Continued to 12/16/2015 for hearing Re: trial by agreement in Rm. 815. Wilson, MAG - G. Cahill, ADA - J. Sandman, Atty - JAVS	
04/02/2015	Case Tracking scheduling order (Gary D. Wilson. Magistrate) mailed 4/2/2015	
05/12/2015	Defendant came into court.	
05/12/2015	Pre-trial conference report filed	8
05/12/2015	Continued to 6/10/2015 for hearing Re: filing of motions by agreement. Kaczmarek, MAG - G. Cahill, ADA - J. Sandman, Atty - JAVS	
06/10/2015	Defendant comes into court, case continued until 7/17/2015 by agreement for hearing Re: Filing of motions. Wilson, MAG - G. Cahill, ADA - J. Sandman, Atty - JAVS	
07/17/2015	Defendant came into court.	
07/17/2015	Case has next date of 8/10/15 for scheduling of motions re: Commonwealth's counsel. First Session Criminal Ctrm 704. Kaczmarek, MAG - J. Sandman, Attorney - JAVS/ERD.	
08/10/2015	Defendant comes into court PTH held	
08/10/2015	Commonwealth files Certificate of Discovery Compliance	9
08/10/2015	Continued to 10/8/2015 by agreement Hrg re: Motion to Suppress Rm 713 Roach, J - N. Porier, ADA - J. Sandman, Atty - JAVS	
08/13/2015	Defendant files Motion to Suppress Statements, with affidavit and Memorandum in support of.	10
08/17/2015	Legal counsel fee paid as assessed in the amount of $150.00	
09/08/2015	Defendant not in Court, hearing continued by agreement until 11/9/2015 re: Motion to Suppress (Ctrm 713). (10/08/2015 date Cancelled). Kaczmzrek-MAG. - J. Sandman, Atty. - JAVS.	
11/09/2015	Event Result: The following event: Evidentiary Hearing on Suppression scheduled for 11/09/2015 09:00 AM has been resulted as follows: Result: Not Held Reason: Request of Defendant. Defendant came into Court. Lobby Conference held. Continued by agreement to 12/1/15 for Hearing re: Change of Plea. Salinger, J. - N. Poirier, ADA - J. Sandman, Attorney - Javs.	
11/09/2015	Defendant 's Motion for Relief From Sex Offendr Registration.	11
11/09/2015	Defendant 's Motion to Waive the Imposition of GPS Monitoring as a Condition of Probatio, filed.	12
11/09/2015	Motion (#10.0) waived to Suppress.	
11/17/2015	The following form was generated:	
11/24/2015	Event Result: The following event: Hearing for Change of Plea scheduled for 12/01/2015 09:00 AM has been resulted as follows: Result: Canceled Reason: Joint request of parties	

Docket Date	Docket Text	File Ref Nbr.
12/01/2015	Event Result: The following event: Final Pre-Trial Conference scheduled for 12/01/2015 02:00 PM has been resulted as follows: Result: Held as Scheduled Defendant Came into Court. Hearing Re: Motion to Continue. After hearing, Motion allowed. Case is continued to 1/14/15 in the CM session for Motions. Case is continued to 5/3/15 for FPTC and 5/9/15 for Trial. Muse,J--N.Poirer--ADA--A.Hackett--Atty--JAVS--ERD	
12/01/2015	Defendant 's Motion to Continue	13
12/01/2015	Endorsement on Motion to . (#13.0): ALLOWED	
12/04/2015	Event Result: The following event: Jury Trial scheduled for 12/16/2015 09:00 AM has been resulted as follows: Result: Canceled Reason: Request of Defendant	
01/14/2016	Event Result: Deft came into Court The following event: Hearing RE: Discovery Motion(s) scheduled for 01/14/2016 09:30 AM has been resulted as follows: Result: Not Held Reason: Not reached by Court Appeared: Defendant Feliz, Ervin Curley, MAG - A. Hackett, Atty - JAVS	
02/26/2016	Defendant comes into court. Continued by Agreement to April 11, 2016 at 9:30 am in First Session for Hearing re: Lobby Conference and Motion to amend Trial Track E. Curley, MAG- N. Poirer, ADA - A. Hackett, Atty - JAVS	
04/11/2016	Comes into court. Lobby held Contineud to 4-22-16 by agreement re change of plea(J). 9am Krupp, J. - N. Porier, ADA. - A. Hackett, Atty. - FTR	
04/22/2016	Defendant waives rights.	14
04/22/2016	Colloquy - Defendant advised of right to attorney	
04/22/2016	Defendant warned pursuant to alien status, G.L. c. 278, § 29D.	
04/22/2016	Notice given to defendant of duty to register as a sex offender.	
04/22/2016	Defendant warned as to submission of DNA G.L. c. 22E, § 3	
04/22/2016	Event Result: The following event: Jury Trial scheduled for 05/09/2016 09:00 AM has been resulted as follows: Result: Canceled Reason: Case Disposed	

