COMMONWEALTH OF MASSACHUSETTS

SUFFOLK COUNTY

SUPREME JUDICIAL COURT
No. DAR-

APPEALS COURT
No. 2018-P-0496

COMMONWEALTH

v.

ERVIN FELIZ

DEFENDANT'S APPLICATION FOR DIRECT APPELLATE REVIEW

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May 10, 2018

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REQUEST FOR DIRECT APPELLATE REVIEW

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

In Commonwealth v. Cory, 454 Mass. 559 (2009), this Court held that the GPS statute, passed in 2006, could not be applied retroactively without violating the constitutional prohibition on ex post facto punishment. In doing so, the Court recognized that a "GPS device burdens liberty in two ways: by its permanent, physical attachment to the offender, and by its continuous surveillance of the offender's activities." Id. at 570. It also acts as a scarlet letter, "exposing the offender to persecution and ostracism." Id. at 570 n.18. That burden, according to this Court, "appears excessive ... to the extent that it applies without exception to convicted sex offenders sentenced to a probationary term, regardless of any individualized determination of their dangerousness or risk of reoffense." Id. at 572.

Five years later, in Commonwealth v. Guzman, 469 Mass. 492 (2014), this Court "note[d] again" the "excessive" nature of § 47's blanket imposition of GPS monitoring. Id. at 500. Although Guzman rejected the

defendant's due process claim, the Court declined to consider the defendant's argument that § 47 worked an unreasonable search and seizure because the record in that case was inadequately developed. Id.

After a three-day evidentiary hearing, this case developed the necessary record, and now raises the exact same issue that the Guzman Court declined to address – whether § 47 violates the Fourth Amendment and art. 14 by mandating GPS monitoring with no consideration of individual circumstances, particularly as applied to those (like this defendant) who have been convicted of non-contact sex offenses.

As this case involves a constitutional challenge to a state statute, on an important issue that this Court has specifically identified and reserved in a past case, it belongs in this Court. Accordingly, the defendant now requests, pursuant to Mass. R.A.P. 11, that this Court grant direct appellate review of his appeal to answer the question presented.

STATEMENT OF PRIOR PROCEEDINGS

On March 3, 2015, a Suffolk County Grand Jury returned indictment SUCR2015-10127, charging Defendant Ervin Feliz with two counts of possession of child pornography, in violation of G.L. c. 272, § 29C, and five counts of dissemination of child pornography, in

violation of G.L. c. 272, § 29B (App.4).[1] On April 22, 2016, Mr. Feliz pled guilty, and was sentenced (Krupp, J.) to a five-year term of probation (App.6). At sentencing, GPS monitoring was imposed and Mr. Feliz preserved an objection to that condition (R.26).

Mr. Feliz then filed a motion to waive the GPS requirement, arguing that it violated his rights under the Fourth Amendment and art. 14 (R.27). An evidentiary hearing was held on the motion on February 10, 17, and 24, 2017. The motion judge (Gordon, J.)[2] denied the motion by written order (R.275), and a timely appeal followed (R.315). That appeal was docketed in the Appeals Court on November 7, 2017 as case number 2017-P-1441.

On February 9, 2018, appellate proceedings were stayed for the defendant to file a motion to reconsider in the Superior Court. The motion to reconsider was allowed in part (App.11), and the judge filed an amended opinion (App.17), which again ultimately denied the defendant's motion to waive the GPS requirement. Mr. Feliz entered a timely appeal (R.488), and the two pending cases were consolidated

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[1] Herein, the appendix to this petition is cited as "App.", the defendant's brief is cited as "D's Br.", the record appendix is cited as "R.", and the motion hearing transcript is cited by Volume/Page.

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

under case number 2018-P-496. The defendant's brief and record appendix were filed on April 13, 2018.

STATEMENT OF FACTS

The Court below heard testimony from six witnesses over three days, including Mr. Feliz, his probation officer, the director of the Electronic Monitoring ("ELMO") program, and two experts in the field of sex offender treatment and therapy.

