
COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

SUFFOLK, SS.

No. SJC-12545

COMMONWEALTH,
Appellee,

v.

ERVIN FELIZ,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

**BRIEF OF AMICUS CURIAE
MASSACHUSETTS PROBATION SERVICE**

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**STATEMENT OF INTEREST OF AMICUS CURIAE MASSACHUSETTS
PROBATION SERVICE**

The Massachusetts Probation Service ("Probation") operates the system that electronically monitors individuals who courts order onto GPS monitoring. Probation submits this brief to provide this Court with information about how Probation conducts GPS monitoring, including steps Probation takes to minimize intrusion into and disruption of individuals' lives and to promote compliance. Probation takes no position on whether G.L. c. 265, § 47's requirement of mandatory GPS monitoring is unconstitutional as applied to non-contact sex offenders with no history of contact offenses.

GPS MONITORING IN MASSACHUSETTS

I. How the GPS monitoring devices used in Massachusetts operate

Probation first began operating an electronic monitoring system in 2001. That initial electronic monitoring system used radio frequency devices, which worked like an electronic leash or tether. The monitoring unit on an individual's ankle communicated by radio frequency with a base station located in that individual's home. The device informed Probation's electronic monitoring center ("ELMO") whether the

individual was within range of the base station. Effectively, it operated to tell ELMO whether the monitored individual violated a court-ordered curfew, the status of the equipment, and whether the equipment had been tampered with.

Since 2005, Probation has contracted with vendors to provide GPS monitoring equipment and software. Probation conducts the monitoring of individuals ordered onto GPS. Some other jurisdictions contract with call centers to conduct the monitoring. In Massachusetts, employees at ELMO respond to alerts by working with monitored individuals, probation officers, and courts to facilitate compliance and respond to non-compliance in ways described herein. ELMO operates 24 hours a day, 7 days a week, 365 days a year.

GPS devices track the location of monitored individuals and communicate that location to ELMO. The GPS device generates location data through communication with government satellites. It communicates that data to ELMO through cellular networks. Accordingly, to perform effectively, the GPS devices need access to two lines of communication - satellites and cellular coverage.

Currently, Probation monitors GPS orders using one of two types of devices - either a 1 Piece or 2 Piece wearable miniature tracking device.¹ The 1 Piece device consists of a GPS receiver attached to an individual (usually at the ankle) with a rubber strap which contains fiber optics.

Some individuals ordered onto GPS monitoring also have a beacon, which operates as a base station at the person's residence. When the individual comes within range of the beacon (50-100 feet),² the GPS function of the ankle device turns off. Instead, the device communicates with the beacon by radio frequency. Once the person exits beacon range, the GPS functioning of the device resumes. This approach preserves battery life by not tasking the device with continually searching for and connecting to satellites to generate location information.

¹ As of August 13, 2018, 98.6% of the GPS devices currently assigned are 1 Piece devices. Probation uses 2 Piece devices infrequently, typically only if the monitored individual has proven or expected poor cellular coverage at their home. See <https://fccid.io/NC3-TSSDX1044VXU/User-Manual/User-manual-3752084> (last visited on August 16, 2018) (User Manual for 2 Piece device, "Overview" section noting that 2 Piece can connect through a landline).

² The range depends on whether the area is enclosed or open.

The device collects data at the rate of one location point per minute - unless the monitored individual "causes a geographic zone violation and is in motion, [then] the [device] will begin to store a point every 15 seconds."³ The device stores data until it reaches a scheduled download time. Probation uses the vendor default download time of one hour. If the device cannot call in (e.g., is in a poor cellular coverage area) at the scheduled download time, it continues to store the data until it can call in. If, as described below, the device generates an alert, that alert does not wait until the scheduled download but generates immediately.⁴

The GPS devices currently in use communicate on either Verizon's or AT&T's networks.⁵ Based on coverage maps, these two networks provide coverage to

³ See <https://fccid.io/NC3-TSSDW4014V/User-Manual/User-manual-3751838> ("Storing GPS Points" section) (last visited on August 16, 2018).

⁴ See <https://fccid.io/NC3-TSSDW4014V/User-Manual/User-manual-3751838> (last visited on August 16, 2018) ("Storing GPS Points" and "Call-in intervals" sections).

⁵ Approximately 10 monitored individuals remain on devices that communicate on the T-Mobile network. Because those individual have not had coverage issues, Probation has not converted them to a Verizon or AT&T device.

