

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss

No. SJC-13600

Commonwealth
(Appellant)

v.

Anthony Govan,
(Defendant-Appellee)

ON APPEAL FROM AN ORDER OF THE SUFFOLK SUPERIOR COURT
(FOLLOWING A CONDITIONAL PLEA)

Defendant-Appellant's Opening Brief & Addendum

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STATEMENT OF ISSUES FOR REVIEW

1. In *Commonwealth v. Rodderick*, the Supreme Judicial Court found that the imposition of GPS monitoring upon a probationer did not advance a legitimate government interest, and was therefore unconstitutional, when the Commonwealth did not have a valid address for the alleged victim of the crime and could not delineate a meaningful exclusion zone that GPS monitoring would help to enforce. Where GPS was imposed upon Mr. Govan as a condition of *pretrial* release, and like in *Rodderick*, the Commonwealth did not have an address for the victim and thus could not demonstrate that the imposition of GPS monitoring would advance any legitimate government interest, did the motion judge err in denying Mr. Govan's motion to suppress evidence recovered from his GPS device?

2. The particularity requirements of the Fourth Amendment and art. 14 forbid "general warrants" and overbroad searches. Was the imposition of GPS monitoring upon Mr. Govan akin to the execution of an overbroad "general warrant" where it tracked Mr. Govan's every movement indefinitely and provided the government with a vast amount of private information that was far greater than necessary to advance any legitimate government interest in monitoring his pretrial release?

3. Consent will validate a warrantless search only when the Commonwealth can demonstrate that the consent given was unambiguous as to the scope of the search conducted. Where the judge who imposed GPS upon Mr. Govan never explained or discussed the extent of the information that his GPS device would record, did the Commonwealth demonstrate that Mr. Govan unambiguously consented to the tracking, storage and later retrieval of his location data?

4. Was the warrantless seizure of Mr. Govan's GPS data unlawful where police had no reason to request Mr. Govan's particular GPS information, and where the request was made six days after the shooting with no apparent exigent circumstances?

STATEMENT OF THE CASE

On August 18, 2020, Anthony Govan was arraigned in Dorchester District Court on several charges stemming from a shooting that occurred on August 1, 2020. On February 26, 2021, a Suffolk County grand jury returned a four count indictment charging the following: County One, unlicensed possession of a firearm in violation of G.L. c. 269 §10(a), with a prior conviction for a crime of violence or serious drug offense in violation of G.L. c. 269 §10G; Count Two, unlawful possession of ammunition, in violation of G.L. c. 269 §10(h); Count Three, carrying a loaded firearm, in violation of G.L. c. 269 §10(n); and Count Four, assault and battery with a firearm, in violation of G.L. c. 265 §15B(b).

On December 28, 2022, Mr. Govan filed a motion to suppress evidence recovered from a GPS device that he was wearing at the time of the shooting, which he had been ordered to wear as a condition of pretrial release in a prior unrelated case from the Roxbury District Court. On February 14, 2023, the Honorable Catherine Ham held an evidentiary hearing on the motion to suppress, and on February 28, 2023, Judge Ham issued a decision denying the motion. On March

28, 2023, pursuant to M. R. Crim P. 12(b)(6) and with the Commonwealth's consent, Mr. Govan entered a conditional plea of guilty on counts one, two and four, and reserved his right to pursue an appeal of the denial of the motion to suppress. Judge Ham accepted the conditional plea and imposed a sentence of three years' to three years' and one days' incarceration in the state prison on count one, followed by one year of probation on counts two and four. Count three was dismissed at the request of the Commonwealth. Following his conditional plea, on April 3, 2023, Mr. Govan filed a timely notice of appeal to the denial of his motion to suppress and the appeal was docketed in this Court on July 12, 2023.¹

¹ The execution of Mr. Govan's sentence was stayed until August 28, 2023.

STATEMENT OF FACTS²

(a) Facts relating to the current charges against Mr. Govan

A shooting occurred on August 1, 2020, in the vicinity of 535 Columbia Road in Boston. No one was struck or injured, and there was no evidence that anyone called 911, but "shot-spotter" technology reported the event to police, who responded. (T.14-15, 39-40; R.A.41-42,68-69) (Decision on Motion to Suppress GPS Evidence; Add.44, ¶15).³ Police later recovered surveillance footage from the area which showed one of the shooters fleeing the scene in a black Chevy Malibu, but no significant information was gathered regarding the identity of the shooter or the owner of the black Chevy Malibu. (T.40-41; R.A.67-68) (Add.44, ¶¶15-24).

² The facts are taken from the evidence developed at the motion to suppress hearing on February 14, 2023, and the motion judges' subsequent findings of fact.

³ "Add.__" refers to the paginated Addendum attached to this brief. The lower court's Decision on Motion to Suppress GPS Evidence is included in the Addendum, and where possible, the numbered paragraphs in the decision are additionally marked "¶__." "R.A.__" refers to the Record Appendix filed herewith, and "T.__" refers to the transcript of the motion to suppress hearing, which is included in the Record Appendix.

