COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-13600

COMMONWEALTH OF MASSACHUSETTS,
Appellee
V.

ANTHONY GOVAN,
Appellant

COMMONWEALTH'S BRIEF ON APPEAL FROM AN ORDER OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY

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APRIL 2024

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I. Whether the motion judge properly concluded that the imposition of a GPS monitoring device as a condition of pretrial release was constitutional where the defendant consented to be monitored by GPS.

II. Whether the motion judge properly held that the police access to the defendant's historical GPS location data was constitutional where the defendant did not have a reasonable expectation of privacy in the data.

STATEMENT OF THE CASE

This is the appeal of the denial of the defendant's motion to suppress in the Suffolk Superior Court.

On December 20, 2019, a complaint issued out of the Roxbury Division of the Boston Municipal Court charging the defendant, Anthony Govan, with: carrying a firearm without a license, in violation of G.L. c. 269, § 10(a); discharging a firearm within 500 feet of a building, in violation of G.L. c. 269, § 12E; assault & battery on a family or household member, in violation of G.L. c. 265, § 13M; and intimidating a witness, in violation of G.L. c. 268, § 13B

(No. 1902CR004178) (C.A.5).[1] On July 14, 2020, the defendant was arraigned on the charges before the Honorable Debra A. DelVecchio. At arraignment, the Commonwealth filed a motion seeking an order of pretrial detention based on dangerousness, pursuant to G.L. c. 276, § 58A (C.A.5-6). At that time, Judge DelVecchio ordered the defendant held without bail pending a hearing on the Commonwealth's motion, which was scheduled for July 17, 2020 (C.A.6). On the day of the dangerousness hearing, the Commonwealth withdrew its motion, communicating to the court that the parties had reached an agreement wherein the defendant consented to being placed on GPS monitoring, among other pretrial conditions of release, and the Commonwealth agreed to withdraw its motion seeking pretrial detention (Exh. 1; 23:00). Based on these representations, Judge DelVecchio set bail in the amount of $1,000 and set the following conditions of release: GPS prior to release; stay away, have no contact with, and do not abuse the named victim, Chantey Pagan; stay away from Pagan's home should the defendant become aware of her new address; and do

[1] References to the defendant's brief will be cited as (D.Br.__); references to the defendant's appendix will be cited as (D.A.__); references to the Commonwealth's record appendix will be cited as (C.A.__); and references to the audio recording of the defendant's arraignment, which was entered as Exhibit 1 at the defendant's suppression hearing, will be cited as (Exh. 1; [timestamp]).

not possess a firearm without a valid license (C.A.6). The defendant consented to all of these conditions of release.

On February 26, 2021, a Suffolk County grand jury indicted the defendant on the following charges: carrying a firearm without a license, in violation of G.L. c. 269, § 10(a), as well as an ACC enhancement (Count 1); possession of ammunition without an FID card, in violation of G.L. c. 269, § 10(h)(1) (Count 2); carrying a loaded firearm without a license, in violation of G.L. c. 269, § 10(n) (Count 3); and assault with a dangerous weapon, in violation of G.L. c. 265, § 15B (Count 4) (No. 2184CR00101) (C.A.13). This case was factually unrelated to the Roxbury case, though the investigation leading to the defendant's indictments involved location data obtained from the GPS monitoring device the defendant wore as a condition of his pretrial release on the Roxbury case.

On December 28, 2022, the defendant filed his motion to suppress evidence obtained from the search of his GPS location data (C.A.28). On February 14, 2023, an evidentiary hearing on the defendant's suppression motion was held before the Honorable Catherine Ham (C.A.21). That same day, the Commonwealth filed its memorandum in opposition to the defendant's motion (C.A.32). On

February 28, 2023, Judge Ham denied the defendant's motion to suppress in a written decision (C.A.48).

On March 28, 2023, the defendant entered a conditional plea pursuant to Mass. R. Crim. P. 12(b)(6), whereby he agreed to plead guilty to all counts while reserving his right to pursue an appeal of Judge Ham's denial of his motion to suppress (D.A.144). As required by Rule 12(b)(6), this conditional plea was entered with the Commonwealth's agreement (D.A.144). Pursuant to the plea agreement, Judge Ham sentenced the defendant to state prison for three years to three years and one day on Count 1 and the ACC portion of Count 1, to run concurrent with each other; on Counts 3 and 4, Judge Ham sentenced the defendant to 1 year of probation from and after the completion of his committed sentence (C.A.23). Count 2 was dismissed at the Commonwealth's request (C.A.23).[2]

The defendant filed his notice of appeal on April 7, 2023, and his case entered in the Appeals Court on September 19, 2023.

[2] The defendant's sentence was not imposed until August 28, 2023, as the defendant was in federal custody in New Hampshire at the time of his change of plea (C.A.25-26).

STATEMENT OF FACTS

I. THE MOTION JUDGE'S FINDINGS OF FACT

The judge made the following factual findings in her written decision:

> Commonwealth submitted exhibits to prove its case on the issue of the initial imposition of GPS on Govan. Both parties agree that I must determine the constitutionality of ordering GPS to Govan, who was a pretrial defendant on an open case out of Roxbury Division of Boston Municipal Court (BMC). Both parties and I agree that in determining the constitutionality of GPS, I must review the BMC's decision de novo. I credit Detective Kevin Plunkett and find the following:
>
> 1. On July 14, 2020, Govan was arraigned in Roxbury Division of BMC (Delvecchio, J.) with charges of carrying a firearm, discharging a firearm within 500 feet of a dwelling, assault and battery on family/household member, and intimidation of a witness.
>
> 2. At arraignment, Commonwealth moved for dangerousness under G.L. c. 276, § 58A. Govan was held without bail and the dangerousness hearing was set for July 17, 2020.
>
> 3. On July 17, 2020, the Commonwealth alleged[3] that on December 26, 2019 (seven months prior to the arraignment), officers responded to 30 Bickford Street for a domestic violence call. Upon arrival, officers located a bullet hole in the apartment window. Officers interviewed Chantey Pagan (Pagan) who stated that at around midnight, she and Govan, who was her ex-husband, got into a heated argument.

[3] [Footnote 1 in original] The judge asked for some time to read the police report, which states the following allegations.

4. Pagan's 15-year-old daughter was in the apartment during the fight. Govan threatened Pagan that he would "shoot her family's faces off." The 15-year-old daughter heard Govan say to Pagan, "You can testify against me and get killed or leave it."

5. Pagan saw Govan remove a firearm from his pants and place it on the window ledge. She did not see the firearm discharge but heard the gunshot. The teenaged daughter was sleeping on the couch only four feet away from the window.

6. After the gunshot, Pagan and her daughter attempted to leave the apartment and Govan followed them. He grabbed her by the jacket collar and broker [sic] her zipper. Govan continued to send her texts to come back to the apartment and told her that he got rid of the firearm.

7. Pagan told the officers that she had previously seen Govan with a firearm. She stated that she would come back to the apartment at 30 Bickford Street if the locks were changed.

8. A straight warrant for Govan was issued but he was not apprehended until he was stopped on a motor vehicle infraction on date close to July 14, 2020. He posted $1,000 and walked info [sic] court on his own on July 14, 2020, upon realizing that there was a straight warrant for him.

