

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUPREME JUDICIAL COURT NO. 13212

COMMONWEALTH

v.

TIMOTHY RODERICK

DEFENDANT'S BRIEF ON APPEAL FROM
THE PLYMOUTH COUNTY SUPERIOR COURT

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STATEMENT OF THE ISSUE

1. Is GPS Monitoring A Constitutionally Valid Condition Of The Defendant's Probation Under *Commonwealth v. Feliz*, 481 Mass. 689 (2019)?

STATEMENT OF THE CASE

The defendant, Timothy Roderick, was indicted in the Plymouth County Superior Court on two counts of rape and three counts of indecent assault and battery.¹ (R. 3-7). The defendant's jury trial took place over the course of three days. (R. 10). The defendant moved for a required finding of not guilty after the Commonwealth presented its case. (R. 13). The trial judge allowed the motion with respect to the three counts of indecent assault and battery, but denied it with respect to the two counts of rape. (R. 13). The jury found the defendant guilty on both remaining counts. (R. 13). The trial judge sentenced the defendant to four years in state prison on the first count and three years of probation on the second count. (R. 13). The judge ordered the defendant to wear a global positioning system (GPS) device as a condition of his probation in accordance with G. L. c. 265, s. 47. (R. 13). The defendant challenged his

¹ The defendant's record appendix will be cited by page number as (R. __).

convictions on appeal, but the Appeals Court affirmed the convictions in an unpublished decision. (R. 14, 27-34).

The defendant subsequently filed a motion under Mass. R. Crim. Pro. 30(a) to vacate GPS monitoring as a condition of his probation in accordance with *Commonwealth v. Feliz*, 481 Mass. 689 (2019). (R. 14, 17-22). The Commonwealth opposed the defendant's motion. (R. 14, 23-25). After a hearing, the trial judge ruled that GPS monitoring remained a constitutionally valid condition of the defendant's probation. (R. 15, 26). The defendant filed a timely notice of appeal. (R. 15-16).

The defendant's appeal was initially docketed at the Appeals Court. (R. 15). The defendant filed an application for direct appellate review with the Supreme Judicial Court (SJC). (R. 15). The SJC allowed the application and transferred the case to its docket. (R. 15).

STATEMENT OF FACTS

The facts underlying the defendant's convictions are taken from the trial transcripts. Other relevant facts are taken from the documents submitted in

support of the defendant's motion to vacate GPS monitoring as a condition of his probation.

A. The Defendant's Offenses.

The victim and the defendant met in the winter of 2016.² (Tr. II/70). The victim was homeless at the time. (Tr. II/35). The defendant invited the victim to stay at his residence in Wareham. (Tr. II/70). The victim stayed with the defendant from the end of February into the first week of March. (Tr. II/70). The relationship was platonic. (Tr. II/39). The defendant repeatedly told the victim that he wanted to be more than friends, but the victim rebuffed him every time. (Tr. II/39). As noted above, the victim left the defendant's residence in the first week of March. (Tr. II/70).

The victim returned to the defendant's residence on May 27th. (Tr. II/36). The defendant and the victim got into an argument on the first day of June. (Tr. II/71). As a result, the victim left the defendant's residence. (Tr. II/71). The victim went to stay with a friend who lived nearby. (Tr. II/43-44). On the evening of June 2nd, the victim and her friend decided

² The trial transcripts will be cited by volume and page number as (Tr. _/_).

to walk to a bar in the neighboring town of Onset. (Tr. II/44). As they walked on the side of the road, the defendant passed them in a car. (Tr. II/44-45, 71). The defendant pulled over and offered to drive them to the bar. (Tr. II/44-45). The victim and her friend accepted the defendant's offer. (Tr. II/45). Upon arriving, all three individuals entered the bar together. (Tr. II/45).

The victim drank three beers at the bar. (Tr. II/45). She had taken a prescription medication for anxiety prior to consuming any alcohol. (Tr. II/45). Combining this medication with alcohol made the sedative effect of the medication "much stronger." (Tr. II/38-39). At some point in the night, the victim and the defendant went outside together to smoke cigarettes. (Tr. II/45-46). After finishing their cigarettes, the victim and the defendant departed in the defendant's car intending to return to his residence. (Tr. II/46). The victim threw up on herself during the ride. (Tr. II/72).