On August 7, 2020, approximately six days after the shooting, Detective Kevin Plunkett, who was the lead detective assigned to the case, sent an email to the division of electronic monitoring at the Probation Department requesting the names of all persons monitored via an electronic monitoring or GPS tracking device who were near 535 Columbia Road at the time the shooting occurred. (Add.45, ¶26; R.A. 127). Detective Plunkett did not seek a warrant prior to making the request or reviewing the response, and at the time of the request, police did not have any leads as to the identity of the shooter in the black Chevy Malibu. (T.41-43; R.A.68-70). Upon receiving the response from the Probation Department, Detective Plunkett identified Mr. Govan as the only person who was wearing a GPS device and in the area at the time of the shooting. (Add.45, ¶¶26-29). Again without seeking a warrant, Detective Plunkett obtained and reviewed more detailed records of Mr. Govan's GPS location information shortly before and after the shooting, and was able to determine that Mr. Govan's movements appeared to track exactly the movements of the black Malibu that were captured on video footage from various locations. (Add.45, ¶¶27-29; T.36,

R.A.63). The GPS data also showed Mr. Govan stopping at the Bromley Housing development, and Detective Plunkett then obtained video footage from there that showed the black Malibu parking, and a person matching the shooter exiting and walking around the development in a matter that also matched Mr. Govan's GPS coordinates. (T.36-37, R.A.63-64; R.A 128-129, 133-143). From that information, Detective Plunkett identified Mr. Govan as the shooter in the black Malibu and obtained a warrant for his arrest. (Add.45, ¶¶26-29; T.43-45, R.A.70-72).

(b) Facts relating to case for which Mr. Govan was initially placed on GPS monitoring

The GPS device that Mr. Govan was wearing on August 1, 2020, was ordered as a condition of pretrial release in an unrelated case from the Roxbury Division of the Boston Municipal Court.⁴ (Add.42, ¶1; R.A. 104-126). That case stemmed from an incident that occurred on December 26, 2019. (Add.43, ¶3).

⁴ Recordings of the relevant 58A hearing were submitted as Exhibit 1 at the hearing on the motion to suppress. The relevant portions are located at Audio File #2, from 22:31-38:08, and Audio File #1, which occurs later in the day, at 0:00 - 2:00.

According to the police reports,⁵ the alleged victims, Chantey Pagan and her fifteen-year-old daughter, reported to police that at approximately 12:30 AM, Ms. Pagan and Mr. Govan had a "heated argument" at Ms. Pagan's apartment at 30 Bickford Street in Jamaica Plain. (Add.43, ¶3; R.A.117). Ms. Pagan and her daughter reported that Mr. Govan made threatening remarks that he would "shoot her family's face off" and "you can testify against me and get killed or leave it," and Ms. Pagan reported that at some point Mr. Govan took a gun from his waistband, which he placed on the windowsill. (Add.43, ¶4; R.A.117-118). Both witnesses reported hearing the gun discharge, but neither saw it occur, and it was not clear whether the discharge was intentional or accidental. (Add.43, ¶5; R.A.118). Following the discharge of the firearm, Ms. Pagan and her daughter left the apartment and Mr. Govan followed them to Egleston Square, where Mr. Govan allegedly grabbed Ms. Pagan's jacket collar and twisted it, breaking a zipper. (Add.43, ¶6; R.A.118). Mr. Pagan and her daughter then walked to her ex-

⁵ The application for the complaint, which included a police report, was admitted at Exhibit 2 at the hearing on the motion to suppress. (R.A.114-119).

husband's house, and Mr. Govan returned to Bickford Street, where he continued to text Ms. Pagan, asking her to return home and telling her that he had gotten rid of the firearm. (Add.43, ¶6; R.A.118).

Mr. Govan was not arrested on the scene. (Add.43, ¶8). A criminal complaint was issued on December 30, 2019, charging Mr. Govan with carrying a firearm without a license, discharging a firearm within 500 feet of a building, assault and battery on a family/household member, and witness intimidation, and a warrant issued for Mr. Govan's arrest. (Add.42-43, ¶¶1,8; R.A.113-114).

At some point shortly before July 14, 2020, Mr. Govan was stopped for a motor vehicle infraction and arrested on the open warrant. (Add.43, ¶8). Bail was set at \$1,000 by the bail commissioner at the jail. (Add.43, ¶8). Mr. Govan posted the bail and then was released from the jail. (Add.43, ¶8). On July 14, 2020, he voluntarily appeared at the Roxbury District Court for his arraignment on the charges in front of Judge Delvechhio. (Add.42-43, ¶¶1,8). At the initial appearance, the Commonwealth moved to hold Mr. Govan on dangerousness pursuant to G.L. c. 276 § 58A, and

requested a three-day continuance to July 17, 2020.
(Add.42-43, ¶¶2,9).

Despite his voluntary appearance in court, Mr. Govan was held in custody until the scheduled dangerousness hearing on July 17, 2020. (Add.43, ¶9). On that date, the Commonwealth withdrew its motion to hold him as dangerous under §58A, and the parties reported that they had reached an agreement to conditions of release which included, "stay away, no contact, no abuse of Pagan, GPS, and no possession of a firearm." (Add.43, ¶¶9,10).⁶ The prosecutor informed the judge that the Commonwealth had contact with Ms. Pagan on the day of Mr. Govan's arraignment, and that Ms. Pagan stated that she had not had any contact with Mr. Govan since the night of the incident and she had left the apartment where the event occurred. (Add.43, ¶11). The prosecutor also reported that Ms. Pagan had been informed of her right to pursue a restraining order but did not do so, and had not responded to

⁶ Note that the motion judge found that "the Commonwealth stated that there were conditions or release which would protect the safety of the community," (Add.43, ¶9), but the Commonwealth only listed the agreed upon conditions, and never made that specific assertion. See Ex. 1, Recording at 0:23:00 - 0:23:24.

several follow-up contact efforts. (Ex. 1, Recording at 0:23:00 - 0:23:24). The judge asked about what exclusion zone could be imposed, and the prosecutor stated that Ms. Pagan had not shared her address, but that if she did, the Commonwealth would ask for the address to be impounded. (Add.43, ¶12). Mr. Govan did not object to the future impoundment order. (Id.)