Docket Date	Docket Text	File Ref Nbr.
04/22/2016	Offense Disposition: Charge #1 CHILD PORNOGRAPHY, POSSESS c272 §29C Date: 04/22/2016 Method: Hearing on Plea Offer/Change Code: Guilty Plea Judge: Krupp, Hon. Peter B Charge #2 CHILD PORNOGRAPHY, POSSESS c272 §29C Date: 04/22/2016 Method: Hearing on Plea Offer/Change Code: Guilty Plea Judge: Krupp, Hon. Peter B Charge #3 CHILD IN NUDE, DISTRIB MATERIAL OF c272 §29B(a) Date: 04/22/2016 Method: Hearing on Plea Offer/Change Code: Guilty Plea Judge: Krupp, Hon. Peter B Charge #4 CHILD IN NUDE, DISTRIB MATERIAL OF c272 §29B(a) Date: 04/22/2016 Method: Hearing on Plea Offer/Change Code: Guilty Plea Judge: Krupp, Hon. Peter B Charge #5 CHILD IN NUDE, DISTRIB MATERIAL OF c272 §29B(a) Date: 04/22/2016 Method: Hearing on Plea Offer/Change Code: Guilty Plea Judge: Krupp, Hon. Peter B Charge #6 CHILD IN NUDE, DISTRIB MATERIAL OF c272 §29B(a) Date: 04/22/2016 Method: Hearing on Plea Offer/Change Code: Guilty Plea Judge: Krupp, Hon. Peter B Charge #7 CHILD IN NUDE, DISTRIB MATERIAL OF c272 §29B(a) Date: 04/22/2016 Method: Hearing on Plea Offer/Change Code: Guilty Plea Judge: Krupp, Hon. Peter B	

Docket Date	Docket Text	File Ref Nbr.
04/22/2016	Defendant sentenced: Sentence Date: 04/22/2016 Judge: Krupp, Hon. Peter B Charge #: 1 CHILD PORNOGRAPHY, POSSESS c272 §29C Suspended Sentence to HOC Term: 2 Years, 6 Months, 0 Days Served Primary Charge Charge #: 2 CHILD PORNOGRAPHY, POSSESS c272 §29C Suspended Sentence to HOC Term: 2 Years, 6 Months, 0 Days Served Concurrently Charge # 1 Charge #: 3 CHILD IN NUDE, DISTRIB MATERIAL OF c272 §29B(a) Served Concurrently Charge # 1 Charge #: 4 CHILD IN NUDE, DISTRIB MATERIAL OF c272 §29B(a) Served Concurrently Charge # 1 Charge #: 5 CHILD IN NUDE, DISTRIB MATERIAL OF c272 §29B(a) Served Concurrently Charge # 1 Charge #: 6 CHILD IN NUDE, DISTRIB MATERIAL OF c272 §29B(a) Served Concurrently Charge # 1 Charge #: 7 CHILD IN NUDE, DISTRIB MATERIAL OF c272 §29B(a) Served Concurrently Probation Probation Type: Risk/Need Probation Duration: 5 Years, 0 Months, 0 Days If deft is fully compliant with conditions after two(2) years to seek releif from conditon #9 If after 4 years of full compliance deft may apply to court for early termination	
04/22/2016	Event Result: The following event: Hearing for Change of Plea scheduled for 04/22/2016 09:00 AM has been resulted as follows: Result: Held as scheduled	
04/22/2016	ORDER: Condition of probation filed	15
04/22/2016	ORDER: Deft files memo in opposition to imposition of GPS monitoring as a condition of probation	16
04/22/2016	ORDER: Comm's motion to forfeit electronic devices filed and allowed	17
05/26/2016	Defendant oral motion to remove GPS for 5-26-16 only is allowed Krupp, J. - E. Phillips, PO. - FTR.	
06/01/2016	Not in court(non-custody) Continued by agreement to 8-26-16 re evidentiary hearing re GPS. To be heard before Krupp J at Middlesex Superior Court Krupp, J. - N. Proirier, ADA - A. Hackett, Atty. - FTR.	
06/02/2016	ORDER: filed re scheduling ADA Poirier, PO Phillips and Atty Hackett notified with copy	18
06/03/2016	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Alyssa Thrasher Hackett, Esq. Prosecutor: Commonwealth Attorney: Nicole A. Poirier, Esq.	
08/04/2016	Commonwealth 's Motion for Additional Time to Respond to the Defendant's Motion to Waive GPS Requirement filed. Copy sent to Krupp,J	19
08/04/2016	The following form was generated: A Clerk's Notice was generated and sent to: Other interested party: Hon. Peter B Krupp	
08/12/2016	Commonwealth 's Motion for Additional Time to Respond to the Defendants Motion to Waive GPS Requirement (Second Motion) filed.	20
08/12/2016	Endorsement on Motion for Additional Time to Respond to the Defendants Motion to Waive GPS Requirement, (#20.0): ALLOWED (Copy of endorsement emailed to N. Poirier, ADA and A. Hackett. Attorney)	