9. On July 17, 2020, after Govan spent three days in custody held without bail, Commonwealth withdrew its request to proceed under G.L. c. 276, § 58A. Commonwealth stated that there were conditions of release which could protect the safety of the community.

10. Commonwealth represented that the defendant agreed to the following conditions: stay away, no contact, no abuse of Pagan, GPS, and no possession of firearm. Govan's attorney agreed to the conditions on the record.

11. The court questioned if there had been any contact with Pagan. Commonwealth stated that they spoke with Pagan

on July 14th who stated that Govan had not had any contact with her since this incident and that she had moved out of the home.

12. The court asked what exclusion zone (address) to put to impose GPS. Commonwealth stated that Ms. Pagan had not shared the address with the Commonwealth and certainly, if there is an address, they would ask the address to be impounded, to which Govan did not object to the future impoundment order.

13. The court imposed the agreed upon conditions and imposed one additional condition that he stay away from her new home address if he become aware of the new address.

14. Commonwealth asked for additional $5,000 in cash bail, which the court denied and set the bail of $1,000 which he had already posted.

15. On August 1, 2020, at around 1:30 A.M., Detective Kevin Plunkett (Plunkett) responded to 547 Columbia Road for a report of shots fired.

16. Upon arrival, the police located ballistics evidence. Several days after August 1, 2020, Plunkett retrieved surveillance videos from traffic cameras and a pizza store located at 535 Columbia Road.

17. Plunkett observed a black Chevy Malibu parked on the side of the road in front of the pizza store. A silver Chevy Malibu arrived and parked nearby. Occupants from the two cars appeared to interact and exchange words with one another.

18. There was one male from the silver car who stood outside of the rear passenger side of the black car. This male from the silver car appeared to be arguing with an individual inside the rear passenger of the black car.

19. The rear passenger from the black car pulled out a firearm, reached it out from the window and began firing.

20. The man from the silver car who stood nearby the black car retreated, then pulled out a firearm and began shooting towards to black car.

21. The black car left, took a left on Dudley, left on West Cottage towards Blue Hill. The black car then took a turn onto Alaska Street. The videos lost sight of the black car.

22. The silver car sped off towards the intersection of Columbia and Massachusetts Ave and headed towards I-93 Southbound.

23. The male from the silver car who retreated and shot in return was later identified by several officers after Plunkett was able to zoom into the male from the videos.[4]

24. The male from the black car was not identified from videos because this person was inside the car and no video cameras captured this suspect. This male at one point had gotten out of the car and could be seen as a male who was short in stature.

25. On August 7, 2020, Plunkett sent an email request to Electronic Monitoring Office (ELMO) for anyone who was on GPS near 547 Columbia Road, on August 1, 2020, from 1:20AM to 1:40AM.

26. Within the same day, ELMO sent information of five individuals with GPS for the date, time and location. By the movement of the five individuals, Plunkett honed in on Govan due to his location and direction with [sic] matched the suspect from the black car.

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[4] [Footnote 2 in original] This male, Jeremy Harris, was charged. Harris filed a motion to suppress identification, which I decided. About half-way through Plunkett's testimony, I recognized the shooting incident and alerted the parties that I had heard and decided Harris' motion to suppress identification but made no findings about Govan's case. No parties objected to me continuing to hear Govan's motion.

27. On the same day at 5:11 P.M., Plunkett asked for Govan's precise GPS points in excel format m [sic] from 1:15 A.M. to 2:15 A.M. ELMO sent the [sic] Govan's GPS points from 1:00 A.M. to 2:00 A.M.

28. Plunkett believed that the GPS points matched the suspect from the black car. Govan is listed as being five feet and five inches tall.

29. After seeing Govan's home address of Bromley Heath, Plunkett pulled several videos around his home address. A video camera depicted a black Chevy pull into the area at about 1:45 A.M. Three individuals exited the car. One was a female, the second was a taller male, and the third male was shorter and believed to be Govan.

30. Plunkett requested an arrest warrant for Govan.

(C.A.39-42).

II. THE MOTION JUDGE'S RULINGS OF LAW

In her written decision, the motion judge first concluded that the imposition of GPS monitoring as a condition of release was constitutional, finding the Commonwealth established that the defendant consented to GPS monitoring and separately established that the governmental interests in imposing GPS monitoring outweighed the privacy intrusion on the defendant. She detailed her conclusions as follows:

> When thinking about the constitutionality of requiring a person to be subject to GPS monitoring, courts generally use the analytic framework of search and seizure. Both the Supreme Court and the Supreme Judicial Court have recognized that attaching a GPS device to a person's body constitutes a search, *Grady v. North Carolina*, 575 U.S.

306, 309-310 (2015) (U.S. Const., Amend. IV); *Commonwealth v. Johnson*, 481 Mass. 710, 715-719, cert. denied, 140 S. Ct. 247 (2019) (Mass. Decl. of Rights, art. 14), including when imposed as a condition of pretrial release. *Commonwealth v. Norman*, 484 Mass. 330, 334-335 (2020) ("reasonable expectation of privacy of a defendant pretrial ... is greater than that of a probationer"). See also *Garcia v. Commonwealth*, 486 Mass. 341, 351-353 (2020) (GPS imposed as condition of stay of execution of sentence pending appeal is search).

Because the search performed by a GPS device is perpetual and without a warrant, it may be supported by a person's free and voluntary consent that was given "unfettered by coercion, express or implied." Id. at 335, quoting *Commonwealth v. Buckley*, 478 Mass. 861, 875 (2018). But consent will not be only inferred from the fact that the defendant signed a form required for GPS monitoring. *Norman*, 484 Mass. 335; *Commonwealth v. Feliz*, 481 Mass. 689, 702 (2019). Here, at arraignment, defendant did consent to GPS. He now argues that he was coerced or left with no other choice than to agree to GPS, given the agreement made between the parties in lieu of a §58A hearing. At arraignment, Govan's attorney did not argue the unconstitutionality or the ineffectiveness of GPS, given that the victim had moved out of the apartment. There was no location to stay away at the time of the arraignment. But GPS did have a purpose to keep Govan away from Pagan. Govan allegedly assaulted her and fired a gun inside the home within few feet from her 15-year-old daughter. It is conceivable that given their prior relationship, Govan would know or could find out the new address. The judge also set a condition that he shall stay away from her home, if he becomes aware of the new address. Although Govan now argues that he was coerced to agreeing to GPS because the Commonwealth made it a condition which he could not refuse, the record is clear that both parties came to an agreement and represented as such to the court. I do not find that Govan was coerced, expressed or implied.