Upon arriving home, the defendant helped the victim clean herself up. (Tr. II/72). The victim's clothes were put into the washing machine and the defendant gave the victim one of his shirts to wear.

(Tr. II/47). The two then went upstairs to the defendant's bedroom. (Tr. II/48-50). The victim fell asleep on the floor in the defendant's bedroom while the defendant was seated across the room on his bed. (Tr. II/50).

The defendant twice had sex with the victim while she was asleep. (Tr. II/50). The defendant confessed this fact to the victim when she woke up the following morning. (Tr. II/51). The victim immediately walked to a nearby hospital. (Tr. II/53). Hospital staff examined the victim and found male sperm inside her. (Tr. II/80). The Wareham police were henceforth notified and they opened an investigation into the incident. (Tr. II/68). The police arrested the defendant and charged him with two counts of rape and three counts of indecent assault and battery on a person over 14 years old. (R. 3-7). The defendant was convicted of both counts of rape and acquitted on the three counts of indecent assault and battery. (R. 13).

The trial judge sentenced the defendant to four years in state prison on the first rape count and three years of probation on the second rape count. (R. 13). The judge ordered the defendant to wear a GPS monitoring device as a condition of his probation in

accordance with G. L. c. 265, s. 47. (R. 13; Tr. III/45). The judge noted that he was statutorily required to impose this condition. (Tr. III/45).

B. The Defendant's Motion to Vacate GPS Monitoring as a Condition of his Probation.

As the defendant approached the end of his committed sentence, he filed a motion to vacate GPS monitoring as a condition of his probation. (R. 14, 17-22). He relied upon the SJC's decision in *Commonwealth v. Feliz*, 481 Mass. 689 (2019), to support his motion. (R. 17-22). In *Feliz*, the SJC concluded that the mandatory imposition of GPS monitoring as a condition of probation under G. L. c. 265, s. 47, is unconstitutional. *Id.* at 700. The Court held that a sentencing judge must conduct an individualized determination of reasonableness before imposing GPS monitoring as a condition of probation. *Id.*

The defendant argued that GPS monitoring is not reasonable as a condition of his probation because he had never previously been convicted of a crime, no history of committing sexual offenses, and no diagnosis of a psychiatric disorder indicating a compulsion towards sexually deviant activity. (R. 19-

20). He also highlighted his adherence to the conditions of release that were imposed upon him prior to trial. (R. 20). He abided by these conditions without issue for 27 months from his arraignment until trial. (R. 20). The defendant acknowledged that the Sex Offender Registry Board (SORB) classified him as a level two sex offender, but argued that this factor alone could not justify the imposition of GPS monitoring. (R. 20-21). Considering the balance of factors, the defendant argued that he did not pose a sufficient threat of reoffending to warrant the imposition of GPS monitoring as a condition of his probation. (R. 19-21).

The Commonwealth opposed the defendant's motion. (R. 23-25). The Commonwealth argued that GPS monitoring is a reasonable condition of the defendant's probation because he committed a contact offense and SORB classified him as a level two sex offender. (R. 23-24).

The trial judge denied the defendant's motion in a margin endorsement. (R. 15, 26). He concluded that GPS monitoring is a reasonable condition of the defendant's probation in light of the facts of the underlying case, the defendant's classification as a

level two sex offender, and the value of GPS monitoring to enforce the condition requiring the defendant to stay away from the victim. (R. 15, 26).

ARGUMENT

I. THE DEFENDANT'S MOTION TO VACATE GPS MONITORING AS A CONDITION OF HIS PROBATION SHOULD HAVE BEEN ALLOWED BECAUSE THE COMMONWEALTH FAILED TO INTRODUCE SUFFICIENT EVIDENCE TO ESTABLISH THAT THE DEFENDANT POSES A THREAT OF REOFFENDING OR OTHERWISE VIOLATING THE TERMS OF HIS PROBATION.

The defendant's motion to vacate GPS monitoring as a condition of his probation should have been allowed because this condition is not reasonable as applied to the defendant. The reasonableness of GPS monitoring is dependent on the defendant's likelihood of reoffending. The Commonwealth failed to present sufficient evidence to establish the defendant's risk of recidivism. In the absence of such evidence, GPS monitoring cannot be justified as a reasonable condition of the defendant's probation.