94-99% of Massachusetts.⁶ In selecting its current vendor, Probation ruled out any vendors whose devices did not communicate using Verizon and another network.⁷

II. How GPS monitoring starts - from court order through enrollment

GPS monitoring in Massachusetts commences with a court order. Once a judge orders a person to be monitored on GPS, the judge signs a standard GPS order form. The form includes specific conditions designed to promote compliance with GPS monitoring.⁸

Next, the individual meets with Probation to begin the enrollment and installation process.⁹ The probation officer fills out the enrollment paperwork.¹⁰ As part of that process, the probation officer seeks

⁶ See coverage maps at <https://www.whistleout.com/CellPhones/Guides/Best-Coverage-in-Massachusetts-USA> (with available drop down maps for AT&T and Verizon) (last visited on August 16, 2018).

⁷ Contract on file with Probation.

⁸ A copy of Ervin Feliz's GPS order is included in the addendum ("Prob. Add.") at 8.

⁹ If the monitored individual has a term of incarceration preceeding supervision, this meeting occurs at the individual's first meeting with Probation.

¹⁰ A copy of the current enrollment paperwork is at Prob. Add. 9-12.

and provides numerous pieces of information to assist in the monitoring.

Probation trains its officers to take the steps set forth in this section. Officers ask individuals being enrolled for all of their own contact numbers and those of others who will know how to contact them - and explain why they ask for these numbers. As described in more detail below (*infra* at pp. 23-24), the more numbers an individual provides, the more people ELMO will contact to try and reach the individual to resolve an alert. Officers discuss with monitored individuals that warrants are less likely if ELMO can reach the individual to resolve alerts.

Officers use the enrollment time to discuss with the individual the basics of GPS monitoring. Those basics include: the GPS order; any exclusion or inclusion zones or curfew; remaining in Massachusetts; charging the device; and what it means and how to respond if the device vibrates or lights display. Prior to installing any GPS device, probation officers make sure that the device is functioning and charged. As part of the enrollment, officers should ensure that the individual has copies of the GPS order, the list of do and don'ts for monitoring, and a written

description or map of any exclusion or inclusion zones.

The probation officer sends the completed enrollment paperwork to ELMO, which inputs the monitored individual's information and schedule into the monitoring software.

The process for installing a GPS device includes fitting the fiber optic strap to the individual's ankle, cutting the strap to the correct length, and completing the attachment.¹¹ Once probation officers install the device, they send the individual outside to allow the device to connect to the satellites. Once the device makes the necessary connection and generates a solid location point, the individual's enrollment is complete. This enrollment process seldom takes less than an hour and often takes longer.

Probation officers, working with Probation's victim service coordinators, also reach out to any identified victims. As part of that victim contact, the officers and coordinators ask whether the victim wants to be notified of any warrants issued for the

¹¹ <https://fccid.io/NC3-TSSDW4014V/User-Manual/User-manual-3751838> ("Attaching the 1 Piece" section) (last visited on August 20, 2018).

arrest of the monitored individual. Probation officers and coordinators then provide the victim's information to ELMO for inclusion in the monitoring software.

III. Statistics on who have courts ordered monitored on GPS

As of August 16, 2018, Probation monitors 3490 people on court-ordered GPS devices. This includes 1811 individuals on conditions of release and 1679 on post-disposition conditions of probation.¹² Mandatory GPS for qualifying sex offenses (see G.L. c. 265, § 47) accounts for 876 (or 52%) of the post disposition GPS orders.

CURRENT¹³ STATISTICS FOR INDIVIDUALS WITH GPS ORDERS

<u>Court Department</u>	<u>Conditions of Release</u>	<u>Conditions of Probation</u>	<u>Total</u>
Boston Municipal Court	174	99	273
District Court	806	643	1449
Juvenile Court	96	50	146
Superior Court	735	887	1622
All court departments with criminal jurisdiction	1811	1678	3490

¹² ELMO also conducts monitoring for 465 parolees (count current as of August 13, 2018).

¹³ As of August 16, 2018.

After this Court's decision in *Commonwealth v. Brangan*, 477 Mass. 691 (2017), orders for GPS as a condition of release have risen nearly 32%.

IV. The standard GPS order informs individuals about the monitoring basics and guides behavior

When the court sentenced Ervin Feliz to probation supervision with GPS, it used the standard GPS order form.¹⁴ The courts have used the standard GPS order since mid-2015 - both for conditions of release and conditions of probation.

Before the standard GPS order, orders lacked consistency - courts often ordered GPS monitoring by writing "GPS" in the "Other Conditions" section on conditions forms. This method of ordering GPS provided little specific guidance to monitored individuals regarding how to comply or what constituted a violation.

A. The standard GPS order includes conditions informing individuals how to comply with monitoring

The standard GPS order incorporates a number of default conditions aimed at instructing the individual how to comply with monitoring. Specifically, the GPS order includes these conditions:

¹⁴ Prob. Add. 8.

1. Do not tamper or interfere with or otherwise damage or destroy the electronic monitoring device.
2. Notify your probation officer within 24 hours if you change phone numbers (applies to landline and cellular).
3. Maintain available cellular phone minutes.
4. Maintain available voicemail space on your phone or answering system.
5. Maintain a charge on the electronic monitoring device at all times.