> Even without Govan's consent, there were "legitimate justifications" for imposing GPS, that are "authorized by statute." *Norman* at 336. As discussed in *Norman*, there are only three such justifications under G.L. c. 276, § 58, based on the three references to conditions of release in section 58: (1) to ensure that defendant appears in court; (2) to restrict contact with victims or witnesses; and (3) to provide safety for victims in domestic abuse cases. *Id*. at 336. The second and third justifications apply here. Given the prior relationship between Govan and the alleged victim, and given the serious allegations, there were legitimate justifications in placing Govan on GPS to keep Pagan and her daughter safe. It does not matter whether there had been no contact for the past six months. Now at the inception of this case, there was a threat and a risk of Govan contacting her and possibly committing new offenses against her.
>
> The government did establish that its interest in imposing GPS monitoring outweighs the privacy intrusion occasioned by the monitoring. *Commonwealth v. Roderick*, 490 Mass. 669, 672 (2021). This inquiry turns on a "constellation of factors," analyzed in the totality of the circumstances. *Commonwealth v. Feliz I*, 481 Mass. 689, 705, 119 N.E. 3d 700 (2019), S.C., 486 Mass. 510, 159 N.E.3d 661 (2020). In evaluating the privacy intrusion by GPS monitoring, I consider the extent to which GPS monitoring would intrude upon the expectation of privacy of Govan. I also evaluate the government's interests. This case differs from *Roderick*. In *Roderick*, the government had no contact with the victim. Here, Commonwealth had contact with Pagan who did not want Govan to know where she lived, expressing her concerns for her safety. Here, the judge added the condition of stay away from her and her new home, if he became aware of the new address. The GPS served its purpose. In reviewing the government's interest in imposing GPS on Govan, a pretrial defendant, the interest is to ensure the safety of the alleged victim of the alleged domestic violence.

(C.A.42-44).

Having found that the imposition of the GPS device was constitutional, the judge then moved on to the accessing of the defendant's historical GPS location data and held that it was not an improper intrusion on his privacy:

> Because *Norman* had not found the initial GPS imposition constitutional, the Supreme Judicial Court did "not reach the question whether ... police use of the data for a criminal investigation would have been permissible." *Id.* at 333. There is no question that the government's extensive collection and examination of personal location data can intrude on an individual's reasonable expectation of privacy, at least for an individual who is not a probationer. A pretrial defendant has greater reasonable expectation of privacy than a defendant who has been convicted. See *Norman* at 334, and *Commonwealth v. Silva*, 471 Mass. 610, 617 (2015). In the Fourth Amendment context, individuals have a reasonable expectation of privacy in a detailed comprehensive documentation of their physical movements over an extended period of time due to the amount of sensitive and private information that can be gleaned from this data. The same is true under Mass. Const. Decl. Rights art. 14.
>
> I next address the constitutionality of the Commonwealth subsequent act of accessing the historical GPS location data recorded from the Govan's GPS device. The Commonwealth's retrieval and review of this historical data requires a separate constitutional inquiry under the Fourth Amendment and art. 14 because it was conducted by the police, not the probation service, for investigatory, rather than probationary, reasons.
>
> To claim a reasonable expectation of privacy, the defendant must first "manifest[] a subjective expectation of privacy in the object of the search." *Commonwealth v. Augustine*, 467 Mass. 230, 242 (2014), S.C., 470 Mass. 837 and 472 Mass. 448 (2015). Govan agreed to the GPS

monitoring as a condition of his release. He knew at arraignment that the purpose of the GPS bracelet was to ensure that he stayed away from Pagan and her home. At minimum, the defendant knew that he was subject to GPS monitoring and that his location could be broadcast to probation officials under certain circumstances. "Whether he could argue plausibly that he did not understand that the purpose of the GPS device was to deter and detect his uninvited presence in other people's homes is not worth belaboring, however, as we conclude that he could have no objectively reasonable expectation of privacy in the historical GPS location data that was accessed and used by the Commonwealth." *Commonwealth v. Johnson*, 481 Mass. 710, 723, 119 N.E.3d 669 (2019).

Even assuming that Govan had a subjective expectation of privacy, the expectation must be one that society is willing to recognize as reasonable for the protections of the Fourth Amendment and art. 14 to apply. See *Augustine* at 242. By virtue of being released, Govan is subject to regular government supervision and thus can neither enjoy the same amount of liberty nor reasonably expect the same amount of privacy as an ordinary citizen. See United *States v. Knights*, 534 U.S. 112, 120-121, 122 S. Ct. 587, 151 L.Ed. 2d 497 (2001). Accordingly, I recognized that, although pretrial defendants do not give up all expectations of privacy while on pretrial release, their expectations are significantly diminished.

One hour of GPS data does not expose "an enormous amount of sensitive information that could provide an 'intimate window' into his life." *Johnson* at 723, quoting *Carpenter v. United States*, 138 S. Ct. 6, 2217, 2218, 201 L.Ed. 2d 507 (2018). We recognize and respect the significant privacy concerns raised by the continuous recording, collection, and accumulation of location data. See *Augustine*, at 251-253. This is, however, quite different from either mapping out and reviewing all of the defendant's movements while on probation or rummaging through the defendant's historical GPS location data indiscriminately. The one hour was targeted at

> identifying the defendant's presence at the time and location of particular criminal activity. In sum, this case is not "one in which the police [...] mapped out months of the defendant's historical GPS location data in a coordinated effort to recreate a full mosaic of his personal life, over an extended and unnecessary period of time, that would have revealed [...] 'not only his particular movements, but through them his familial, political, professional, religious, and sexual associations.'" *Johnson* at 728, quoting *Carpenter*, at 2217. The police's access to a [sic] one hour of GPS data was constitutional.

(C.A.44-47).

ARGUMENT

I. THE MOTION JUDGE PROPERLY CONCLUDED THAT THE IMPOSITION OF A GPS MONITORING DEVICE AS A CONDITION OF PRETRIAL RELEASE WAS CONSTITUTIONAL WHERE THE DEFENDANT CONSENTED TO BE MONITORED BY GPS.

In reviewing a motion to suppress, this Court will accept the motion judge's findings of fact unless there is clear error. *Commonwealth v. Welch*, 420 Mass. 646, 651 (1995); *Commonwealth v. Yesilciman*, 406 Mass. 736, 743 (1990). However, the Court reviews de novo any factual "findings of the motion judge that were based entirely on the documentary evidence." *Commonwealth v. Mauricio*, 477 Mass. 588, 591 (2017), quoting *Commonwealth v. Thomas*, 469 Mass. 531, 539 (2014). The Court will "independently determine the correctness of the judge's application of constitutional principles to the facts

found." *Commonwealth v. DePeiza*, 449 Mass. 367, 369 (2007), quoting *Commonwealth v. Catanzaro*, 441 Mass. 46, 50 (2004).

"The Fourth Amendment and art. 14 prohibit unreasonable searches and seizures." *Commonwealth v. Moore*, 473 Mass. 481, 484 (2016). "The imposition of GPS monitoring as a condition of pretrial release is a search under art. 14." *Commonwealth v. Norman*, 484 Mass. 330, 335 (2020). A warrantless search is presumptively unreasonable "unless one of the 'few specifically established and well-delineated exceptions' to the warrant requirement apply." *Commonwealth v. Buckley*, 478 Mass. 861, 875 (2018), quoting *Commonwealth v. Johnson*, 461 Mass. 44, 48 (2011). If an exception to the warrant requirement does not apply, the Commonwealth may still show that GPS monitoring as a condition of release is reasonable if "the government's interest in imposing GPS monitoring outweighs the privacy intrusion occasioned by GPS monitoring." *Commonwealth v. Feliz*, 481 Mass. 689, 701 (2019).