GPS Monitoring in Massachusetts

GPS enrollees are monitored by the Electronic Monitoring Center in Clinton, Massachusetts (III/9). Each enrollee wears a device around their ankle that records location data once per minute (III/11). This data is retained indefinitely. Overall, 3,195 people in Massachusetts are on GPS monitoring (III/37), and about 24% of those are believed to be sex offenders.[3]

The GPS system typically consists of two pieces: an ankle bracelet and a stationary beacon placed in the enrollee's home (III/50). The GPS equipment and software is leased from the 3M Corporation, which claims that its technology is "90 percent accurate within thirty feet" (III/11). Massachusetts has done no testing to determine whether this claim is true, and ELMO does no routine maintenance on the GPS

[3] See Daniel Pires, Presentation at the Mass. Bar Association (March 20, 2018) (cited hereafter as "Pires Presentation").

hardware (III/29). The location data is transmitted to ELMO via the Verizon cellular network.

Enrollees are expected to spend two hours each day charging the bracelet (III/31). They are advised not to charge it while sleeping, as it can disconnect. See Pires Presentation.

The technology works by triggering a range of "alerts" that notify the ELMO office in Clinton of potential violations (I/34). Possible alerts include, among others: "unable to connect", "charging", "exclusion zone", and "no GPS" (see D's Br. at 14-15). When there is an alert, ELMO generally tries to contact the probationer. If the issue cannot be resolved, ELMO will reach out to the enrollee's probation officer, who may then seek a warrant for the enrollee's arrest (I/52, 57; II/83-84).[4]

Mr. Feliz's Experience on GPS Supervision

Mr. Feliz was sentenced to a five-year term of probation on April 22, 2016 (I/28). As to his GPS, Mr. Feliz has a condition that he remain 300 feet away from all schools, parks, and daycares (I/38). However, if he enters an exclusion zone, there is no alert that is triggered in "real time" because that area is too broad to be entered into the ELMO system (III/45-46;

[4] According to the director of ELMO, the ELMO office fields 1,700 alerts per day, only 1% of which result in the issuance of warrants. See Pires Presentation.

App.22). The GPS monitoring condition was imposed despite a psychologist's judgment the Mr. Feliz "is not a significant sexual offense recidivism risk ... going forward in time" (R.45).

During the motion hearing, Mr. Feliz described a number of problems with his GPS device. Overall, he has experienced hundreds of blameless alerts – which happen primarily due to connectivity problems at his place of employment – and four of the alerts have resulted in warrants for his arrest. These alerts are amply documented (R.174, 328). Despite that documentation, the judge found as a fact "that false alerts are infrequent and easily resolved" (App.23).

The GPS device has exacerbated Mr. Feliz's pre-existing anxiety and made him fear for his job (R.59). On one occasion, an "unable to connect" alert could not be resolved – despite his walking around outside for two hours in the cold – and triggered a warrant (though Mr. Feliz was not ultimately arrested) (I/74-77; III/56-57; R.184). The same thing happened three days later, resulting in another warrant that was also rescinded (R.188, 228). In total, up to February 2018, Mr. Feliz has experienced 244 alerts and four warrants (R.59). In reality, he has never violated his probation in the over two years since it was imposed, nor has any violation ever been alleged.

Non-Contact Sex Offenders & The Risk of Recidivism

Two experts testified about the risks of re-offense posed by non-contact sex offenders, one for the Commonwealth and one for the defense. As the motion judge found, "many of the conclusions they offered ... aligned in material respects" (App.24). For example, "the rates of recidivism for sex offenders is lower than the rates of re-offense for all crimes," while the recidivism rate of non-contact sex offenders in particular "is lower still" (App.24-25). These conclusions were based on their expertise, as well as a number of studies that were admitted as exhibits at the motion hearing (R.100-173). Overall, both experts agreed that the rate of recidivism of non-contact sex offenders is low (III/99), and that one cannot determine a person's risk of re-offense, or diagnose pedophilia, solely from the fact that someone had been convicted of a non-contact sex offense (III/118-119).

In response to this evidence, the motion judge hypothesized in his order that GPS monitoring was itself causing the lower recidivism rates of sex offenders (App.25). None of the literature submitted at the motion hearing supported that conclusion. In fact, a probation officer testified that, in his six years of experience supervising sex offenders both

with and without GPS, he did not think that GPS monitoring reduced recidivism (II/92). Nonetheless, the motion judge set "[e]mpiricism aside" and accepted as a fact the "common-sense conclusion" that GPS monitoring deters sex offenses (App.26).

