COMMONWEALTH OF MASSACUSETTS
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 Reply Brief

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1. The Commonwealth cannot rely on Mr. Govan's "consent" to GPS monitoring where the imposition of GPS monitoring did not serve a legitimate government interest in a manner that outweighed the privacy invasion that it caused.

In his opening brief, Mr. Govan argues that the initial imposition of pretrial GPS monitoring violated his constitutional rights because (1) the Commonwealth failed to show that GPS monitoring advanced any legitimate government interest; (2) the vast amount of location data gathered and stored by GPS monitoring was far broader than necessary to advance any legitimate interest the Commonwealth could have had, and was akin to an ongoing "general warrant"; and, (3) the Commonwealth could not rely on the defendant's purported consent to "GPS prior to release." (D.Br.16-36).[1] In responding to these arguments, the Commonwealth did not assert that the imposition of GPS monitoring upon Mr. Govan advanced any legitimate government interest, or that the information it

[1] References to record are identified as follows: Defendant's brief, "D.Br.__"; Defendant's Addendum "Add.__"; Defendant's Record Appendix, "R.A.__"; Defendant's Supplemental Record Appendix, "S.R.A__"); Commonwealth Brief, "C.Br.__"; Commonwealth's Impounded Appendix "C.A.__"; transcripts, "T.[date]___."

ultimately tracked and recorded was appropriately tailored to serve that interest. Instead, the Commonwealth relies entirely on Mr. Govan's "consent" to "GPS prior to release."[2] (G.Br.20-25). As described below, the Commonwealth's argument is inconsistent with this Court's ruling in *Commonwealth v. Norman* regarding coerced consent,[3] as well as the principle that a defendant cannot validly consent to an "unconstitutional condition" to secure his release from custody.[4]

As noted in the opening brief, the Commonwealth bears the burden of demonstrating consent to search, as it does with any exception to the warrant requirement. (D.Br. 16-17, 30).[5]

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[2] The only description of what Mr. Govan agreed to while in court is "GPS prior to release," (S.R.A. 5, 8-9, 14) and the record contains no further description of what that meant or entailed.

[3] *Commonwealth v. Norman*, 484 Mass. 330, 335 (2020).

[4] *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604(2013); *Commonwealth v. Johnson*, 91 Mass. App. Ct. 296, 321 (2017) ("Johnson I")(Wolohojian, J., dissenting)*citing Koontz*, 57 U.S. at 604.

[5] *Norman*, 484 Mass. at 335. In his opening brief, the defendant's argument concerning the Commonwealth's failure to meet its burden of establishing consent focused only on the Commonwealth's failure to adequately establish that the scope of Mr. Govan's in-court consent to GPS monitoring included the tracking and storage of all of his location data, and this

In *Norman*, this Court rejected the Commonwealth's argument that a defendant's signed consent to pretrial GPS monitoring met its burden of establishing free and voluntary consent, where the imposition of GPS monitoring was otherwise unconstitutional. In finding that the signed form failed to satisfy the Commonwealth's burden, the Court cited its prior rulings in *Feliz* and *LaFrance*, both of which held that "the coercive quality of the circumstances in which a defendant seeks to avoid incarceration by obtaining probation on certain conditions makes principles of voluntary waiver and consent generally inapplicable."[6] The Court then noted that, like the defendants in *Feliz* and *LaFrance*, if

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reply brief focuses, as the Commonwealth has, (C.Br.19-20), on the voluntariness and coerced quality of whatever consent was given. This argument should be considered in full, where Mr. Govan explicitly argued that his consent was the product of coercive circumstances akin to those in *Norman* to the motion judge in both oral argument (T.2/14/23:48-52, 57-58; R.A.75-79, 84-85) and in his written memorandum (S.R.A.40); where it was considered and decided by the motion judge (Add. 46); and where it has been fully briefed by the Commonwealth. (C.Br.18-25).