The judge ultimately set Mr. Govan's bail at the \$1,000 Mr. Govan had initially posted, and ordered the agreed upon conditions. (Add.44, ¶¶13-14). The judge did not set any exclusion zone, but added that Mr. Govan stay away from Ms. Pagan's new address if it became known to him. (Add.44, ¶13; R.A. 125).

SUMMARY OF THE ARGUMENT

Both the initial imposition of GPS monitoring upon Mr. Govan as a condition of his pretrial release, as well as the storage and later recovery of his GPS location data, constitute warrantless searches and seizures.⁷ The Commonwealth failed to meet its burden of demonstrating the reasonableness of these searches and seizures because (1) subjecting Mr. Govan to GPS monitoring did not sufficiently advance a legitimate

⁷ *Commonwealth v. Norman*, 484 Mass. 330, 335 (2020).

government interest where, as in *Commonwealth v. Rodderick*, the Commonwealth could not identify any exclusion zone that the GPS device would help monitor,⁸ (Arg. *infra* at 16-27); (2) the vast amount of information tracked and stored by Mr. Govan's GPS device was far broader than necessary to serve any legitimate government interest, and its imposition was akin to an illegal "general warrant" resulting in an overbroad search,⁹ (Arg. *infra* at 28-32); (3) Mr. Govan did not unambiguously consent to the extensive scope of the location data that the GPS device would collect and store, nor did he consent to the potential seizure and review of that information in connection with an unanticipated and unrelated future criminal charge,¹⁰ (Arg. *infra* at 32-36); and (4) Detective Plunkett's later seizure of Mr. Govan's location data six days after the shooting was not justified by probable cause to search *Mr. Govan's* particular location data, nor were there any exigent circumstances justifying the

⁸ *Commonwealth v. Roderick*, 490 Mass. 669, 673 (2022).

⁹ *Commonwealth v. Garden*, 451 Mass. 43, 51 (2008); *Riley v. California*, 573 U.S. 373, 403 (2014).

¹⁰ *See Commonwealth v. Ortiz*, 478 Mass. 820, 825-26 (2018)(consent will not justify a warrantless search unless it is unambiguous as to the scope of the search).

warrantless nature of the search and seizure.¹¹ (Arg. *infra* at 36-39).

ARGUMENT

I. The Commonwealth failed to meet its burden of demonstrating that imposing GPS as a condition of pretrial release served a legitimate government interest in a manner that outweighed the substantial privacy intrusion that it caused.

In *Commonwealth v. Norman*, the Supreme Judicial Court held that the imposition of GPS monitoring as a condition of pretrial release is a search under art. 14 and the Fourth Amendment.¹² As with any warrantless search, the imposition of GPS monitoring, as well as the recovery of the data it stores, is “presumptively unreasonable” and therefore presumptively unconstitutional.¹³ The Commonwealth bears the burden of demonstrating that the search “falls within a

¹¹ See *Commonwealth v. Barrett*, 97 Mass. App. Ct. 437, 440 (2020).

¹² *Commonwealth v. Norman*, 484 Mass. 330, 335 (2020). *Norman* followed the United States Supreme Court’s ruling in *Grady v. North Carolina*, 575 U.S. 306, 309 (2015) holding that the imposition of GPS monitoring on a sex offender constituted a search under the Fourth Amendment, and the SJC’s decision in *Commonwealth v. Feliz*, 481 Mass. 689 (2019) (*Feliz I*), holding that the imposition of GPS as a condition of probation is a search under Article 14 of the Massachusetts Declaration of Rights, despite a probationer’s diminished expectations or privacy.

¹³ *Norman*, 484 Mass. at 335 quoting *Commonwealth v. White*, 475 Mass. 583, 588 (2016).

narrow class of permissible exceptions to the warrant requirement.”¹⁴

A court determines the propriety of a search by “balanc[ing] the intrusiveness of the police activities at issue against any legitimate governmental interests that these activities serve.”¹⁵ The imposition of pretrial GPS monitoring is permissible only where it is specifically authorized by statute, and only where “the totality of the circumstances”¹⁶ demonstrate that it will serve a legitimate government interest in a manner that “outweigh[s] the level of intrusion” caused by the monitoring.¹⁷ The analysis must be case-specific, and requires the Commonwealth to demonstrate that there are “particularized reasons for imposing GPS monitoring on this defendant” which outweigh the substantial privacy intrusion.¹⁸

¹⁴ *Norman*, 484 Mass. at 335, citing *Commonwealth v. Ferreira*, 481 Mass. 641, 655 (2019).

¹⁵ *Norman*, 484 Mass. at 335 citing *Commonwealth v. Moore*, 473 Mass. 481 (2016).

¹⁶ *Roderick*, 490 Mass. 669, 673 (2022).

¹⁷ *Norman*, 484 Mass. at 335-336, 339.

¹⁸ *Feliz I*, 481 Mass. at 705 (emphasis supplied).