A. The Mandatory Imposition of GPS Monitoring As A Condition Of Probation Violates Article 14 And Thus An Individualized Determination Of Reasonableness Is Required Before Such A Condition Can Be Imposed.

In *Commonwealth v. Feliz*, 481 Mass. 689 (2019), the SJC considered whether the mandatory imposition of GPS monitoring as a condition of probation pursuant to

G. L. c. 265, s. 47, violates Article 14 of the Massachusetts Declaration of Rights. *Id.* at 690. The Court concluded that “[m]andatory, blanket imposition of GPS monitoring on probationers, absent individualized determinations of reasonableness, is unconstitutional.” *Id.* at 700. Having reached this conclusion, the Court explained that an individualized determination of reasonableness involves a balancing test that asks “whether the government’s interest in imposing GPS monitoring outweighs the privacy intrusion occasioned by GPS monitoring.” *Id.* at 701. For the balance to weigh in favor of the government, the Court stated that the Commonwealth must “establish how GPS monitoring, when viewed as a search, furthers its interests.” *Id.* at 705.

The Court subsequently applied the balancing test to the circumstances presented by the defendant’s case. *Feliz*, 481 Mass. at 705-709. The Commonwealth argued that GPS monitoring of the defendant furthered its interests because GPS data could be used to investigate future sex crimes committed by the defendant and thus would deter the defendant from engaging in such conduct. *Id.* at 705. The Court concluded that this proffered justification was

lacking because the Commonwealth failed to present "evidence sufficient to indicate that this defendant poses a threat of reoffending or otherwise violating the terms of his probation." *Id.* at 705-706. Looking at the individual circumstances of the defendant, the Court noted that "the defendant was thirty-three years old and had no prior record of a sexual offense." *Id.* at 706. The Court further noted that the defendant had "no psychiatric diagnosis indicating a compulsion toward sexually deviant activity; no history of violations of probation or terms of pretrial release; no exclusion zone entered into the ELMO system capable of generating real-time alerts for real-time monitoring; and no geographically proximate victim." *Id.* at 705. The Court also highlighted the fact that SORB classified the defendant as a level one sex offender. *Id.* at 706. The Court ultimately concluded that "[t]he absence of evidence demonstrating a risk of recidivism anchored in facts related to this particular defendant tilts the balance against concluding that GPS monitoring is a reasonable search." *Id.* at 709.

B. The Commonwealth Bears The Burden Of Establishing The Reasonableness Of GPS Monitoring.

Before applying *Feliz* to the circumstances presented here, it is important to emphasize that the Commonwealth bears the burden of proving the reasonableness of GPS monitoring as a condition of probation. Though the SJC did not expressly state as much in *Feliz*, this conclusion is inescapable. In *Feliz*, the SJC concluded that GPS monitoring constitutes a warrantless search. 481 Mass. at 696-700. It is well-established that the government bears the burden of establishing the reasonableness of a warrantless search. *See Commonwealth v. Antobenedetto*, 366 Mass. 51, 57 (1974) ("It is our conclusion that where . . . the search is without a warrant the burden of establishing its reasonableness is on the Commonwealth."); *Commonwealth v. Forde*, 367 Mass. 798, 800 (1975) ("When searches are conducted without a warrant, the burden is on the government to show that a particular search falls within a narrow class of permissible exceptions."); *see also United States v. Jeffers*, 342 U.S. 48, 51 (1951) ("[T]he burden is on those seeking the exemption [to the warrant requirement] to show the need for it."); *United States*

v. Carbajal, 956 F.2d 924, 930 (9th Cir. 1992) (“The burden is on the government . . . to show the reasonableness of a warrantless search.”). Because GPS monitoring constitutes a warrantless search, it is the Commonwealth’s burden to establish reasonableness.