[6] *Id. citing Commonwealth v. Feliz,* 481 Mass. 689, 702 (2019) (probationer's written consent to improper imposition of GPS was not valid) *quoting Commonwealth v. LaFrance,* 402 Mass. 789, 791 n.3 (1988) (probationer's consent, after colloquy, to a condition of probation that would subject her to random searches reasonable suspicion was not valid).

Norman had not "consented" to the GPS monitoring "the consequence presumably would have been pretrial detention" and held that, "[t]herefore, the form 'does not change our constitutional analysis' [that the imposition of pretrial GPS was improper]."[7] This reasoning had additional force as it applied to Norman because, unlike the defendants in *Feliz* and *LaFrance*, he was a pretrial releasee who was entitled to the presumption of innocence and personal recognizance.[8]

The same coercive qualities that worked to invalidate consent in *Norman*, *Feliz* and *LaFrance* also invalidate Mr. Govan's "consent." As noted in his opening brief, and as argued to the motion judge below, Mr. Govan was initially arrested on the warrant for the charge at issue after a traffic stop, and he then posted bail and came into court for his arraignment on his own accord. He was then promptly taken into custody solely on the Commonwealth's motion under G.L. c. 276 § 58A, and held in custody for three days. (D.Br.12-13; Add.42-43). When the Commonwealth

[7] *Id.* at 335. *See also Commonwealth v. Moore*, 473 Mass. 481, 487 n.6 (2016) (parolee could validly agree to a condition of release that would allow a search that violated constitutional requirements).

[8] *Norman,* 484 Mass. at 334-335.

agreed to recommend his release with GPS monitoring and forgo the § 58A hearing, the coercive effect of the previous three days' incarceration was obvious and substantial.

The Commonwealth notes that, unlike *Norman*, Mr. Govan's consent was made in court, by his attorney, and in connection with the Commonwealth's agreement to withdraw its request to continue to hold him under § 58A (G.Br.22-23). But these circumstances only highlight the coercive circumstances of the proposed exchange of Mr. Govan's constitutional right to be free of an otherwise unjustified search, for the assurance of freedom from incarceration.[9] Indeed, with almost no modification, the Court's conclusion in *Norman* applies with equal force to Govan: Had Govan not agreed to GPS, "the consequence presumably would have been pretrial detention" and "[t]herefore, the [oral consent] 'does not change [the] constitutional

[9] These facts also do not advance any claim that by agreeing to "GPS prior to release," Mr. Govan understood that he was agreeing to have all of his location data stored and made available for later use by police. *See Henderson v. Morgan*, 426 U.S. 637, 645(1976) (finding that a plea to second degree murder was invalid where the record of the colloquy did not include a description of intent element, despite acknowledgement that the defendant was represented at the time by "concededly competent counsel.")

analysis' [that the imposition of pretrial GPS was improper]."[10]

The other cases cited by the Commonwealth establish only one side of the equation -- i.e. that consent to search is not invalid solely because a defendant is in custody when he gives the consent[11] -- and none condone an exchange of a constitutionally protected right for the assurance of freedom from custody.[12]

Finally, additional support for Mr. Govan's position is provided by the "well settled doctrine of 'unconstitutional conditions.'"[13] As Justice

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[10] *Norman,* 484 Mass. at 335; *LaFrance*, 402 Mass. 791.

[11] See G. Br at 22-24, *citing Commonwealth v. Wallace*, 70 Mass App Ct. 757 (2007)(no evidence of offer to release defendant in exchange for consent); *Commonwealth v. Franco*, 419 Mass. 635, 642 (1995) (same).

[12] It is of course true that many, if not most, plea agreements involve the exchange a constitutional right to trial for an assurance with respect to incarceration. But plea agreements require a full colloquy with the judge and specific findings that there is sufficient evidence to support a conviction. M.R.Crim.P.12(d). At the very least, a similar colloquy setting out the extent that a defendant's location data will be monitored and stored, and a judicial finding that the imposition of GPS is warranted by the facts, should be required before consent can be deemed valid.

[13] *See Koontz*, 570 U.S. at 604.