Prob. Add. 8. Each of these conditions directly relates to Probation's ability to contact the individual and facilitates monitoring and compliance. *Infra* at pp. 18-29.

B. The standard GPS order notifies individuals that their location information may be shared

With the background of G.L. c. 276, §§ 90 and 100, providing that judges, probation officers, and law enforcement may access Probation records, the standard GPS order includes cautionary language alerting the individual that location data is not confidential. Specifically, the GPS order provides:

TO THE ABOVE NAMED PROBATIONER: You are hereby placed on electronic monitoring by this Court... Coordinates and other data related to your physical location while on electronic monitoring are recorded and may be shared with the court, probation, parole, attorneys and law enforcement. Data generated by electronic monitoring equipment assigned to you is not private and confidential.

Prob. Add. 8. The courts included this caution in the GPS order after considering - and ultimately denying - several motions to suppress where individuals on GPS argued that they had a subjective expectation of privacy in the location data generated by the court-ordered GPS.¹⁵

C. The standard GPS order prompts use of GPS in a way that enhances supervision

The standard GPS order lists exclusion zones, inclusion zones, and curfews as default conditions with blanks to be filled in by the judge. Prob. Add. 8. While courts sometimes omit these conditions, the purpose underlying them is to prompt courts to consider using them to guide behavior. GPS, which provides an added layer of supervision, works most effectively when tied to some other condition of supervision.¹⁶

¹⁵ These cases included *Commonwealth v. Shakeem Johnson*, 1284-CR-11109 (suppression denied May 28, 2015); *Commonwealth v. Jamie Johnson*, 1382-CR-1122-28 and 1482-CR-0087 (suppression denied June 9, 2015) (Appeals Court decision at *Commonwealth v. Jamie Johnson*, 91 Mass. App. Ct. 296 (2017)); *Commonwealth v. Jamie Johnson*, 1483-CR-0154 (currently before this Court at SJC-12483); *Commonwealth v. Hendricks-Winbush*, 1584-CR-10606 (suppression denied December 22, 2015); and *Commonwealth v. Dew*, 1584-CR-10164 (suppression denied October 27, 2015).

¹⁶ In his brief, Feliz cites a GPS information session Probation presented at the Massachusetts Bar

To effectuate court-ordered exclusion zones, inclusion zones, and curfews, Probation inputs the zones or curfew into the monitoring software. The software contains a unique profile for each individual ordered for GPS monitoring.

1. Exclusion zones

In certain cases, G.L. c. 265, § 47 requires GPS monitoring with "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." As § 47 makes clear, the intent of exclusion zones is to minimize contact with identified or potential victims. While

Association. See Feliz Br. at n. 41 (citing presentation for the proposition that the "bracelet doesn't actually do anything in terms of changing behavior if the person does not have" zones and/or curfew). Probation has not directly studied whether GPS standing alone prevents a monitored individual from committing new offenses - indeed, it would prove nearly impossible to do so. GPS cannot be divorced from other interventions that Probation undertakes with monitored individuals. The information session statement related to the fact that Probation fields numerous requests for GPS data for monitored individuals charged with new offenses. Accordingly, if GPS alone were sufficient to prevent re-offense, Probation would not receive these requests. But even this analysis does not consider the impact of GPS on reduction of re-offense frequency, as opposed to full desistance.

the statute expects Probation to “establish” such zones, Probation lacks the authority to set conditions. *Buckley v. Quincy Div. of the Dist. Ct. Dept.*, 395 Mass. 815, 820 (1985). Instead, Probation monitors and supervises conditions set by the courts.

To address the requirements of § 47, Probation trains its officers to request and offer input on any required zones at sentencing, including exclusion zones that help enforce any stay away orders. Additionally, the standard GPS order prompts the sentencing court to include the required zones.

Once a court orders an exclusion zone, a probation officer communicates that information to ELMO as part of enrollment. Because the monitoring software is map-based, ELMO cannot input categorical zones (e.g., schools, parks, playgrounds). Feliz Addendum (“Feliz Add.”) 71. Probation, therefore, trains its officers to inform courts of the inability to include such zones in the monitoring software. Courts may respond in any of several ways: (1) leaving the categorical zones in place; (2) modifying the zones to specify addresses; or (3) removing the zones. If the court leaves the categorical zones, upon reviewing location data, Probation may be able to

determine if an individual entered an excluded zone. Such determination, however, is extraordinarily challenging without specific information that an individual violated the condition by going to a specified location (e.g., a particular playground).