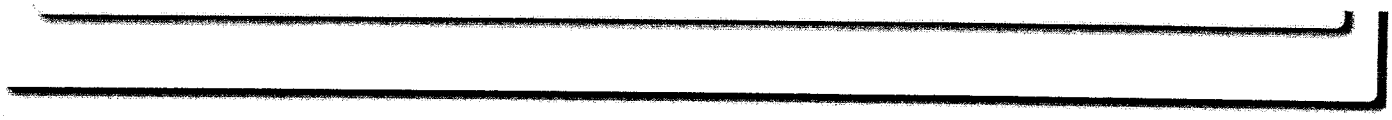
Docket Date	Docket Text	File Ref Nbr.
08/12/2016	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Alyssa Thrasher Hackett, Esq. Attorney: Nicole A. Poirier, Esq.	
08/16/2016	Commonwealth 's Response to Defendant's motion in opposition to the imposition of GPS monitoring as a condition of probation. (notice sent to Krupp,J)	21
08/24/2016	Event Result: The following event: Motion Hearing scheduled for 08/26/2016 09:30 AM has been resulted as follows: Result: Canceled Reason: Joint request of parties	
09/01/2016	Commonwealth 's Motion for the Office of the Commissioner of Probation to produce documents filed and allowed	22
09/01/2016	ORDER: filed	23
09/01/2016	Defendant 's Request for authorization to summons probation officer filed and allowed Atty to issue summons	24
09/01/2016	Defendant 's Motion for funds filed and allowed as endorsed up to $750 Miller, J. - N. Poirier, ADA. - A. Hackett, Atty. - FTR.	25
09/06/2016	Commonwealth 's Notice of Discovery	26
09/06/2016	Commonwealth 's Motion for Production of an E-Mail and Conditional Motion for Recusal	27
09/08/2016	Business Records received from Commissioner of Probation. (Stored on 14th Floor)	
09/13/2016	P#27 allowed as endorsed(See motion). Krupp, J Continued by order of cort to 9-14-16 re motion hearing(J). Copy to ADA Poirier and Atty Hackett.	
09/14/2016	Not in court Continued by agreement to 10-18-16 re motions(J). Deft excused Miller, J. - N. Poirier, ADA. - A. Hackett, Atty. - FTR.	
10/18/2016	Not in court After hearing P#12 taken under advisement Continued to 11-23-16 re status(J) Miller, J. - A. Tavo, ADA. - A. Hackett, Atty. - FTR.	
11/23/2016	Comes into court Continued by order of court to 11-28-16 status re findings(J). Deft excused Sanders, J. - G. Ogus for A. Tao, ADA. - A. Hackett, Atty. - FTR.	
11/28/2016	Event Result: The following event: Conference to Review Status scheduled for 11/28/2016 09:30 AM has been resulted as follows: Result: Held as Scheduled	
01/24/2017	Defendant 's Motion for funds for a psychiatric expert (Ex Parte) with Affidavit filed and allowed as endorsed. Deft not in Court Curley, MAG - A. Hackett, Atty - FTR	28
02/10/2017	Event Result: Judge: Gordon, Hon. Robert B The following event: Motion Hearing scheduled for 02/10/2017 09:30 AM has been resulted as follows: Result: Held as Scheduled Defendant comes into Court; hearing held; matter continued to 2/17/17 for Further hearing. Gordon,J. - N.Poirer, ADA - A.Hackett, Attny - FTR Judge: Gordon, Hon. Robert B	
02/17/2017	Defendant comes into Court Motion Hearing Held as Scheduled Case Continued to 2-24-17 by agreement re Further Motion to Suppress, filed Defendant excused on 2-24-17 Gordon, J.: N. Poirier, ADA: A. Hackett, Atty: FTR	
02/24/2017	Matter taken under advisement The following event: Evidentiary Hearing on Suppression scheduled for 02/24/2017 09:00 AM has been resulted as follows: Result: Held - Under advisement	
03/10/2017	Defendant 's Memorandum of Opposition (Supplemental) to Imposition of GPS Condition, filed.	29