Wolohojian previously observed, this doctrine means that a "person cannot effectively consent to an unconstitutional condition of pretrial release or to one that is outside the authority of the judge to impose."[14] More specifically:

> If on the facts presented, GPS monitoring would be an excessive condition of pretrial release under art. 26 of the Massachusetts Declaration of Rights or would violate art. 14, then 'the State could not constitutionally require' the defendant to agree to it 'and any consent given would be ineffective.' [] To conclude otherwise would mean that a defendant 'keen' to be released pretrial would be impermissibly compelled 'to accept a condition that would unnecessarily and unreasonably limit his or her art. 14 privacy rights.'[] If this is true for parolees, as in *Moore*, then it is certainly true for the defendant here, who was only a pretrial releasee.[15]

The above reasoning applies squarely to Mr. Govan, who was also initially held pretrial and was "keen" to be released.

For the above stated reasons, the Commonwealth has failed to meet its burden of demonstrating that

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[14] *Commonwealth v. Johnson*, 91 Mass. App. Ct. 296, 321 (2017) ("Johnson I")(Wolohojian, J., dissenting) *citing Koontz*, 57 U.S. at 604. As discussed further below, Norman essentially overruled the majority opinion in Johnson I, and adopted the reasoning in the dissent.

[15] *Id. citing O'Connor v. Police Commr. of Boston*, 408 Mass. 324, 329 (1990); *LaFrance*, 402 Mass. 789, 791 n.3; *Moore*, 473 Mass. at 487.

Mr. Govan's consent to "GPS prior to release" was "unfettered by coercion, express or implied." In addition, as argued in his opening brief, even if the consent Mr. Govan gave for "GPS prior to release" was deemed sufficiently "voluntary," it was far too ambiguous to permit the extensive tracking and recording of his location data that occurred. (D.Br. 32-36). Indeed, the written acknowledgement in *Norman* that the location data would be collected and could be shared with law-enforcement, was far more detailed and explicit than the "consent" here.[16]

2. As a pretrial releasee subject to GPS monitoring, Mr. Govan maintained a reasonable expectation of privacy in his location data that was at least as broad as his constitutional protections against an unreasonable search and could be diminished only to the extent that was necessary to enforce the conditions of release for which GPS monitoring was imposed.

In his opening brief Mr. Govan argues that even if placing him on a GPS device was constitutionally permissible, before searching any portion of his

[16] The consent form produced by the Commonwealth was explicit in noting that "[c]oordinates and other data related to your physical location while on GPS are recorded and may be shared with the court, probation, parole, attorneys and law enforcement. Data generated by GPS equipment assigned to you is not private and confidential … I have read and understood the above conditions of GPS supervision and I agree to observe them." *Norman,* 484 Mass. at 331-332.

seized location data to investigate a crime unrelated to purposes of enforcing the initial imposition of GPS, the Commonwealth was at least required to obtain a search warrant demonstrating probable cause specific to Mr. Govan, or to establish such probable cause and exigent circumstances. (D.Br.36-40). In response, the Commonwealth argues that once Mr. Govan was placed on pretrial release GPS monitoring, he gave up all reasonable expectation of privacy in any location data that his GPS device would later track and store, and from there argues that the later search of his location data was not a search requiring either a warrant or probable cause and exigent circumstances. (G. Br.25-32).

Contrary to the Commonwealth's contention, a pretrial releasee's reasonable expectation of privacy is at least as broad as his constitutionally protected right against an unreasonable search. Thus, when a pretrial releasee is subjected to GPS monitoring, his expectation of privacy narrows only to the extent that is minimally necessary to serve the legitimate government interests that warrant the imposition of GPS monitoring in the first place. As Justice Wolohojian put it,

> [A] defendant's consent to GPS monitoring as a condition of pretrial release did not extend beyond the judge's authority to impose GPS monitoring as a reasonable pretrial condition as authorized by the Legislature. Therefore, although the defendant's consent operated to reduce his expectation of privacy in the GPS data to the extent they would be searched to ensure compliance with the stay-away conditions of his pretrial release, it did not operate to eliminate his expectation of privacy in the long-term historical GPS data unrelated to those conditions." [17]

Because the reasonable expectations of privacy are a function of the purposes for which the GPS monitoring is imposed, there is no amount of GPS-generated data, regardless of how long or short, that police can later review without violating those expectations.[18] Thus, when the police want to search GPS data for purposes unrelated to the enforcement of a release condition, they must obtain a warrant or establish probable cause and exigent circumstances.