Courts sometimes confront the competing needs of establishing a victim-centered exclusion zone and maintaining an impounded victim address. In such circumstances, Probation works with the court and parties to create a zone that protects the confidentiality of the address. For example, if the victim lived in Clinton, Massachusetts, Probation might suggest a zone that covers all of Clinton and contiguous halves of both Bolton and Lancaster - all assuming that the monitored individual does not live in that zone. Such a zone seeks to ensure that the victim's address cannot be inadvertently disclosed by limiting the zone to a single town.

2. Inclusion zones

Inclusion zones, as the name suggests, are places where the individual on GPS must be at set times. Courts have ordered inclusion zones to enforce other conditions of probation, such as attending treatment or school (for juveniles). Individuals ordered to GPS

monitoring have a default inclusion zone for Massachusetts. This default inclusion zone comports with the standard condition that probationers not leave Massachusetts without permission from their probation officer. Prob. Add. 8.

Sometimes courts order individuals to comply with a lock-down schedule, which operates as an inclusion zone. A lock-down schedule functions like a house arrest, where the person may not leave the residence without prior permission. With an inclusion zone for the residence, the GPS device generates an alert if the individual leaves the lock down.

3. Curfews

Courts sometimes order curfews enforced with GPS. The curfew order works by tying the GPS device to the individual's residence at the time of the court-ordered curfew. If the individual is not within the residence at the curfew time, the GPS device generates an alert.

4. Special releases

Court orders for zones and curfews create rules that may not account for certain situations. For example, if the court orders someone on lock down, that would not allow the individual to attend court

dates. To address the periodic need to depart from the general rules, courts often order categories of "releases," or exceptions to the general rule. So, a court might order someone on lock down with releases for court dates and medical appointments.

Apart from the anticipated exceptions, circumstances that call for additional exceptions sometimes arise. For example, an individual on GPS with a court-ordered curfew may have a temporary change in work schedule which would make them miss their curfew. In those circumstances, depending on the terms of the court order, the person would either move the court to allow a special release from the inclusion zone or Probation could grant the special release.¹⁷

Sometimes the need for a release arises on an emergency basis. For example, an individual with a

¹⁷ The sentencing court's wording of the conditions determines how this proceeds. Sometimes courts establish categories of releases that Probation can grant without requiring the individual to return to court (e.g., court appearances, medical, work). Other times the court order says nothing about releases, meaning that the individual would need to seek the release from the court. Probation trains its officers to suggest at sentencing categories of releases that can be granted by Probation to cut down on individuals' need to return to court for releases on routine matters.

court-ordered curfew may have a medical crisis requiring a trip to the hospital. If this occurs, Probation (whether the probation officer or ELMO) remains in contact with the individual to keep updated on the situation. In such circumstances, Probation often sets up a temporary inclusion around the hospital, which would enable the GPS device to alert ELMO when the individual leaves the hospital. Upon leaving the hospital, Probation would give the individual a window of time to return home, with a check to ensure that the individual did return home. Probation does this to avoid issuing a warrant for a departure from the court order that is beyond the monitored individual's control.

V. How Probation works to minimize intrusion and disruption and to maximize compliance

Probation continually works to improve its monitoring operations. Probation attempts to minimize the intrusion and disruption that can result from GPS monitoring, while maximizing opportunities for rehabilitation and compliance.¹⁸

¹⁸ In his brief, Feliz seems to argue that "the Massachusetts GPS systems, as administered" uniquely invades privacy by requiring him to charge the device and by forbidding him from swimming or taking a bath. Feliz Brief at p. 34. Neither limitation, to the extent either constitutes an impingement on Feliz's

A. How Probation selects equipment and addresses equipment complaints

In 2016, necessitated by the cellular carriers' move away from the 2G networks, Probation worked with its vendor to switch out GPS equipment assigned to individual probationers and defendants. The current GPS devices communicate on CDMA (Verizon) and the 3G network (AT&T). Feliz Add. 72. Further, as set forth above, when selecting a vendor, Probation ruled out any vendor offering devices that would not operate on - at least - the Verizon network.

The most easily damaged part of the equipment is the charging cord. Probation has worked with its vendor to establish a ready supply of replacement charging cords.

B. How Probation monitors alerts to enforce court orders and promote public safety

As the Superior Court found, Probation monitors GPS by investigating and responding to "alerts." Feliz Add. 69. The alert appears on a monitoring

privacy, is a function of how Probation "administers" GPS. Instead, both constraints directly result from the fact of GPS, rather than the way in which Probation conducts monitoring. See <https://fccid.io/NC3-TSSDW40143/User-Manual/User-manual-3751975> ("Battery Life" section, noting the need for a 2-2 ½ hour charge daily).

screen at ELMO where an Assistant Coordinator addresses the alert (see *infra* at pp. 23-29).