The North Carolina Court of Appeals reached this exact conclusion in *State v. Blue*, 783 S.E.2d 524 (N.C. Ct. App. 2016).³ In *Blue*, the court considered which party bears the burden of establishing the reasonableness of GPS monitoring. *Id.* at 527. The government argued that the defendant bears the burden of proving that GPS monitoring violates the Fourth Amendment. *Id.* The court disagreed and concluded that it is the government’s burden to prove the reasonableness of GPS monitoring. *Id.* The court

³ Issues related to the constitutionality of GPS monitoring have been heavily litigated in North Carolina in the wake of the Supreme Court’s decision in *Grady v. North Carolina*, 575 U.S. 306 (2015). In *Grady*, the Supreme Court ruled that GPS monitoring constitutes a search under the Fourth Amendment and thus is only permissible if it is reasonable. *Id.* at 310. The Court remanded the case for a determination of reasonableness. *Id.* at 310-311. On remand, the North Carolina Court of Appeals recognized the need for “individualized determinations of reasonableness” that take into account the specific circumstances of each monitored individual. *State v. Grady*, 817 S.E.2d 18, 28 (N.C. Ct. App. 2018). As discussed above, the SJC adopted this same approach in *Feliz*. 481 Mass. at 609-700.

recognized that the burden must fall at the feet of the government because GPS monitoring is a warrantless search. *Id.*

This analysis is equally applicable here. GPS monitoring as a condition of probation constitutes a warrantless search and thus the Commonwealth bears the burden of proving that it is reasonable as applied to the defendant. Under the framework set forth in *Feliz*, satisfaction of this burden requires the Commonwealth to introduce "evidence sufficient to indicate that this defendant poses a threat of reoffending or otherwise violating the terms of his probation." 481 Mass. at 705-706.

C. The Factors Relied Upon By The Judge Failed To Establish That The Defendant Poses A Risk Of Reoffending Or Violating The Terms Of His Probation.

The judge concluded that the Commonwealth satisfied its burden based on the underlying facts of the defendant's convictions and SORB's classification of the defendant as a level two sex offender. (R. 15, 26). The judge further concluded that GPS monitoring is a reasonable condition of the defendant's probation because of its value in enforcing the order requiring

the defendant to stay away from the victim. (R. 15, 26).

With respect to these conclusions, the defendant's argument is threefold. First, the underlying facts of the defendant's convictions cannot be relied upon to justify imposition of GPS monitoring because neither the judge nor the Commonwealth drew a connection between these facts and the defendant's risk of recidivism. Second, the defendant's classification as a level two sex offender, though relevant to the reasonableness analysis, cannot supply the sole basis for concluding that the defendant poses a threat of reoffending. Lastly, the reasonableness of GPS monitoring cannot be based on the value of enforcing the stay away order because (1) there was insufficient evidence that the defendant is a threat to violate the order and (2) the Commonwealth acknowledged that it did not know whether the victim had a stable home address.

These three arguments will be elaborated upon in the following subsections.

i. *The Underlying Facts.*

The judge ruled that GPS monitoring is reasonable "in light of [the] facts of [the] underlying case."

(R. 15, 26). However, neither the Commonwealth nor the judge attempted to draw any connection between the underlying facts of the case and the defendant's risk of recidivism. As the SJC made clear in *Feliz*, it is the threat of recidivism that justifies the imposition of GPS monitoring. If the underlying facts of the case are to be relied upon to support imposition of GPS monitoring, there must be some link drawn between the facts and the defendant's risk of reoffending. Without such a link, the underlying facts of the case are irrelevant to the analysis.

The decision by the North Carolina Court of Appeals in *State v. Griffin*, 840 S.E.2d 267 (N.C. Ct. App. 2020), is instructive on this point. The defendant in *Griffin* was convicted of first-degree sexual offense with a child. *Id.* at 269. The underlying facts were that the defendant engaged in digital and penile penetration of his girlfriend's minor daughter. *Id.* The sentencing judge concluded that GPS monitoring was reasonable. *Id.* To support this conclusion, the judge relied on the fact that the defendant exploited his position of trust in the victim's household. *Id.* at 270. On appeal, the court dismissed the relevance of this fact because the judge

failed to explain how the defendant's "betrayal of [the victim's] trust . . . increased his likelihood of recidivism." *Id.* at 275. This logic is directly applicable here. The judge concluded that GPS monitoring is reasonable in light of the underlying facts of the case, but failed to explain how these facts increased the defendant's risk of recidivism.⁴