The Commonwealth's contrary position ignores the limited purposes for which GPS could be imposed on Mr.

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[17] *See Johnson I*, 91 Mass. App. Ct. at 314 (Wolohojian, J., dissenting).

[18] A pretrial releasee's expectations of privacy are set at the time that the monitoring is ordered, and may not be narrowed "post hoc." *See Commonwealth v. Rodderick*, 490 Mass. 669, 678 (2022) ("[t]he relevant question, however, is whether the search 'was justified at its inception,' not whether it was justified post hoc.").

Govan. It also ignores the important distinction, recognized in *Norman* and *Johnson II*,[19] between the reasonable expectations of privacy that a pretrial releasee, as opposed to a post-conviction probationer, maintains when subjected to GPS monitoring.

As an initial matter, Mr. Govan's appeal should not, as the Commonwealth argues, be denied simply because he, or more accurately his attorney, failed to submit an affidavit that affirmatively asserted his subjective expectation of privacy in his location data. (G.Br.26-27). Since at least *Norman*, which confirmed that "individuals have a reasonable expectation of privacy in the whole of their physical movements,"[20] and that, despite a signed consent form, placing a pretrial releasee on GPS constituted a search under Article 14, a pretrial probationer's subjective expectation of privacy in his location data can be presumed as a matter of law.[21] When a physical

[19] *Commonwealth v. Johnson*, 481 Mass. 710 (2019) ("Johnson II").

[20] *Norman*, 484 Mass. at 334 *citing Carpenter v. United States*, 585 U.S. 296, 138 S. Ct. 2206, 2217 (2018) (additional citations omitted).

[21] The "reasonable expectation of privacy" test requiring the defendant to show a subjective and objectively reasonable expectation of privacy in the area at issue was initially developed in response to a

area or body of information has been declared by this Court to be constitutionally protected, the burden remains on the Commonwealth to establish an exception to the warrant requirement.[22] Accordingly, the trial judge below assumed Mr. Govan's subjective expectation of privacy, (Add.47) and it was not contested at the hearing below. (R.A. 82-89).

With respect to a pretrial releasee's objectively reasonable expectations of privacy, the Commonwealth erroneously relies on *Johson I* and *Johnson II*. First, the Commonwealth misconstrues *Johnson II* when it writes that "[t]he Court found that a probationer subject to GPS monitoring would 'certainly objectively understand that his or her location would be recorded

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prior and more limited view that constitutional protections applied only when a defendant had standing to challenge a search via his or her property rights in the subject area, and the initial burden was placed on the defendant to establish the expectation or privacy. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring). But once the court has declared that a particular area – or here, a specific body of information – is constitutionally protected, a defendant's expectation of privacy is, at least presumptively, established.

[22] In any event, a defendant needs only to "manifest" subjective expectations of privacy, and here. *Commonwealth v. Augustine*, 467 Mass. 230, 241 (2014) (defendant must "manifest[] a subjective expectation of privacy").

and monitored to determine compliance with conditions of probation,' and thus did not have a reasonable expectation of privacy in that GPS data."[23] The full quote reveals that the Court did not make this finding for just any convicted probationer, but rather for Mr. Johnson in particular:

> The defendant here was of course not just on probation; he was on probation with the added condition of GPS monitoring because he had stipulated to violating his original sentence of probation after he was charged with breaking and entering and larceny while on probation. The defendant was thus on notice that GPS monitoring was imposed as a result of the defendant's criminal activity while on probation and the judge's concern over the defendant's demonstrated risk of recidivism [24] . . . Under these circumstances, a probationer subject to GPS monitoring as a condition of probation would certainly objectively understand that his or her location would be recorded and monitored to determine compliance with the conditions of probation, including whether he or she had engaged in additional criminal activity, to deter the commission of such offenses, and that police would have access to this location information for that purpose.[25]

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[23] C.Br.29 *citing Johnson II*, at 727. Note the Commonwealth's pin cite to Johnson II is "727" but it appears that it should be "724".