Here, the motion judge held that the imposition of GPS monitoring as pretrial condition of release was constitutional, finding that the Commonwealth demonstrated the reasonableness of the GPS monitoring in two ways: by establishing that the defendant consented to be monitored, and, separately, by showing that the government's

interest in GPS monitoring outweighed the privacy intrusion (C.A.43-44). On appeal, the defendant only challenges the judge's second finding of reasonableness. Specifically, he argues that the Commonwealth could not have established how GPS monitoring would serve its interests because a specific exclusion zone was not delineated when the GPS monitoring was ordered (D.Br.16-28). *See Commonwealth v. Roderick*, 490 Mass. 669, 677-678 (2022) ("Absent evidence that an effective exclusion zone would be configured in the defendant's GPS device, the Commonwealth could not establish how GPS monitoring would further its interest in enforcing the court-ordered exclusion zone."). Assuming arguendo that the defendant is correct that the Commonwealth could not establish the reasonableness of the GPS monitoring because of the lack of an exclusion zone, his claim still fails because he validly consented to the imposition of the GPS monitoring as a condition of release, a finding he does not challenge in his appeal.[5] *See generally Commonwealth v. Cruz*, 430 Mass. 838, 844 (2000), citing *Commonwealth v. Va Meng Joe*, 40 Mass. App. Ct. 499, 503 n.7 (1996) ("The motion judge was correct in denying the defendants' motion to suppress, although we rely on a different

[5] Indeed, the defendant concedes that he consented to the imposition of the device by arguing in his brief that the scope of his consent to GPS monitoring was ambiguous as it relates to storage of and access to his location data (D.Br.32-36).

ground"). While the defendant does not challenge the motion judge's finding that he consented to the imposition of GPS monitoring, the Commonwealth still discusses the propriety of that finding herein.

"A search authorized by consent is one such exception" to the warrant requirement. *Buckley*, 478 Mass. at 875. "Although consent can justify a warrantless search, 'the Commonwealth bears the burden of proof that consent was freely and voluntarily given, meaning it was unfettered by coercion, express or implied.'" *Norman*, 484 Mass. at 335, quoting *Buckley*, 478 Mass. at 875. "[W]hile consent must be free and voluntary, there is no requirement that it be 'knowing and intelligent.'" *Commonwealth v. Costa*, 65 Mass. App. Ct. 227, 232 (2005), citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-249 (1973). "Voluntariness of consent 'is a question of fact to be determined from the totality of all the circumstances.'" *Commonwealth v. Gaynor*, 443 Mass. 245, 253 (2005), quoting *Bustamonte*, 412 U.S. at 227. "As a question of fact, 'it should not be reversed absent clear error by the judge.'" *Buckley*, 478 Mass. at 875, quoting *Commonwealth v. Gray*, 465 Mass. 330, 343 (2013).

Here, the motion judge properly found that the defendant freely and voluntarily consented to GPS monitoring as a condition of release (C.A.44). First and foremost, the record establishes that the

Commonwealth and the defendant agreed to GPS monitoring as one of multiple conditions of release that would ensure the safety of Pagan and the community, in lieu of proceeding on a dangerousness hearing (Exh. 1; 23:00, 26:43-27:05). The agreed-upon conditions were the product of discussions between the parties, where the defendant was represented by his attorney. As the conditions were jointly presented as an alternative to moving forward with the dangerousness hearing, it is reasonable to infer that the defendant knew he had the right to refuse to consent to the GPS and instead go forward with the hearing. *See Commonwealth v. Wallace*, 70 Mass. App. Ct. 757, 763-764 (2007) (consent valid where, among other factors, defendant was not illegally detained at time of consent and understood his right to refuse consent); *Commonwealth v. Rogers*, 444 Mass. 234, 241-242 (2005) (Commonwealth failed to demonstrate voluntary consent to search where, among other factors, three armed uniformed officers appeared at defendant's front door between 4:40 A.M. and 5:00 A.M. and did not state purpose of their presence). Moreover, the defendant's agreement, as conveyed to the court via his counsel, was presented without any reservations. When the parties discussed the lack of an exclusion zone and the likelihood of impounding Pagan's address should it be provided to the court, counsel stated, "and we have no objection to that, your

Honor" (Exh 1; 27:00). Later, when the judge was finalizing the details of the conditions of release and included the condition that the defendant stay away from Pagan's address should he learn of it, the defendant himself replied, "that's fine" (Exh 1; 36:36). At no point did the defendant push back on either the representations made by the prosecutor regarding their agreement or the larger conversation between the judge, the prosecutor, and the defendant about the specifics of the GPS condition.

There are additional factors beyond the defendant's own representation of agreement that show his consent was freely and voluntarily given. The defendant was twenty-seven years old at the time of hearing and had familiarity with the criminal justice system, as evidenced by multiple entries on his Board of Probation record predating this offense (C.A.48).[6] The defendant was not alone when giving his consent; in fact, his consent was offered in open court before the judge, the prosecutor, and any other court staff or members of the public that may have been present in the courtroom. *Contrast*

[6] While the defendant's appendix includes the exhibits from the suppression hearing, his appendix leaves out his Board of Probation record, which was part of Exhibit 2 at the suppression hearing and was before the judge in Roxbury when she ordered the conditions of release on that case (D.A. 36, 103). The Commonwealth includes in its record appendix a copy of the defendant's board of probation record, dated a month after the setting of his conditions of release, which accurately reflects the record that was before the judge at that time (C.A.48).

Commonwealth v. Heath, 12 Mass. App. Ct. 677, 684-685 (1981) (voluntary consent not shown where, among other factors, defendant did not have a prior arrest record and was alone when giving consent). Additionally, the defendant was not subjected to any illegality when he gave his consent. *Contrast Commonwealth v. Yehudi Y.*, 56 Mass. App. Ct. 812, 818 (2002) (consent not freely given where police obtained consent in home after illegal entry). Though the defendant was in custody pending the dangerousness hearing at the time of his consent, that "does not preclude a finding that the consent was voluntarily given." *Commonwealth v. Franco*, 419 Mass. 635, 642 (1995), citing *Commonwealth v. Aguiar*, 370 Mass. 490, 497 (1976).

The evidence of consent here is demonstrably different from that put forth in *Commonwealth v. Norman*, 484 Mass. 330 (2020), where the only evidence of consent was a probation contract signed by the defendant that included disclosures about GPS monitoring. *Id*. at 335. The SJC ruled that contract to be insufficient evidence of consent because had the defendant not signed it, "the consequence presumably would have been pretrial detention," as refusal to sign would indicate a refusal to comply with the conditions set by the court. *Id*. There was no other evidence to suggest that the defendant had consented to the condition of GPS monitoring; understandably, the signed mandatory

probation contract was irrelevant to the question of whether he consented to the imposition of the condition in the first place. So too was the case in *Commonwealth v. Feliz*, 481 Mass. 689 (2019), which the *Norman* court references, where the defendant objected to the GPS device at the time of its imposition and the monitoring was ordered because it was a statutory requirement at the time. *Id*. at 703-705. Here, the defendant expressly agreed to the imposition of GPS monitoring as a condition of release, an unambiguous and far greater expression of consent than the signing of a contract.

For these reasons, the motion judge properly concluded that the defendant freely and voluntarily consented to GPS monitoring when he agreed to its imposition as a pretrial condition of release, and thus the imposition was reasonable and constitutional.

II. THE MOTION JUDGE PROPERLY HELD THAT THE POLICE ACCESS TO THE DEFENDANT'S HISTORICAL GPS LOCATION DATA WAS CONSTITUTIONAL WHERE THE DEFENDANT DID NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN THE DATA.