On appeal, this Court accepts any facts found by the judge who saw and heard the motion below, unless those findings are clearly erroneous, but will consider the constitutionality of the search, and whether the Commonwealth met its burden, *de novo*.¹⁹

1. Mr. Govan's privacy interests and the high level of intrusion caused by GPS.

The level of intrusion caused by GPS monitoring is significant. As the Supreme Judicial Court explained in *Commonwealth v. Roderick*:

To effectuate GPS monitoring, the probation department must attach a GPS device to the defendant's person, in such a way that the defendant cannot remove the device; this significantly burdens the defendant's liberty interest in bodily autonomy and integrity... Because of its visibility and cultural salience, the device serves as a "modern-day 'scarlet letter,'" ... that may "expos[e] the [defendant] to persecution or ostracism" ... Moreover, the device necessarily requires some amount of maintenance, which at best is an inconvenience and at worst is a threat to the defendant's livelihood ... In addition, despite an individual's best efforts to comply with the strictures of GPS monitoring, [maintenance] issues can lead to the issuance of arrest warrants, thereby subjecting the individual to the indignity and dangers of an arrest.

The information exposed through GPS monitoring is uniquely revealing. GPS monitoring "provides the government with a 'detailed, encyclopedic, and effortlessly compiled' log of the individual's movements" ... This "data is stored indefinitely," with little oversight as to when and how it may be examined ... Such extensive location information provides the government with "a highly detailed

¹⁹ *Roderick*, 490 Mass. at 673.

profile, not simply of where [the defendant] goes], but by easy inference, of [his or her] associations -- political, religious, amicable and amorous, to name only a few -- and the pattern of [his or her] professional and avocational pursuits" ... This, in turn, "'chills associational and expressive freedoms[,]'" potentially 'alter[ing] the relationship between citizen and government in a way that is inimical to democratic society'"²⁰

In *Commonwealth v. Feliz*, the SJC described GPS monitoring as "singularly punitive" when imposed as a post-conviction condition of probation.²¹ This characterization is particularly important when considering the propriety of imposing GPS upon a person, like Mr. Govan, who has not been convicted and must be presumed innocent.

2. The Government's interest in imposing GPS.

In assessing the government's interest in imposing GPS as a condition of pretrial release, a reviewing court must look first to whether the imposition was authorized by statute. "When a search, such as GPS monitoring, is conducted as a pretrial condition of release, the only legitimate justifications for doing so are those authorized by

²⁰ *Roderick*, 490 Mass. at 666-67 (internal citations omitted).

²¹ *Feliz I*, 481 Mass. at 698.

statute; courts do not have inherent authority to impose pretrial conditions of release."²²

As explained in *Norman*, under the bail statute applicable here, there are only three authorized justifications for imposing GPS monitoring as a condition of pretrial release: (1) to ensure that the defendant appears in court; (2) to restrict contact with victims or witnesses in order to "preserve the integrity of the judicial process", and (3) to provide the "safety of the alleged victim, any other individual or the community[,]" in domestic abuse cases.²³

²² *Norman*, 484 Mass. at 336.

²³ *Norman* at 336-37; G.L. c. 276 § 58. Notably, General Laws c. 276 §§ 42A, 57 & 58 all allow for the imposition of conditions of release "in order to ensure the appearance of the person before the court and the safety of the alleged victim, any other individual or the community[,]" in cases where domestic violence is charged. See G.L. c. 276 § 42A, second par.; G.L. c. 276 § 57, second par.; G.L. c. 276 §58, third par. Chapter 276 §58A also allows courts to impose conditions that "will reasonably assure the appearance of the person as required and the safety of any other person and the community of that the person" for certain felonies involving the use or threatened use of force, but only where the court, after an evidentiary hearing, makes a finding that the defendant's release on personal recognizance will "endanger the safety of another person or the community." G.L. c. 276 § 58A. Because the Commonwealth withdrew its application to hold Mr. Govan under 58A, Mr. Govan's potential danger to the

Importantly, “[t]he extent of the government’s interest in imposing GPS monitoring turns on the extent to which the search advances a legitimate government interest.”²⁴ The Commonwealth must specifically “establish how GPS monitoring, when viewed as a search, furthers its interests,”²⁵ and, as noted above, there must “particularized reasons for imposing GPS monitoring on this defendant.”²⁶ Thus, it is not enough for the government to show that GPS monitoring is authorized by statute and that the defendant poses a threat to an identified person; rather, the government must show specifically how, under the particular circumstances of the case at hand, the imposition of GPS monitoring will actually address and lessen the threat that the defendant poses.²⁷

community could not be considered as a factor in imposing GPS.

²⁴ *Commonwealth v. Roderick*, 490 Mass. 669, 673 (2022), citing *Feliz I*, 481 Mass. at 705.

²⁵ *Id.*

²⁶ *Feliz I*, 481 Mass. at 701 (emphasis supplied).

²⁷ See *Roderick*, 490 Mass. 669 (imposition of GPS as a condition of probation for a rape conviction did not advance legitimate goal of protecting victim where the government did not know victim’s address and could not establish an appropriate exclusion zone).

3. In this case, the Commonwealth could not sufficiently demonstrate that the imposition of GPS advanced a legitimate government interest where, as in *Commonwealth v. Rodderick*, the alleged victim refused to provide her address and no meaningful exclusion zone could be established.

In this case, Mr. Govan concedes that because he was charged with a count of domestic violence, the imposition of GPS monitoring was statutorily authorized under the bail statute, and the Commonwealth had a legitimate interest in protecting the alleged victim and her daughter. Nevertheless, because the Commonwealth did not know the alleged victim's address, and therefore could not establish any functional or meaningful exclusion zone, the Commonwealth cannot demonstrate that the imposition of GPS upon Mr. Govan advanced its interest in protecting the alleged victim or any other legitimate government interest.