[24] *Johnson II*, at 722.

[25] *Id.* at 724.

Johnson's objective expectations of privacy were thus defined by the particular purposes for which the GPS device was imposed upon him, which included general deterrence. More importantly, the Court repeatedly "emphasized the importance of the individual's status as a probationer, contrasting his expectations of privacy with those of a non-probationer."[26] Unlike Johnson, Mr. Govan was not a convicted probationer. Rather, he was entitled to the presumption of innocence, and he was not placed on GPS for purposes of general deterrence or to prevent recidivism.[27] In these circumstances, it cannot be reasonably assumed

[26] *Commonwealth v. McCarthy*, 484 Mass. 493, 506, n. 11 (2020) *citing Johnson II*, at 724 ("There is no question that the reasonableness of any expectations of privacy held by a probationer knowingly subject to GPS monitoring as a condition of probation is far different from the reasonableness of the expectations of privacy held by individuals who are surreptitiously tracked by law enforcement").

[27] As noted above, the Commonwealth does not argue that there was a legitimate government interest served by the imposition of GPS and instead relies entirely on his consent. Nevertheless, in addition to the argument on this point in Mr. Govan's opening brief, he notes that at the relevant hearing in the District Court, the Commonwealth did not enter a stipulation on the question of dangerousness, nor did it choose to proceed with the dangerousness hearing "on the papers" or without calling live witnesses, as it often does. Thus, the *only* plausible authorized purpose for imposing GPS was to enforce the stay away order and assure his appearance in court. *See Norman*, at 336.

that Mr. Govan understood that all of his location data would be tracked and stored, unless it related to an alleged violation of his stay away order or a failure to appear in court.[28]

The Commonwealth also cites to *Johnson I* for the proposition that the defendant had no "objective expectations 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 data..."[29] But *Johnson I* was an Appeals Court case,[30] decided by a divided panel with a concurrence and a dissent, where the concurrence agreed only in the result, and the dissent and the concurrence both conceded the possibility that a pretrial releasee could maintain expectations of privacy in GPS data collected, regardless of where it was stored physically.[31] Moreover, as noted above,

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[28] *See Johnson II,* at 737-38 (Lenk, J., dissenting) ("The government's permitted use of information it obtains [even from a convicted probationer] is limited, and the subject of the information retains reasonable expectations of privacy in it.").

[29] C.Br.29-30, *citing Johson I*, at 305-306.

[30] *Johnson I* and *Johnson II* involved the same defendant, though *Johnson II* involved an incident that predated the incident in *Johnson I*. *See Johnson II*, at 731.

[31] *See Johonson I*, 91 Mass. App. Ct. at 313 (Grainger, J., concurring) ("Reasonable expectations

infra at n.16, *Norman* effectively adopted the dissent's reasoning in *Johnson I*, by holding that due to the "expectation of privacy of a defendant pretrial…[t]he imposition of GPS monitoring as a condition of pretrial release is a search under art. 14."[32]

Finally, the Commonwealth's reliance on *Johnson II* for the proposition that the one-hour window of GPS information that the police initially sought from probation did not violate expectations of privacy because it was not "a coordinated effort to recreate a full mosaic of his personal life over an extended and unnecessary period of time…" is also misplaced. (G.Br.31). As noted above, the Court determined that Johnson, due to his status as a probationer who was placed on GPS specifically for purposes of deterrence, was not entitled to an expectation of privacy in his

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depend on specific circumstances"); *id.* at 314-15 (Wolohojian, J., dissenting) ("although the defendant's consent operated to reduce his expectation of privacy in the GPS data to the extent they would be searched to ensure compliance with the stay-away conditions of his pretrial release, it did not operate to eliminate his expectation of privacy in the long-term historical GPS data unrelated to those conditions.")

[32] *Norman, 484 Mass.* at 331-335.