The defendant argues that police access to his historical GPS location data was unlawful for three reasons: (1) the extent of tracked information was overly broad; (2) the scope of his consent to the search was ambiguous; and (3) and the police lacked a sufficient nexus between the crime being investigated and the data so as to justify the

warrantless search (D.Br.28-40). Where the defendant did not have an expectation of privacy in his location information and the accessed data was narrowed to one hour's worth of data for a singular day and specific location, the motion judge properly ruled that the police constitutionally accessed the information and denied the defendant's motion to suppress.

The imposition of a GPS monitoring device is a search separate and distinct from any subsequent review of the historical GPS location data for investigatory purposes, and thus this Court must also review the constitutionality of subsequent access to the data. *See Commonwealth v. Johnson*, 481 Mass. 710, 715 (2019) ("*Johnson II*"). In reviewing a motion to suppress, this Court will accept the motion judge's findings of fact unless there is clear error. *Welch*, 420 Mass. at 651. The Court will "independently determine the correctness of the judge's application of constitutional principles to the facts found." *DePeiza*, 449 Mass. at 369, quoting *Catanzaro*, 441 Mass. at 50.

A search in the constitutional sense occurs "when the government's conduct intrudes on a person's reasonable expectation of privacy." *Commonwealth v. Augustine*, 467 Mass. 230, 241 (2014). An individual has a reasonable expectation of privacy where (i) the individual has "manifested a subjective expectation of privacy in the

object of the search," and (ii) "society is willing to recognize that expectation as reasonable." *Id.* at 242. The defendant bears the burden of establishing that the governmental conduct violated his reasonable expectations of privacy. *Commonwealth v. Miller*, 475 Mass. 212, 219 (2016).

Here, the defendant has neither shown that he had a subjective expectation of privacy in his GPS data nor that society would recognize that expectation as reasonable. At the outset, the defendant failed to submit an affidavit in support of his motion claiming any belief that he had an expectation of privacy while being subjected to GPS monitoring. His claim, therefore, necessarily fails because he has not established any expectation of privacy. Were the absence of an affidavit claiming an expectation of privacy not enough, the defendant also consented to GPS monitoring as a condition of pretrial release in agreement with the Commonwealth. He knew when the condition was imposed that the purpose of GPS monitoring was to ensure he stay away from Pagan (Exh. 1; 36:36). From this, "at minimum, the defendant knew that he was subject to GPS monitoring and that his location could be broadcast to probation officials under certain circumstances." *Johnson II*, 481 Mass. at 721. There is no substantive difference between a probationer

and a pretrial defendant released on GPS monitoring in terms of their objective understanding that GPS is tracking them.

Even if the defendant had established his subjective expectation of privacy, he has not and cannot establish an objective expectation of privacy that society would recognize as reasonable. Indeed, both the Supreme Judicial Court and the Appeals Court have held that a defendant subject to GPS monitoring does not have an objective expectation of privacy in the historical GPS location data retrieved by police as part of a targeted investigation, and therefore the accessing of that data is not a search in the constitutional sense. *Johnson II,* 481 Mass. at 727; *Commonwealth v. Johnson*, 91 Mass. App. Ct. 296, 305-306 (2017) ("*Johnson I*").

In *Johnson II*, having determined that imposition of GPS monitoring on a probationer was a reasonable search so long as the intrusiveness of the GPS monitoring condition was outweighed by the governmental interests served by the monitoring, *see id.* at 720, the SJC then examined whether the later accessing of that probationer's historical GPS location data was also constitutional. 481 Mass. at 727.[7] The Court found that a probationer subject to GPS monitoring

[7] The SJC first passed on the question of whether the defendant had established a subjective expectation of privacy, finding that the

would "certainly objectively understand that his or her location would be recorded and monitored to determine compliance with conditions of probation," and thus did not have an objective expectation of privacy in that GPS data. *Id.* at 727. The Court then held that the subsequent access and review of the probationer's historical GPS location data is not a search in the constitutional sense "[s]o long as the review is targeted at identifying the defendant's presence at the time and location and time of particular criminal activity." *Id.*

Similarly, the Appeals Court held in *Johnson I* that it is not a search for police to access the historical GPS location data of a defendant ordered to wear a GPS bracelet as a condition of pretrial release. *Johnson I*, 91 Mass. App. Ct. at 305-306. In that case, the majority of the Court found that the defendant failed to establish a subjective expectation of privacy either in his affidavit or by his conduct, as he had expressly "signed an agreement to provide the probation department with his constant and continuous location." *Id.* at 305. Similarly, the Court found that the defendant had failed to establish an objective expectation of privacy where the GPS data was stored in the ELMO system, a place the defendant did not control, possess, or have access to, and he had no possessory interest in the

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affidavit he submitted in support of his motion to suppress was unclear on that point. *Id.* at 721.

data nor endeavored to protect any privacy interest (as evidenced by his agreement with probation to provide his location information). *Id.* at 305-306. Finally, because the nature of the intrusion was one that the defendant voluntarily chose so that he could enjoy the liberty of his pretrial release, it was not an unreasonable intrusion. *Id.*

Here, as in both *Johnson I* and *Johnson II,* the defendant cannot establish an objective expectation of privacy. While it is not in the record that the defendant signed the GPS probation form, as was the case in *Johnson I* and *Johnson II*, his agreement to wear the GPS and the discussions had on the record in open court indicate that he understood and would comply with the conditions of GPS monitoring (Exh.1; 23:00–37:00). *See Johnson II,* 481 Mass. at 724; *Johnson I*, 91 Mass. App. Ct. at 305-306. "Simply comparing subsets of the defendant's GPS location data recorded while he was on probation to the general times and places of suspected criminal activity during the probationary period is not a search in the constitutional sense." *Johnson II*, 481 Mass. at 726-727. Indeed, "society has not recognized a probationer's purported expectation of privacy in information that identifies his or her presence at the scene of a crime as a reasonable one." *Id*. at 727.

Additionally, because here the police sought very limited subsets of historical GPS location data (C.A.42), the data was "targeted to the task at hand." *Johnson II,* 481 Mass. at 726. The police here accessed only the GPS/ELMO data from the time frame of August 1, 2020 (the day of the shooting), in the vicinity of 547 Columbia Road (the specific location of the shooting), for the one hour between 1:00 A.M. and 2:00 A.M. (the specific hour when the shooting occurred) (C.A.42). ELMO sent information for only five individuals on GPS for that requested date, time, and location, from which the police were then able to further target their data request (C.A.42). The intrusion into the defendant's life for a one-hour period was not "a coordinated effort to recreate a full mosaic of his personal life over an extended and unnecessary period of time, that would have revealed . . . 'not only his particular movements, but through them his familial, political, professional, religious, and sexual associations,'" nor is it a case of "indiscriminate rummaging through six months of data." *Johnson II*, 481 Mass. at 727-728, quoting *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018). Thus, because the review of this data was targeted only at identifying the defendant's presence at the time and location of the shooting, it was not a search in a constitutional sense, and no

warrant was required to access the GPS data. *Johnson II*, 481 Mass. at 727.