On this point, the Supreme Judicial Court's decision in *Rodderick* is dispositive. There, the defendant was convicted after trial of rape and the judge imposed four years' incarceration followed by three years' probation with GPS monitoring and an exclusion zone of half a mile around the victim's home

as a condition of his probation.²⁸ Prior to his release on probation, the defendant moved to vacate the GPS condition pursuant to *Commonwealth v. Feliz*,²⁹ and at a hearing, the Commonwealth reported that it did not know where the victim was living at the time.³⁰ The hearing judge found the imposition of GPS reasonable and ordered the Commonwealth to continue its efforts to find the victim's address. Subsequently, but still prior to the defendant's release, the Commonwealth did locate the victim's address and configured the exclusion zone accordingly. On appeal, the SJC found the judge's imposition of GPS was not justified, despite the defendant's lessened expectation of privacy as a probationer convicted of rape and the government's legitimate interest in protecting the safety of the victim. The SJC held that "GPS monitoring furthers this interest [in protecting the victim] only where the GPS device is configured effectively to notify authorities should a defendant enter prohibited areas," and noted that "in order to rely upon a purported interest in enforcing

²⁸ *Id.* at 671.

²⁹ *Feliz I*, supra, 481 Mass. 689 (2019).

³⁰ *Roderick*, 490 Mass. at 671.

an exclusion zone, the government must establish that the device will be configured effectively to contain such a zone.”³¹

The SJC also rejected the Commonwealth’s claim that it had cured any error because, after the hearing but before the defendant’s release, it had discovered the victim’s residence and configured the exclusion zone accordingly.³² In so doing, the SJC held that the relevant question was “whether the search was justified at its inception, not whether it was justified post hoc” and further held that the motion judge could “not infer or assume the existence of facts that might justify the intrusion” without having been presented with evidence to support such a finding.³³ Thus, in *Roderick*, the SJC found the imposition of GPS as a condition of his probation was not warranted.

Likewise in this case, the government did not know the alleged victim’s address at the time the GPS monitoring was imposed, and the judge could not assume that an effective exclusion zone could or would be

³¹ *Id.*

³² *Id.* at 678.

³³ *Id.* (internal citations omitted).

created in the future. Applying *Roderick*, the interest that the government had in protecting the alleged victim could not justify imposition of GPS monitoring upon Mr. Govan.³⁴

In denying the motion below, the motion judge attempted to distinguish *Rodderick* on grounds that there the Commonwealth had had no contact with the alleged victim prior to the hearing, while here, the Commonwealth had some contact with the victim, who declined to provide her address to the Commonwealth, citing her concern for her safety.³⁵ But the ruling in

³⁴ Moreover, the government's interests were not as strong as they were in *Rodderick*, where Rodderick had been convicted of raping the victim, while Mr. Govan was accused of a non-injurious assault, and was not convicted. In addition, Rodderick had been in jail for four years, presumably because of the victim's testimony, and had no track record of staying away from the victim while out of custody, while Mr. Govan had been out of custody and had not attempted to initiate any contact with Ms. Pagan for the six months between the time the crime was reported and the hearing at which GPS was imposed. When Mr. Govan learned of the charges, rather than attempting to contact or pursue Ms. Pagan, he turned himself in to authorities to answer the charges.

³⁵ Add.47. The motion judge's finding that the victim cited safety concerns as a reason for not providing her address is not accurate. A review of the hearing shows that that the Commonwealth never reported that the victim mentioned any safety concerns, but only that she had not provided her address, that she had not had contact with Mr. Govan since the incident and that she did not want to have contact with him. The Commonwealth also reported that

Rodderick did not rely on the Commonwealth's lack of contact with the victim, and the SJC did not find that the Commonwealth's interest in protecting the victim was diminished because of the lack of contact.

Rather, the ruling relied on the finding that the imposition of GPS on the defendant could not advance the government's legitimate interest in protecting the victim where the Commonwealth could not establish a meaningful exclusion zone. The same is true here, regardless of the Commonwealth's level of contact with the victim.

The motion judge also attempted to distinguish *Rodderick* by noting that in Mr. Govan's case "the judge added the condition of stay away from [the alleged victim] and her new home, if he became aware of the new address" and from that concluded, without explanation, that "[t]he GPS served its purpose."³⁶

But again, the motion judge failed to explain *how* GPS could advance or promote the stay away order without

the victim knew about her right to pursue a restraining order and declined to do so. When the judge asked about exclusion zones, both the prosecutor and the judge surmised that the victim would likely ask for an impoundment order, but it was not clear that the victim ever actually made that request or cited any ongoing safety concern. (See Ex. 1).

³⁶ Add.47.

an address, and as *Rodderick* explicitly found, the question is “whether the search was justified at its inception, not whether it was [or could be] justified post hoc.”

Finally, the government cannot rely on a more generalized interest in reducing the defendant’s likelihood to commit a crime or to comply with his obligation to come to court. In *Norman*, the SJC recognized that “while the general specter of government tracking could provide an additional incentive to appear in court on specified dates, the causal link [] is too attenuated and speculative to justify GPS monitoring” without some evidence specific to the case at hand.³⁷ There is no such specific evidence here, where the judge who imposed GPS repeatedly lauded Mr. Govan’s decision to come to court after having initially posted bail before the Commonwealth moved to hold him on dangerousness, and where Mr. Govan had not picked up any new crimes in the several months since the December 2019 event that prompted the charges.³⁸

³⁷ *Norman*, 484 Mass. at 338.

³⁸ Ex. 1 at 0:31:25-32:20; R.A. 125.

In summary, the government failed to establish that imposing GPS would actually advance any legitimate government interest, and therefore cannot demonstrate that the substantial privacy invasion caused by the monitoring was justified.

II. The scope of the information that GPS monitoring tracked and gathered was far broader than necessary to serve any legitimate governmental interest.