This is not to say that the underlying facts of the case can never be relied upon to support GPS monitoring. The Commonwealth is certainly free to introduce evidence showing that people who commit certain types of sexual offenses have higher rates of

⁴ Relying on the underlying facts to justify GPS monitoring without linking these facts to recidivism is akin to relying on certain facts to justify a warrantless stop without linking these facts to reasonable suspicion of criminal activity. In both situations, the facts relied upon do not support the reasonableness of the search and thus carry no weight in the constitutional analysis. See *Commonwealth v. King*, 389 Mass. 233, 244 (1983) (presence of white man and black man together in vehicle at rest stop failed to support reasonable suspicion of criminal activity); *Commonwealth v. Torres*, 424 Mass. 153, 159 n.4 (1997) (fact that defendant was born in Colombia had no weight in reasonable suspicion calculus).

recidivism.⁵ There will also be cases in which the underlying facts logically speak to a heightened risk of recidivism. For example, if the underlying facts involve numerous sexual offenses over an extended period of time or some other type of compulsive sexual behavior, it would be logical to conclude that the defendant poses a threat of reoffending. See *Commonwealth v. Torres*, 99 Mass. App. Ct. 1117 (unpublished decision) (GPS monitoring reasonable because defendant had history of committing sexual offenses).⁶ The underlying facts at issue here do not lead to such a conclusion. The evidence at trial established that the defendant and the victim went home together after a night of heavy drinking. The defendant had sex with the victim after she passed out in his bedroom. This was surely a reprehensible act.

⁵ The Department of Justice has conducted a number of studies compiling data on the recidivism rates of sex offenders. See Alper & Durose, *Recidivism of Sex Offenders Released From State Prison: A 9-year Follow-Up*, U.S. Dept. of Justice, pg. 5 (May 2019) (7.7% of prisoners released after serving time for rape or sexual assault were rearrested for rape or sexual assault within nine years of release); Langan, Schmitt, & Durose, *Recidivism of Sex Offenders Released From Prison in 1994*, U.S. Dept. of Justice, pg. 24 (Nov. 2003) (5.3% of released sex offenders were rearrested for a new sex crime within three years of release).

⁶ A copy of this unpublished decision is included in the appendix to this application. (R. 49-57).

However, nothing about these facts inherently indicates that the defendant poses a risk of reoffending.

The purpose of GPS monitoring cannot simply be to punish the defendant for the crime that he has committed. Yet that is exactly what is invited when judges are allowed to rely on the underlying facts of the case to justify GPS monitoring without linking these facts to an increased risk of recidivism. There will be an inclination to impose GPS monitoring based solely on the underlying offense with no consideration of whether the defendant poses a threat to reoffend. GPS monitoring is reasonable if it "advances the Commonwealth's interests in rehabilitation of the probationer and protection of the public." *Feliz*, 481 Mass. at 701. It is not reasonable if it serves only to punish the defendant for the crime that he has committed.

ii. *The Defendant's SORB Classification.*

The judge relied upon one factor that was truly relevant to the defendant's risk of recidivism: SORB's classification of the defendant as a level two sex offender. Such a classification is appropriate "if the risk of reoffense is moderate." *Doe, Sex Offender*

Registry Bd. No. 972 v. Sex Offender Registry Bd., 428 Mass. 90, 93 (1998). The defendant's classification as a level two sex offender is certainly relevant to his likelihood of reoffending and is therefore an appropriate consideration when assessing the reasonableness of GPS monitoring. However, this factor cannot be solely dispositive of the issue. See *Feliz*, 481 Mass. at 701, quoting *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015) ("Because reasonableness depends 'on the totality of the circumstances,' no one factor will be dispositive in every case."). The SJC highlighted a bevy of factors that should be considered in the reasonableness analysis. *Feliz*, 481 Mass. at 705-707. There would be no need to consider any of these factors if the Commonwealth could meet its burden by simply relying upon the defendant's classification as a level two sex offender. This is not what the SJC envisioned when it held that Art. 14 "requires individualized determinations of reasonableness in order to impose GPS monitoring as a condition of probation." *Id.* at 700.