1. GPS devices generate a variety of alerts

GPS devices generate the following alerts:

"Battery." The GPS device generates a battery alert when the device has 30 minutes left before the battery dies.¹⁹ In advance of generating that alert in the monitoring software, it warns the individual wearing it by vibrating when the battery has about an hour left of battery life. That vibration serves as a warning that the monitored individual needs to charge the device. Simultaneously, a light on top of the GPS device labeled "Power" will blink red until the individual starts charging. This serves as another notice to the individual that the battery is low.²⁰

¹⁹ The user manual defines this alert as "The battery is getting low and the device needs to be charged.... When the battery needs to be charged, the device will vibrate three times consecutively and then once every ten minutes until connected to the charger. During this time, the Power LED will blink Red." See <https://fccid.io/NC3-TSSDW4014V/User-Manual/User-manual-3751881> ("1 Piece GPS (TD4) Battery" section) (last visited on August 17, 2018).

²⁰ Probation recommends to monitored individuals that they charge for 2 hours per day - which does not need to be 2 consecutive hours. With 2 hours of charging, the battery should hold the charge for 24-30 hours. Additionally, Probation informs monitored individuals that they should not charge while sleeping. The GPS

"Strap." The strap that connects the GPS device to the individual's ankle contains fiber optics that create a light circuit through the strap. If something disrupts the circuit, the device generates a strap alert.²¹ When a strap alert occurs, Probation cannot guarantee without a visual confirmation that the GPS device remains attached to the monitored individual. Therefore, strap alerts mean that the individual may not be monitored, increasing the risk to public safety.

"Motion No GPS." The GPS device generates a "motion no GPS" alert when it cannot connect to the satellites but is still in motion.²² According to the device user manual, "[t]he device will vibrate three

devices use a magnetized charger to decrease the possibility of accidental disconnection. When people attempt to charge while sleeping, they often do not get a sufficient charge because their movement disrupts the magnetic connection.

²¹ The user manual defines this alert as "The strap has been compromised or removed from the 1 Piece." See <https://fccid.io/NC3-TSSDW4014V/User-Manual/User-manual-3751881> ("1 Piece GPS (TD4) Strap" section) (last visited on August 17, 2018).

²² The user manual defines this alert as "Occurs when the 1 Piece has lost GPS for five minutes and then accumulates excessive motion in a 60 minute period without receiving a signal from the GPS satellites." See <https://fccid.io/NC3-TSSDW4014V/User-Manual/User-manual-3751881> ("1 Piece GPS (TD4) Motion No GPS" section) (last visited on August 17, 2018).

times consecutively and once every ten minutes until the violation has cleared by acquiring GPS. During this time, the GPS LED will blink Red.”²³

“Unable To Connect.” The GPS device generates an “unable to connect” alert when it cannot call in via the cellular network.²⁴ Absent some violation (e.g., one involving a compromised strap or violation of an inclusion or exclusion zone), the GPS device typically calls in through the cellular network every hour. If the device is unable to connect to the cellular network at that hour mark, it will continue trying to call in for another 90 minutes before it generates an “unable to connect” alert. Given this sequence,

²³ See <https://fccid.io/NC3-TSSDW4014V/User-Manual/User-manual-3751881> (“1 Piece GPS (TD4) Motion No GPS” section) (last visited on August 17, 2018).

²⁴ The user manual defines this alert as “The 1 Piece has a defined call-in interval that is determined by the contract. [In Massachusetts, that interval is 1 hour.] If the 1 Piece is unable to connect to call [in] at its defined call-in interval, a default 90 minute grace period will go into effect. If the default 90 minute grace period expires and the 1 Piece has still not called [in], the database will create this alarm. This is normally due to poor cellular coverage in the area... Once the 1 Piece is able to use the cellular network to call in, it will report any violations that occurred during this time and download all tracking data.” See <https://fccid.io/NC3-TSSDW4014V/User-Manual/User-manual-3751881> (“1 Piece GPS (TD4) Unable to Connect” section) (last visited on August 17, 2018).

individuals could be in poor cellular coverage for up to two and a half hours before an alert generates (if they entered the poor coverage area immediately after a scheduled call in).

An "unable to connect" alert may also result if an individual fails to charge the battery and allows the device to die. When that happens, the device cannot call in and may generate the alert.

"Tamper." The GPS device generates a tamper alert when "[t]he 1 Piece has been compromised in some form"²⁵ - meaning that something damaged the housing of the GPS device. Given the sturdiness of the device, these alerts are uncommon.

"Zone." Zone alerts occur if the individual fails to comply with court-ordered inclusion or exclusion zones. If such an alert occurs, "[t]he device will vibrate three times consecutively and once every ten minutes while still in violation... The Zone LED will blink Red."²⁶

²⁵ See <https://fccid.io/NC3-TSSDW4014V/User-Manual/User-manual-3751881> ("1 Piece GPS (TD4) Tamper" section) (last visited on August 17, 2018).