Even if the government succeeds in demonstrating that GPS monitoring specifically advances a legitimate government interest, it must still show that the level of intrusion is not broader than necessary to advance that interest. Here, the extent of the information tracked and stored by the GPS device imposed upon Mr. Govan was overly broad.

The permissible bounds of any warrantless search must be appropriately limited in scope. In the case of a traditional search for evidence of a crime in a home, vehicle or on someone's person, it is well understood that even when there is probable cause to search, the search must be limited to "any area, place, or container reasonably capable of containing

the object of the search."³⁹ The same principle holds when a "search" is imposed as a condition of pretrial release. "Reasonableness is the 'touchstone' of art. 14 ... and the Fourth Amendment."⁴⁰ Thus, merely because *some* level monitoring a defendant's real-time location might advance a legitimate government interest in protecting the victim of an alleged domestic assault, that does not permit the government to conduct an unfettered *collection* and *recording* of "'detailed, encyclopedic, and effortlessly compiled' log of the individual's movements."⁴¹

³⁹ *Commonwealth v. Garden*, 451 Mass. 43, 51 (2008) citing *Commonwealth v. Signorine*, 404 Mass. 400, 405 (1989). See e.g. *Garden* (finding that a search of defendant's car trunk exceeded the permissible scope of the search where officer could not reasonably have believed that evidence of crime would be found in the trunk); *Commonwealth v. Prophete*, 443 Mass. 548, 553-54 (2005) (even where a defendant has been lawfully arrested, and even where that arrest is for a drug-related offense, a search pursuant to such an arrest may "progressively extend into a strip (or a visual body cavity) search only if such a search [is] justified by probable cause to believe that the defendant had concealed [contraband] on his person or his clothing that would not otherwise be discovered by the usual search incident to arrest.").

⁴⁰ *Garden*, 451 Mass. at 51, citing *Commonwealth v. Roland R.*, 448 Mass. 278 (2007).

⁴¹ *Roderick*, 490 Mass. at 666-67. It is true that, to date, the SJC seems to have treated GPS monitoring as a "one size fits all" condition, or perhaps more appropriately, a "one size either fits or does not fit," where either the full extent of GPS's intrusiveness is justified, or no monitoring is

Indeed, one of the bedrock principles behind the adoption of the Fourth Amendment was the rejection of "general warrants."⁴² As the Supreme Court explained in *Riley v. California*, "the Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity."⁴³ The Fourth Amendment thus requires that warrants "particularly describ[e] the place to be searched and the persons or things to be seized."⁴⁴ This "makes general searches . . . impossible and prevents the seizure of one thing under

justified. It is, however, obvious that limitations can be placed in advance on the storage, recording or later recovery and use of any real-time location monitoring, and the scope of the search need not be defined by the default settings in place on a standard GPS device. In other words, while the court can use GPS technology to conduct a search, the technology should not dictate the scope of the search. See *Commonwealth v. Johnson*, 481 Mass. 710, 716 (2019) ("privacy rights cannot be left at the 'mercy of advancing technology' but rather must be preserved and protected as new technologies are adopted and applied by law enforcement").

⁴² *Riley v. California*, 573 U.S. 373, 403 (2014).

⁴³ *Id.*

⁴⁴ U.S. Const. amend. IV (emphasis added).

Article 14 of the Massachusetts Declaration of Rights has a similarly provision requiring that "all warrants ...[must be accompanied] with a special designation of the persons or objects of search, arrest or seizure..."

a warrant describing another,"⁴⁵ and it ensures that "[a]s to what is to be taken, nothing is left to the discretion of the officer executing the warrant."⁴⁶

To the extent that GPS monitoring is imposed for one particular purpose, but by virtue of a GPS device's default mechanics the government collects and stores vast amounts of information unrelated to that purpose, the collection of that information runs afoul of the Fourth Amendment's particularity requirement and the parallel requirement that warrantless searches be properly limited in scope. Likewise, the later recovery and search of such information, when done in connection with a criminal investigation that is unrelated to the one for which the GPS was imposed, will also run afoul of the particularity requirement.⁴⁷

In this case, the only reason advanced for placing Mr. Govan on GPS was to protect the alleged victim and her daughter. Recording Mr. Govan's every

⁴⁵ *United States v. Fuccillo*, 808 F.2d 173, 175 (1st Cir. 1987) (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965)).

⁴⁶ *Id.*

⁴⁷ See *Commonwealth v. Augustine*, 467 Mass. 230, 255 (2015) ("government-compelled production of the defendant's CSL records ... constituted a search in the constitutional sense to which the warrant requirement of art. 14 applied").

movement for an indefinite period was far broader than necessary to achieve that goal. In practical effect, the imposition of GPS and the recording of all of Mr. Govan's location data was the equivalent of authorizing and executing an unconstitutional "general warrant."⁴⁸

III. The storage and later search of Mr. Govan's location data was not justified by his agreement to wear a GPS device, where the scope of his consent was at best ambiguous.

The government cannot rely on Mr. Govan's consent to wear a GPS device to justify the storage of all his location data and the later search of the stored information, where Mr. Govan did not unambiguously consent to such a broad search. "A search that is based on consent may not exceed the scope of that consent."⁴⁹ The standard for measuring the scope of

⁴⁸ An overbroad warrant is not cured by a more limited execution of the warrant, and thus the Commonwealth cannot rely on a claim that only a limited amount of location data was later requested by police. See *United States v. Klein*, 565 F.2d 183, 189 (1st Cir. 1977) ("A warrant for 'stolen', 'pirate', or 'illegal' goods, be they watches, drugs, clothing, or tapes does not become sufficiently particular by after the fact explanations as to how these products were differentiated from legal merchandise when the seizures were carried out.").