An individualized determination of reasonableness should consider "the totality of the circumstances." *Feliz*, 481 Mass. at 701, quoting *Grady*, 135 S. Ct. at

1371. Under this type of analysis, all of the factors relevant to the defendant's risk of recidivism should be considered. Simply relying on the defendant's classification as a level two sex offender is not an analysis that considers the totality of the circumstances. Taken to its logical extent, all probationers classified as level two sex offenders would be required to submit to GPS monitoring as a condition of their probation. This blanket imposition of GPS monitoring on a large group of individuals is exactly what the SJC found to be unconstitutional in *Feliz*.⁷

To comport with *Feliz*, the individualized determination of reasonableness must consider all of the factors related to the defendant's risk of reoffending. The defendant's SORB classification level should be considered in the reasonableness analysis, but it cannot be the sole factor relied upon to

⁷ The situation might be different if the defendant were classified as a level three sex offender. In *Feliz*, the Court noted that mandatory GPS monitoring "has been deemed reasonable where it is applicable only to individuals assigned to the 'most severe' risk assessment tier, who have committed crimes such as rape and sexual abuse of a child under age thirteen." 481 Mass. at 707, citing *Doe v. Coupe*, 143 A.3d 1266, 1270, 1279 (Del. Ch. 2016).

justify GPS monitoring. Some additional evidence indicating that the defendant poses a threat of reoffending is necessary.

iii. *Enforcement Of The Stay Away Order.*

The final factor relied upon by the judge was the value of GPS monitoring to enforce the order requiring the defendant to stay away from the victim. This factor would have supported a finding of reasonableness if the Commonwealth had introduced evidence indicating that the defendant poses a threat of violating the stay away order. However, the Commonwealth failed to do so. As argued above, the only evidence that speaks to the defendant's increased risk of recidivism is his classification as a level two sex offender. This factor alone cannot establish that the defendant is a threat to violate the stay away order. This is especially true when this factor is weighed against the defendant's demonstrated history of compliance with the stay away order. The order was initially entered at the defendant's arraignment in Wareham District Court in June 2016. (R. 44-48). He complied with this order for 27 months until his trial in September 2018. (R. 8-15, 44-48)

The value of GPS monitoring is further negated here because the Commonwealth acknowledged that it did not know whether the victim has a stable home address. GPS monitoring can only be used to enforce the stay away order if an exclusion zone can be created around the victim's residence. At the motion hearing, the judge noted that the evidence at trial indicated that the victim had a "very unstable housing situation."⁸ (Mot. Hrg. 6). The prosecutor acknowledged that this was true. (Mot. Hrg. 6). The judge subsequently asked the prosecutor if the victim's housing situation had stabilized. (Mot. Hrg. 6). The prosecutor responded that she could not represent that. (Mot. Hrg. 6). GPS monitoring cannot be deemed a valuable tool for enforcing the stay away order when the Commonwealth acknowledges that it does not know whether the victim has a stable home address. GPS monitoring is useless as a tool for enforcing the stay away order without an address to put an exclusion zone around. See *Feliz*, 481 Mass. at 708-709 (GPS monitoring not useful to enforce condition requiring defendant to stay away

⁸ The transcript of the motion hearing will be cited by page number as (Mot. Hrg. _).

from parks, schools, and daycare centers without exclusion zones around these areas).

D. Numerous Factors Undercut The Conclusion That The Defendant Poses A Threat To Reoffend Sexually.

As argued above, the defendant's classification as a level two sex offender, standing alone, is insufficient to establish that the defendant poses a risk of reoffending that would justify imposition of GPS monitoring. This conclusion becomes even more apparent upon consideration of the factors indicating that the defendant is unlikely to reoffend. At the time of the motion hearing, the defendant was 45 years old with no prior history of committing sexual offenses. (R. 35-43). In fact, he had never been convicted of a crime prior to this case. (R. 35-43). The last time he was charged with a criminal offense was in 1998 when he was arrested for possession of marijuana. (R. 41). With respect to the defendant's psychiatric history, he has never been diagnosed with a disorder indicating a compulsion towards sexually

deviant activity.⁹ He also successfully abided by the terms of his release for 27 months from the date of his arraignment to the time of trial. (R. 8-15, 44-48).