GPS location data. The above-cited discussion merely acknowledged the possibility that, if the Commonwealth had sought to use a broader swath of data, "[t]hose circumstances might raise different, more difficult constitutional questions about objective expectations of privacy, even for a probationer subjected to GPS monitoring..."[33] In contrast, Mr. Govan had no reason to suspect that police would obtain any of his location data, whether targeted or broad, for any purpose other than to assure his appearance in court and enforce his stay away order. Thus, the short duration of the GPS-generated data sought by police is irrelevant to the expectations of privacy that he had when he gave his consent.

To the extent that this Court has, in the context of cell site location information (CSLI), stated that the request for a six-hour window of CSLI would not infringe on an expectation of privacy, this six hour safe-harbor applied only to location data generated when the defendant actually used the phone to make a call, and not to the constant location data generated automatically by the phone, which is akin to the GPS

[33] *Johnson II*, 481 Mass. at 728.

tracking at issue in this case.[34] It is also notable that even if a warrant requiring a showing of probable cause is not required to obtain six-hours of CSLI information, there is still at least some judicial oversight under the Federal Stored Communications Act, which requires a superior court to issue a summons based on a showing of reasonable suspicion before the information can be disclosed.[35] Here, there was none.

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[34] *See Commonwealth v. Estabrook*, 472 Mass. 852, 858 n. 12 (2015).

[35] *Commonwealth v. Augustine*, 467 Mass. 230, 231 (2014) (police compelled the production of two weeks of CLSI via an administrative subpoena issued by a superior court pursuant to the Federal Stored Communications Act, which required only a showing of reasonable suspicion, rather than a traditional warrant requiring a showing of probable cause, violated Art. 14 and defendant's reasonable expectations of privacy). Notably, in both *Augustine* and *Estabrook*, the Court found that obtaining two weeks of CLSI information from third party cell phone providers violated reasonable expectations of privacy and were protected by Article 14, even though in both cases, police used only a small portion of that information. In so doing the Court found that "[i]n determining whether a reasonable expectation of privacy has been invaded, it is not the amount of data that the Commonwealth seeks to admit in evidence that counts, but, rather, the amount of data that the government collects or to which it gains access." *Estabrook*, 472 Mass. at 858-859. Likewise, in this case, the Commonwealth, via the probation department, collected and made available all of Mr. Govan's GPS data since he'd been placed on GPS monitoring, and although the police ultimately reviewed and used only a limited amount of that information, because it was not for the purposes of enforcing his probation conditions, Mr. Govan's expectations of privacy were

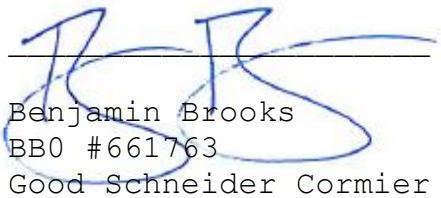
CONCLUSION

For all the foregoing reasons, as well as those set out in the opening brief, the trial court's denial of Mr. Govan's motion to suppress GPS location data should be reversed and the motion should be allowed.

Respectfully submitted,

Anthony Govan,

By his attorney,



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still invaded. As noted in the opening brief, to hold otherwise is the equivalent of allowing the Commonwealth to issue an unlawful "general warrant," which cannot be remedied even if the officer later uses a proper discretion in executing the warrant. (D.Br. 28-32). *See In the Matter of Lafayette Academy*, Inc., 610 F.2d 1 (1st Cir. 1979)("self-restraint on the part of the instant executing officers does not erase the fact that under the broadly worded warrant appellees were subject to a greater exercise of power than that which may have actually transpired and for which probable cause had been established.").

CERTIFICATE OF RULE 16 (k) 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 20 pages in length.

Benjamin Brooks

Dated: July 20, 2024

CERTIFICATE OF SERVICE

I, Benjamin Brooks, hereby certify that two true and accurate copies of this brief have been served upon counsel for the Commonwealth by means of this court's electronic filing system.

_____
Benjamin Brooks

Dated: July 20, 2024