⁴⁹ *Commonwealth v. Ortiz*, 478 Mass. 820, 824 (2018). See also *Commonwealth v. Cantalupo*, 380 Mass. 173, 178 (1980) ("Because consent can legitimize what would otherwise be an unreasonable and illegal search,

consent is "that of 'objective' reasonableness – what would the typical reasonable person have understood by the exchange" during which consent was given.⁵⁰ On this point, "[i]t bears emphasis that the standard is that of a typical reasonable person, not a typical reasonable police officer [or judge]," and "the focus is solely on what a typical reasonable person would understand the scope of the consent to be, based on the words spoken and the context in which they are spoken."⁵¹

To the extent that the exchange during which consent is given leaves any ambiguity as to the scope of the consent, that ambiguity must be resolved in the defendant's favor. The "voluntariness of consent to a search must be unambiguous . . . [and] [a]s a matter of logic and constitutional fairness, the requirement of reasonable clarity must also apply to the scope of the consent."⁵² As the SJC stated in *Commonwealth v. Ortiz*, "[t]he Commonwealth must provide us with more

a search with consent is reasonable and legal only to the extent that the individual has consented").

⁵⁰ *Ortiz*, 478 Mass. at 824, citing *Florida v. Jimeno*, 500 U.S. 248, 251 (1991).

⁵¹ *Ortiz* at 824.

⁵² *Ortiz*, 478 Mass. at 825-826 (internal citations omitted).

than an ambiguous set of facts that leaves us guessing about the meaning of [the] interaction and, ultimately, the [consenting person's] words or actions."⁵³ The scope of any consented-to search may "not extend into the realm of the ambiguous,"⁵⁴ and this is true "especially when the police [or a judge] can easily resolve that ambiguity with a clarifying question."⁵⁵

In this case, the exchange between Mr. Govan and the judge who ordered GPS monitoring did not include any discussion about the scope of the monitoring or what information would be recorded. At best, the exchange was ambiguous and leaves this Court guessing as to whether Mr. Govan's consent to "GPS" included his consent to the full-blown tracking and recording of his every move for the duration of his pretrial release. It is one thing for a person to agree to a form of real-time electronic monitoring where it is understood that if they enter a certain area an alert will go off, or that if they fail to appear in court, their location can be immediately determined. But it

⁵³ *Id.*

⁵⁴ *Id.* at 826.

⁵⁵ *Id.*

is an entirely different thing to agree to the collection, recording, and storage of location data that tracks one's every movement for an indefinite amount of time, or to agree in advance to a later review of that information in connection with an unanticipated future criminal investigation that has nothing to do with the case for which the monitoring is being conducted. While judges and legal practitioners might have that understanding, a reasonable person in Mr. Govan's position would not have understood that he was granting such a broad-based consent, and there was nothing in the exchange between Mr. Govan and the judge that shows that he did.⁵⁶

In *Ortiz*, the SJC found that where the defendant gave consent to the police to search "in" his vehicle, but did not "with reasonable clarity" give the police consent to search beneath the hood of the car, the search exceeded the scope of the consent.⁵⁷ In so doing, the Court noted that a "simple clarifying

⁵⁶ See *Ortiz*, 478 Mass. at 824-25 (reasonable person would not have understood consent to look for weapon "in" a vehicle, to include search under the hood.).

⁵⁷ *Ortiz*, 478 Mass. at 826.

question" by police could have resolved any ambiguity as what the defendant meant when he told the officer he could search his car. Likewise, in this case the record does not show that Mr. Govan clearly consented to the tracking, storage and later retrieval of all of his location data, and the ambiguity of his agreement to wear a GPS device could easily have been clarified by a brief colloquy addressing the extent to which his location data would be tracked and stored. Without that, the government has failed to meet its burden of demonstrating that Mr. Govan's consent justified the search that was conducted.

IV. Detective Plunkett's search lacked a sufficient nexus to search Mr. Govan's tracked location information, and there were no exigent circumstances supporting the warrantless search.

Police must have "a substantial basis for concluding that" the items, person or places to be searched or seized contain "evidence connected to the crime" under investigation.⁵⁸ In other words, the government must "demonstrate[] ... a 'nexus' between the crime alleged and the article to be searched or

⁵⁸ See *Commonwealth v. White*, 475 Mass. 583, 588 (2016) citing *Commonwealth v. Escalera*, 462 Mass. 636, 642 (2012).

seized.”⁵⁹ Where Detective Plunkett had no reason to suspect Mr. Govan of being involved in the shooting at the time that he obtained his GPS data, he lacked a sufficient nexus to retrieve and review *his* information.

In addition, no exigent circumstances justified the warrantless search of Mr. Govan’s GPS location data. When police conduct a warrantless search of electronically stored information, the “Commonwealth bears ‘a heavy burden’ to show (1) that the search or seizure was supported by ‘probable cause,’ such that a warrant would have issued had one been sought,[] and (2) that there ‘exist[ed] ... exigent circumstances’ that made obtaining a warrant impracticable.”⁶⁰ Courts review whether exigent circumstances existed with “particular emphasis on whether police ‘consider[ed] how long it would take to obtain a warrant’ before acting ... and whether police engaged in an unjustified delay before seeking a warrant.”⁶¹ It is only when the “police face a ‘now or never”

⁵⁹ *Id.* (internal citation omitted).