In sum, the police request for the defendant's GPS data was not a general search but a targeted one that was limited to one hour's worth of information on a singular date at a specific location. It was not a search in the constitutional sense as the defendant did not manifest a subjective expectation of privacy in the data nor would society recognize such an expectation as reasonable. For these reasons, the motion judge properly ruled that police access to the data was constitutional and properly denied the defendant's motion to suppress.

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Honorable Court affirm the denial of the defendant's motion to suppress GPS evidence.

Respectfully submitted
FOR THE COMMONWEALTH,

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March 1, 2024

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ADDENDUM

G.L. c. 265, § 13M: Assault or assault and battery on a family or household member; second or subsequent offense; penalty.

(a) Whoever commits an assault or assault and battery on a family or household member shall be punished by imprisonment in the house of correction for not more than 2 1/2 years or by a fine of not more than $5,000, or both such fine and imprisonment.

(b) Whoever is convicted of a second or subsequent offense of assault or assault and battery on a family or household member shall be punished by imprisonment in the house of correction for not more than 2 1/2 years or by imprisonment in the state prison for not more than 5 years.

(c) For the purposes of this section, "family or household member" shall mean persons who (i) are or were married to one another, (ii) have a child in common regardless of whether they have ever married or lived together or (iii) are or have been in a substantive dating or engagement relationship; provided, that the trier of fact shall determine whether a relationship is substantive by considering the following factors: the length of time of the relationship; the type of relationship; the frequency of interaction between the parties; whether the relationship was terminated by either person; and the length of time elapsed since the termination of the relationship.

(d) For any violation of this section, or as a condition of a continuance without a finding, the court shall order the defendant to complete a certified batterer's intervention program unless, upon good cause shown, the court issues specific written findings describing the reasons that batterer's intervention should not be ordered or unless the batterer's intervention program determines that the defendant is not suitable for intervention.

G.L. c. 265, § 15B: Assault with dangerous weapon; victim sixty or older; punishment; subsequent offenses.

(a) Whoever, by means of a dangerous weapon, commits an assault upon a person sixty years or older, shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.

Whoever, after having been convicted of the crime of assault upon a person sixty years or older, by means of a dangerous weapon, commits a second or subsequent such crime, shall be punished by imprisonment for not less than two years. Said sentence shall not be reduced until

one year of said sentence has been served nor shall the person convicted be eligible for probation, parole, furlough, work release or receive any deduction from his sentence for good conduct until he shall have served one year of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to said offender a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of next of kin or spouse; to visit a critically ill close relative or spouse; or to obtain emergency medical services unavailable at said institution. The provisions of section eighty-seven of chapter two hundred and seventy-six relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this subsection.

For the purposes of prosecution, a conviction obtained under subsection (a) of section fifteen A or paragraph (a) of section 18 shall count as a prior criminal conviction for the purpose of prosecution and sentencing as a second or subsequent conviction.

(b) Whoever, by means of a dangerous weapon, commits an assault upon another shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.

G.L. c. 268, § 13B: Intimidation of witnesses, jurors and persons furnishing information in connection with criminal proceedings.

(a) As used in this section, the following words shall have the following meanings unless the context clearly requires otherwise:—

"Investigator", an individual or group of individuals lawfully authorized by a department or agency of the federal government or any political subdivision thereof or a department or agency of the commonwealth or any political subdivision thereof to conduct or engage in an investigation of, prosecution for, or defense of a violation of the laws of the United States or of the commonwealth in the course of such individual's or group's official duties.

"Harass", to engage in an act directed at a specific person or group of persons that seriously alarms or annoys such person or group of persons and would cause a reasonable person or group of persons to suffer substantial emotional distress including, but not limited to, an act conducted by mail or by use of a telephonic or telecommunication

device or electronic communication device including, but not limited to, a device that transfers signs, signals, writing, images, sounds, data or intelligence of any nature, transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system including, but not limited to, electronic mail, internet communications, instant messages and facsimile communications.

(b) Whoever willfully, either directly or indirectly: (i) threatens, attempts or causes physical, emotional or economic injury or property damage to; (ii) conveys a gift, offer or promise of anything of value to; or (iii) misleads, intimidates or harasses another person who is a: (A) witness or potential witness; (B) person who is or was aware of information, records, documents or objects that relate to a violation of a criminal law or a violation of conditions of probation, parole, bail or other court order; (C) judge, juror, grand juror, attorney, victim witness advocate, police officer, correction officer, federal agent, investigator, clerk, court officer, court reporter, court interpreter, probation officer or parole officer; (D) person who is or was attending or a person who had made known an intention to attend a proceeding described in this section; or (E) family member of a person described in this section, with the intent to or with reckless disregard for the fact that it may; (1) impede, obstruct, delay, prevent or otherwise interfere with: a criminal investigation at any stage, a grand jury proceeding, a dangerousness hearing, a motion hearing, a trial or other criminal proceeding of any type or a parole hearing, parole violation proceeding or probation violation proceeding; or an administrative hearing or a probate or family court proceeding, juvenile proceeding, housing proceeding, land proceeding, clerk's hearing, court-ordered mediation or any other civil proceeding of any type; or (2) punish, harm or otherwise retaliate against any such person described in this section for such person or such person's family member's participation in any of the proceedings described in this section, shall be punished by imprisonment in the state prison for not more than 10 years or by imprisonment in the house of correction for not more than 21/2 years or by a fine of not less than $1,000 or more than $5,000 or by both such fine and imprisonment. If the proceeding in which the misconduct is directed at is the investigation or prosecution of a crime punishable by life imprisonment or the parole of a person convicted of a crime punishable by life imprisonment, such person shall be punished by imprisonment in the state prison for not more than 20 years or by imprisonment in the house of corrections for not more than 21/2 years or by a fine of not more than $10,000 or by both such fine and imprisonment.

(c) A prosecution under this section may be brought in the county in which the criminal investigation, trial or other proceeding was being conducted or took place or in the county in which the alleged conduct constituting the offense occurred.

G.L. c. 269, § 10: Carrying dangerous weapons; possession of machine gun or sawed-off shotguns; possession of large capacity weapon or large capacity feeding device.

(a) Whoever, except as provided or exempted by statute, knowingly has in his possession; or knowingly has under his control in a vehicle; a firearm, loaded or unloaded, as defined in section one hundred and twenty-one of chapter one hundred and forty without either:
(1) being present in or on his residence or place of business; or
(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or
(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or
(4) having complied with the provisions of sections one hundred and twenty-nine C and one hundred and thirty-one G of chapter one hundred and forty; or
(5) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; and whoever knowingly has in his possession; or knowingly has under control in a vehicle; a rifle or shotgun, loaded or unloaded, without either:
(1) being present in or on his residence or place of business; or
(2) having in effect a license to carry firearms issued under section one hundred and thirty-one of chapter one hundred and forty; or
(3) having in effect a license to carry firearms issued under section one hundred and thirty-one F of chapter one hundred and forty; or
(4) having in effect a firearms identification card issued under section one hundred and twenty-nine B of chapter one hundred and forty; or
(5) having complied with the requirements imposed by section one hundred and twenty-nine C of chapter one hundred and forty upon ownership or possession of rifles and shotguns; or
(6) having complied as to possession of an air rifle or BB gun with the requirements imposed by section twelve B; shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years, or for not less than 18 months nor more than two and one-half years in a jail or house of correction. The sentence imposed on such person shall not be reduced to less than 18 months, nor suspended, nor shall any person convicted under this subsection be eligible for probation, parole, work release, or furlough or

receive any deduction from his sentence for good conduct until he shall have served 18 months of such sentence; provided, however, that the commissioner of correction may on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, grant to an offender committed under this subsection a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; or to obtain emergency medical or psychiatric service unavailable at said institution. Prosecutions commenced under this subsection shall neither be continued without a finding nor placed on file.