The SJC faced similar facts in *Feliz*. The defendant in *Feliz* was 33 years old with no prior history of a sexual offense. 481 Mass. at 706. He was not diagnosed with a psychiatric disorder that would compel him to sexual deviance. *Id.* at 705. He also complied with the terms of his pretrial release for 16 months and the conditions of his probation for 9 months. *Id.* at 706-707. The SJC weighed each of these facts in favor of the defendant because they undermined the conclusion that he was a threat to reoffend. *Id.* at 705-707.

Of course, the underlying offenses in this case are significantly more serious than those at issue in *Feliz*. The defendant in *Feliz* was convicted of numerous child pornography offenses. 481 Mass. at 691.

⁹ At the motion hearing, the Commonwealth asserted that it was impossible to conclude that the defendant lacked a psychiatric disorder indicating a compulsion to sexually deviant activity "because we don't have any records to support that indication." (Mot. Hrg. 5). However, as explained above, the Commonwealth bore the evidentiary burden here. The defendant had no burden to prove the absence of a psychiatric disorder.

The defendant here was convicted of two counts of rape. It is logically inviting to rely upon this distinction to justify the imposition of GPS monitoring in the instant case. However, this logic falls apart upon closer inspection. The analysis in *Feliz* focused on the risk of reoffending, not the severity of the underlying offense. 481 Mass. at 705-709. In ultimately concluding that the defendant was not a threat to reoffend, the Court did not rely on the seriousness of the defendant's child pornography offenses. *Id.* The Court instead relied upon other factors that spoke directly to the defendant's likelihood of reoffending. *Id.* As discussed above, these factors included the defendant's status as a first-time offender, the defendant's history of compliance with his probation conditions and pretrial terms of release, SORB's classification of the defendant as a level one sex offender, and the absence of a psychiatric disorder indicating a compulsion towards sexually deviant activity. *Id.* at 705-707. In sum, the Court drew no connection between the severity of the offense and the likelihood of reoffending. *Id.* at 705-709.

The same rationale should apply here. The seriousness of the defendant's offense should not be used to justify GPS monitoring absent some evidence linking this type of offense to an increased risk of recidivism. Nor should the facts that undermine the defendant's likelihood of reoffending be disregarded simply because SORB classified the defendant as a level two sex offender. The defendant's classification level is just one of many factors that should be considered in the reasonableness analysis. As noted above, the analysis must focus on the "totality of the circumstances." *Feliz*, 481 Mass. at 701, quoting *Grady*, 135 S. Ct. at 1370. The totality of the circumstances here paint the picture of a defendant who poses little threat of reoffending. It is therefore unreasonable to subject the defendant to the significant intrusion that comes with having to wear a GPS device as a condition of his probation.

CONCLUSION

For the above-stated reasons, the defendant requests that the Court reverse the denial of his motion to vacate GPS monitoring as a condition of his probation.

Respectfully Submitted,
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Judge's Decision

After hearing, judge reconsidered GPS condition pursuant to Comm v. Feliz; after hearing, Court imposes GPS requirement in light of the facts of underlying case, defendant's level two SORB registration, and value of GPS in monitoring/enforcing no contact/stay away/exclusion zone order. Defendant may move to vacate GPS after 18 months if there has been successful compliance.

(R. 15, 26).

G. L. c. 265, s. 47

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

The fees incurred by installing, maintaining and operating the global positioning system device, or comparable device, shall be paid by the probationer. If the court finds that such fees would cause a substantial financial hardship to the offender or the person's immediate family or the person's dependents, the court may waive such fees.

CERTIFICATE OF SERVICE

I hereby certify, under the pains and penalties of perjury, that I have served a copy of the defendant's brief and record appendix to Assistant District Attorney Carolyn Burbine, Plymouth County District Attorney's Office, 32 Belmont Street, Brockton, MA 02401. I have made service via email.

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CERTIFICATE OF COMPLIANCE

I, Edward Crane, hereby certify, that this brief complies with all applicable rules of court pertaining to the filing of briefs. This brief was written using Courier New font in 12-point size with 10 characters per inch. There are 19 non-excluded pages that count towards the 50-page limit imposed by Mass. R. App. Pro. 20(a)(2)(A).

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