²⁶ See <https://fccid.io/NC3-TSSDW4014V/User-Manual/User-manual-3751881> ("Zone Rules" section) (last visited on August 17, 2018).

2. The basics of Probation's approach to monitoring

Probation employs 50 staff at the ELMO center, covering three shifts. The 35 Assistant Coordinators monitor by investigating and responding to alerts.

Once an alert appears on the monitoring software, an Assistant Coordinator opens the alert and reviews it to determine its type. Next, the Assistant Coordinator attempts to contact the individual whose device generated the alert, using as many phone numbers as the individual provided. See *supra* at pp. 5-7 (discussing acquiring numbers at enrollment); *infra* at pp. 29-32 (process explained to the bench and bar, in hopes that defense bar can help facilitate individuals' providing additional numbers). The Assistant Coordinator can also send a notification to the GPS device. This causes the device to vibrate and should prompt the individual to contact ELMO.

Once ELMO reaches the individual whose device generated the alert, the Assistant Coordinator gathers information from the individual and investigates. For example, if the individual has missed a curfew but says that he was given a special release, the Assistant Coordinator reviews available information to

determine whether either the court or Probation granted a special release.

During court hours, if the Assistant Coordinator cannot resolve the alert, she contacts the supervising probation officer to discuss an appropriate response. After court hours, if the Assistant Coordinator cannot resolve the alert, she contacts the on-call Chief Probation Officer (CPO)²⁷ to discuss appropriate next steps. If the on-call CPO decides to issue a warrant,²⁸ the Assistant Coordinator fills out the warrant forms and transmits them to law enforcement.²⁹ Assistant Coordinators document these steps in the case notes for the individual case.

²⁷ Outside of court hours (evenings and weekends), Probation has a CPO on-call. Instead of a CPO, sometimes the on-call contact is a Probation Statewide or Regional Supervisor.

²⁸ See G.L. c. 279, § 3 ("if a probation officer has probable cause to believe that a person placed under probation supervision or in the custody or care of a probation officer pursuant to sections 42A, 58A or 87 of chapter 276 or any other statute that allows the court to set conditions of release, has violated the conditions set by the court, the probation officer may arrest the probationer or may issue a warrant for the temporary custody of the probationer for a period not to exceed 72 hours or until the next sitting of the court").

²⁹ Specifically, ELMO sends the forms to the police departments where the last GPS point occurred, where the monitored individual lives, and where any victims tied to the case live.

When contacting the on-call CPO about an unresolved alert, the Assistant Coordinator provides information about the monitored individual's record (including charges and defaults), updates the on-call CPO about communications with the monitored individual, details the individual's history of alerts, and notifies of the existence and nature of any pending violations.

Because equipment complaints may occur outside of court hours, Probation has worked to provide options for monitored individuals. Since February 2016, Probation has made staff available after hours at two geographically dispersed police stations - one in eastern Massachusetts (located proximate to the largest concentration of monitored individuals) and one in central Massachusetts.³⁰ Probationers with equipment issues outside of court hours may be directed to one of these police departments, where an ELMO employee will meet them to provide replacement equipment. From the inception of this program through

³⁰ Given how comparatively few GPS orders Probation monitors in western Massachusetts, Probation deployed these after-hours resources where they would provide the greatest convenience to the greatest number of monitored individuals.

August 14, 2018, Probation has directed individuals to this after-hours option 2,963 times.³¹

Probation does not automatically seek or issue a warrant upon the occurrence of an alert.³² Instead, hundreds of times every day, ELMO works to resolve alerts, address issues, and get the monitored individual into compliance. On average, on-call CPOs

³¹ Of the 2,963 after-hours referrals, 2,469 were for GPS; the remainder were for remote alcohol monitoring. The 2,963 referrals were for 2,398 individuals, while 565 of the referrals were for individuals with two or more referrals. For individuals on GPS, problems addressed by the after-hours employee have included lost or broken chargers, restrapping, and other equipment swap outs. Chargers and straps accounted for 65% of the after-hours referrals. Another 9% were new installations. These referrals do not necessarily reflect "blameless" equipment issues (Feliz Br. at pp. 1, 8) - any of these issues could result from tampering, misconduct, or negligence by the monitored individual - something that Probation has no way of gauging over the phone.