No person having in effect a license to carry firearms for any purpose, issued under section one hundred and thirty-one or section one hundred and thirty-one F of chapter one hundred and forty shall be deemed to be in violation of this section.

The provisions of section eighty-seven of chapter two hundred and seventy-six shall not apply to any person 18 years of age or older, charged with a violation of this subsection, or to any child between ages fourteen and 18 so charged, if the court is of the opinion that the interests of the public require that he should be tried as an adult for such offense instead of being dealt with as a child.

The provisions of this subsection shall not affect the licensing requirements of section one hundred and twenty-nine C of chapter one hundred and forty which require every person not otherwise duly licensed or exempted to have been issued a firearms identification card in order to possess a firearm, rifle or shotgun in his residence or place of business.

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(h)(1) Whoever owns, possesses or transfers a firearm, rifle, shotgun or ammunition without complying with the provisions of section 129C of chapter 140 shall be punished by imprisonment in a jail or house of correction for not more than 2 years or by a fine of not more than $500. Whoever commits a second or subsequent violation of this paragraph shall be punished by imprisonment in a house of correction for not more than 2 years or by a fine of not more than $1,000, or both. Any officer authorized to make arrests may arrest without a warrant any person whom the officer has probable cause to believe has violated this paragraph.

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(n) Whoever violates paragraph (a) or paragraph (c), by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished by imprisonment in the house of correction for not

more than 21/2 years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c).

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G.L. c. 269, § 12E: Discharge of a firearm within 500 feet of a dwelling or other building in use; exceptions.

Section 12E. Whoever discharges a firearm as defined in section one hundred and twenty-one of chapter one hundred and forty, a rifle or shotgun within five hundred feet of a dwelling or other building in use, except with the consent of the owner or legal occupant thereof, shall be punished by a fine of not less than fifty nor more than one hundred dollars or by imprisonment in a jail or house of correction for not more than three months, or both. The provisions of this section shall not apply to (a) the lawful defense of life and property; (b) any law enforcement officer acting in the discharge of his duties; (c) persons using underground or indoor target or test ranges with the consent of the owner or legal occupant thereof; (d) persons using outdoor skeet, trap, target or test ranges with the consent of the owner or legal occupant of the land on which the range is established; (e) persons using shooting galleries, licensed and defined under the provisions of section fifty-six A of chapter one hundred and forty; and (f) the discharge of blank cartridges for theatrical, athletic, ceremonial, firing squad, or other purposes in accordance with section thirty-nine of chapter one hundred and forty-eight.

G.L. c. 276, § 58A: Conditions for release of persons accused of certain offenses involving physical force or abuse; hearing; order; review.

(1) The commonwealth may move, based on dangerousness, for an order of pretrial detention or release on conditions for a felony offense that has as an element of the offense the use, attempted use or threatened use of physical force against the person of another or any other felony that, by its nature, involves a substantial risk that physical force against the person of another may result, including the crimes of burglary and arson whether or not a person has been placed at risk thereof, or a violation of an order pursuant to section 18, 34B or 34C of chapter 208, section 32 of chapter 209, section 3, 4 or 5 of chapter 209 A or section 15 or 20 of chapter 209C, or arrested and charged with a misdemeanor or felony involving abuse as defined in section 1 of said chapter 209A or while an order of protection issued under said chapter 209A was in effect against such person, an offense

for which a mandatory minimum term of 3 years or more is prescribed in chapter 94C, arrested and charged with a violation of section 13B of chapter 268 or a charge of a third or subsequent violation of section 24 of chapter 90 within 10 years of the previous conviction for such violation, or convicted of a violent crime as defined in said section 121 of said chapter 140 for which a term of imprisonment was served and arrested and charged with a second or subsequent offense of felony possession of a weapon or machine gun as defined in section 121 of chapter 140, or arrested and charged with a violation of paragraph (a), (c) or (m) of section 10 of chapter 269, section 112 of chapter 266 or section 77 or 94 of chapter 272; provided, however, that the commonwealth may not move for an order of detention under this section based on possession of a large capacity feeding device without simultaneous possession of a large capacity weapon; or arrested and charged with a violation of section 10G of said chapter 269.

(2) Upon the appearance before a superior court or district court judge of an individual charged with an offense listed in subsection (1) and upon the motion of the commonwealth, the judicial officer shall hold a hearing pursuant to subsection (4) issue an order that, pending trial, the individual shall either be released on personal recognizance without surety; released on conditions of release as set forth herein; or detained under subsection (3).

If the judicial officer determines that personal recognizance will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person—

(A) subject to the condition that the person not commit a federal, state or local crime during the period of release; and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community that the person—

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode or travel;

(v) avoid all contact with an alleged victim of the crime and with any potential witness or witnesses who may testify concerning the offense;
(vi) report on a regular basis to a designated law enforcement agency, pretrial service agency, or other agency;
(vii) comply with a specified curfew;
(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;
(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, without a prescription by a licensed medical practitioner;
(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency and remain in a specified institution if required for that purpose;
(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial officer may require;
(xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;
(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and
(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.
The judicial officer may not impose a financial condition that results in the pretrial detention of the person.
The judicial officer may at any time amend the order to impose additional or different conditions of release.
Participation in a community corrections program pursuant to chapter 211F may be ordered by the court or as a condition of release; provided, however, that the defendant shall consent to such participation.
(3) If, after a hearing pursuant to the provisions of subsection (4), the district or superior court justice finds by clear and convincing evidence that no conditions of release will reasonably assure the safety of any

other person or the community, said justice shall order the detention of the person prior to trial. A person detained under this subsection shall be brought to a trial as soon as reasonably possible, but in absence of good cause, the person so held shall not be detained for a period exceeding 120 days by the district court or for a period exceeding 180 days by the superior court excluding any period of delay as defined in Massachusetts Rules of Criminal Procedure Rule 36(b)(2). A justice may not impose a financial condition under this section that results in the pretrial detention of the person. Nothing in this section shall be interpreted as limiting the imposition of a financial condition upon the person to reasonably assure his appearance before the courts.

(4) When a person is held under arrest for an offense listed in subsection (1) and upon a motion by the commonwealth, the judge shall hold a hearing to determine whether conditions of release will reasonably assure the safety of any other person or the community.