⁶⁰ *Commonwealth v. Barrett*, 97 Mass. App. Ct. 437, 440 (2020).

⁶¹ *Id.*

situation[,]’ ... [that] they may be able to rely on exigent circumstances to search [electronic media] immediately.”⁶²

In this case, the Commonwealth offered no evidence of any exigent circumstances to support the warrantless nature of the search. Detective Plunkett did not seek the GPS data until 6 days after the shooting, and while he indicated that it was his department’s “standard practice” to request the GPS data via email,⁶³ there was no evidence presented suggesting that it would have been impractical to obtain a warrant before requesting or reviewing the information. The data at issue was not subject to immediate destruction, and there was no reason that Detective Plunkett could not have sought a warrant. For this reason, the Commonwealth failed to meet its “heavy burden” of demonstrating that the warrantless nature of the search was justified.

Mr. Govan recognizes that in *Commonwealth v. Johnson* the SJC found that a probationer properly placed on GPS monitoring did not have a reasonable

⁶² *Id.*, citing *Riley v. California*, 573 U.S. 373, 391 (2014).

⁶³ R.A. 52.

expectation of privacy in his location data and could not challenge the recovery of the information.⁶⁴ Thus, if this Court rejects the arguments above and concludes that the initial imposition of GPS upon Mr. Govan was proper, the Commonwealth might claim that Mr. Govan's expectations of privacy were diminished. But *Johnson* was based primarily on the lowered privacy expectations of a convicted probationer,⁶⁵ and because Mr. Govan was presumed innocent, his expectation of privacy could not be entirely erased. Moreover, as Supreme Court in *Grady* held, when the government attaches a GPS device to a person's body to track their location, it is "not necessary to inquire about the target's expectation of privacy" because it is plain it constitutes a search.⁶⁶ Thus, on balance, even with a lesser expectation of privacy, where the police had no good reason for failing to request a

⁶⁴ *Commonwealth v. Johnson*, 481 Mass 710,720 (2019).

⁶⁵ *Id.* at 716 ("[a]s this court and the Supreme Court have held in recent years, 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."); *Id.* at 722 ("[t]he defendant's status as a probationer is 'salient' to [the] evaluation" of expectations of privacy).

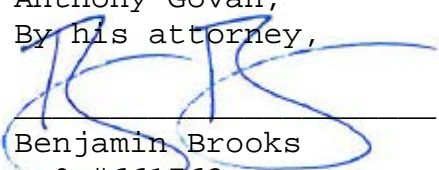
⁶⁶ *Grady*, 575 U.S. at 308-09.

warrant, the Commonwealth cannot meet its burden of showing that that privacy intrusion incurred by the warrantless search was justified.

CONCLUSION

For the reasons outlined above, the Commonwealth failed to meet its burden of demonstrating that the imposition of GPS monitoring upon Mr. Govan served a legitimate government interest in a manner that outweighed the substantial privacy invasion it caused, or that there were legitimate reasons for the police to forgoe obtaining a warrant. This Court should therefore reverse the motion judge's decision denying Mr. Govan's motion to suppress evidence recovered from his GPS device.

Respectfully submitted,
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Dated: September 18, 2023

ADDENDUM

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
Case No. 2184CR00101

COMMONWEALTH

vs.

ANTHONY GOVAN

DECISION ON MOTION TO SUPPRESS GPS EVIDENCE

Defendant Anthony Govan (Govan) is charged with one count of carrying a firearm, one count of possessing ammunition, one count of carrying a loaded firearm, and one count of assault with a dangerous weapon. An evidentiary motion was held on February 14, 2023. For the reasons set forth below, the motion to suppress is **DENIED**.

FINDINGS OF FACT:

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 alleged¹ 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.
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 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 into 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.

¹ The judge asked for some time to read the police report, which states the following allegations.

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.²
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.

² 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.

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

RULING:

Imposition of GPS

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 §58 A 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.

Detective’s request to ELMO of GPS coordinates

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 one hour of GPS data was constitutional.

For the reasons stated, defendant’s motion to suppress GPS evidence is **DENIED**.

Dated: 2/28/2023

Ham. J.
Catherine H. Ham
Justice of the Superior Court

CERTIFICATE OF RULE 16 (k) AND 11 (g) COMPLIANCE

I, Benjamin Brooks, hereby certify that this brief and its attachments comply with this Court's rules governing the filing of briefs, including, but not limited to: Mass. R. App.P. 16(a)(6), 16(e), 16(f); 16(h); 18; 20; and 21. The brief is produced in a 12-point monospaced font with 1.5 inch margins and the portions of the brief counted under Rule 16(a)(5)-(11), are less than 50 pages in length. In addition, as per Mass. R. App. P. 11 (g), this brief is identical to the brief filed in the Appeals Court prior to the transfer of this case to the Supreme Judicial Court, except for the title page, the date, and the certificates of compliance and service.

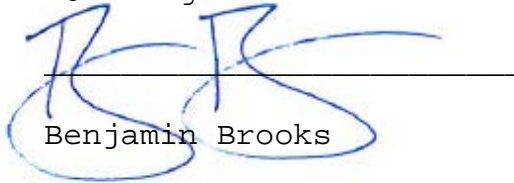


Benjamin Brooks

Dated: May 3, 2024

CERTIFICATE OF SERVICE

I, Benjamin Brooks, hereby certify that a true and accurate copy of this brief has been served upon counsel for the Commonwealth by means of this court's electronic filing system, and by emailing a copy of the same to ADA Mackenzie Slyman at mackenzie.slyman@mass.gov



Benjamin Brooks

Dated: May 3, 2024