Docket Date	Docket Text	File Ref Nbr.
04/21/2017	Findings of Fact and Rulings of Law: AND ORDER OF DECISION ON DEFENDANT'S OPPOSITION TO GPS MONITORING AS CONDITION OF PROBATION DENIED	30
04/21/2017	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Alyssa Thrasher Hackett, Esq. Attorney: Nicole A. Poirier, Esq.	
05/18/2017	Notice of appeal filed on the denial of his Motion in Opposition to the Imposition of Global Positioning System Monitoring as a Condition of his Probation Applies To: Feliz, Ervin (Defendant)	31
05/19/2017	OTS is hereby notified to provide the JAVS transcript of the proceedings of 02/10/2017 09:30 AM Motion Hearing, 02/17/2017 09:30 AM Motion Hearing, 02/24/2017 09:00 AM Evidentiary Hearing on Suppression. Ctrm 713 FTR Original sent 5/19/17 2nd Notice sent 10/2/17	
05/25/2017	Rebecca Catherine Kiley, Esq.'s Notice of appearance. Filed.	32
07/17/2017	Comes into court At request of deft, GPS may be removed for surgery today(7-17-17) GPS must be back in place by 9am on Wednesday 7-19-17 Sullivan, J. - E. Phillips, PO. - FTR.	
10/18/2017	Appeal: JAVS DVD/CD Received from OTS Re: FTR 2/10/17, 2/17/17, 2/24/17	
10/19/2017	Notice to counsel with transcript(s), 2/10/17, 2/17/17 and 2/24/17 sent to Atty R.Kiley & transcripts to ADA J.Zanini	
11/07/2017	Appeal: notice of assembly of record sent to Counsel ADA J.Zanini, Atty R.Kiley & Clerk J.Stanton	
11/07/2017	Appeal: Statement of the Case on Appeal (Cover Sheet). RE: P#31	33
11/10/2017	Appeal entered in Appeals Court on 11/07/2017 docket number 2017-P-1441	34
02/13/2018	Defendant 's Motion to Reconsider Defendants Motion to Waive GPS Monitoring as a Condition of Probation Filed (Sent to Sullivan,J , E.Phillips,PO w/ copy) on 2/14 RESENT TO GORDON, J ON 2/21	35
02/14/2018	Notice of docket entry received from Appeals Court Re#7: Allowed. The defendant is given leave to file, and the trial court is given leave to consider, a motion for reconsideration. Appellate proceedings stayed to 3/12/2018. Status report due then confirming filing of said motion in the trial court and any disposition thereof.	36
03/12/2018	Opposition to paper #35.0 Opposition to the Defendants Motion to Reconsider filed by Commonwealth Filed (Copy to Sullivan,J and R.Kiley,Atty)	37
03/16/2018	Notice of docket entry received from Appeals Court Re#8: Appellate proceedings stayed to 4/17/2018. Status report due then concerning trial court's disposition of pending motion for reconsideration. Notice/attest/ Gordon, J.	38
03/22/2018	MEMORANDUM & ORDER: ON DEFENDANT'S MOTION TO RECONSIDER DENIED Judge: Gordon, Hon. Robert B	39
03/22/2018	Findings of Fact and Rulings of Law: & Order of Decision (Amended) on Defendant's Defendant's Opposition To GPS Monitoring as Condition of Probation Judge: Gordon, Hon. Robert B	40
03/23/2018	David Rassoul Rangaviz, Esq.'s Notice of appearance. Filed.	41
03/27/2018	Notice of appeal filed by the defendant regarding decisions and orders of this court dated March21, 2018, denying in part his motion to reconsider and denying his motion to waive GPS monitoring as a condition of probation. Filed.	42
03/27/2018	Appeal: Statement of the Case on Appeal (Cover Sheet).	43
03/27/2018	Appeal: notice of assembly of record sent to Counsel J. Stanton Clerk, D. Rangaviz Atty and J. Zanini ADA.	