ISSUE PRESENTED

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

STATEMENT AS TO PRESERVATION

This issue is preserved. The defendant objected to the imposition of the GPS monitoring at his sentencing (R.26) and filed a written motion to waive that condition (R.27), arguing that § 47 violated the Fourth Amendment and art. 14. A hearing was held on the defendant's motion, and the judge issued a written order (App.17) from which the defendant filed a timely appeal.

ARGUMENT

THE MANDATORY ATTACHMENT OF A GPS DEVICE TO NON-CONTACT SEX OFFENDERS FOR THE FULL DURATION OF THEIR PROBATION, WITHOUT ANY INDIVIDUALIZED ASSESSMENT OF THEIR DANGEROUSNESS OR RISK OF RECIDIVISM, VIOLATES ARTICLE XIV AND THE FOURTH AMENDMENT.

"In setting this matter in context, it is useful to delineate what this case is not about." Commonwealth v. Pugh, 462 Mass. 482, 494 (2012) (original emphasis). Mr. Feliz is not arguing that judges are powerless to impose GPS monitoring on non-contact sex offenders. Instead, he merely argues that judges must be free to waive the condition, after an individualized hearing. In other words, Mr. Feliz is arguing no more than what this Court has already twice said: GPS monitoring "appears excessive ... to the extent that it applies without exception to convicted sex offenders sentenced to a probationary term, regardless of any individualized determination of their dangerousness or risk of reoffense." Guzman, 469 Mass. at 500, quoting Cory, 454 Mass. at 572.

Of course, when GPS supervision is necessary to serve the interests that the Commonwealth has asserted here, judges will order it. But, uniquely, § 47 divests judges of their usual discretion in sentencing and imposes a severe probation condition with no individualized assessment of the need for it. Especially "[i]n cases where a condition touches on

constitutional rights, the goals of probation are best served if the conditions of probation are tailored to address the particular characteristics of the defendant and the crime." Commonwealth v. LaPointe, 435 Mass. 455, 459 (2001). The Commonwealth has yet to explain why conscientious Superior Court judges, acting in good faith, are incompetent to determine when GPS is necessary in particular cases, as they do for all other conditions of probation. This Court should hold that non-contact sex offenders – who have the lowest recidivism rate of all defendants subject to § 47 – have a right to an individualized "reasonableness hearing" addressed to the particular offender's need for GPS monitoring. See, e.g., State v. Johnson, 801 S.E.2d 123 (N.C. Ct. App. 2017).

In effect, such a ruling would only relieve from monitoring those defendants (1) who were convicted of non-contact sex offenses, and (2) who a sentencing judge determines do not present a risk of re-offense such that GPS is necessary. The Fourth Amendment and art. 14 do not permit the intrusive search required by § 47 in the absence of an individualized need for it.

(1) Attaching a GPS device is a "search".

This Court has already held that GPS monitoring imposes two "serious, affirmative restraint[s]" on liberty: (1) the "physical[] attach[ment] [of] an item

to a person, without consent and also without consideration of individual circumstances"; and (2) the "continuous reporting of the offender's location to the probation department." Cory, 454 Mass. at 570. The statute invades privacy in the same way it restrains liberty. Were there any doubt, the Supreme Court has expressly said so: "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." Grady v. North Carolina, 135 S. Ct. 1368, 1370 (2015).

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

(2) Art. 14 does not allow probationers to be subject to blanket search conditions without individualized suspicion.

"[A]rt. 14 bars the imposition on probationers of a blanket threat of warrantless searches." Commonwealth v. LaFrance, 402 Mass. 789, 795 (1988). In LaFrance, this Court invalidated a condition that

required the probationer to submit to a search, at any place and time, without suspicion or a warrant. Id. at 790. This Court held that the condition violated art. 14, "notwithstanding the fact that such a condition might aid in the probationer's rehabilitation." Commonwealth v. Obi, 475 Mass. 541, 548 (2016).

If probationers cannot be subject to the constant threat of a search, they surely cannot be subject to a constant actual search. Section 47 imposes a far more onerous condition than the one at issue in LaFrance, and it does so for the exact same reasons. To comply with LaFrance's requirements of judicial oversight and individual suspicion, GPS monitoring must be limited to those cases where the sentencing judge makes an individualized determination that it is necessary.