The hearing shall be held immediately upon the person's first appearance before the court unless that person, or the attorney for the commonwealth, seeks a continuance. Except for good cause, a continuance on motion of the person may not exceed seven days, and a continuance on motion of the attorney for the commonwealth may not exceed three business days. During a continuance, the individual shall be detained upon a showing that there existed probable cause to arrest the person. At the hearing, such person shall have the right to be represented by counsel, and, if financially unable to retain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information. Prior to the summons of an alleged victim, or a member of the alleged victim's family, to appear as a witness at the hearing, the person shall demonstrate to the court a good faith basis for the person's reasonable belief that the testimony from the witness will be material and relevant to support a conclusion that there are conditions of release that will reasonably assure the safety of any other person or the community. The rules concerning admissibility of evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing and the judge shall consider hearsay contained in a police report or the statement of an alleged victim or witness. The facts the judge uses to support findings pursuant to subsection (3), that no conditions will reasonably assure the safety of any other person or the community, shall be supported by clear and convincing evidence. In a detention order issued pursuant to the provisions of said subsection (3) the judge shall (a) include written

findings of fact and a written statement of the reasons for the detention; (b) direct that the person be committed to custody or confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentence or being held in custody pending appeal; and (c) direct that the person be afforded reasonable opportunity for private consultation with his counsel. The person may be detained pending completion of the hearing. The hearing may be reopened by the judge, at any time before trial, or upon a motion of the commonwealth or the person detained if the judge finds that: (i) information exists that was not known at the time of the hearing or that there has been a change in circumstances and (ii) that such information or change in circumstances has a material bearing on the issue of whether there are conditions of release that will reasonably assure the safety of any other person or the community.

(5) In his determination as to whether there are conditions of release that will reasonably assure the safety of any other individual or the community, said justice, shall, on the basis of any information which he can reasonably obtain, take into account the nature and seriousness of the danger posed to any person or the community that would result by the person's release, the nature and circumstances of the offense charged, the potential penalty the person faces, the person's family ties, employment record and history of mental illness, his reputation, the risk that the person will obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror, his record of convictions, if any, any illegal drug distribution or present drug dependency, whether the person is on bail pending adjudication of a prior charge, whether the acts alleged involve abuse as defined in section one of chapter two hundred and nine A, or violation of a temporary or permanent order issued pursuant to section eighteen or thirty-four B of chapter two hundred and eight, section thirty-two of chapter two hundred and nine, sections three, four or five of chapter two hundred and nine A, or sections fifteen or twenty of chapter two hundred and nine C, whether the person has any history of orders issued against him pursuant to the aforesaid sections, whether he is on probation, parole or other release pending completion of sentence for any conviction and whether he is on release pending sentence or appeal for any conviction; provided, however, that if the person who has attained the age of 18 years is held under arrest for a violation of an order issued pursuant to section 18 or 34B of chapter 208, section 32 of chapter 209, section 3, 4 or 5 of chapter 209A or section 15 or 20 of chapter 209C or any act that would constitute abuse, as defined in section 1 of said chapter 209A, or

a violation of sections 13M or 15D of chapter 265, said justice shall make a written determination as to the considerations required by this subsection which shall be filed in the domestic violence record keeping system.

(6) Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

(7) A person aggrieved by the denial of a district court justice to admit him to bail on his personal recognizance with or without surety may petition the superior court for a review of the order of the recognizance and the justice of the district court shall thereupon immediately notify such person of his right to file a petition for review in the superior court. When a petition for review is filed in the district court or with the detaining authority subsequent to petitioner's district court appearance, the clerk of the district court or the detaining authority, as the case may be, shall immediately notify by telephone, the clerk and probation officer of the district court, the district attorney for the district in which the district court is located, the prosecuting officer, the petitioner's counsel, if any, and the clerk of courts of the county to which the petition is to be transmitted. The clerk of the district court, upon the filing of a petition for review, either in the district court or with the detaining authority, shall forthwith transmit the petition for review, a copy of the complaint and the record of the court, including the appearance of the attorney, if any is entered, and a summary of the court's reasons for denying the release of the defendant on his personal recognizance with or without surety to the superior court for the county in which the district court is located, if a justice thereof is then sitting, or to the superior court of the nearest county in which a justice is then sitting; the probation officer of the district court shall transmit forthwith to the probation officer of the superior court, copies of all records of the probation office of said district court pertaining to the petitioner, including the petitioner's record of prior convictions, if any, as currently verified by inquiry of the commissioner of probation. The district court or the detaining authority, as the case may be, shall cause any petitioner in its custody to be brought before the said superior court within two business days of the petition having been filed. The district court is authorized to order any officer authorized to execute criminal process to transfer the petitioner and any papers herein above described from the district court or the detaining authority to the superior court, and to coordinate the transfer of the petitioner and the papers by such officer. The petition for review shall constitute authority in the person or officer having custody of the petitioner to transport the petitioner to said superior court without the

issuance of any writ or other legal process; provided, however, that any district or superior court is authorized to issue a writ of habeas corpus for the appearance forthwith of the petitioner before the superior court. The superior court shall in accordance with the standards set forth in section fifty-eight A, hear the petition for review under section fifty-eight A as speedily as practicable and in any event within five business days of the filing of the petition. The justice of the superior court hearing the review may consider the record below which the commonwealth and the person may supplement. The justice of the superior court may, after a hearing on the petition for review, order that the petitioner be released on bail on his personal recognizance without surety, or, in his discretion, to reasonably assure the effective administration of justice, make any other order of bail or recognizance or remand the petitioner in accordance with the terms of the process by which he was ordered committed by the district court.
(8) If after a hearing under subsection (4) detention under subsection (3) is ordered or pretrial release subject to conditions under subsection (2) is ordered, then: (A) the clerk shall immediately notify the probation officer of the order; and (B) the order of detention under subsection (3) or order of pretrial release subject to conditions under subsection (2) shall be recorded in (i) the defendant's criminal record as compiled by the commissioner of probation under section 100 and (ii) the domestic violence record keeping system.

Mass. R. Crim. P. 12: Pleas and Plea Agreements.

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(b) Plea Discussions; Pleas Without Plea Agreement and With Plea Agreement.

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(6) Pleas reserving appellate review. With the written agreement of the prosecutor, the defendant may tender a plea of guilty or an admission to sufficient facts while reserving the right to appeal any ruling or rulings that would, if reversed, render the Commonwealth's case not viable on one or more charges. The written agreement must specify the ruling or rulings that may be appealed, and must state that reversal of the ruling or rulings would render the Commonwealth's case not viable on one or more specified charges. The judge, in an exercise of discretion, may refuse to accept a plea of guilty or an admission to sufficient facts reserving the right to appeal. If the defendant prevails in whole or in part on appeal, the defendant may withdraw the guilty plea or the admission to sufficient facts on any of the specified charges. If the defendant withdraws the guilty plea or the admission to

sufficient facts, the judge shall dismiss the complaint or indictment on those charges, unless the prosecutor shows good cause to do otherwise. The appeal shall be governed by the Massachusetts Rules of Appellate Procedure, provided that a notice of appeal is filed within thirty days of the acceptance of the plea.

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CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the rules of court that pertain to the filing of briefs, including those rules specified in Mass. R. App. P. 16(k) and Mass. R. App. P. 20(a)(2)(F). The brief is in 12-point Century Schoolbook and contains 6,516 words.

/s/ Mackenzie Slyman
MACKENZIE SLYMAN
Assistant District Attorney

COMMONWEALTH'S CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that I have today made service on the defendant by e-filing a copy of the brief and record appendix and sending it to:

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Respectfully submitted
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April 30, 2024

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-13600

COMMONWEALTH OF MASSACHUSETTS,
Appellee
V.

ANTHONY GOVAN,
Appellant

COMMONWEALTH'S BRIEF ON APPEAL FROM AN ORDER OF THE SUFFOLK SUPERIOR COURT

SUFFOLK COUNTY