Docket Date	Docket Text	File Ref Nbr.
03/28/2018	Petitioner 's Motion for travel pass	44
03/28/2018	Endorsement on , (#44.0): ALLOWED Probationer may travel from 3-2-18 to 4-5-18 J Avalo, ACPO. - A Hackett, Attty. - FTR Judge: Tochka, Hon. Robert N	
04/10/2018	Notice of Entry of appeal received from the Appeals Court Case was entered in this court on April 4, 2018	45
04/13/2018	Notice of docket entry received from Appeals Court Order: Allowed. The appeals in 2017-P-1441 and 2018-P-0496 are hereby consolidated. The appeal in 2017-P-1441 is closed, all future filing shall refer to 2018-P-0496 only. The transcripts, lower court assembly of the record package, docketing statement, and copy of memorandum and order on defendant's motion to reconsider filed in 2017-P-1441 are hereby transferred to the docket in 2018-P-0496.	46
05/02/2018	Notice of docket entry received from Appeals Court Re#4: Denied without prejudice to renewal in the trial court. The proposed impounded appendix will not be accepted and placed in the court's file until the defendant reports the outcome of the anticipated motion in the trial court. Maldonado,J	47
05/07/2018	Defendant 's Motion to Impound. w/affidavit (J. Pardi)	48
05/14/2018	Deft not in court Continued at request of deft to 6-4-18 hearing re motion to impound(P#48) D Rangaviz, Atty by phone	
06/04/2018	Event Result:: Motion Hearing scheduled on: 06/04/2018 09:30 AM Has been: Held as Scheduled Hon. Beverly J Cannone, Presiding C Campbell, ADA. - D Rangaviz, Atty. - FTR. Judge: Cannone, Hon. Beverly J	
06/04/2018	Endorsement on , (#48.0): ALLOWED Judge: Cannone, Hon. Beverly J	
06/04/2018	ORDER: filed P#12 - Exh B+C ordered Impounded Judge: Cannone, Hon. Beverly J	49
06/11/2018	Notice of docket entry received from Appeals Court Re#8: The impounded appendix has been accepted for filing.	50
06/18/2018	Defendant 's Motion for Relief From Condition of Probation Nos. 8 & 9.	51
06/25/2018	Notice of docket entry received from Appeals Court The Supreme Judicial Court allowed an application for Direct Appellate Review of the above-referenced matter. Case transferred to Supreme Judicial Court	52
06/26/2018	Defendant not in Court (Non Custody) 06/26/2018 09:30 AM Has been: Held as Scheduled Hon. Beverly J Cannone, Presiding continued to 6/29/18 by Agreement for Hearing re: Bail in J Session at 1200pm Cannone,J - L.Weinstein, ADA- FTR Judge: Cannone, Hon. Beverly J	
06/29/2018	Event Result:: Bail Hearing scheduled on: Defendant comes into court, Continued by agreement to 7/26/2018 hearing re: motions (first session at 2:30pm) Cannone, J E. Phillips PO A. Hackett Atty FTR Judge: Cannone, Hon. Beverly J	

Case Disposition

Disposition	Date	Case Judge
Disposed by Plea	04/22/2016	



SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

COMMONWEALTH vs. ERVIN FELIZ
DAR-26102

CASE HEADER

Case Status	DAR allowed	**Status Date**	06/22/2018
Nature	Possession of Pornography	**Entry Date**	05/10/2018
Appeals Ct Number	2018-P-0496	**Opposition Date**	05/23/2018
Appellant	Defendant	**Applicant**	Defendant
Citation		**Case Type**	Criminal
Full Ct Number		**TC Number**	
Lower Court	Suffolk Superior Court	**Lower Ct Judge**	

INVOLVED PARTY	ATTORNEY APPEARANCE
Commonwealth Plaintiff/Appellee	John P. Zanini, A.D.A.
Ervin Feliz Defendant/Appellant	David Rassoul Rangaviz, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
05/10/2018		Docket opened.
05/10/2018	#1	MOTION to file DAR application late filed for Ervin Feliz by Attorney David Rangaviz.
05/10/2018	#2	DAR APPLICATION filed for Ervin Feliz by Attorney David Rangaviz. (Notice sent)
06/22/2018	#3	ALLOWANCE of DAR application.

As of 06/22/2018 20:00

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

---

[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]

---

[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.

---

[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

---

[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

---

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

---

[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,

---

[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

---

[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 . . . .").

---

[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

[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

---

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

---

[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

---

[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,

---

[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

---

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.
>
> ***
>
> 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

---

[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)

---

[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

---

[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

CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k).

Cailin M. Campbell

Cailin M. Campbell
Assistant District Attorney