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

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

"[E]ven a limited search of the person is a substantial invasion of privacy," New Jersey v. TLO,

469 U.S. 325, 337 (1985), and GPS is far from limited. It requires a "permanent, physical attachment to the offender." Cory, 454 Mass. at 570. The privacy intrusion is truly breathtaking: twenty-four hours per day, every day, for years on end, Mr. Feliz must have a device strapped to his leg that he can never remove. This constitutes a "serious, affirmative restraint" upon bodily integrity, "dramatically more intrusive and burdensome" than other conditions of probation. Id. at 570-571. And the physical intrusion triggers a deeper harm: it is "inherently stigmatizing, a modern-day 'scarlet letter.'" Commonwealth v. Hanson H., 464 Mass. 807, 815 (2013). If visible, the device "may have the additional punitive effect of exposing the offender to persecution or ostracism." Cory, 454 Mass. at 570 n.18.

And, once attached, the device catalogs the offender's every move:

> 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. The Government can store such records and efficiently mine them for information years into the future. ... Awareness that the Government may be watching chills associational and expressive freedoms.

United States v. Jones, 565 U.S. 400, 415-416 (2012) (Sotomayor, J., concurring). And Jones involved the attachment of a GPS device to a car (for only 28

days). The degree of intrusiveness here is far greater: monitoring the location of a person's body for years on end paints a much more detailed picture, as it allows the government to "reconstruct someone's specific movements down to the minute, not only around town but also within a particular building." Riley v. California, 134 S. Ct. 2473, 2490 (2014). See also Commonwealth v. Augustine, 467 Mass. 230, 249-253 (2014) (GPS "tracks the user's location far beyond the limitations of where a car can travel").

As administered, the Massachusetts GPS program causes a number of additional invasions of privacy. Most importantly, the device causes needless anxiety because connectivity issues are – in the words of the statewide director of the program – "very random" (III/16). ELMO itself does not check if an enrollee's home or work has adequate cell service to support the device (III/15), and has conducted no studies or research to determine the error rate or accuracy of its hardware or software (III/21, 29). The issuance of a warrant is left to the unfettered discretion of the probation officer. Armed with a warrant – which probation may issue without the imprimatur of a court (I/64; II/84) – it can hold someone in custody for up to 72 hours. See G.L. c. 279, § 3. Four warrants have already issued for the arrest of Mr. Feliz, who fears

that the device will eventually cost him the steady job that he has maintained for many years (I/81).

Imagine the fear of knowing that a loss of cell service could trigger a loss of liberty. Even if this system worked perfectly, the invasion of privacy it caused would be profound. But, here, the government is seeking to impose a GPS condition on a mandatory basis, while simultaneously making zero effort – by regular testing or maintenance – to ensure that it does not needlessly burden those it supervises. The GPS device works a deeply invasive search.

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

Here, the government has asserted an interest of the highest order: protecting children from sexual abuse. But "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000). At issue here is not whether this interest is legitimate, but whether the means employed to serve that interest can overcome the privacy rights of those subject to GPS monitoring. The government must establish that § 47 serves its asserted interest.

The government has failed to meet its burden. When § 47 requires GPS monitoring of non-contact sex

offenders without any individualized hearing, the Commonwealth's interest is not sufficiently compelling to outweigh the privacy intrusion. During the motion hearing, it offered no study or other evidence establishing that GPS monitoring deters crime in general or sex offenses in particular. To the contrary, a probation officer testified that, in his experience, GPS monitoring did not reduce recidivism (II/92). Lacking record support, the judge set "[e]mpiricism aside" and accepted the idea that GPS deters crime as a "common-sense conclusion" (App.26).

One cannot set experience, empiricism, and evidence aside when reviewing the reasonableness of an invasive search that the government has the burden to justify. Facts matter. This Court has cautioned against intrusions that "serve safety or deterrence values which are merely speculative, and have no basis in the record." Horsemen's Benev. & Protective Ass'n, Inc. v. State Racing Comm'n, 403 Mass. 692, 705 (1989). This is a "necessarily fact-dependent" inquiry, Guzman, 469 Mass. at 500, and the government has submitted no evidence at all that GPS monitoring actually deters crime or facilitates rehabilitation.