³² Feliz argues that the "issuance of a warrant is left to the unfettered discretion of the probation officer." Feliz Br. at p. 35. Currently, if a violation occurs during court hours and cannot be resolved, probation officers do not issue warrants. Instead, they bring the matter before the court, which may issue a warrant. Outside of court hours, an on-call CPO may issue a warrant in appropriate circumstances where an alert cannot be resolved. See G.L. c. 279, § 3. See also Dist./Mun. Ct. R. for Probation Violation Proceedings 4(b), Guidelines for probation violation proceedings in the Superior Court Section 3(C), and Juvenile Court Standing Order 1-17 Section IV (all describing commencement of violation proceedings as within the discretion of Probation for conduct other than new charged criminal conduct).

issue 118 warrants per week, or about 17 per day. Of these warrants, approximately 40% concern remote alcohol monitoring. Of the remaining warrants that concern GPS: 42.5% are for failure to charge the GPS device, 17% result from strap or tamper alerts, 15.6% are for curfew violations, 6% occur after "unable to connect" alerts, the remaining are for other issues (e.g., exclusion or inclusion zone violations, new arrests unrelated to electronic monitoring).³³

In responding to and managing alerts, Probation works to promote compliance in a variety of ways. The response to an alert depends - as it should - on the facts of the particular situation. For example:

- a monitored individual has missed a curfew and tells the Assistant Coordinator that she is stuck in traffic; the on-call CPO may give the individual some additional time to arrive home, with the Assistant Coordinator reviewing the individual's GPS location points to confirm that she was where she said, travelling in the direction she reported, and that she arrived home;
- a battery alert appears and the Assistant Coordinator, working with the probation officer or on-call CPO, asks when the individual will be able to charge; the individual begins charging within that period of time, the alert is deemed resolved;
- an Assistant Coordinator directs an individual with a strap alert to the courthouse (during

³³ This data represents the cumulative average from January 2018 through July 2018.

the day) or the after-hours police station (outside of court hours) for restrapping;³⁴

- after court hours a monitored individual has a strap alert; upon learning that the individual has a landline, the on-call CPO directs ELMO to perform spot checks and tell the individual to report to court the next day for restrapping or directs ELMO to reach out to local law enforcement to conduct a wellbeing check and then report back;
- a monitored individual has recurrent "motion no GPS" or "unable to connect" alerts; in discussing this issue with the individual the probation officer learns that individual works in a warehouse; the probation officer works with ELMO on a special release for the individual's work location and schedule so that once the individual arrives at the work location, ELMO does not need to prompt that individual to step outside for a GPS point or cellular signal (thereby decreasing disruption at the individual's workplace);
- an individual has recurrent "unable to connect" alerts while at home, so the probation officer switches the individual from an AT&T device to a Verizon device or a 2 Piece;
- on seeing that a monitored individual has recurrent exclusion zone alerts the probation officer learns that the commute to the individual's new job takes them through the exclusion zone, generating an alert each time; rather than responding serially, the probation officer works with the individual to seek from the court modification of the zone or a special

³⁴ It is also possible that Probation may issue or seek a warrant in response to a strap alert. Particularly when the individual has exclusion zones and Probation has been unable to make contact with the individual (either directly or through intermediaries whose numbers the individual has provided), a strap alert may result in a warrant.

release to accommodate the need to travel on the highway.³⁵

The provisions of G.L. c. 265, § 47 also impact how Probation responds to victim exclusion zone alerts. Section 47 provides, in relevant part,

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 where the violation occurred and the commissioner of probation... 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.

G.L. c. 265, § 47 (emphasis added).

C. Probation conducted numerous information sessions for bench and bar about GPS

In an effort to disseminate information about GPS monitoring, and in the hopes that such information will lead to better results, Probation has conducted numerous information sessions for the bench and bar. In the past two years, Probation staff conducted multiple information sessions with the Committee for

³⁵ Probation officers also seek updates to victim zones if a victim relocates.

Public Counsel Services (CPCS), with various District Attorneys' Offices, and (as Feliz's brief notes) for the Massachusetts Bar Association.³⁶ Probation also presented about GPS monitoring at judicial conferences for both the District and Juvenile Courts, and had a joint bench-bar information session in Middlesex Superior Court. In these sessions, Probation provided basic information about how monitoring works, the equipment, the types and frequency of alerts, warrants and victims, how to structure GPS supervision most effectively (through the use of zones and curfews), constructing zones, the GPS order, and available data and how it is shared.

As Probation explained at these sessions and as set forth above, GPS monitoring without connection to other conditions is not likely to promote either rehabilitation or public safety. While GPS will tell the court where someone is - or more often has been - it does not tell the court what the individual did

³⁶ The presentation at the Massachusetts Bar Association is available at: <https://massbar.org/events/cle-program?productId=6074&kitId=6074> (membership required) (last visited on August 16, 2018). Slides from the various information sessions are on file with Probation.

while there. Nor does it anticipate or prevent behavior.³⁷ Through the use of zones and curfews, courts can shape GPS orders in a way that helps guide an individual's behavior. Additionally, where courts have flexibility to do so, they can use GPS to create incentives. For example, at sentencing a court could set a 6:00 p.m. curfew, with the curfew moving to 7:00 p.m. after the first six months if the individual had no violations.

In these information sessions, Probation emphasized the effort it makes to collect contact numbers for monitored individuals. As set forth above, the more contact numbers Probation has for a monitored individual, the more avenues ELMO has to try

³⁷ Probation seeks to combat the perception that simply requesting, agreeing to, or ordering GPS means that the monitored individual will not reoffend and that victims and the public will be protected. For example, imagine a court orders a defendant on GPS as a condition of release on a charge of assault and battery on a household member. That in and of itself will not ensure the victim's safety. If the court orders the defendant to stay away from the victim, GPS does not guarantee that outcome. GPS data would show - after the fact - where the defendant was if she reoffended. But the victim could be anywhere, meaning that GPS cannot ensure the defendant stays away from the victim. The court could establish exclusion zones for places the victim frequents, a violation of which would generate an alert and a prompt response. But GPS provides no guarantee of safety.

and contact that individual to resolve an alert. In particular, Probation underscored this in information sessions with CPCS as defense counsel are best positioned to assist their clients in understanding why probation officers sought this information.

VI. Probation responds to specific allegations in Feliz's brief

Cellular coverage. Contrary to the assertions in Feliz's brief, Probation has taken steps to ensure that the GPS devices it deploys have maximal cellular coverage. Only the court can determine which individuals are ordered onto GPS monitoring. Accordingly, even if Probation investigated the cellular coverage available at each individual's residence and employment, it could not remove GPS monitoring if it turned out that the individual lived or worked in a poor coverage area. So Probation has taken the steps it can take - it contracted for a device that communicates through the cellular networks that provide broad coverage in Massachusetts, insisted on a device that can communicate on more than one network, and contracted for the 2 Piece device (that can communicate through landline as well as cellular networks).

Point accuracy. Additionally, while Probation has not conducted a study to determine location point accuracy for the GPS devices, it contracted for a device that meets industry standards.³⁸ As the Superior Court judge here found - and Feliz offers no contradiction of this factual finding - industry standard holds that 90% of GPS location points are accurate to within 30 feet. Feliz Add. 69. Moreover, in the most recent contract, Probation contracted for an annual location accuracy survey. In addition to that survey, each individual GPS location point (for each person on GPS) has available data for the accuracy of that particular point.³⁹

Accessing data. Feliz disagrees with the Superior Court's finding of fact that "the government ... 'only access[ed] this collected information'" when an alert occurred or when a monitored individual was in geographic proximity to a crime. Feliz Brief at p. 31, n. 30. Even if the court had no direct evidence

³⁸ See, e.g., *Commonwealth v. Johnson*, 91 Mass. App. Ct. at 301 ("[b]ecause the transmission of data is satellite-based, in general, the data points are accurate ninety percent of the time, within a thirty-foot radius of the transmitted point").

³⁹ In information sessions, Probation has discussed the availability of this data.

on this point, Probation notes that the court's finding rests on a logical inference. As Probation monitors more than 5,000 individuals at any given time, responds to approximately 1,700 alerts per day,⁴⁰ with a total of 50 staff members across 3 shifts, it could not spend time accessing individuals' data for no reason or the monitoring work would not get done.

Alert data. ELMO reviews and responds to approximately 1,700 alerts per day - this includes alerts for both GPS monitoring and remote alcohol monitoring. This does not mean that 1,700 different individuals' GPS devices generate alerts. Of those 1,700 daily alerts, only about 1% result in Probation-issued warrants. *Supra* at pp. 25-29. Contrary to Feliz's assertion, this reflects not faulty equipment, but successful monitoring and collaboration with monitored individuals.

Device history logs. Feliz asserts that ELMO "conducts no routine maintenance on the hardware it uses." Feliz Br. at p. 35. While Probation does some limited upkeep (e.g., cleaning devices after removal from one monitored individual before assigning them to

⁴⁰ This figure includes both GPS and alcohol monitoring.

another individual), it contracted with the vendor to provide device maintenance.⁴¹ For each device, the vendor maintains a device history log which contains information relating to the individual device's functioning and maintenance history.

CONCLUSION

WHEREFORE, Probation respectfully submits this amicus brief to provide the Court information as it determines whether application of G.L. c. 265, § 47 is unconstitutional as applied to non-contact sex offenders with no history of contact offenses.

Respectfully submitted,

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Date: August 22, 2018

⁴¹ Contract for GPS equipment and services on file with Probation.

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I, Sarah M. Joss, hereby certify that the foregoing brief complies with all of the rules of court that pertain to the filing of briefs, including, but not limited to, the requirements imposed by Rules 16 and 20 of the Massachusetts Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I certify that on August 22, 2018, a true copy of this document was served upon the parties by mailing copies, first class mail, postage prepaid to:

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