Even examining the extant literature, there is little reason to think that GPS monitoring will reduce recidivism. "[T]he rates of recidivism for sex

offenders are actually lower than the rates of recidivism for those convicted of other crimes." Doe No. 380316 v. SORB, 473 Mass. 297, 312 n.22 (2015). And the rate of recidivism of non-contact sex offenders is categorically lower still – about 0.8% to 3.9% (R.167). See also 803 CMR 1.33(36) (child pornography offenders "pose a lower risk of re-offense" than contact offenders). GPS or no GPS, the overwhelming majority of non-contact sex offenders simply will not re-offend. There is no reason to think, and no literature to suggest, that GPS monitoring will deter crime in this population.

But even if we assume that GPS does, in fact, deter crime within this set of offenders – a big assumption – the mandatory nature of this condition is still unreasonable. That some non-contact sex offenders might properly be subject to GPS "is a reason to decide each case on its facts," not to create an overbroad, mandatory regime. Missouri v. McNeely, 569 U.S. 141, 153 (2013). In the context of sexual dangerousness, "[e]ach case is fact specific." Commonwealth v. Suave, 460 Mass. 582, 589 (2011).[5]

[5] Our entire system of commitment and registration rests on the premise that experts can conduct such an individualized assessment of a person's future sexual dangerousness with some degree of precision. See, e.g., G.L. c. 6, § 178K (varying registration obligations depending on whether offender presents "low", "moderate", or "high" risk).

Indeed, there is every reason to think that the overbroad imposition of GPS monitoring may well undermine the government's asserted interests. See Doe No. 380316, 473 Mass. at 306 n.12 (imposing "exceptionally burdensome" probation conditions "may even trigger some sex offenders to relapse"). An offender's level of monitoring should be commensurate with his level of risk. The study out of Tennessee cited by the motion judge (App.26) illustrates this dynamic: "lower risk offenders who are supervised at enhanced levels reoffend more frequently and have overall higher recidivism rates than similar offenders supervised at lower risk levels." Tenn. Bd. Of Probation, Monitoring Tennessee's Sex Offenders Using Global Positions Systems, at 6 (April 2007). Probationers can lose their jobs or housing due to their GPS bracelets, disrupting the very factors that make them low-risk in the first place. In these circumstances, sometimes less is more.

Given the narrow nature of this dispute – mandatory versus case-by-case imposition of GPS – the question presented almost answers itself: Does the government have an interest in monitoring those who a judge determines do not need to be monitored? Of course not. Such an invasive, humiliating condition should be reserved only for those who truly need it.

STATEMENT OF REASONS WHY DIRECT APPELLATE REVIEW IS APPROPRIATE

This case easily meets all three criteria for direct appellate review: it raises a question of first impression, which involves the constitutionality of a statute, about a subject of substantial public interest and importance. See Mass. R.A.P. 11(a).

Although this Court recently settled the due process implications of § 47, it specifically declined to address the defendant's search and seizure argument because the record was "too sparse to permit an adequate assessment" of the claim. Guzman, 469 Mass. at 497. This case has addressed that deficiency, and raises the exact issue that this Court has twice raised – having noted the "excessive" nature of blanket GPS monitoring, id. at 500 – but never squarely resolved. This Court has already recognized that questions around the proper scope of § 47 are matters "of significant public interest." Id. at 493 n.2, quoting Hanson H., 464 Mass. at 808 n.2. And this Court has repeatedly granted direct appellate review or taken cases sua sponte to resolve such questions.[6]

[6] See Commonwealth v. Samuel S., 476 Mass. 497 (2017) (holding that youthful offenders are not subject to § 47); Commonwealth v. Doe, 473 Mass. 76 (2015) (holding that § 47 does not apply to cases that are continued without a finding); Commonwealth v. Selavka, 469 Mass. 502 (2014) (holding that GPS monitoring cannot be belatedly added to a sentence even when the

There is also a substantial private interest at stake – probation in these cases is often very long, and non-contact sex offenders are subject to mandatory GPS supervision for its full duration even if the sentencing judge does not think it necessary.[7] If this Court recognizes their right to an individualized hearing, those individuals may be relieved of an exceedingly onerous condition that never should have been imposed in the first place.

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sentence is illegal because GPS should have been mandatory); Hanson H., 464 Mass. at 807 (holding that § 47 does not apply to juvenile delinquents); Cory, 454 Mass. at 559 (holding that retroactive imposition of GPS monitoring under § 47 violates the prohibition on ex post facto punishment); Commonwealth v. Raposo, 453 Mass. 739 (2009) (holding that § 47 does not apply to defendant placed on pretrial probation).

[7] It is unclear exactly what percentage of the 3,195 individuals subject to GPS monitoring are non-contact sex offenders in particular. To give some sense of numbers, according to the Sentencing Commission's website, 81 defendants were convicted of child pornography possession in FY2013, 58 defendants were convicted in FY2012, and 44 were convicted in FY2011. See MA Sentencing Commission, Surveys of Massachusetts Sentencing Practices, available at https://www.mass.gov/lists/surveys-of-massachusetts-sentencing-practices.

CONCLUSION

For the reasons stated herein, the defendant respectfully requests that this Court grant this application for direct appellate review.

Respectfully Submitted,

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By his attorney,

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Dated: May 10, 2018

CERTIFICATE OF SERVICE

I, David Rangaviz, counsel for the defendant herein, do hereby certify that on this date, I served a copy of the foregoing Application for Direct Appellate Review, by using the Odyssey E-Service system to direct a copy to counsel for the Commonwealth:

Cailin Campbell
Office of the Suffolk County District Attorney

/s/ David Rangaviz
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Dated: May 10, 2018

TABLE OF APPENDICES

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:	

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

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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

Date	Session	Location	Type	Event Judge	Result
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

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
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.	

Docket Date	Docket Text	File Ref Nbr.
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	
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	

Docket Date	Docket Text	File Ref Nbr.
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	
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	
04/22/2016	Disposed for statistical purposes	

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
03/22/2018	The following form was generated: A Clerk's Notice was generated and sent to: Attorney: Alyssa Thrasher Hackett, Esq. Attorney: John P Zanini, Esq. Attorney: Nicole A Poirier, Esq. Other interested party: Joseph Stanton ,Clerk	

Case Disposition

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

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

COMMONWEALTH

v.

ERVIN FELIZ

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

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

PROCEDURAL BACKGROUND

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

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

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

DISCUSSION

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

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

not agree.

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

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

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

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

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

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

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

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

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

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

ORDER

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

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

SO ORDERED.

Robert B. Gordon
Justice of the Superior Court

Dated: March 21, 2018

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

COMMONWEALTH

vs.

ERVIN FELIZ

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

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

BACKGROUND

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

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

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

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

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

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

FINDINGS OF FACT

A. GPS Monitoring in Massachusetts

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

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

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

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

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

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

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

Id. (citations omitted).

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

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

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

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

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

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

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

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

B. Feliz's Experience With GPS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

pornographers from committing even non-contact offenses.

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

RULINGS OF LAW

I. LEGAL LANDSCAPE

Section 47 provides in relevant part as follows:

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

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

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

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

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

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

II. ANALYTICAL FRAMEWORK

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

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

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[13] The parties are in disagreement as to whether the GPS monitoring prescribed by Section 47 amounts to a search in the constitutional sense. As set forth supra, the U.S. Supreme Court directly addressed this question in Grady. Grady, 135 S. Ct. at 1371 ("[A] State ... conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements."). Compare Commonwealth v. Connolly, 454 Mass. 808, 818 (2009) (installation of GPS device on motor vehicle and continued use for surveillance purposes is a "seizure") and Commonwealth v. Augustine, 467 Mass. 230, 255 (2014) (compelled production of cell site location information constituted search). The Commonwealth, however, contends that the defendant has failed to specify which conduct constitutes the Fourth Amendment search: the physical intrusion of wearing the GPS tracking device, or the collection of the defendant's location information during the pendency of his probation. As the defendant has challenged both features of Section 47's GPS requirement, and inasmuch as both can occur simultaneously, the Court will address them together.

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

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

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

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

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

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

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

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

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

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

III. FACIAL CHALLENGE

A. Intrusion on Privacy

i. Probationer Interests

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ii. Level of Intrusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Government Interests

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Balance of Interests

i. Totality of the Circumstances

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

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

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

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

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

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

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

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

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

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

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

ii. Special Needs

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

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

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

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

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

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

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

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

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

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

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

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

IV. AS-APPLIED CHALLENGE

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

A. Intrusion Into Privacy

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

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

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

B. Legitimate Government Interests

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

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

C. Balance of Interests

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

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

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

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

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

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

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

ORDER

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

SO ORDERED.

Robert B. Gordon
Justice of the Superior Court

Dated: March 21, 2018